



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **20732/2020**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

DATE: 14 June 2022

SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

HATFIELD MAN TRUCK AND BUS

Applicant

A division of **HATFIELD HOLDING (PTY) LTD**
(Registration Number: 2006/027767/07)

And

ZITHOLAMA CLEANING HYGIENE CHEMICALS CC

Respondent

(Registration Number: 2011/025009/23)

In Re:

ZITHOLAMA CLEANING HYGIENE CHEMICALS CC

Plaintiff

(Registration Number: 2011/025009/23)

And

HATFIELD MAN TRUCK AND BUS

Defendant

A division of **HATFIELD HOLDING (PTY) LTD**
(Registration Number: 2006/027767/07)

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The applicant prays, in terms of the provisions of rule 24(1) of the Uniform Rules of court, for leave to file a counterclaim. The applicant's plea was filed on 5 June 2020 and its counterclaim, contrary to the provisions of rule 24(1), only on 26 August 2020.
- [2] This prompted the respondent to deliver a rule 30(1) and rule 30A notice, in which it stated that the filing of the applicant's counterclaim is an irregular step and affording the applicant a period of 10 days to withdraw the counterclaim. Faced with the aforesaid difficulty, the applicant's attorney requested consent from the respondent on 14 September 2020 to introduce the counterclaim.
- [3] The respondent refused to grant consent and on 17 September 2020 the applicant duly filed a notice of withdrawal of its counterclaim.
- [4] The present application to seek leave from the court to file the counterclaim was served on or about 22 September 2020.

LEGAL FRAMEWORK

- [5] In order to succeed with the relief claimed the applicant must:

5.1 give a reasonable and acceptable explanation for the lateness; and

5.2 show an entitlement to institute the counterclaim.

[See: *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ)]

[6] The respondent did not, during the hearing of the matter, seriously contend that the applicant has not shown an entitlement to institute the counterclaim. The respondent, however, strenuously opposed the application on the basis that the applicant has not given a reasonable and acceptable explanation for its delay.

Reasonable explanation

[7] The applicant's attorney, Alistair Jonathan Adams ("Adams"), deposed to the affidavit in support of the application.

[8] Adams explained that, due to the lockdown measures that were implemented during the period between April 2020 and August 2020, his consultations with the applicant were always telephonically or through email. The file in the matter was, furthermore, at his office and due to the travel restrictions and other difficulties facing legal practitioners during this time, the matter was not given the attention it deserved.

[9] Upon receipt of a notice of bar on 1 June 2020, Adams immediately contacted the applicant for instructions to file an appropriate plea. He explained that during the consultations, which were never in person, some details were omitted and

that the applicant at no stage indicated that they have a counterclaim against the respondent.

- [10] Adams stated that it was only when he was preparing the applicant's discovery affidavit that certain details emerged which proved sufficient to establish a counterclaim against the respondent's claim. The counterclaim was prepared without delay and served with the discovery affidavit on 24 August 2020.
- [11] The respondent, in answer, criticised the explanation proffered by Adams as being wholly unsatisfactorily. The respondent pointed out that the explanation lacked detail insofar as the exact times, dates and names of the persons he consulted with is concerned. The explanation, furthermore, does not cover the whole period of the delay.
- [12] According to the respondent Adams could have obtained proper instructions in telephonic conversations, via email and through the utilisation of virtual platforms, such as Microsoft Teams.
- [13] The respondent, furthermore, stated that legal practitioners were permitted from May 2020 to travel in order to provide legal services.
- [14] In reply, Adams added that although legal practitioners were at some stage allowed to travel, his personal predicament made it difficult for him to engage with his clients during this period. His wife is a doctor and as an essential worker and healthcare provider, she had to attend work everyday.

[15] Adams has two small children who were not at school due to the Covid regulations and had to attend online classes. In the result, he had to remain at home to attend to their needs.

[16] Adams stated that although, he could work from home, his interactions with his clients were interrupted, not sufficient and it was difficult for him to travel and attend consultations.

DISSUSSION

[17] In maintaining that the applicant did not provide a reasonable and acceptable explanation for its failure to file the counterclaim timeously, the respondent relied on various reported cases.

[18] More specifically and in respect of the alleged paucity of detail, the respondent relied on the following extract from *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 571F:

“Two principal requirements for the favourable exercise of the court’s discretion have crystallized out. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives.”

[19] The fact that the details pertaining to the applicant’s counterclaim only emerged when Adams perused the applicant’s documents for purposes of discovery is

not in dispute. Upon realising that the applicant has a counterclaim, Adams, although erroneously so, filed the counterclaim without delay.

[20] Upon receipt of the notice in terms of rule 30(1) and 30A, Adams sought consent from the respondent for the late filing of the counterclaim.

[20] Save to state that the respondent's consent would have expedited the finalisation of the real dispute between the parties, the respondent was acting within its procedural right to refuse such consent.

[21] This led to the application presently before court.

[22] The only question therefore is whether Adam's explanation for the time period between 5 June 2020 to 26 August 2020, some two months and 20 days, is reasonable and acceptable.

[21] The challenges faced by the whole of South Africa, including the legal profession, since the onset of Covid is well known and well recorded. Although Adams could in hindsight have adopted more technologically advanced methods to consult in more detail with the applicant, I do not deem his explanation, in the unusualness of the circumstances, as unreasonable or unacceptable.

[22] The steps, although procedurally incorrect, taken by Adams since he became aware of the existence of the counterclaim, evidence a genuine desire on the part of the applicant to ventilate the true dispute between the parties without delay.

[23] In the result and in the exercise of my discretion, I am prepared to grant leave to the applicant to file its counterclaim out of time.

COSTS

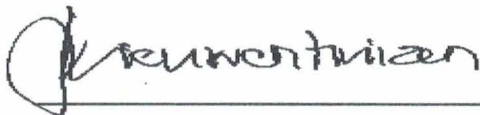
[24] Although the applicant was successful in obtaining the relief claimed herein, the customary rule that a litigant requesting an indulgence should pay the costs apply in *casu*.

[25] The only exception would be if the respondent's opposition to the application was unreasonable. Having had regard to the papers filed herein, I cannot fault the respondent for opposing the application and the customary cost order will follow.

ORDER

The following order is issued:

1. The applicant is granted leave to file its counterclaim within 5 days from date of this order.
2. The applicant is ordered to pay the costs of the application.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

29 April 2022 (Virtual hearing)

DATE DELIVERED PER COVID19 DIRECTIVES:**APPEARANCES**

For the Applicant: Advocate X Khoza

Instructed by: Adams Attorneys

Counsel for the First Respondent: Advocate W Moadi

Instructed by: Fairbridges Wertheim Becker