IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case no: 22758/2016

In the matter between:

TSIU VINCENT MATSEPE N.O. **First Applicant**

PIERRE DE VILLIERS BERRANGE N.O. **Second Applicant**

(in their capacities as duly appointed trustees
in the insolvent estate of Andre Francois Malan,
Master's reference B12/2015)

and

KATLOU BOERDERY **Respondent**

Coram: Norton AJ

Heard: 25 August 2020

Delivered: 13 October 2020

JUDGMENT

Norton AJ

[1] The applicants (the plaintiffs in the main action), who are insolvency practitioners duly appointed as trustees in the insolvent estate of Andre Francois Malan, instituted an action on 23 November 2016 against the respondent (the defendant in the main action) seeking the delivery of 194 head of cattle in the possession of the respondent, ownership of which is alleged to vest in the insolvent estate. The respondent delivered a notice of intention to defend on 12 December 2016 and, after being placed under bar, filed a plea on 24 March 2017.

[2] A pre-trial conference was held before Justice Allie on 24 April 2018. As the respondent's attorney was not present, Justice Allie postponed the pre-trial conference until 24 May 2018 and directed the parties to file a pre-trial minute before 21 May 2018. A pre-trial minute signed by the parties' representatives was filed on 21 May 2018. Among other things, the pre-trial minute contained a recordal in the following terms:

> '2.1 The Plaintiff will hand to the Defendant a list of admissions sought, if any, on or before 6 July 2018. Same will be annexed hereto and marked "A".
>
> 2.2 The Defendant's response to the Plaintiff's list, if any, will be served on the Plaintiff on or before 27 July 2018. Same will be annexed hereto and marked "B".

2.3 The Defendant will deliver a request for further particulars (if any) and a Rule 37(4) request by no later than 27 July 2018. It will be annexed and marked "C".'

[3] On 24 May 2018 Justice Allie postponed the pre-trial conference until 11 September 2018 so that the parties could comply with the undertakings in the pre-trial minute.

[4] The parties failed to comply with the agreed timelines in the pre-trial minute, and the pre-trial conference was postponed until 23 April 2019. On 18 April 2019 the applicants delivered to the respondent a document headed 'Plaintiffs' pre-trial questions and list of admissions sought' (the applicants' pre-trial questions), calling upon the respondent to make certain admissions and answer certain questions 'to limit the issues to be decided upon at, and the duration of, the trial'.

[5] On 23 April 2019 Justice Allie once again postponed the pre-trial conference so that the respondent could file its response to the applicants' pre-trial questions. The applicants aver that Justice Allie directed the respondent to do so, and this averment is not denied by the respondent.

[6] By December 2019 the respondent had not yet filed a response to the applicants' pre-trial questions. On 5 December 2019 the applicants served notice of an application in terms of rule 30A of the Uniform Rules of Court (the Uniform Rules) to be made on 13 December 2019. The notice was delivered to the respondent's correspondent attorney, in accordance with the Uniform Rules, but no notice of intention to oppose the application was

delivered, and on 13 December 2019 an order was handed down on an unopposed basis by Justice Fortuin -

(a) directing the respondent to 'furnish the applicants with the outstanding replies as requested by the applicants in their notice in terms of rule 37(4), dated 18 April 2019, within ten (10) days of service of this order upon the respondent's attorneys of record'; and

(b) authorising the applicants, in the event that the respondent failed to furnish the outstanding replies, to apply on the same papers, duly supplemented, for an order striking out the defence of the respondent in the action.

[7] The order handed down by Justice Fortuin (the Fortuin order) was served on the respondent's correspondent attorney on 19 December 2019.

[8] The respondent failed to comply with the Fortuin order and on 3 February 2020 the applicants instituted an application for an order (a) dismissing the respondent's defence; (b) directing the respondent to pay the costs of the application on an attorney and client scale; and (c) entering judgment against the respondent for the relief set out in the particulars of claim in the main action.

[9] The respondent gave notice that it would oppose the application and the hearing of the application was postponed by agreement until 25 August 2020.

The application

[10] The applicants seek an order dismissing the respondent's defence in the action and ordering the respondent to pay the costs of the application on an attorney and client scale. The applicants intend to seek the remainder of the relief sought in their Notice of Motion, for judgment in terms of the relief sought in their particulars of claim, at a later stage.

[11] The respondent opposes the application on the basis that the Fortuin order was 'erroneously sought and granted in the absence of the respondent' and accordingly falls to be rescinded (in accordance with the respondent's application for rescission made *pari passu*) in terms of rule 42(1)(a) of the Uniform Rules.

[12] The principal grounds on which the respondent contends that the Fortuin order should be rescinded are that –

(a) rule 30A applies only where a party has failed to comply with an order or direction made in a judicial case management process referred to in rule 37A, and not where a party has failed to comply with a direction made in terms of rule 37; and

(b) in any event, the remedy of a party which is aggrieved by the other party's non-compliance with a request made in terms of rule 37(4) is to request a pre-trial conference to be held before a judge in chambers, and any directive which purports to compel the respondent to make admissions or respond to a rule 37(4)

questionnaire is only competent if it is made with the consent of both parties.

Rescission of the Fortuin order

[13] The Fortuin order was served on the respondent's correspondent attorney on 10 December 2019. The respondent took no steps to seek a rescission of that order before raising the issue in its answering affidavit in this application on 8 June 2020. The rescission application is in any event ill-founded.

[14] Rule 42(1)(a) provides that a court may, in addition to any other powers that it may have, '*mero motu* or upon the application of any party affected, rescind or vary… an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby'.

[15] It is well-established that when an affected party invokes rule 42(1)(a), the pertinent question is whether the party that obtained the order was *procedurally* entitled to it, and if the party was so entitled, the order cannot be said to have been erroneously granted in the absence of the affected party. The Supreme Court of Appeal recently set out the position in *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) paras 18 and 25:

> '[18] As Streicher JA explained in *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25-27, the phrase "erroneously granted" relates to the procedure followed to obtain the judgment in the absence of another

party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 203 (6) SA 1 (SCA) paras 6 and 9. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party.

[25] As I have said, when an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence.'

[16] It is common cause that notice of the application which resulted in the Fortuin order was served on the respondent's correspondent attorney on 5 December 2019. In the answering affidavit filed on behalf of the respondent, the respondent's attorney furnishes a range of reasons why he did not receive that notice.

'17. Due to a death in my family, I was not in office between 02 December and 13 December 2019, the date on which my office closed for the festive seasons.

18. On the 05 December, during my absence as aforesaid, the applicants served an application in terms of Rule 30A.

19. My previous secretary, Charnell Willemse, who was responsible for handling my email correspondence, resigned on 13 December 2020 and moved to Gauteng. I no longer have access to her inbox and computer used during December 2019.

20. I have gone through all previous email correspondence between the parties. I am unable to find any email correspondence in terms of which either the Rule 30A notice or the subsequent application was served on my offices.

21. In the event that such correspondence was indeed addressed to my offices, I was not informed thereof.

22. I was, in the premises, unaware of the fact that the Rule 30A application had been enrolled for hearing on 13 December 2020.'

[17] This, it must be said, is a most implausible account. That an attorney should lose access to the inbox on which his email correspondence is received when his secretary leaves his employ, beggars belief.

[18] In any event, the courts have made it clear that where a party claims not to have known about proceedings because of a mistake by their attorney, that is not a procedural irregularity or mistake in respect of the issue of the order and it is not possible to conclude that the order had been erroneously sought by the plaintiff or erroneously granted by the judge (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 9).

[19] In the absence of a procedural error, the respondent has advanced no basis upon which the Fortuin order falls to be rescinded in terms of Rule 42(1)(a).

The application for striking out

[20] Rule 30A provides as follows:

> ‘(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order-
>
> (a) that such rule, notice, request, order or direction be complied with; or
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> (b) that the claim or defence be struck out.
>
> (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.’

[21] In *Helen Suzman Foundation v Judicial Service Commission* 2018 (7) BCLR 763 (CC) para 79 Madlanga J, writing for a majority of the Constitutional Court, explained that in terms of rule 30A(2) there is an exercise of discretion as to what an appropriate order should be once a court

has held, under rule 30A(1), that there has been non-compliance with the rules.

> 'As to the antecedent question arising from rule 30A(1) whether there has, in fact, been non-compliance with the rules, there is no question of an exercise of discretion. The court must determine – as an objective question of fact or law – whether there has been non-compliance.'

[22] In the Fortuin order the respondent was directed to furnish the applicants with the outstanding replies requested by the applicants in their notice in terms of Rule 37(4), failing which the applicants were authorised to apply to this court on the same papers for an order striking out the defence of the respondent.

[23] The Fortuin order, which is premised on a finding that the necessary non-compliance was established, does not fall to be rescinded and has not been the subject of an appeal by the respondent. In these circumstances I am required only to exercise my discretion regarding the appropriate order to be made.

[24] Striking out a defence is a drastic remedy and a court called upon to grant it must consider all relevant circumstances, including (a) the reasons for the respondent's non-compliance; (b) whether the defaulting party has recklessly disregarded its obligations; (c) whether the defaulting party does not seriously intend to proceed; and (d) prejudice to either party (Erasmus, *Superior Court Practice*, D1-358 with reference to, *inter alia, SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T) at 634).

[25] The respondent has failed, over a period of 18 months, to take the straightforward step of filing a response to the applicants' pre-trial questions.

[26] In terms of the pre-trial minute signed by the parties' legal representatives on 21 May 2018, the respondent was to respond to the applicants' pre-trial questions, if any, within a week after receiving them. The respondent received the applicants' pre-trial questions on 18 April 2019 and has to date not responded, either by providing answers or admissions or by indicating that it declines to provide all or any of the answers or admissions sought.

[27] The respondent has failed to respond to the applicants' pre-trial questions despite having been directed to do so, first by Justice Allie, and subsequently by Justice Fortuin. The respondent's failure to respond has delayed the finalisation of the pre-trial process and the progression of the matter to trial.

[28] The respondent offers no satisfactory explanation for this sustained failure to respond to the applicants' pre-trial questions, relying on the contentions that (a) the applicants' pre-trial questions were in the form of a notice and amounted to an abuse of the court process; (b) the directions given by Justice Allie on 23 April 2019 were not made with the consent of the parties and thus not competent directions in terms of rule 37(8) of the Uniform Rules; and (c) the Fortuin order was not competent.

[29] The Fortuin order, however, stands, in circumstances in which it does not fall to be rescinded and the respondent has not sought to appeal against

it. The challenges which the respondent now advances in respect of the form of the applicants' pre-trial questions and the directions of Justice Allie are issues which should have been raised in the proceedings which resulted in the Fortuin order.

[30] Whatever the merits of the respondent's contention that the applicants' pre-trial questions were an abuse of the court process, it was not for the respondent to decide for itself that the applicants' pre-trial questions were an abuse of process and therefore did not require a response. It was also not for the respondent to decide for itself that Justice Allie's directions and the Fortuin order were not competent and therefore did not require compliance.

[31] I am of the view that the respondent has recklessly disregarded its obligations and wilfully defied the directions made by two judges of this court. The irresistible inference from all the facts is that the respondent has embarked on a course of obstruction and delay in order to stall the action against it, occasioning clear prejudice to the applicants in prosecuting their claim.

[32] In the answering affidavit filed on behalf of the respondent, no averments are made in respect of the respondent's attitude to the further conduct of the action. In particular, there are no averments from which it can be concluded that the respondent has a reasonable defence to the applicants' claim or seriously intends to proceed with its defence.

[33] While the striking out of the respondent's defence will cause serious prejudice to the respondent, this must be weighed against the prejudice already occasioned to the applicants and the violation of the dignity and

authority of this court by the respondent's sustained disobedience. The foundational constitutional principle of the rule of law 'requires that the dignity and authority of the courts…should always be maintained' (*Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) para 61. See also the decision of this court in *MT v CT* 2016 (4) SA 193 (WCC) paras 33 and 34 that a party's failure to adhere to directions given by a judge in terms of rule 37(8) of the Uniform Rules undermined the efficiency, dignity and authority of the court and was capable of being addressed through contempt proceedings).

Conclusion

[34] In all the circumstances I am of the view that the respondent's defence in the action should be struck out.

[35] The applicants seek an order directing the respondent to pay the costs of this application on an attorney and client scale.

[36] The question whether a costs order on this scale is justified depends on 'what would be just and equitable in the circumstances of a particular case' (*Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 222). In *Public Protector* a majority of the Constitutional Court observed that over the years courts have awarded costs on this scale to mark their disapproval of 'fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court' (para 223) and concluded that a punitive costs order is justified where

the conduct concerned is ‘extraordinary and worthy of a court’s rebuke’ (para 226).

[37] Having regard to the respondent’s failure over a long period to comply with the directions handed down by two judges of this court, I am satisfied that a costs order on a punitive scale is justified.

[38] The following order is made:

(a) The respondent’s defence in the action instituted in this court under case number 22758/2016 is struck out.

(b) The respondent shall pay the costs of the application on an attorney and client scale.

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Michelle Norton
Acting Justice of the High Court
Western Cape Division

APPEARANCES

For Applicants:	HC Jansen Van Rensburg Instructed by Strydom & Bredenkamp Inc, Pretoria

	c/o Werksmans Attorneys
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For Respondent:	FA Ferreira
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