IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 18910/07

DATE: 16/4/2008

REPORTABLE

IN THE MATTER BETWEEN:

WALTLOO MEAT AND CHICKEN SA (PTY) LTD	APPLICANT
AND	
SILVY LUIS (PTY) LTD	1ST RESPONDENT
DA SILVA, JOSE SILVERIO	2ND RESPONDENT
DA SILVA, LUIS	3RD RESPONDENT

JUDGMENT

POSWA, J

[1] This is an application, by the applicant, for condonation of its late filing of its replying affidavit.

BACKGROUND

[2] 0n 23 February 2005, the applicant and the first respondent entered into a franchise agreement. In entering the agreement with the applicant, the first

respondent was represented by the second and third respondents, who were the sole shareholders in the first respondent, with the third respondent being the managing director thereof and the second respondent a director. The second respondent resigned as director of first respondent during November 2006, resulting in the third respondent being the managing director of the first respondent and the sole shareholder therein. It appears that, when the applicant brought the application, it was not aware of the second respondent's resignation from the first respondent. During negotiations preceding the conclusion of the franchise agreement, the applicant was represented by one Reis.

[3] The applicant alleged, in the main application, that the respondents were acting in breach of a restraint of trade clause contained in the franchise agreement and that they were, thus, competing unlawfully with the applicant. The respondents were, therefore, according to the applicant, trading off the applicant's goodwill and were using the applicant's trade secrets and know-how. The applicant further submitted that the first respondent was unlawfully passing off the applicant's products as its own.

[4] 0n 5 March 2007 the parties met. There is disagreement as to whether the meeting was called at the instance of the applicant or that of the first respondent. That was the beginning of a series of discussions, most of which was by way of correspondence, between the parties regarding their misunderstanding of each

other. Each party accused the other of being in breach of the agreement. Whilst the applicant demanded an undertaking from the first respondent that it would abide with the terms of the contract and stop buying supplies from suppliers other than those they were supposed to use in terms of the agreement, the first respondent demanded that the applicant stops taking kickbacks, unlawfully, and not passing them to the first respondent. The first respondent accused the applicant of having misrepresented, through Reis, the fact that, according to the first respondent, the applicant was causing the first respondent to purchase at higher prices than those from which other franchisees purchased supplies. It was, in other words, accusing the applicant of having acted fraudulently.

[5] The first respondent's constant refusal to give an undertaking, unconditionally, that it would not purchase supplies from suppliers who were not designated in the franchise agreement, caused the applicant serious irritation. Similarly, the applicant's repeated insistence that kickbacks were normal and were known to the respondents at the time of the agreement being gone into, irked the first respondent. These counter-accusations were contained in letters written by the parties' respective attorneys.

[6] In their letter of 26 March 2007, the applicant's attorneys wrote, *inter alia*, the following:

"*The purpose of this letter is to call upon you, as I hereby do, to furnish*

me with an undertaking by no later than 5:00 p.m. on the 30th instant that you will henceforth refrain from conducting yourself in the manners set forth above, failing which my client intends to take such action against you as it is entitled to do and as set forth in the franchise agreement …"

In their letter of 12 April 2007, the respondents' attorneys, on their part, wrote, *inter alia*, the following:

"*Consequently, our client again calls upon your client to furnish an undertaking as demanded, within 5 days of the date of this letter, failing which the franchise agreement will be cancelled without further notice …*"

[7] It was after this statement that the applicant brought an application in the urgent Court, before RABIE, J on Friday 18 May 2007. The notice of motion for the urgent application reads, *inter alia*, as follows:

"*TAKE NOTICE that the Applicant intends to make application for an order in the following terms:*

1. 1.1 Declaring that the Applicant has validly exercised its option to purchase all the assets of the 1st Respondent in the licensed business.

1.2 Declaring that the purchase price to be paid by the Applicant pursuant to the said option is to be calculated in terms of clause 20.2 (read with clauses 20.3 and 20.4) of

the franchise agreement.

2. *Interdicting and restraining the First Respondent:-*

2.1 *for a period of 24 months commencing on 2 May 2007 in any capacity and whether directly or indirectly, from carrying on or assisting financially or otherwise being engaged or concerned or interested in any business where trade in meat, chicken, turkey, fish, wors, lamb, pork, offal or other approved products represent a part thereof, within the Elias Motsoaledi Local Municipality or in any territory where a similar licensed business was conducted by the Applicant or any of its franchisees as at 2 May 2007 alternatively the date of cancellation of the franchise agreement;*

2.2 *from directly or indirectly utilising and/or divulging or disclosing to others any of the trade secrets;*

2.3 *using the Applicant's recipes;*

2.4 *selling products bearing the Applicant's packaging and/or name.*

3. *Alternatively, that prayer 2 above operate as interim interdict pending the final decision in action proceedings to be instituted within fifteen days from date of the order by the applicant against the respondents to claim an interdict and/or damages based on unlawful competition, unless such action has not been finally decided by 3 May 2009, in which case this interim interdict shall lapse.*

4. *0rdering the Respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved.*

5. *Further and/or alternative relief.*"

[8] The application was dismissed, for lack of urgency, and the applicant was ordered to pay costs of the application, which included costs of senior counsel. The applicant had given the respondents only about one day in which to file an answering affidavit. For purposes of the present judgment, I shall not allude to the merits of the main application as seen by the parties, respectively.

[9] In paragraph 4 of the answering affidavit, the respondents dealt fully with what they referred to as "INADEQUATE TIME FOR ANSWERING AFFIDAVITS". They emphasised, in particular, the fact that they were given only one day in

which to consult witnesses, who were in different places, prepare and file an answering affidavit. In paragraphs 4.5 to 4.8, the respondents say the following:

> "*4.5 It has accordingly been impossible, both logistically and practically to have any answering affidavit completed within the time period afforded to Respondents.*
>
> *4.6 Respondents are further not in a position to fully present their case in the present answering affidavit as further evidence will have to be obtained relating to the intentional misrepresentation relied upon. This will involve both affidavit and documentary evidence which cannot be obtained in such a short time.*
>
> *4.7 Respondents will, notwithstanding, present their case as best we can in the available time, albeit in truncated and incomplete form.*
>
> *4.8 In the event of the matter not being struck from the roll as a result of the lack of urgency, Respondents will, however, require additional time to amplify their answering affidavits.*"

[10] After the application was struck off in the urgent Court, the respondents did not file supplementary affidavits, to complete their averments. The applicant, not satisfied with the Court's ruling that there was no urgency, initially intended to bring a further application in the urgent motions Court. It subsequently

abandoned that idea and started making preparations to bring the application on the ordinary opposed motion roll.

APPLICATION IN THE ORDINARY MOTION ROLL

[11] From the papers, as well as what was mentioned by Mr Vivian, the applicant's counsel, during his address, it is evident that the applicant **filed** and **served** a notice in terms of Rule 28, in which it gave its intention to amend its notice of motion, as it then was or as it was before the urgent Court. It is not necessary for purposes of this judgment to record what the amended portions of the notice, in particular prayers 1.1, 1.2 and 2, read before the amendment.

[12] When, after the expiration of ten days from the date of service of the notice of amendment, the respondents had not filed their objection to the proposed amendment, the applicant, in terms of Rule 28(7), filed the amended notice of motion, on 26 June 2007. The amended notice of motion had been served on the respondents' attorneys on 25 June 2007. 0n 26 June 2007, without filing a fresh founding affidavit, with the amended notice of motion serving that purpose, the applicant issued and filed its replying affidavit, which had also been served, with the amended notice of motion, on the respondents' attorneys, on 25 June 2007. The respondents did not file a notice of intention to oppose the application after it was served with the amended notice of motion.

[13] 0n 17 July 2007, the applicant filed its notice of set down of the application on the opposed motion roll for 15 August 2007. The notice had been served on the respondents' attorneys on 16 July 2007. For the applicant to have obtained a date of hearing that quickly, it must have convinced the Deputy Judge-President that the application was semi-urgent. That is how the application came to be before me on 15 August 2007.

[14] Paragraph 5 of the applicant's heads of argument reads:

> "*5. The applicant* ***seeks condonation for the late filing of the replying affidavit****. It contends that the reason therefor is primarily that it was waiting for the Respondents to file their supplementary (or amplifying affidavits).*" (Emphasis added.)

In paragraph 7 of the same heads of argument the following appears:

> "*7. Similarly, the Respondents have not been prejudiced by the late filing of the replying affidavit. They received the affidavit in June 2007 and have simply remained supine.*"

Finally, for present purposes, paragraph 8 of the applicant's heads reads:

> "*8. It is accordingly submitted that this matter* ***should now be resolved on its merits*** *and the Respondents should not be allowed to delay the determination of the matter by raising* ***technical objections****.*"

(Emphasis added.)

[15] In support of his submission, in paragraph 4 of the heads of argument, that the respondents had ignored the invitations to amplify their affidavits, Mr Vivian referred, in the footnote, to annexures "RA18" and "RA20", respectively, whereas, in respect of paragraph 5 of the heads of argument, he relied on paragraph 12 of the replying affidavit. The applicant also submitted, in its heads of argument, that the respondents had not been prejudiced by the late filing of the replying affidavit, seeing that they received it on 25 June 2007.

[16] In his heads of argument, on the respondents' behalf, Mr M C Maritz submitted the following, *inter alia*:

1. In paragraph 1.2 of the respondents' heads of argument the following is stated:

> "*1.2 Although there was a clear factual dispute on the papers filed in the first round, Applicant, in the face of such dispute of fact and warnings not to proceed by way of application, elected to again bring the matter on notice of motion.*"

Reference to "warnings" is to the letters written by the respondents' attorneys to the applicant's attorneys after the urgent application had been

struck off the roll.

2. The amended notice of motion failed to reflect a date within which appearance to defend had to be entered and also failed to reflect a date by which the answering affidavits were to be filed.

3. The applicant "*irregularly and simultaneously with the filing of the amended notice of motion, filed its replying affidavit which was really a reply to the answering affidavit filed as part of the alleged urgent application*".

4. Therefore, the respondents submitted "*that the procedure adopted by the applicant is completely irregular and [that] the filing of the replying affidavit was completely irregular and, in law, cannot be condoned*".

5. "*The irregular filing of the replying affidavit further enabled applicant to immediately approach the Registrar for the allocation of a date which enabled applicant to jump the queue of waiting matters and bring the matter as a semi-urgent matter, which it otherwise would not have been able to do*." This submission relates to the fact that the applicant could not have approached the Court for a date of hearing if the pleadings had not closed. If the respondents had been given the opportunity to file their

notice of intention to oppose the application, as amended, and had subsequently filed an answering affidavit, and if the applicant had not filed its replying affidavit until the respondents had duly filed their opposing affidavit(s), the application would certainly not have been ready for hearing at the time at which the applicant approached the Court for the matter to be set down for 15 August 2007. The respondents submit that there is a clear factual dispute on the papers with regard to the question whether or not the entire contract was brought about by the alleged applicant's fraud. For that reason, so the respondents contend, the applicant should not have brought its case by way of motion proceedings but should, instead, have instituted action by way of summons. The respondents' heads of argument also alluded to the applicant having abandoned prayers 2.3 and 2.4 of the notice of motion, in the replying affidavit, a submission that had already been made by Mr Vivian.

[17] According to Mr Maritz, the respondents' submission is that, when RABIE, J refused to grant the applicant the condonation it sought in prayer 1 of the notice of motion, during the urgent application proceedings, he was, in effect, telling the applicant that the application had to be brought in compliance with the Rules of the High Court of South Africa, including Rule 6(5). In failing to provide a date by which the appearance to defend had to be entered as well as a date by which the answering affidavit(s) was/were to be filed, the amended notice of motion

does not comply with the provisions of Rule 6(5), so submitted Mr Maritz. He pointed out that Rule 6(5)(d), when referring to "notice" that a party that seeks to oppose an application should give to the applicant in writing, that it intends to oppose the application, pegs the time within which such notice must be given on the time stated in the notice of motion (6(5)(d)(i)).

[18] Mr Vivian submitted that an application that is struck off the roll in an urgent Court or any other Court is not, by virtue of the striking off, rendered a nullity. For that submission he relied on what is stated by CAMERON, JA, on behalf of the Court, in paragraph [9], page 299, in the case of **Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd: Commissioner, South African Revenue Service v Hawker Aviation Partnership and 0thers 2006 (4) SA 292 (SCA) at 299**, where the following is stated:

> "*[9] 0ne of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This, in effect,*

> *permits an urgent applicant, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with' the Rules). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again,* ***on proper notice and compliance***. "
> (Emphasis added and references to footnotes omitted.)

[19] Mr Vivian submitted that, because the application is struck off the roll on account of non-compliance with rule 6(12)(a), and the applicant is at liberty "to set the matter down again", such application is still alive. Moreover, it contains a valid notice of motion, one in respect whereof the respondents, in the present case, have already entered their notice of intention to defend and have, indeed, filed their respective answering affidavits.

[20] Mr Vivian did not allude to the implications of the applicant's service of an amended notice of motion after the striking off of the application by RABIE, J. Mr Maritz, on his part, disagreed with the interpretation of that passage by Mr Vivian. Before I deal further with Mr Vivian's submissions in this regard, it is

necessary that the relevant provisions of Rule 6(5) be set out:

"*6(5)(a)* *Every application other than one brought **ex parte** shall be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all other annexures thereto, shall be served upon every party to whom notice thereof is to be given.*

(b) *In such notice the applicant shall appoint an address within eight kilometres of the office of the Registrar at which he will accept notice and service of all documents in such proceedings, and shall, subject to the provisions of section 27 of the Act, **set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application**, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than ten days after such service on the said respondent of the said notice.*

(c) *… .*

(d) *Any person opposing the grant of an order sought in the notice of motion shall-*

(i) ***within the time stated in the said notice****, give applicant notice, in writing, that he intends to oppose the application and in such notice appoint an address within eight kilometres of the office of the Registrar, at which he will accept notice and service of all documents;*

(ii) *within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and*

(iii) *… .*

(e) ***Within 10 days of the service upon him of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of subrule (5)*** *the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits."* (Emphasis added.)

[21] I have difficulty with Mr Vivian's interpretation of the phrase in (5)(a), "*as near as may be in accordance with Form 2(a) of the first Schedule.*" The relevant portion of Form 2(a) reads:

> "*TAKE NOTICE FURTHER that if you intend opposing this application you are required (a) to notify the applicant's attorney in writing* ***on or before the …***
>
> *(b) and* ***within fifteen days after you have so given notice of your intention to oppose the application****, to file your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.*" (Emphasis added.)

Initially, Mr Vivian submitted that there is no provision in the Rules for the amount of time that an applicant whose application has been struck off the roll of the urgent Court must give to the same respondent(s), within which to give its/their intention to oppose the application and time within which to deliver its/their answering affidavit(s), when the applicant sets the matter down for hearing in the opposed motions roll.

[22] When I drew Mr Vivian's attention to reference to Form 2(a), in Rule (5)(a), he submitted that that form is of minor importance in the context of the discussion.

That is so, so he submitted, because, whilst Form 2(a) is mentioned in the subrule, its contents are not repeated in the body thereof and it appears elsewhere, ie in the Schedule. That, he submitted, indicates that it is of less importance than the text of the subsection. When I sought to find out from Mr Vivian whether, in essence, his submission that the applicant in the present case would, had it not decided to go to the urgent Court, have been entitled to allocate a date, by which the respondents would give notice of their intention to oppose, giving the respondents less than fifteen days in which to file their answering affidavit(s). I raised that question in the light of there being no mention of fifteen days in the text of Rule 6(5)(a), but only reference to Form 2(a). Mr Vivian submitted that, as a matter of practice and not an obligation on the applicant, he would, invariably, have given fifteen days notice. The mere fact, however, that the respondents were not given fifteen days in the present instance, so submitted Mr Vivian, is of no consequence. He emphasised that the clause in the notice of motion in the current application, that reads: "*(a) notify the Applicant (MIKO LOUW, telephone 012 326 3331) in writing of your intention by no later than 14h00 on … 2007*", was entered in error, because it was never the intention of the applicant to give such notice to the respondents, in that it was not necessary to do so. It should be noted that, even if Mr Vivian's submission was otherwise, the applicant would have encountered the difficulty in that no date was given to the respondents, by which they were to notify the applicant of their intention to oppose the application.

[23] Mr Vivian submitted that the practice he was referring to is not one based on the fifteen days mentioned in Form 2(a) but the fifteen days mentioned in (d)(ii) of Rule 6(5). He had no answer to the question as to why an applicant should be guided by an instruction *to a respondent*, in 6(5)(d)(ii), instead of an instruction *to an applicant* contained in 6(5)(a), *read with Form 2(a)*.

[24] Mr Vivian reminded the Court that courts are not encouraged to be formalistic in their application of the Rules. He based his submission on what is stated by VAN WINSEN, AJA (as he then was) in **Federated Trust Ltd v Botha 1978(3) SA 645 (A)**, **at 654C/D-F**, which is as follows:

> "*The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts. See, eg.* ***Hudson v Hudson and Another 1927 AD 259 at 267;***
>
> ***L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2) 1971 (4) SA 532 (C) at 535 (last paragraph); Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 754D-E; Vitorakis v Wolf 1973 (3) SA 928 (W) at 932F-G****. Where one or other of the parties has failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the*

circumstances, always bearing in mind the object for which the Rules were designed. See in this regard the remarks of SCHREINER JA in ***Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F-G****.*"

[25] Mr Vivian also referred the Court to a passage in the judgment by SLOMOWITZ, AJ (as he then was) in **Khunou and 0thers v M Fihrer & Son (Pty) Ltd and 0thers 1982 (3) SA 353 (W)** at 355F/G-356B, which reads:

"*The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.*

0f course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not

exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.

It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible. Unfortunately this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the Courts' procedures that their true purpose is frustrated."

[26] Mr Vivian submitted that it would be to "encourage formalism in the application of the rules", if the applicant's omission to provide a period within which the respondents were to enter their notice of intention to oppose the application and if the omission to mention the period within which they were supposed to file their answering affidavits would amount to non-compliance with the provisions of Rule 6(5)(a) and (b). In my view, Mr Vivian's submissions, in so far as he contends that insisting on compliance with adherence to time limits provided in Rule 6(5)(a), read with Form 2(a), is being formalistic, is incorrect. Such time limits are, no doubt, based on considerations of fairness and the *audi alteram partem* principle – the need to ensure that parties are afforded ample and equal

opportunity to adequately present their respective cases. That avoids litigation by ambush. Besides, it is clear from CAMERON, JA's judgment in **Commissioner, SARS v Hawker Aviation Partnership and 0thers 2006 (4) SA 292 (SCA), at 300A**, that an applicant must set down its application "*on proper notice and compliance*". It is true that a court is authorised in Rule 6(6) to grant leave – to a party that, unlike the applicant here, makes such a request – "*to renew the application on the same papers, supplemented by such further affidavits as the case may require*". Let me repeat that the applicant in the present case seeks no such indulgence, insisting that the amended notice of motion is compliant with Rule 6(5) and that the replying affidavit was properly filed. It is important to note that the discretion to condone non-compliance, by making no order where there is non-compliance, and to allow the applicant further opportunity to comply, lies only with the court. No act or omission by a respondent facing a defective notice of motion can, therefore, in my view, cure such non-compliance by the applicant.

[27] Mr Vivian further submitted that the respondents would suffer no prejudice in the present instance, if what amount to be technical flaws were overlooked, in that they had, as a matter of fact, entered their notice of intention to defend the application when it was filed for purposes of the urgent Court application. It remained, in essence, the same application. Moreover, so Mr Vivian proceeded, they had had far more than fifteen days, from 18 May 2007, when the application was struck off the roll, to 25 June 2007, when the amended notice of

motion and the replying affidavit were filed. They had done absolutely nothing about supplementing their answering affidavits. I have already pointed out that insisting on an applicant to give a defendant adequate time in which to notify its intention to oppose the application and enough time in which to file its answering affidavit, if any, is a question of fairness.

[28] Mr Vivian further submitted that the respondents had ignored the applicant's written request for them to indicate whether they intended to make further submissions and, if so, how much time they required to do so. He was then referring to correspondence annexed to the replying affidavit. When both counsel referred me to the correspondence contained in the replying affidavit and, in Mr Vivian's case, the passage in the replying affidavit in which the applicant applies for condonation and gives reasons therefor, I raised the question with both of them as to whether I was entitled to have sight of and/or take into account the contents of the replying affidavit. I raised that question because, as both counsel conceded, the replying affidavit was not part of the application until I had condoned its late filing. The late filing I am referring to is that which did not comply with the provisions of Rule 6(5)(e), as submitted by both counsel, viz service within ten days of receipt of the answering affidavit. Counsel were of the view that the Court is entitled to look at the contents of the replying affidavit, for purposes of determining the issue of condonation.

[29] In my view both counsel are wrong, for two reasons. Firstly, if, as I have already found, the notice of motion is defective, it makes no difference that the respondents did not respond to correspondence related thereto. Secondly, the Court may not resort to information contained in a document that is not before it. That, in my view, is akin to the case of an additional affidavit, after the traditional founding, answering and replying affidavits had been filed, which cannot be considered as part of the evidence until the Court exercises its discretion in terms of Rule 6(5)(e) (**Standard Bank of SA Ltd v Sewpersadh and Another 2005 (4) SA 148 (C)**, **at 155E, para [13]**). In that judgment DLODLO, J expressed himself as follows:

> "*[13] Clearly a litigant who wished (**sic**) to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as **pro non scripto***."

Whether or not a further set of affidavits is permitted is a question of fairness. (**Milne NO v Fabric House (Pty) Ltd 1957 (3) SA 63 (N) at 65A**.) In that regard, it is stated as follows, in Erasmus **Superior Court Practice**, on B1-47:

> "*There should in each case be a proper and satisfactory explanation which negatives **mala fides** or culpable remissness as to the cause of the facts or information not having been put before the court at an earlier*

stage, and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs."

[30] Whilst all the above is based on the explicit wording of rule 6(5)(e), I see no reason why the same principles should not apply in a matter, such as this, where it is agreed by the parties, correctly so, that, although the replying affidavit was filed by the applicant, it remains in the discretion of the Court whether to have it admitted or not as evidence, by granting the application for condonation of such late filing. In this regard, Mr Maritz emphasised the fact that an applicant in the position of the current applicant is asking for indulgence, it is not approaching the Court as of right. I agree with Mr Maritz' submission (**James Brown and Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A)**, **at 660E-H; York Timbers Ltd v Minister of Water Affairs and Forestry and Another 2003 (4) SA 477 (T).**)

[31] Mr Vivian submitted that the respondents did not oppose the notice of amendment of the notice of motion, which must mean that they are not opposed to it. To the extent that the irregularity in the notice of motion is one of form and not of substance, Mr Vivian was correct, as was also conceded by Mr Maritz, that the respondents could have objected to the notice of motion, in its amended form. It was further submitted on the applicant's behalf that, in view of the fact that the

respondents did not oppose the application for amendment and took no steps to have the amended notice of motion set aside, as an irregular process in terms of Rule 37(1), there is nothing inappropriate in both the amended notice of motion and the replying affidavit having been simultaneously served on the respondents. After all, so went the submission, the respondents had already pleaded and had evidently decided not to supplement their initial answering affidavit. This submission clearly overlooks the fact that when the application was struck off the roll by RABIE, J, it disappeared from circulation, together with all affidavits in relation thereto. It could only exist through the Rule 6(5)(a) route, taking into account the requirements of Form 2(a). The answering affidavit was not before the Court and could not, therefore, have been relied on by the applicant as a basis for submitting that the respondents had given their answer. The notice, itself, and its founding affidavit were non-existent until re-introduced – amended or otherwise – through the Rule 6(5)(a) route, which did not happen.

[32] Alluding to the correspondence attached to the replying affidavit, Mr Vivian further submitted that the respondents' failure to take the applicant's invitation to indicate how much time they would require for them to file answering affidavits was a further indication that there was no objection to the notice of motion, as amended. It was, consequently, so it was further submitted, only natural that a replying affidavit should be filed as soon as possible, so as to avoid further delay in the finalisation of the application. I can only assume that Mr Vivian

overlooked the requirement in Rule 6(5)(a), that every application that is not brought *ex parte* "*shall be brought on notice of motion as near as may be in accordance with Form 2(a) …*" (emphasis added). Use of Form 2(a) is peremptory. (**Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (W) at 502E-503C.)** As pointed out in **Gallagher (supra)** at 502E-503C, even in urgent applications Rule 6(5)(a), which incorporates Form 2(a) is operative. All that happens in urgent applications, where there is justification to do so, is that the periods provided in Form 2(a) are shortened.

[33] What FLEMMING, DJP, as he then was, says in **Gallagher (supra)**, at 502E, is worth repeating for purposes of this application. He says:

> "*Rule 6(5)(a) of the Uniform Rules of Court is peremptory. An application must be in the form 'as near as may be in accordance with Form 2(a)'. Rule 6(5)(b) also compels. An applicant is bound to nominate a day, at least five days after service on the respondent, on or before which the respondent must notify the applicant of intended opposition. Within 15 days after the notification, a respondent who does oppose must deliver opposing affidavits (rule 6(5)(d)(ii)) …*"

Equally important is what the learned Judge says further at 502J:

> "*The mere existence of some urgency cannot therefore justify an applicant not using Form 2(a) of the First Schedule to the Uniform Rules.*"

Referring to **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A)**, and relying thereon, FLEMMING, DJP categorically says:

> "*… almost all requirements of urgency can be managed by using Form (2) (a) with shortened periods, or by a mere adaptation of an aspect of the form, for example advance nomination for hearing, omitting notice on the Registrar, accompanied by changed wording when necessary. Compare the* **Republikeinse Publikasies** *case at 78G.* ***Adjustment, and not abandonment, of Form (2)(a) is the method.***" (503C, emphasis added).

[34] In **Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen 1978 (1) SA 779 (T)** it is said:

> "*… in an application which does not fall under Rule 6(12), and is not brought* **ex parte***, a 'notice of motion' which is not substantially in material respects as near as may be in accordance with Form (2)(a) is a nullity.*" (Emphasis added),

just as a summons not issued by the Registrar is a nullity. I do not propose embarking on the long and arduous route that a discussion of what is an irregular proceeding, on the one hand, and a nullity, on the other (see **Krugel v Minister of Police 1981 (1) SA 765 (T) at 768C-G**). I am satisfied that a procedure such as

that adopted by the applicant in this case is not a nullity and can be condoned. The applicant did not do nothing. It adopted a procedure, albeit an incorrect one by not using a procedure akin to Form (2)(a). It did serve a defective notice of motion and a premature replying affidavit. Mr Maritz conceded, correctly in my view, that the respondents could have objected to the purported amendment to the notice of motion, in terms of Rule 30, in which event the applicant could have applied for condonation in terms of Rule 27(3). (See **Mynhardt v Mynhardt 1986 (1) SA 456 (T)**.) However, the respondents did not take any further step with regard to the defective notice of motion, that did not comply with Rule 6(5) (a) and (b). The irregularity was not, therefore, cured by the respondents' conduct. (See **Gouws v Scholtz 1999 (4) SA 315 (NC)**.)

[35] Even though I am of the view that the defects in the notice of motion can be condoned, the applicant still has a problem. In view of the fact that there is no formal application for condonation, it being based only on the request contained in the replying affidavit, whose very legitimacy is in issue, and also that the correspondence relied on by the applicant appears only in the same replying affidavit, there is no basis on which Mr Vivian could have argued, on behalf of the applicant, for condonation. Moreover, Mr Vivian at no stage conceded that the procedure adopted by the applicant was defective. How, then, can there be condonation?

[36] I have already stated that when I raised that aspect with both counsel, they were in agreement that it was appropriate for either of them to address the Court on the basis of what is contained in the replying affidavit. For the reasons I have already given, I disagree with them. Apart from anything else I have said, hitherto, it should be borne in mind that the replying affidavit purports to reply to an answering affidavit that is not before the Court, just as there is no founding affidavit before the Court.

[37] Having concluded, as I have done, that there is, properly speaking, no replying affidavit and, therefore, no correspondence – such as is attached to the would-be replying affidavit – for the respondents to respond to, I proceed, nevertheless, to consider the respondents' submissions in this regard. The respondents' attitude, as explained by Mr Maritz, was that they were under no obligation to file answering affidavits simply because the applicant invited them to do so in his correspondence. It is, so submitted Mr Maritz, only by way of action or notice of motion that a party is called upon to officially react to what the plaintiff or the applicant, as the case may be, claims. He further submitted that it frequently happens that an application that had failed on urgency before the urgent Court ends up never being resuscitated by way of ordinary motion. It would, therefore, so Mr Maritz further submitted, have been imprudent of the respondents to file supplementary affidavits in response to mere correspondence, only to find that the application was not being proceeded with, after all that. That would subsequently

give rise to a prolonged process, in an attempt to establish the respondents' entitlement to costs incurred on account of their responding to the applicant's correspondence. He emphasised that the respondents were entitled to respond to the one and only notice of motion that has been brought by the applicant before this Court, in normal course, which was served on them on 25 June 2007. After filing their notice of intention to oppose the application in its current form, the respondents would have been entitled to the normal time periods afforded them by Rule 6(5). When, however, the applicant filed its amended notice of motion simultaneously with its replying affidavit, it committed irregularities. Conceding that the respondents had failed to take steps against the notice of motion, in terms of Rule 30(1), Mr Maritz submitted that the filing of the replying affidavit, in such circumstances, was an independent irregularity from that of the notice of motion. Even if, therefore, the amendment to the notice of motion stood, that did not justify the filing and service of a replying affidavit simultaneously therewith. I agree with the submissions by Mr Maritz.

[38] Mr Maritz further submitted that the explanation given by the applicant for its failure to file the replying affidavit timeously was inadequate. It cannot be a good explanation, he submitted, to allege that the respondents, by failing to respond to correspondence by the applicant, and not to a formal process, such as a notice of motion, justified the applicant's non-compliance with the Rules. He pointed out, moreover, that there was prejudice to the respondents, in that, as stated in the

answering affidavit to which the applicant purported to reply, they had not had adequate time to answer as they would have liked to do. In particular, he mentioned the fact that they needed further information and affidavits regarding the alleged fraudulent misrepresentation by the applicant, which resulted in the franchise agreement.

[39] I am in full agreement with Mr Maritz' submissions regarding the inadequacy of the explanation for the delay and the presence of prejudice to the respondents. In the circumstances, I find that, even if I was inclined to grant condonation, I would have to contend with the fact that the applicant has not made a case for condonation of the late filing of the replying affidavit. It follows that the application can be dismissed on that ground alone.

COSTS

[40] That costs follow the cause, is such a trite principle that it requires no authority. Mr Maritz submitted that there was no reason why the rule should not apply in this case. 0n his part, Mr Vivian submitted that this was not the case for the application of that rule. He referred the Court to the decision in **Mancisco and Sons CC (in liquidation) v Stone 2001 (1) SA 168 (W)**. He did not have the details of the case, nor its name for that matter, when he made the submission but undertook, on my instructions that I needed to prepare judgment that evening, to bring the authority to me before he left the Court and that he would furnish

Mr Maritz with the details of the case. I had understood him to submit that this case is authority for the proposition that even a successful party can be mulcted in courts. The passage he referred to, at 181F-182C does not, in my view, support his submission. Because Mr Vivian did not have opportunity to address me on his interpretation of the excerpt, I deem it necessary to quote the entire passage in full, which reads:

> "*The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put (**Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488**). That underlies the basic principle that a successful party should get its costs. Some awards for damages must not be made beyond proof of reasonableness of **quantum**. A **bona fide** amendment of a pleading with the object of ventilating the real issues between the parties must be allowed. 0nly if justification is adequately present are those judicial obligations qualified. In the result one finds in practice that, if costs are incurred only to determine liability for costs, it is accepted by practitioners that the party losing the debate must also pay the costs of that debate even if it was reasonable to oppose or reasonable to ask. The party choosing to contest that issue is expected to decide at its own risk whether or not to declare battle – just like a defendant who is found to be negligent pays costs of suit even if he had an arguable case or seemed to possess evidence to show that he was not negligent. The argument for reasonableness as a factor in costs is not heard from a party*

who contested damages and found that the award is for more than he reasonably argued.

Between the two extremes come other cases. The present argument is heard when a party unsuccessfully opposes rescission of judgment, amendments and other procedural orders. I have for years more often than not also approached the award of costs in such cases on the basis that the decision to oppose is at the risk of the relevant party normally without allowing reasonableness in as a guide. A practitioner receiving and reading an application for rescission will normally accurately predict whether the application should succeed despite tendering pages of evidence which will do no more than record a dispute of fact about the presence of a defence. The pirate ship which is conscious of the achievable gain in terms of harassment or obstruction and delay of the other side or even conscious of some professional fees should not be allowed to sail under the flag of sweet reasonableness. It should be discouraged. 0ppositions should also in such matters be at the risk of the party who chooses to oppose. In the modern context that will promote fairness to the other side (and the practitioner's client), help to prevent clogging of the Courts by procedural interplay which still marks Motion Courts and even trials and promote getting to the real issues between the parties."

0n my understanding of the above passage, it would apply in favour of the applicant if the respondents' opposition to the application for condonation had failed, it would not avail them to speak of "reasonableness" as a factor to be taken into account when the award of costs against him was being considered. It would not, for instance, help the respondents to submit that they incorrectly but *bona fide* interpreted the provisions of rule 6(5) in the manner they did and that they should not, therefore, be mulcted in court. Moreover, in saying what he said, FLEMMING, DJP, giving a judgment on behalf of the Full Bench, repeated "*the basic principal that a successful party should get his costs*".

[41] It remains now to determine the question as to whether Mr Maritz' submission that costs should include costs of the employment of the services of senior counsel is appropriate. Mr Maritz submitted, in that regard, that the case was of sufficient complexity to warrant the engagement of senior counsel. I raised the question with him whether it was not simply a question of coming to oppose the application for condonation, seeing that, with the respondents not having filed supplementary answering affidavits, the main application would not have proceeded, regardless of the outcome of the application for condonation. He responded that the respondents would have proceeded on the basis of what there is, towards the merits, in the answering affidavits. They would, however, have been unable to make submissions concerning the fraud allegations.

[42] It would have been a great surprise to me to see the respondents wanting to proceed with the application in the absence of ammunition that will deal with the very foundation of the franchise agreement. I was, at that stage, not satisfied that the opposition of the application for condonation warranted the employment of the services of two counsel. I was, however, constrained to award costs on the basis asked for by Mr Maritz on account of two reasons. Firstly, Mr Vivian did not raise an objection to this submission. Although that was not binding on me, the applicant's attitude was a matter of serious consideration. The second reason is that the applicant was ordered, when the application was removed from the roll in the urgent Court, to pay costs (which included costs of senior counsel). As I do not know the basis on which that costs order was made, I am inclined to think that Mr Vivian believed that the previous regime with regard to costs should not be disturbed, I must accept that the parties know more than I do about that.

[43] In the circumstances I make the following order:

1. The application for condonation of the replying affidavit is refused.

2. The applicant is ordered to pay costs, including costs for the engagement of the services of two counsel, one of whom is senior counsel.

J N M POSWA
JUDGE OF THE HIGH COURT

18910-2007

HEARD ON: 15/8/2007
FOR THE APPLICANT: ADV D HINRICHSEN
INSTRUCTED BY: T G FINE ATTORNEYS, JHB
c/o FRIEDLAND HART & PARTNERS, PRETORIA
FOR THE RESPONDENTS: ADV M C MARITZ SC
INSTRUCTED BY: G T AVVAKOUMIDES INC, PRETORIA