Practice – Applications and affidavits – Time limits for filing of affidavits – Failure to comply with Uniform Rules of Court – Insistence with compliance formalistic – interests of justice require that affidavits may be considered although affidavit filed out of time.

REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/30282

CASE NO: 2009/37649

DATE: 19/11/2010

In the matter between:

PANGBOURNE PROPERTIES LTD Applicant

and

PULSE MOVING CC First Respondent

BRONKHORST, STEPHANUS PETRUS Second Respondent

J U D G M E N T

WEPENER, J:

[1] There are two applications before me in terms of which the applicant seeks the ejectment of the first respondent from premises and payment of a portion of a deposit pursuant to a written agreement entered into between it and the first respondent. The second respondent is a surety for the first respondent.

[2] Pursuant to a written lease agreement which was cancelled, the applicant and the first respondent entered into a re-instatement agreement (referred to as the lease agreement) in terms of which a deposit of R200 000,00 was payable in four instalments to be secured by way of four post-dated cheques of R50 000,00 each, such cheques to be dated 1 July 2009, 30 July 2009, 1 September 2009 and 10 October 2009, respectively. It was further agreed that should any of the four instalments not be paid on due date, the full amount of the deposit would forthwith become due, owing and payable by the first respondent in one sum.

[3] The respondents do not challenge the conclusion of the lease agreement or any of its terms. The first respondent duly furnished the applicant with the four post-dated cheques and thereupon took occupation of the premises.

[4] Prior to the first instalment falling due the first respondent advised the applicant that it was not in a financial position to honour its commitment regarding the first cheque of R50 000,00. It also acknowledged that it was unable to comply with its obligation to pay the deposit of R200 000,00. Nevertheless the applicant presented the first cheque for payment on due date and it was dishonoured and returned. Having regard to the terms of the lease agreement the full deposit of R200 000,00 then became due and payable on 1 July 2009.

[5] As a result of the first respondent's failure to pay the sum of R200 000,00 the applicant cancelled the lease agreement on 22 July 2009 – a right which is specifically provided for in the lease agreement. The cancellation of the lease was communicated by service of the application on the first respondent who thereafter vacated the premises and no order in that regard needs to be made. The parties are at loggerheads as to the date of vacation and according to the first respondent it vacated the premises on 14 August 2009. A person who vacates a property but remains in possession of the keys remains in legal possession of such property. See *Malan v Dippenaar* 1969 (2) SA 59 (O) at 62H-63A and the authorities there cited. The keys were handed to the applicant on 1 September 2009 resulting in the first respondent being liable for the rental for occupation of the premises for August 2009.

[6] It was a term of the lease agreement that in the event of the first respondent failing to return the premises in a condition that it was obliged to do, it would be liable for the costs of restoration of the premises to that condition.

[7] It is clear from the wording of the lease agreement that the deposit would have been available to the applicant for purposes of recovering rental, the costs of re-instating the premises as well as for damages for holding over or other charges payable by the first respondent.

[8] The applicant has reduced the amount of its claim for payment of the full deposit of R200 000,00 to a lesser amount which amount includes claims

for payment of the sum of R45 951,32 as rental for August 2009, as stated by Mt Both on behalf of the applicant, which applicant alleges had accrued to it at the time of the cancellation of the agreement and payment of the sum of R64 879,04 into an interest-bearing trust account pending its claim for damages arising from the re-instatement of the premises, which claim is the subject matter of an action instituted by the applicant against the respondents. I do not agree that any rental for August 2009 had accrued to the applicant as at the date of cancellation, as the agreement was cancelled prior to rental for August 2009 becoming due and payable. But that is immaterial by virtue of the fact that the payment of the deposit had accrued to the applicant on 1 July 2009. The applicant will be entitled to claim damages from the first respondent for unlawfully holding over the premises after the cancellation of the lease agreement. See *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 164-165. Indeed the claim under case number 09/37649, one of the applications before me, is for payment of the amount of R45 951,32 for the unlawful holding over the premises by the first respondent and not for rental, as argued by Mr Both.

[9] The total amount claimed is therefore less than the amount of the agreed deposit of R200 000,00 which the applicant would otherwise have been entitled to claim. The applicant is entitled to hold the deposit (or such lesser amount) until a complete discharge of the first respondent's obligations arising from the lease agreement.

[10] The first argument raised on behalf of the respondents is that the replying affidavit was filed some eight months out of time and falls to be disregarded. Reliance for this argument was placed on the following cases: *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C); *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (T) and *Brenner's Service Station and Garage (Pty) Ltd v Milne and Another* 1983 (4) SA 233 (W).

[11] The application was served on 22 July 2009 and the respondents filed answering affidavits on 27 August 2009 – approximately 9 days after the time prescribed in the Rules for the filing of answering affidavits, had lapsed. The respondents filed its reply some ten months later i.e. during July 2010. The matter was set down for hearing. Neither party brought an application for condonation for the late filing of the answer or the reply and neither party availed itself of the remedies contained in Rule 30 to have the irregular filing of the affidavits set aside – the latter step which was open to the respondents to utilise within 10 days of receiving the replying affidavit.

[12] Reliance for the objection to the replying affidavit was placed on the *Standard Bank* case *(supra).* In that matter Dlodlo J stated at 153H as follows:

> "*Indeed, the practice relating to the number of affidavits is clear and settled in our law. This was well stated by the well-known authors, Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4th ed at 359, as follows:*

> *'The ordinary rule is that three sets of affidavits are allowed, sc supporting affidavits, answering affidavits and replying affidavits. The Court may in its discretion permit the filing of further affidavits.'*

The discretion of the Court to admit further affidavits is provided for in Rule 6(5) of the Uniform Rules of Court, namely:

> *'The Court may in its discretion permit the filing of further affidavits.'*

This clear and well-settled practice enjoyed consideration in James Brown and Hamer (Pty) Ltd (previously named Gilbert Hamer Co Ltd) v Simmons NO 1963 (4) SA 656 (A) where at 660D-H the Court dealt with the filing of further sets of affidavits:

> *'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied; some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.'*

The Court is vested with the discretion. There is thus no official who can decide on this, not even the Registrar of this Court. (See Transvaal Government v The Standerton Farmers' Association 1906 TS 21.) A fortiori no litigant may take it upon himself to simply file further affidavits without first having obtained the leave of the Court to do so. The Court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the Court considers such a cause advisable. (See Rieseberg v Rieseberg 1926 WLD 59; Joseph and Jeans v Spitz and Others 1931 WLD 48.) In Bangtoo Bros and Others v National Transport Commission and Others 1973 (4) SA 667 (N)it was held among other things that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and/or information not being put before the court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs. (See Transvaal Racing Club v Jockey Club of South Africa 1958 (3) SA 599 (W); Cohen NO v Nel and Another 1975 (3) SA 936 (W).)"

This judgment deals with an affidavit falling outside the general rules regarding the number of sets and proper sequence of affidavits and not with an affidavit which was filed out of time. Reliance on that judgment is therefore

misplaced. Affidavits falling outside the general rules were also discussed in this Division in *Sealed Africa (Pty) Ltd v Kelly and Another* 2006 (3) SA 65 (W). These two judgments do not deal with the question of the late filing of affidavits.

[13] The *Brenner* case *supra* deals with an application for an extension of time when a party requires such extension. There was no such application before me. Indeed, Leveson AJ (as he then was) remarked as follows at 237E-F:

> "*I think it emerges from the passages quoted that, in appropriate cases, the Court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party.*"

[14] In the *Waltloo* matter Poswa J held regarding an affidavit filed out of time that:

> "*… 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) para [13] at 155E.)*."

[15] The result of Poswa J's finding is that I should not look at the answer or the reply in this matter because it is not before me. I cannot agree that the statement of Poswa J should be followed.

[16] There are a large number of matters that come before us in this Division in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that is it not, without more, before the court. Without attempting to tabulate all instances where affidavits which are filed out of time may indeed be validly before a court, I refer to two examples only. Affidavits can validly be before the court pursuant to an agreement between the parties – see Rule 27(1) which provides for such an agreement. It can also be validly before the court if the interests of justice require it. See the unreported judgment of the National Director of Public Prosecutions In Re: An Application for the Issuing of a Letter of Request, case number 3771/07 which was delivered in the North Gauteng High Court on 14 September 2007 where Van der Merwe J (as he then was) said: "*Though the replying affidavit was well out of time it had to be taken into account in the interests of justice*". Shongwe J (as he then was) said in the unreported judgment of *Venter v Van Wyk*, case number 30323/04 delivered in the North Gauteng High Court on 27 June 2005:

> "*The first point in limine is, in my view, highly technical. It is correct that the replying affidavit was filed out of time and that no formal application for condonation was filed by the respondent. However there are a lot of mud-slinging to and fro between the parties which situation I do not prefer to entertain. It is a waste of valuable time. I therefore rule that I will admit all affidavits before me and deal with the important issues presented by the application.*"

[17] In *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 278F-G Schreiner JA remarked:

> "*… technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.*"

In *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) Van Winsen AJA (as he then was) said at 654C-F 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 1963 (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 the opponent, it should be the Court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects 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.*"

In *Khunou and Others v M Fihrer and Son (Pty) Ltd and Others* 1982 (3) SA 353 (W) at 355-356 Slomowitz AJ said:

> "*Of 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.*"

In *Szedlacsek v Szedlacsek and Others* 2000 (4) SA 147 (E) at 149C-H Leach J (as he then was) stated the following after quoting from the *Khunou* case *supra* with approval at 149G-H:

> "*These observations I wholeheartedly endorse. It is trite that Rules are there for the Court, not the Court for the Rules and this Court must zealously guard against its rules being abused, particularly by the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation but which appear to be designed merely to inflate costs to the advantage of the practitioner's pocket.*"

In *Hart and Another v Nelson* 2000 (4) SA 368 (ECD) Horn AJ (as he then was) stated as follows at 374G-375F:

> "*Where strict adherence to a Rule of court would give rise to a substantial injustice the court will grant relief which will prevent such an injustice. The court has an inherent power to grant relief where an insistence upon the exact compliance with a Rule of court would result in substantial injustice to one of the parties. (Moluele and Others v Deschatelets NO 1950 (2) SA 670 (T) at 676; also Matyeka v Kaaber 1960 (4) SA 900 (T).) It is inconceivable that a court would give effect to the Rule where the implication of such a Rule would clearly cause undue hardship to one party and present an unfair advantage to the other. In Ncoweni v Bezuidenhout 1927 CPD 130 Gardener JP remarked as follows at 130:*
>
> > *'The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go so far as I can in granting orders which would help to further the administration of justice.'*
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> *Similarly, where it is evident that use is being made of a procedure for ulterior purposes it amounts to an abuse of the process and the court has an inherent power to prevent such an abuse (Hudson v Hudson and Another 1927 AD 259 at 267; Basson v Bester 1952 (3) SA 578 (C) at 583D). In Beinash v Wixley 1997 (3) SA 721 (SCA) at 734D, Mahomed CJ said the following:*
>
> > *'There can be no doubt that every court is entitled to protect itself and others against an abuse of its process.'*

At para F on the same page of the judgment, the learned Chief Justice continues as follows:

> *'What does constitute an abuse of the process of Court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abusive process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'*

The Rules of Court are after all designed to facilitate the expeditious ventilation and hearing of disputes as little cost as possible (SOS Kinderhof International v Effie Lentin Architects 1993 (2) SA 481 (Nm) at 491E; Wolf v Zenex Oil (Pty) Ltd 1999 (1) SA 652 (W) at 654F). The Rules exist for the court, not the court for the Rules (Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783). Fairness and transparency come into play, even in the most intense litigation, and no man should be allowed to manipulate the procedures of the Court in a way which would cause a palpable injustice to another, which, I believe would be the case should the appellants be permitted to rely on the payment procedure in terms of Rule 18(1)."

[18] The respondents had the replying affidavit in their possession for four months and made no attempt to object to the late filing thereof until the objection was made in argument before me. Its own affidavit was late and would pursuant to the *Waltloo* judgment not be before me. The respondents did not show why it would be prejudiced should the matter be heard by me. The objection to the affidavit is stated thus:

> "*Applicant's replying affidavit was served and filed some 8 months out of time and falls to be disregarded*."

It fails to indicate what prejudice, if any, the respondents suffered as a result of the late filing of the replying affidavit. The words of Brand JA in *Anglo*

Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at para [32] are apposite:

> "*I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the Uniform Rules of Court, the answer is, in my view, that, as is often been said, the Rules are there for the Court, and not the Court for the Rules. The court a quo obviously had a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application the respondent had already responded – in its rejoining affidavit – to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in a pointless waste of time and costs.*"

On the facts of the present matter I deem it unnecessary for either of the parties to have brought a substantive application for condonation. See *McGill v Vlakplaats Brickworks (Pty) Ltd* 1981 (1) SA 637 (W) at 643C-F, *Hessel's Cash and Carry v SA Commercial Catering and Allied Workers Union* 1992 (4) SA 593 (E) at 599F-600B and the unreported matter of The National Director of Public Prosecutions referred to above.

In the matter under consideration all the papers are before me and the matter is ready to be dealt with. To uphold the argument that the replying affidavit and consequently also the answering affidavit, fall to be disregarded because

they were filed out of time will be too formalistic an exercise in futility and leave the parties to commence the same proceedings on the same facts *de novo*.

[19] There is no allegation of prejudice to any party nor have I been referred to any such prejudice if the matter is to be disposed of on its merits despite the late filing of the answering and replying affidavits. The failure of the respondent to utilise the provisions of Rule 30 regarding the setting aside of irregular proceedings strengthens my view that neither party was prejudiced by the late filing of the affidavits.

It is in the interests of justice that the affidavits be taken into account and that this matter be finalised and unnecessary additional costs be avoided. Insofar as it may be necessary and within my discretion to allow the late filing of the answering affidavit and the late replying affidavit, I do so in order to decide the merits of the dispute between the parties unfettered by technicalities.

[20] The first respondent's main defence to the merits of the matter taken in the answering affidavit is that the applicant was not entitled to cancel the lease agreement because the applicant had failed to first place the respondent in *mora* by not giving the first respondent an opportunity to remedy its breach before the applicant would become entitled to cancel the lease agreement. However, it misses the fact that the applicant was entitled to forthwith cancel the lease agreement in the event of non-payment of any amount due in terms of the agreement. It is only in the event of other

breaches that the applicant was obliged to afford the first respondent a period of seven days to rectify such breach before the applicant would become entitled to cancel the lease agreement. The first respondent's counsel did not pursue this defence in argument. During argument four defences were raised by Mr Venter who appeared on behalf of the respondents. The first defence was that the agreement was subject to a suspensive condition which was never fulfilled and accordingly, the R200 000,00 never became due and payable. This condition is contained in clause 3.1 of the agreement and reads:

> "*The Landlord and the Tenant agree that upon signature of the last Party to this Agreement and against delivery of the amounts referred to in 3.4.3 below, the Lease Agreement, as amended in terms of clause 3.4 below, is reinstated with immediate effect and is of full force and effect.*"

Mr Both for the applicant argued that the intention was to refer to the four cheques rather than "*amounts*" which had to be delivered. If the intention was that the agreement was conditional upon the delivery of the cheques, then obviously the condition was met.

It was argued by Mr Venter on behalf of the respondents, that the first respondent failed to pay the deposit which he equated to a failure to "deliver' the amounts and as a result thereof, no agreement came into force. If this interpretation is correct, which I seriously doubt, the first respondent was, however, the cause of the failure and cannot rely on its own failure to perform its obligations in order to avoid the contract. The condition is to be regarded as fulfilled. *McDuff and Co Ltd (In Liq) v Johannesburg Consolidated*

Investment Co Ltd 1924 AD 573. On either basis, the condition was met or it should be regarded as having been met and the defence cannot succeed.

[21] A further defence is that the applicant is seeking specific performance of a term of the agreement notwithstanding having elected to cancel the agreement which in law it is not entitled to do. This argument misses the principle that a party is entitled to enforce its accrued rights when a contract comes to an end. This principle was set out in *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394 at 401 where Greenberg J said:

> "*No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract. But it appears to me that this only applies to the executionary portion of the contract; but where a certain right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced.*"

The applicant's right to receive the deposit of R200 000,00 accrued on 1 July 2009 and it elected to cancel the agreement on 22 July 2009. It is entitled to claim the deposit. However, the applicant's counsel argued that it elected to claim the rental for August 2009, which it is not entitled to claim after cancelling the lease agreement. As stated, it is claim for holding over and pursuant to clause 24.2 of the lease agreement it is provided that in the event of the applicant cancelling the lease agreement and the first respondent remaining in occupation it shall continue to pay the amounts equivalent to the rental and other amounts provided for in the lease agreement on due date. The amount claimed for holding over is consequently equal to the amount the

applicant could have claimed as rental in the absence of the cancellation of the lease agreement. The argument that the applicant is claiming specific performance is incorrect and is probably based on the argument of Mr Both who stated that an amount was claimed for rental. This, as I have indicated, is incorrect as applicant is seeking damages for holding over and is not claiming specific performance.

[22] Although there is a dispute raised by the respondents in relation to an alleged counterclaim against the applicant it was fully dealt with in the replying affidavit under case number 09/37649 resulting in the applicant allowing a credit of R12 774,75 to the respondents. The respondents did not convincingly pursue the argument regarding the counterclaim.

There is consequently no merit in this defence.

[23] The final argument was that the granting of the relief will lead to undue hardship for the respondents. This argument was not pressed and no supporting facts or legal argument was furnished for this proposition. I know of none and I am not able to uphold the argument.

[24] The lease agreement provides that the first respondent shall pay the costs on an attorney and client scale in the event of the applicant instituting proceedings to exercise its rights pursuant to the agreement and the suretyship has a similar provision regarding the second respondent's liability for costs.

[25] The defences raised by the first and second respondents have failed. In the circumstances the applicant is entitled to an order in the following terms:

1. The respondents are ordered jointly and severally to pay the sum of R64 879,04 to attorneys Kokinis Inc, to be held in an interest-bearing trust account by them pending the final determination of the proceedings pending between the parties under case number 2010/04459;

2. The respondents are ordered, jointly and severally, to pay the applicant the sum of R45 951,32 together with interest thereon at the rate of 15,5% per annum calculated from 4 September 2009 to date of payment;

3. The respondents are ordered jointly and severally to pay the applicant's costs of the two applications under Case Nos. 2009/30282 and 2009/37649 on the scale as between attorney and client, provided that counsel's fee in respect of the appearance on 4 November 2010 shall be limited to only one appearance fee taxable on the aforesaid scale.

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W L WEPENER

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR APPLICANT:	Adv J Both SC
INSTRUCTED BY:	Kokinis Inc
COUNSEL FOR RESPONDENTS:	Adv AJ Venter
INSTRUCTED BY:	Jouberts Attorneys
DATE OF HEARING:	4 November 2010
DATE OF JUDGMENT:	19 November 2010