

23/6/17



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

23/6/17

DATE

SIGNATURE

CASE NUMBER: 46556/2010

In the matter between:

BUFFALO VALLEY FARMS (PTY) LTD

Plaintiff

and

BERNARD DE BEER N.O.

Defendant

JUDGMENT

MOTHLE J

Introduction

1. This is an interlocutory application in which the applicant, cited as Plaintiff in the main action, seeks relief in the form of leave to amend its summons, to properly cite the trustees of a trust, against which it has instituted action proceedings. The respondent, cited as the Defendant in the main action, opposes this application.
2. In this judgment I will refer to the parties as cited in the summons.

Background

3. The following is a summary of the background facts:
 - 3.1 On 13 August 2010 the Plaintiff issued and served summons against the Defendant.
 - 3.2 On 20 September 2010, the Defendant filed a plea to the summons wherein it included a special plea as well as a plea on the merits. The special plea is based on the ground that the Defendant being a trust, was not properly cited as such in the summons and that one other trustee was not mentioned.

3.3 On 18 August 2011, the Plaintiff served a notice of intention to amend the summons. The Defendant lodged its objection in terms of Rule 28(3), dated 31 August 2011. In its objection to the proposed amendment, the Defendant raises several grounds which include the following:

3.3.1 That Krokodil Nest 21 Trust was not properly cited as Defendant;

3.3.2 That the Plaintiff's claim has prescribed;

3.3.3 That it is not permissible to add another trustee as a second Defendant by way of an amendment; and

3.3.4 As the claim has prescribed, the Krokodil Nest 21 Trust will be prejudiced such that not even a cost order would compensate for that prejudice.

3.4 The Plaintiff failed to bring an application in terms of Rule 28(4) within the prescribed 10-day period to formally prosecute the notice to amend. Between 29 April 2014 and 27 May 2014 the parties exchanged correspondence, copies whereof are attached in the papers before Court.

- 3.5 The Plaintiff then brought a new notice to amend dated 4 July 2014 which it served on the Defendant on 10 July 2014. On 16 July 2014 the Defendant again objected in terms of Rule 28(3). In its objection, the Defendant this time reminded the Plaintiff of the previous notice to amend dated 17 August 2011 which has not been prosecuted or formally withdrawn.
- 3.6 On 17 September 2014, the Plaintiff this time followed through and launched a formal application for the amendment of the summons in terms of Rule 28. There appears to be a dispute between the two parties as to the dates on which service of this application was effected.
- 3.7 On 12 August 2014, the Defendant the filed a notice in terms of Rule 30A, in which the Defendant seeks a dismissal of the action, on the grounds that the application to amend was not brought within a reasonable period, in any event as an irregular step outside the provisions of Rule 28(4). The second objection being that the application is predicated on the fact that the Plaintiff failed to obtain condonation from the Court for the delay. It is further contended in the notice that Melissa Myburgh (formally De Beer) as well as Lindie De Beer on whom the notice was served, were not parties to the main action, having not been previously cited as such.

3.8 On 1 September 2014, the Plaintiff served on the Defendant an application for condonation.

3.9 The applications for amendment and condonation were set down and heard on 13 February 2017.

4. The Court has to decide on the following issues:

4.1 The condonation application by the Plaintiff;

4.2 The Rule 30A application by the Defendant;

4.3 The application to amend by the Plaintiff; and

4.4 The special plea of prescription raised by the Defendant.

5. I now turn to deal with each of these matters.

Condonation

6. The Plaintiff brought a substantive application for condonation of the late services and filing of its application for amendment of the particulars of claim. In doing so, the Plaintiff makes reference to the notice to amend dated 30 July 2014.

7. Plaintiff made no reference to the initial notice that was raised in August 2011 to which there was opposition.
8. In the affidavit supporting the application for condonation, the Plaintiff contends that there was a delay by the co-Defendants in responding to the application to amend, filed within 10 days of the notice of objection to their notice to amend in terms of Rule 28(4). It further submits that the Defendant would not be prejudiced by the delay since it has pleaded to the summons.
9. A party seeking condonation must provide a reasonable explanation to excuse the default. It would then be in the discretion of the Court as to whether the Plaintiff has discharged itself of this obligation. In the words of Bosielo AJ (as he was then), writing for the Constitutional Court in the matter ***of Derrick Grootbroom v National Prosecuting Authority and Another***,

¹ the Learned Judge stated thus:

“23. *It is now trite that condonation cannot be had for the mere asking. The party seeking condonation must make out a case entitling it to the Court's indulgence. It must show sufficient cause. This requires a party to*

give a full explanation for the non-compliance with the Rules of Court's directions. Of grave significance, the explanation must be reasonable enough to excuse the default."

10. The application for condonation in this case must be seen against the chronology of events since 14 August 2007 to February 2017. The following is a brief summary of the time line:
 - 10.1 Plaintiff's right of action accrued on 14 August 2007;
 - 10.2 The Plaintiff instituted action on 13 August 2010, citing only one trustee of the Krokodil Nest Trust as Defendant. On 20 September 2010, the trust filed a special plea to the summons;
 - 10.3 Almost a year later in particular on 19 August 2011, the Plaintiff issued a notice of amendment to correct the citation of parties. The Defendant objected to the notice and the Plaintiff failed to bring an application to effect the amendment;
 - 10.4 Almost three years later, on 30 July 2014, Plaintiff again served the Defendant with a notice to amend which was also

objected to on the same grounds as before. The notice was issued on the 10 of July and the objection delivered on 16 July 2014;

10.5 On 30 July 2014, for the first time since 2010, the Plaintiff filed an application for amendment of the summons. In response, the Defendant filed an application in terms of Rule 30A. The main objection for this irregular step was that the Plaintiff's application was not launched within the 10 days prescribed by Rule 28(4); and

10.6 Almost a year thereafter and on 6 September 2015, the Plaintiff filed an application for condonation which for some unknown reason was issued on 29 July 2016. For the record, the matter only came to be heard in February 2017.

10.7 In addition to the obvious delay on the part of the Plaintiff in prosecuting what is essentially an interlocutory application, the Plaintiff did not in his application for amendment, deem it fit to attach thereto a copy of the summons sought to be amended. The papers for the main action before Court are not in the Court file.

10.8 The tardiness with which this matter has been handled by the Plaintiff is self-evident. The Learned Judge in Grootboom further stated as follows:

"24. I need to remind practitioners and litigants that the Rules in Court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our Courts is run effectively and efficiently. Invariably this will lead to the orderly management of our Courts rolls, which in turn will bring about the expeditious disposal of cases in the most cost effective manner. This is particularly important given the ever increasing costs of litigation, which if left unchecked will make access to justice too expensive.

25. Recently this Court has been inundated with cases where there have been disregard for its directions. In its efforts to arrest this unhealthy trend, the Court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this Court once again

expressed its displeasure in eThekwini as follows:

'It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.

34. *The language used in both Van Wyk and eThekwini is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgements is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message*

must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity.

35. *It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a valued judgment by the court seized with a matter based on the facts of that particular case. In this case, the respondents have not made out a case entitling them to an indulgence. It follows that their application must fail."*

11. This Court agrees with the sentiment expressed by Bosielo AJ in Grootboom. The application for condonation does not address the following;

11.1 Why there was a delay in issuing a notice of amendment after the special plea was filed;

11.2 Why there was a delay in lodging an application for amendment after the objection was launched in 2011;

11.3 What the fate of the first notice to amend is;

11.4 Why there was a three year delay before another notice to amend was issued; and

11.5 Why this matter came to be heard in February 2017.

12. Plaintiff's affidavit seems to concentrate on non-compliance with the ten day period prescribed by Rule 28(4) after objection was launched **for the second time**, to the notice to amend. The Plaintiff does not explain the delay in prosecuting the first notice to amend or what its status is in the current proceedings. The second notice to amend was issued without the first one being dealt with or withdrawn. This Court thus finds that the Plaintiff has failed to comply with the provisions of Rule 28, in particular Rule 28(4). Consequently, the condonation application cannot succeed and stands to be dismissed.

13. Having declined the Plaintiff's application for condonation, I now turn to deal with the Defendant's application in terms to Rule 30A.

Defendant's application in terms of Rule 30A .

14. The Defendant has brought an application in terms of Rule 30A.
The Rule reads as follows:

"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of ten days, to apply for an order that such Rule, notice or request be complied with or that the claim or defence be struck out.


(2) Failing compliance within 10 days, application may on notice be made to the Court and the Court may make such order thereon as to it seems meet."

15. It is common cause and this Court has found that the Plaintiff failed to prosecute this interlocutory application timeously as prescribed by the Rules. There is no proper explanation for the delay and noncompliance with the Rules and the prescribed *dies* or time frames.

16. The Defendant argues that the step taken by the Plaintiff is irregular in that there is still a notice to amend that has not been withdrawn. It was thus irregular for the Plaintiff to proceed in prosecuting a second notice to amend while the first one has not been withdrawn. Secondly, the lapse of time in prosecuting this claim will prejudice the Defendant.
17. The Plaintiff simply alleges that the Defendant will not be prejudiced without stating why it comes to this conclusion. This Court is of the view that Defendant is that it correct will suffer prejudice if the application in terms of Rule 30A is not granted. Accordingly, the Defendant's Rule 30A application succeeds.
18. The failure to attach the summons makes it impossible for the Court to assess even the prospects of success of the claim in order to exercise its discretion in the interest of justice.
19. Having regard to the application as a whole, I am of the view that the Plaintiff has not made out a case for the condonation application. There will thus be no need to deal with the merits of the application for the intended amendment raised by the Plaintiff and the special plea raised by the Defendant.

20. In the premises I make the following order:

1. The Plaintiff's application for condonation is dismissed.
2. The Defendant's application in terms of Rule 30A is granted.
3. The Plaintiff is ordered to pay the Defendant the costs of these two applications including costs of counsel.


S P MOTHLE
Judge of the High Court.
Gauteng Division, Pretoria

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