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

Case number: 91849/2015

Date: 9 October 2017

- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

In the matter between:

PETROS FAKAZI ZWANE

PLAINTIFF

Vs

SASOL TECHNOLOGY

FIRST DEFENDANT

SASOL LIMITED

SECOND DEFENDANT

JUDGMENT

TOLMAY, J:

BACKGROUND

- [1] In this matter Mr Zwane instituted action against Sasol Technology and Sasol Limited (SASOL). In the particulars of claim Mr Zwane claims R1 11 039 317-53 (One hundred and eleven million, thirty nine thousand, three

hundred and seventeen rand and fifty three cents) together with some ancillary relief from Sasol. This summons was issued on 15 November 2015. Sasol filed a notice of intention to defend dated 19 November 2015. To avoid any confusion I refer to the parties as Mr Zwane and Sasol throughout.

- [2] The combined summons was accompanied by a condonation application by Mr Zwane. He asks for condonation for the defective manner in which his pleadings and/or documents are lodged or brought in prosecuting his action and any application related thereto. Mr Zwane also asks that any fees payable by him be waived, because he is an indigent litigant. I understand this to mean that no cost order should be made against him irrespective of the outcome of litigation between him and Sasol.
- [3] Sasol opposed the aforementioned condonation application, but was late in filing an answering affidavit. Sasol consequently filed a condonation application for the late filing of the answering affidavit. Mr Zwane filed a notice to oppose the condonation application, but failed to file an answering affidavit.
- [4] Sasol also filed a notice to remove a cause of complaint in terms of Rule 30(2)(b), stating that Mr Zwane's particulars of claim does not comply with Rule 17(3), 18(3) and 18(4) of the Uniform Rules of Court and requests that he removes the cause of complaint. This notice was also filed out of time. Sasol filed a condonation application for the late filing of this notice and this application is also opposed.
- [5] Mr Zwane filed an application that Sasol's answering affidavit, dated 27 January 2016 be declared an irregular step, unlawful and improper. Sasol opposed this application.
- [6] Mr Zwane filed a notice of bar on 1 February 2016 and Sasol filed an application for the setting aside of the notice of bar and this was then opposed by Mr Zwane.
- [7] In the light of the aforesaid this Court must determine the following applications:
 - a. Mr Zwane's condonation application for the defective particulars of claim and non-compliance with processes, and "waiver of fees";

- b. The condonation application by Sasol for the late filing of the answering affidavit in Mr Zwane's condonation application for non-compliance with the Rules of Court;
- c. The condonation application by Sasol for the late filing of the notice to remove a cause of complaint;
- d. The application by Mr Zwane to have Sasol's answering affidavit dated 27 January 2016 be declared an irregular step, improper and unlawful; and
- e. The application by Sasol for the setting aside of Mr Zwane's notice of bar.

CONDONATION APPLICATIONS

[8] In the light of the various condonation applications I first deal with the principles applicable to condonation applications in general before applying them to the different applications.

[9] The relevant rule to consider is Rule 27 of the Uniform Rules of Court which reads in relevant part as follows:

- "(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*
- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.*
- (3) The court may, on good cause shown, condone any non-*

compliance with these rules."

- [10] What would constitute good cause has not been exhaustively defined in order to prevent undue interference with the Court's discretion, which must be exercised judicially, upon a consideration of all the facts and must be fair to both sides¹. If the Applicant succeeds in showing good cause the Court should also consider the possibility of prejudice to the other party². The application must be *bona fide* and not be brought with the purpose to delay the proceedings³. The Applicant must satisfy the Court that it has a *bona fide* defence or that the action is not ill-founded⁴.
- [11] The Court also considers whether the granting of the indulgence will prejudice the other party in any way that cannot be compensated by a suitable order or postponement and costs⁵.
- [12] A Court may condone any non-compliance with the rules, unless the non-compliance is so severe that the litigation will amount to a nullity⁶.

DECLARATION OF IRREGULARITY

- [13] The parties both also ask the Court to declare steps taken by the other side as irregular and to set it aside.
- [14] The relevant rule, Rule 30 reads as follows:
- "(1) *A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside*
- (2) *An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if.-*

¹ Erasmus Superior Court Practice, Van Loggerenberg, sec ed, vol 2 0 1-323 and authorities referred to in footnotes 1 and 2. See also *Melane v Santam* 1962(4) SA 531 (A) at 532 C-E

² *Standard & General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000(3) SA 87 (W).

³ Erasmus, *supra* and authorities referred to in footnote 7 thereof

⁴ Erasmus, *supra*, footnote 8

⁵ Erasmus, *supra* 01-324 and authorities cited in footnote 1

- (a) *the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) *the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*
 - (c) *the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).*
- (3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*
- (4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.*
- (5)”

[15] The Court will grant an order if it is satisfied that the proceedings are irregular, the Applicant has not taken a further step with knowledge of the irregularity, the Applicant has within 10 days of becoming aware of the step given written notice affording his opponent an opportunity of removing the irregularity within 10 days, and the Applicant will suffer prejudice if the irregularity is not removed. The prejudice referred to is prejudice that will be experienced in the further conduct of the case if the irregular step is not set aside⁷

[16] If a pleading does not comply with Rule 18 a party has a choice to either bring an application in terms of Rule 30 or raise an exception in terms of

⁶ Melane, *supra* at 532C-E

⁷ De Klerk v De Klerk 1986(4) SA 424 (W) at 426, Afrisun Mpumalanga(Pty) Ltd v Kunene NO & Others 1999(2) SA 599 Tat 611 C-E

Rule 23(1)⁸.

MR ZWANE APPLICATION FOR CONDONATION FOR THE NON-COMPLIANCE WITH THE RULES OF COURT

- [17] Mr Zwane conceded that the particulars of claim does not comply with the Uniform Rules of court in particular Rules 6(5)(b) , 17(3)(b), 18(4) and 18(7). Mr Zwane also wants the Court to go even further than condoning the admitted non-compliance with the Rules of Court, and to condone all future non-compliance with the Rules.
- [18] The reasons for Mr Zwane's deviation from the Rules are, he says, that he is layperson and indigent and is as a result not in a position to comply with the rules.
- [19] Both Rule 6(5)(b) and 17(3) deals with the necessity to appoint an address for service within 15 kilometres of the office of the Registrar. Mr Zwane provided a postal address and a fax number where service can take place.
- [20] Mr Zwane gave the following as his address for service: PO Box [...] and fax [...]. It would seem that, service by fax and per registered post on Mr Zwane has been effected successfully during the course of the proceedings. Mr Zwane states that due to the fact that he is indigent, he is not able to provide an address for service as required by the rules. I do not make any finding on whether Mr Zwane is indigent, but seeing that service has apparently been effective by means of registered post and by fax I am of the view that service by registered post at the aforementioned postal address and fax number, as was done in the past, should be allowed. There will be no prejudice for Sasol if service is done in this way.
- [21] Mr Zwane conceded that he did not comply with 18(4) and 18(7). It is also clear that Rule 18(3) is relevant and Sasol stated in their notice to remove a cause.of complaint that he did not comply with this rule.
- [22] Rule 18(3) reads as follows:
- "Every pleading shall be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment."*

⁸ Erasmus, *supra* D1-352

[23] Rule 18(4) reads as follows:

Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[24] Rule 18(7) reads as follows:

It shall not be necessary in any pleading to state the circumstances from which an alleged implied term can be inferred."

[25] Despite Mr Zwane's concession it would seem that Rule 18(7) is not applicable and the reference thereto is not appropriate, nor is there any necessity to condone non-compliance with this rule.

[26] A perusal of the particulars of claim, which consists of 286 pages reveal that there was indeed no compliance with Rule 18(3) and 18(4).

[27] The paragraphs of the particulars of claim do not contain a distinct averment, as is required by Rule 18(3). The particulars of claim furthermore do not contain a clear or concise statement of the material facts on which Mr Zwane relies, as is required by Rule 18(4).

[28] The particulars of claim sets out a detailed account of the history between Mr Zwane and Sasol. It sets out evidence which Mr Zwane is going to present, as well as opinions held by him pertaining to various aspects related to his claim. As such the particulars of claim go far beyond setting out the material facts on which he will rely.

[29] It is trite that facts and not evidence must be pleaded⁹. In this regard the distinction between *facta probanda* and *facta probantia* must be kept in mind.¹⁰ Mr Zwane sets out evidence in detail and deviates from this principle by doing so.

[30] Although it has been found that it might sometimes be necessary to plead

⁹ Erasmus, *supra*, D1-232 and authorities referred to in footnote 6

¹⁰ Nasionale AartappelKooperasie Bpk v Price Waterhouse Coopers Ing 2001(2) SA 790 (T) at 797G-I and 798C-D. S

history, *"this should be done with caution and unless history is clearly severed from the cause of action the pleading may be rendered vague and embarrassing"*¹¹. Ironically Mr Zwane's intention, as set out in the condonation application, was to avoid any allegations of vagueness. Unfortunately, the way in which the particulars of claim is drafted makes it very difficult to plead on it in any constructive manner or in accordance with the Uniform Rules of Court. Specifically Rule 18(5), which requires of a defendant to, not plead evasively and answer any point of substance. In my view it is not possible to plead in any constructive manner on the particulars of claim as it presently stands.

- [31] Taking into account that Mr Zwane is a layperson, one would be inclined to assist him, if at all possible, but in this instance condonation will result in uncertainty pertaining to how to plead in accordance with the rules and this will impact on the future conduct of the case. Mr Zwane, may not be legally qualified, but he is obviously an educated and intelligent man. He has also been involved in litigation with Sasol over an extended period of time and obviously gained much experience and knowledge about the law in doing so. I am of the view that he is capable of pleading in accordance with the Rules. There is also Legal Aid or *pro bono* legal assistance to which he can turn, if he complies with the requirements set, to assist him, if he requires such assistance.
- [32] Mr Zwane asks furthermore that Sasol waives all fees because he is an indigent litigant. Sasol disputes that he is indigent and asks that costs orders be granted against him. I am of the view that each Court, which hear matters between the parties, should determine the appropriate cost order which should be granted in that particular matter. It will be inappropriate for this Court to interfere or hamper the discretion of the Court who hears the matter.
- [33] In the light of the vast deviation from the rules pertaining to the drafting of pleadings, condonation for the non-compliance with Rule 18(3) and 18(4) can't be granted, nor can a Court be seen to grant general condonation for

¹¹ Erasmus, *supra*, D1-232, 01-233 and authorities set out in footnote 1 on 01-233

all future non-compliance. Such an order will be too wide and will result in uncertainty and will open the door to abuse. Mr Zwane will not be prejudiced as he can amend his pleadings and continue with his action on the amended pleadings.

- [34] I am of the view that it will be in the interest of justice to award him sufficient time to amend his pleadings.

SASOL's APPLICATIONS FOR CONDONATION

- [35] Mr Zwane as already stated filed the particulars of claim and condonation application for non-compliance with the Rules of Court on 16 November 2015, the answering affidavit by Sasol should have been filed on or before 11 December 2015, but was only filed on 28 January 2016. So was Sasol's notice in terms of Rule 30(2)(b).
- [36] Sasol explained in its papers that the delay was caused by the December holidays, when counsel who was briefed, due to his knowledge of the history of the matter, was on leave. Sasol states that the counsel who was briefed, was also briefed in a pending Labour Court matter between the parties. It must be noted that Mr Zwane is of the view that there is no matter pending in the Labour Court. At the very least however, the parties did litigate against each other in the Labour Court in the past. This much is clear from a perusal of the particulars of claim. A perusal of the papers reveals that the litigation between the parties has a long and protracted history and the particulars of claim consists of 286 pages. The particulars of claim contains a lot of detail pertaining to the history between the parties. As a result, it can't be stated that it was unreasonable of Sasol to make use of the services of counsel who had some knowledge of the case.
- [37] Sasol proceeded to state that after counsel returned from leave, it was decided that the appropriate cause of action was to file the notice of objection in terms of Rule 30, Sasol also decided to file an answering affidavit to Mr Zwane's condonation application, although this they say, was *ex abundanti cautela*. This answering affidavit deals in large part with the same subject matter as Sasol's Rule 30 application.

- [38] In the light of Mr Zwane's concession in his application for condonation that he did not comply with the Rules of Court, and my findings that such condonation can't be granted, it is actually common cause that the Rule 30 objection is good in law and consequently Sasol has good prospects of success on the merits.
- [39] The case between the parties is also of great importance as Mr Zwane claims R1 11 039 317-53 from Sasol. A perusal of the particulars of claim furthermore reveals that Mr Zwane alleges that various of his constitutional rights have been violated, both by Sasol and the Courts. Serious allegations are made in the particulars of claim and Mr Zwane himself states, in his papers, that this is an exceptional case. All of the above points to the fact that it is of the utmost importance that the disputes be ventilated in court.
- [40] Sasol's explanation for the delay is reasonable and was not inordinate under the circumstances. I am also satisfied that Mr Zwane will suffer no prejudice if condonation is granted. Sasol on the other hand will suffer severe prejudice if it is not allowed to defend the substantial claim brought by Mr Zwane against it.
- [41] In this regard condonation should be granted for the late filing of the answering affidavit as well as the late filing of the notice to remove the cause of complaint.

APPLICATION FOR SETTING ASIDE SASOL's AFFIDVATIT OF 27 JANUARY

2016

- [42] Mr Zwane is of the view that the affidavit filed by Sasol opposing the condonation applicant should be set aside as irregular, unlawful and improper.
- [43] Mr Zwane contends that Sasol's answering affidavit of 27 January 2016 should be set aside and that Sasol's defence against his condonation application should be struck out and that his condonation application should be granted by default.
- [44] The answering affidavit was served by telefax and registered post on 28

January 2016.

- [45] Sasol's answering affidavit dated 27 January 2016 was also served by way of sheriff on Mr Zwane at his last known place of employment.
- [46] On 18 March 2016 Sasol served a condonation application for the late filing of the answering affidavit to Mr Zwane's condonation application.
- [47] Mr Zwane served a replying affidavit to Sasol's answering affidavit on or about 15 April 2016. Accordingly, Mr Zwane has taken a further step with knowledge of -the alleged irregularity and is in terms of the Rules of Court not entitled to seek an order that the answering affidavit be declared an irregularity.
- [48] In any event Sasol has removed the cause of complaint, by filing a condonation application. There will be not be any prejudice for Mr Zwane as he received the answering affidavit and a condonation application was filed.
- [49] Consequently there is no merit in the application that Sasol's affidavit dated 27 January 2016 be declared irregular and improper and unlawful.

APPLICATION FOR SETTING ASIDE THE NOTICE OF BAR

- [50] Mr Zwane served a notice of bar on Sasol by way of facsimile on 1 February 2016.
- [51] In the light of the filing of the condonation application, both for the late filing of the answering affidavit, as well as the application that the particulars of claim be declared an irregular step, Sasol is at this stage not obliged to plead. Therefore the notice of bar is premature.
- [52] In the light of the aforesaid the notice of bar constitutes an irregular step and should be set aside.

COSTS

- [53] Both parties brought condonation applications. Which means that they seek an indulgence from the Court. This aspect is relevant when a Court has to exercise its discretion pertaining to an appropriate cost order. I also take cognisance of the fact that Mr Zwane is a layperson and must, even if he might is not be indigent, have limited financial means in comparison

with Sasol, who must be in a better financial position to fund litigation. I also take into consideration that Mr Zwane is appearing in person, which may impact on the way that he may choose to present his case. In the light of all the circumstances I am of the view that each party should pay its own costs in the applications before me.

[54] I make the following order:

54.1 The condonation application of Mr Zwane dated 15 November 2015 is dismissed; but leave is granted that service of all documents and processes on Mr Zwane may be effected as follows:

54.1.1 Per registered post at P O Box 821, Newcastle, 2940

54.1.2 Per fax at 086 614 6031;

54.2 Sasol's applications for condonation dated 31 March 2016 for the late filing of the notice to remove the cause of complaint is granted;

54.3 Sasol's application for condonation for the late filing of the answering affidavit to Mr Zwane's condonation application is granted;

54.4 Mr Zwane's application that Sasol's answering affidavit dated 27 January 2017 be declared an irregular step, improper and unlawful is dismissed;

54.5 The notice of bar filed by Mr Zwane is set aside;

54.6 Mr Zwane is given 30 days from date of this order to amend his pleadings to comply with Rule 18(3) and 18(4) of the Uniform Rules of court; and

54.7 Each party is to pay its own costs in all of the applications heard by the Court.

RG TOLMAY
JUDGE OF THE HIGH COURT