

SOUTH AFRICA / JUDGMENT

Barnard N.O and Others v Route Holdings (Pty) Ltd (5907/2023) [2024]

ZAFSHC 291 (10 September 2024)

[2024] ZAFSHC 291

COURT

Free State High Court, Bloemfontein

BEFORE

Mahlangu AJ

CASE / FILE NUMBER

5907/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Not

reportable

Case

no: 5907/2023

In

the matter between:

CHRISTIAAN
JOHANNES BOTHA BARNARD N.O
First
Applicant
GERT
LUKAS MULLER N.O
Second
Applicant
GERT
LUKAS MULLER
Third
Applicant
RADIQAL
INVESTMENTS CC
Fourth
Applicant
And
ROUTE
HOLDINGS (PTY) LTD

	Respondent
	In
re:	In
	the matter of
	ROUTE
	HOLDINGS (PTY) LTD
	Plaintiff
	And
	CHRISTIAAN
	JOHANNES BOTHA BARNARD N.O
	First
	Respondent
	GERT
	LUKAS MULLER N.O
	Second
	Respondent
	GERT
	LUKAS MULLER
	Third
	Respondent
	RADIQAL
	INVESTMENTS CC
	Fourth
	Respondent
	Neutral
	citation: Route Holdings (PTY) LTD v
	Barnard N.O & onother (case no 5907/2023)
Coram:	MAHLANGU AJ
Heard:	29 August 2024
Delivered:	10 September 2024
Summary:	Condonation-late filing of the replying affidavit-application to compel-Rule 35(14) ORDER 1. That the condonation application for the late filing of the replying affidavit is granted; 2. That the applicants to pay costs incurred in the condonation application jointly and severally the one paying the other to be absolved on a party and party scale A. 3. That the respondent is directed to comply with paragraph 1.2 of the applicants' notice in terms of Rule 35(14) within 10 days of service of this Court order in terms of this application by making

available for inspection within five days the ledger accounts of Entle Trading 504 (Pty) Ltd for the financial years ending on 28 February 2022 and 28 February 2023 and allow copy or transcript to be made thereof as contemplated by Rule 35(14) of the Uniform Rules of Court.

4.

That the respondent pay costs of the application to compel in terms of Rule 35(14) on a party and party scale B.

JUDGMENT

MAHLANGU AJ

INTRODCUTION

- [1] This is an interlocutory application which emanates from the action brought by the respondent against the applicants. The following two applications were brought before this court for adjudication: the condonation application for the late filing of the replying affidavit and the application to compel in terms of Rule 35(14) of the Uniform Rules of Court. Both these applications were opposed by the respondent.

BACKGROUND

FACTS

- [2] The first and second applicants are the trustees of SWP Trust and the third applicant was authorised to represent the G.L Trust. The fourth applicant is represented by the third applicant in his capacity as its director. The plaintiff and the first and second defendants concluded the sale of shares agreement on 2 July 2020.
- [3] The terms of the sale of shares agreement briefly included that, the SWP Trust as the beneficial owner of 70% of the par value shares of Entle Trading 504 (PTY) LTD (Entle) sells the aforesaid shares and make over, transfer and assign the full value of the SWP Trust's claims in Entle, in one indivisible transaction, to the respondent. In casu, the purchase price of the sale of shares and claims was in the amount of R39, 200, 000.00.
- [4] On 13 July 2020, the parties entered into a loan agreement in which the respondent lend and advance an amount of R10,385,869.60 to the SWP Trust, represented by its trustees being the first and second defendants. The capital amount of loan shall from 1 June 2023, bear the interest at a rate to the prime rate plus 2% which interest shall be calculated and be capitalised monthly in arrears.

- [5] The respondent submitted that it complied with its contractual obligations by making the payment of R20 000 000.00 to the SWP Trust with the R9 614 130.00 constituting a provisional payment towards the purchase price and R10 385 869.00 constituted and advance in terms of the loan agreement. The respondent further submitted that, its auditors rendered the valuation of Entle to the value of R9 614 130.00.
- [6] Based on the above agreements that were entered between the parties, the respondent seeks to claim payment of R10 385 869.60 plus interest and costs from the applicants. The summons were issued and before the applicants could plea to the respondent's claim, they served the respondent with a Rule 35(14) notice requesting the respondent to provide them with the annual financial statements of Entle for the financial years ending on 28 February 2021, 28 February 2022 and 28 February 2023 (financial statements) and the ledger accounts of Entle for the financial years ending on 28 February 2022, 28 February 2022 and 28 February 2023 (ledger accounts). In response to the Rule 35(14) notice, the respondent provided the financial statements and the ledger account for the year 2021 and did not provide the ledger accounts for the year 2022 and 2023. The respondent indicated that the request for the ledger accounts does not comply with the rules of court due to their vagueness.
- [7] The applicants submitted that, the ledger accounts are necessary to enable them to plead to the respondent's claim in terms of Rule
22. The applicants auditor indicated in his report that, the annual financial statements prepared by the respondent's auditor are inaccurate for the purposes of valuation. The only plausible method to remove doubt regarding the accuracy and reliability of financial statements are to conduct a detailed comparison of the financial statements to the underlying accounting record ledgers of Entle. The applicants require access to the ledger accounts in order to state material facts upon which it relies when responding to the respondent's claim. The applicants do not want to file a mere denial plea to the allegations made by the respondent, but wish to plead meaningfully that is why they requested the ledger accounts of the respondent.
- [8] The respondent is of a view that the request by the applicants is not competent. The applicants could plead without the ledger accounts that they have requested. The applicants are on a fishing expedition and they require evidence which is not permissible in the pleadings. What the applicants are attempting to do according to the respondent is to bring discovery in terms of Rule 35(1) through Rule 35(14) which it is not designed for. The respondent is therefore of the opinion that, the applicants do not need the ledger accounts for them to can be able to plead.
- [9] Mr Steyn for the applicants referred the Court to the following case which summarised the legal position of Rule 35(14) in *Western Reefs Primary School v Erasmus Jooste Inc*[1]:

“[65] The test whether production of a specific document should be ordered under Rule 35(14) is whether the document is essential in order to enable the party requesting the document to plead, and not whether it is merely useful to that party. In this regard with reference to (inter alia) the Cullinan Holdings and MV Urgup, Erasmus says the following: This subrule [i.e Rule 35(14) does not provide a mechanism whereby a party, by making use of generic terms, can cast a net with which to fish for vaguely known documents. In this respect the subrule differs markedly from sub rule 12 and its ambit is much narrower than that of sub rule’. [66] There is also valid criticism to the earlier qualification reflected in Cullinan Holdings Ltd case, supra note 16, that the document

requested is essential, and not only useful in the formulation of the plea. In Herbstein Van Winsen, the Civil practice of the High Courts of South Africa (Volume 1), at 790, criticism is correctly reflected that: ‘ the decision cannot be supported. There is no authority for the additional requirement that such document or (tape) recording should be essential for the purposes of pleadings. It is also in conflict with the rules of equity. See Story Commentaries on Equity Pleadings 7th edition (Boston: Little, brown, and Company, 1865) para 324(a). it must also be shown, upon the face of the bill, (Bill of Discovery)

that the discovery is material to the defence at law of the party, seeking the discovery and how and in what manner it is material. But it is not necessary to aver, that the discovery is absolutely necessary or indispensable to that defence. It will be sufficient and show that it is material evidence. [67] Pete at al correctly submits that: “The purpose of the rule is presumably to ensure that a party is in a position to reply to pleadings, which it does not open the door to the general discovery at this stage of the proceedings. A defendant may not use rule 35(14) ... in order to gather information needed to decide whether he has a cause of action for a counter claim.” A party’s motive for seeking access to a document under subrule (14) is irrelevant. That party has to show that the document sought in its notice in terms of Uniform Rule 35(14) is relevant to a reasonably anticipated issue in the main action/application. [68] In its plea, the current applicant (as the defendant in the action) bears a duty to deal with all facts which the Respondent has raised in its declaration (in the action) in order to point out what the basis of its defence is. This is imperative in terms of Rule 22(2) of the Uniform Rules of Court. See in this regard FPS Ltd v Trdent Construction (Pty) Ltd where Eksteen JA ruled that: ‘In my view the learned Judge was fully justified in coming to this conclusion. One of the prime functions of pleadings is to clarify the issues between the parties. To this end the Rules of Court require a defendant in his plea to: ‘admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent....’ (Rule 22(2)). A defendant must therefore give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him.’ [69] Traverso J, in Quayside Fish Suppliers CC had the following to say in the application and interpretation of Rule 35(14): ‘It is apparent from the wording of the Rule that before a party can invoke the provisions thereof (a) He/she must discharge the onus of persuading a court that an order should be made in terms of the Rule;

- (b) An appearance to defend must have been entered; (c) The document must be required for the purposes of a pleading; (d) the document must be clearly specified; (e) the document must be relevant to ‘a reasonably anticipated issue in the action.’ [70] In *Titus v RNE Holdings (Pty) Ltd*, Jafta AJP as he was then qualifies the judgement of Traverso J as follows: ‘However, it is significant to note that the sub-rule itself does not require the applicant to have knowledge of the documents and to describe them in precise terms. Instead the applicant is required to specify such documents clearly. The purpose of this requirement is plainly that the party from whom the documents are sought should be able to identify which documents he is asked to produce and also be in a position to determine whether such documents were sought for the proper purpose and further that they would be relevant to an issue in the action. Therefore the term “clearly specified” means a description with sufficient detail to enable proper identification of the document. It is only after such identification that a determination on whether it meets the other requirements in the sub-rule can be made.”
- [10] I am of a view that it would be impossible for the applicants to plead to the respondent’s claim in terms of rule 22(2) without the ledger accounts. Rule 22(2) provides that, the defendant in the plea must admit or deny or confess or avooid all material facts alleged in the combined summons or state which of the said facts are not admitted. The applicants had to be provided with the ledger accounts to can be able to give a fair and clear answer to the facts raised by the respondent in its claim.

CONDONATION APPLICATION

- [11] The applicants filed the condonation application for the late filling of the replying affidavit to the application to compel in terms of rule 35(14). The replying affidavit was filed two days late. The condonation application was opposed by the respondent on the basis that, the applicants did not take the Court into confidence regarding the true reasons why the replying affidavit was not filed timeously.
- [12] The applicants’ attorney, Mr Oosthuizen informed the respondents attorney Mr Jones that the applicants no longer intended to proceed with the application to compel in terms of rule 35(14) but to file a plea. The applicants’ response to this submission was that, their attorney, Mr Oosthuizen did not have instructions to abandon the application to compel. It is the applicants’ contention that, even if the impression was created with the respondent’s attorneys that the applicants’ intend to abandon the application to compel and plead, such was not their instructions.
- [13] According to the applicants’, the application for condonation was bona fide in that, the Rule 35(14) application does not intend to frustrate the respondent. The instruction to proceed and file the replying affidavit was obtained a few days before the filling of the replying affidavit and the counsel who was to draft the replying affidavit had other matters to attend to.

[14] One of the requirements for the condonation application is that the indulgence sought must not prejudice the opposite party. I do not foresee any prejudice to the respondent as the replying affidavit was only two days late. The applicants referred the court to the matter of *Ferris v FirstRand Bank Ltd*[2] in which it was held that lateness is not the only consideration in determining whether an application for condonation may be granted. It held that the test for condonation is whether it is in the interest of justice to grant it and in this regard, that an applicant's

prospects of success and the importance of the issue to be determined are relevant factors.

[15] The principles relating to condonation have become settled in our law. In the matter of *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie*[3] the following factors were used by the Court to decide whether or not there is good cause for the condonation being sought:

"..(1) the degree of non-compliance; (2) the explanation for it; (3) the importance of the case; (4) the prospects of success; (5) the respondent's interest in the finality of his judgement; (6) the convenience of the court; and (7) the avoidance of unnecessary delay in the administration of justice."

[16] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited*[4] at paragraph 11 it was held that, the degree of non-compliance, the explanation thereof, the importance of the case and the avoidance of unnecessary delay in the administration of justice are among the factors that usually weigh with a court when it considers an

application for the condonation.

[17] In *MEC for Education KZN v Shange*[5] it was stated that the court is to exercise a wide discretion, that "good cause" may include a number of factors that are entirely deponent on the facts of each case, and that the prospects of success in the main action play a significant role.

[18] It is submitted that, the court must be mindful of the fact that not only the explanation for the delay, but also the prospects of success in the main action, are important factors in determining whether condonation should be granted or not. If strong merits of success are shown, it may mitigate the fault of the applicant in applications for condonation. The court may then exercise its discretion in favour of the applicant, despite a poor explanation for the delay.

[19] In the matter of *Rance supra*, the Supreme Court of Appeal held that "condonation must be applied of as soon as the party concerned realizes that is required". In the case of *Van Wyk v Unitas Hospital*[6] at paragraph 20 the court confirmed that the requirement that an applicant must give a full explanation for the delay, "In addition, the explanation must cover the entire period of delay", the court stated. In the present application, as stated above the delay in this matter is two days.

[20] In this matter, the applicants require that the respondent provide them with the ledger accounts for them to properly plea to their claim. I am convinced that the applicants did not disregard the rules of this Court by filing the replying affidavit out of time. It is in the interest of justice to grant this condonation application. The respondent would not be prejudice should the court grant this application.

[21] The following order is therefore made an order of court:

- (1) That the condonation application for the late filing of the replying affidavit is granted;
- (2) That the applicants are to pay costs incurred in the condonation application jointly and severally the one paying the other to be absolved on a party and party scale A.
- (3) That the respondent is directed to comply with paragraph 1.2 of the applicants' notice in terms of Rule 35(14) within 10 days of service of this Court order in terms of this application by making available for inspection within five days the ledger accounts of Entle Trading 504 (Pty) Ltd for the financial years ending on 28 February 2022 and 28 February 2023 and allow copy or transcript to be made thereof as contemplated by Rule 35(14) of the Uniform Rules of Court.
- (4) That the respondent pay costs of the application to compel in terms of Rule 35(14) on a party and party scale B.

Appearances: For the applicants: Adv JW Steyn Instructing attorneys: EG Cooper Majiedt Inc 17 Third Avenue WESTDENE BLOEMFONTEIN For the Respondent: Snellenburg SC Instructing attorneys: Honey Attorneys Northridge Mall KENETH KAUNDA ROAD BLOEMFONTEIN

- [1] Western Reefs Primary School v Erasmus Jooste Inc NWHC case number KP530/18.
- [2] Ferris v FirstRand Bank Ltd 2014(3) SA 39 (CC) at 43G-44A
- [3] Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362F-H
- [4] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited (2013) 2 All SA 251 (SCA)
- [5] MEC for Education KZN v Shange 2012(5)SA 313 (SCA)
- [6] Van Wyk v Unitas Hospital 2008(2) SA 240 (CC)

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