

SOUTH AFRICA / JUDGMENT

Bester NO and Others v Target Brand Orchards (Pty) Ltd and Others (22593/2019)

[2020] ZAWCHC 183 (21 December 2020)

[2020] ZAWCHC 183

COURT

Western Cape High Court, Cape Town

BEFORE

S Hockey

CASE / FILE NUMBER

22593/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

CASE NO:

22593/2019

In

the matter between:

CHRISTIAN
FINDLAY BESTER
N.O.
1st
Plaintiff
MARTINUS
JACOBUS BEKKER
N.O.
2nd
Plaintiff
MOSA
MOLEDI
N.O.
3rd
Plaintiff
and
TARGET
BRAND ORCHARDS (PTY)
LTD
1st
Respondent
FUNKY

FRUIT (PTY) LTD
2nd
Respondent
BETKO
VARSPRODUKTE (PTY) LTD
3rd
Respondent
DELECTA
FRUIT (PTY) LTD
4th
Respondent
KROMCO
(PTY) LTD
5th
Respondent
Date
of hearing: 20 October 2020
Date
of Judgment: 21 December 2020 (delivered
via email to the parties' legal representatives)

JUDGMENT

HOCKEY, AJ

INTRODUCTION

- [1] The plaintiffs in this matter are the joint liquidators of Moor Fruit and Veg CC t/a The Apple Co. (in liquidation) ("Moor Fruit"). In the main action, the plaintiffs caused summons to be issued against the five defendants on 19 December 2019 on the basis that the defendants received payments from Moor Fruits within a period of six months prior to Moor Fruit's liquidation. The plaintiffs claim that these payments constitute voidable preferences in terms of section 29 of the Insolvency Act, Act 24 of 1936 ("the Insolvency Act"), and that these dispositions should be set aside and repaid to the insolvent estate. All five defendants are defending the main action.
- [2] In the present proceedings, there are two interlocutory applications relating to the main matter. These applications only concern the plaintiffs and the first and second defendants. (For convenience, I shall continue to refer to the plaintiffs as "the plaintiffs" in these interlocutory applications, and to the first and second defendants by their names as referred to hereunder).

2.1 The first is an application by the plaintiffs against the first defendant ("Target Brand") to compel it to deliver trial

particulars in response to a request by the applicants to that effect.

2.2 The second is an application by the second defendant (“Funky Fruit”) in terms of rule 30(1) of the Uniform Rules of Court (“the rules”) to declare that the combined summons issued by the plaintiffs constitute an irregular proceeding which falls to be set aside. The plaintiffs also brought a counter-application for default judgment against Funky Fruit on the basis that the latter failed to timeously file a plea after a notice of bar has been served on it in terms of rule 26, and that it is now debarred from filing such plea. Belatedly, Funky Fruit also brought an application for, amongst other, the bar against it to be uplifted.

- [3] The interlocutory issues before me, therefore, are firstly those between the plaintiffs and Target Brand, and secondly those between the plaintiffs and Funky Fruit. For reasons that will become apparent, it is expedient to deal with the issues between the plaintiffs and Funky Fruit first.

THE ISSUES BETWEEN THE PLAINTIFFS AND FUNKY FRUIT

The rule 30(1) application

- [4] After summons was issued and served on Funky Fruit on 19 December 2019 in the main action, the latter, through its attorneys, filed its notice of intention to defend on 6 January 2020. On 14 January 2020, Funky Fruit, notified the attorneys for the plaintiffs in writing that it objected to the summons as an irregular step in terms of rule 30 (1). The reason being that the action was instituted against five defendants who are independent of one another, and the causes of action against the respective defendants are not linked to one another. The written notice called on the applicants to withdraw the irregular step within 10 days. It specifically stated that should the summons not be withdrawn as it then stood, Funky Fruit will be left with no alternative but to bring an application in terms of rule 30 to have the summons set aside. This written notice which came in the form of a letter clearly constituted a notice in terms of rule 30(2)(b). In terms of this rule a party is required to afford its opponent an opportunity to remove a cause of complaint within 10 days of the notifying party becoming aware of such cause of complaint. The letter contained all the necessary requirements as set out in rule 30(2)(b).
- [5] On 16 January 2020, the attorneys for the applicants informed the attorney for Funky Fruit that the applicants had no intention of withdrawing their summons, or amending the particulars of claim as suggested in the rule 30(2)(b) notice.
- [6] On 14 February 2020, Funky Fruit served a further notice in terms of rule 30(2)(b) on the plaintiffs, which contained the same complaint as made in the letter dated 14 January 2020.
- [7] On 18 February 2020, the plaintiffs’ attorneys responded, by reminding the attorneys for Funky Fruit that they had already been notified of the purported irregular step and that they (the plaintiffs’ attorneys) had rejected the opportunity to remove

the cause of complaint. The plaintiffs' attorneys further advised that due to the failure by Funky Fruit to bring an application within the required 15 day stipulated period, its right to do so had lapsed unless condoned. In the premise, the plaintiffs'

attorneys called on Funky Fruit to deliver its plea before close of business on 19 February 2020.

- [8] On 21 February 2020, Funky Fruit's attorney advised that they would file a Rule 30 notice and on 28 February, the plaintiffs served a notice of bar on Funky Fruit. Funky Fruit failed to deliver its plea within five days of receiving the notice of bar and the plaintiffs accordingly proceeded to apply for default judgment in terms of rule 31 on the basis that Funky Fruit had failed to deliver its plea after having been required to do so.
- [9] The application for default judgment was set down for 29 May 2020. Funky Fruit opposed the granting of default judgment on the basis that it intended to pursue an application in terms of rule 30(1). The matter was before Francis AJ, who accordingly ordered Funky Fruit to file its Rule 30 application by no later than 5 June 2020, and ordered Funky Fruit to pay the wasted costs of the day.
- [10] According to Mr Van der Merwe, who appeared on behalf of the plaintiffs, the order of Francis AJ was made without prejudice to the plaintiffs' objections raised in respect of the rule 30(1) application that was to be brought in terms of that order. In this regard, Funky Fruit brought an application for the condonation of the late filing of its application in terms of rule 30(1), which condonation application is under consideration in this judgment.
- [11] Ms Forster, who was not involved in the matter when it came before Francis AJ, received instructions shortly before the matter appeared before me. She contends that the rule 30(1) application was not defective due to the extension granted to file same until 5 June 2020. This contention is not borne out by the application for condonation of the late filing of the rule 30(1) notice. The condonation application is also dealt with in the heads of argument filed by Funky Fruit, which was prepared by Mr Zazeraj whom Ms Forster replaced. There was also no application for condonation when Francis AJ considered the matter on 29 May 2020. Furthermore, paragraph 22 of the plaintiffs' answering affidavit in the rule 30(1) application, the plaintiffs' attorney, Mr Muller states that on 29 May 2020, when the matter was set down for default judgment against the second defendant, the latter opposed the granting of default judgment on the basis that it intended to pursue a rule 30(1) application. The matter was postponed for this reason. It is clear that the rule 30(1) application had to be accompanied by an application for condonation, which it was.

Is there an irregular step?

- [12] I shall first deal with the merits of the rule 30(1) application and then return to the condonation application in respect of the late filing thereof.
- [13] A court will grant a rule 30(1) application if it is satisfied that there is an irregular step, that the party bringing such application has not taken any further step in the cause of the matter with knowledge of such irregular step, has given its opponent notice to remove such step

within 10 days of the former becoming aware of the step, and importantly, if the applicant will suffer prejudice unless the irregular step is removed. In this regard, see *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999(2) SA 599 (TPD) where it was held by Southwood J (at 611 C-F);

“With regard to the Rule 30 application Mr Van der Linde pointed out that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside. In support of this argument he referred to Trans-African Co Ltd v Maluleka 1956

- (2) SA 273 (A) at 276 F-H; *SA Metropolitan Lewensversekering-maatskappy Bpk v Louw* NO 1981
- (4) SA 329 (O) at 333 D-F and 333 H-334 E; *De Klerk v De Klerk* 1986
- (4) 424 (W) at 426 F- 427 B; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabriek GmbH* 1991
- (1) SA 823 (T) at 824 G-H; and *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992
- (4) SA 466 (W) at 496 G. The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step

and the irregular step can simply be ignored.”

- [14] The basis of the Rule 30(1) application is that Funky Fruit contends that the combined summons against the five defendants constitute an irregular proceeding in that the plaintiff should have instituted separate claims against each of the defendants as the claims against them are separate and independent from each other.
- [15] During argument, Ms Forster requested that in the event that the rule 30(1) application is not granted, for the separation of the matter in terms of rule 10(5).
- [16] The affidavit in support of the rule 30(1) application is based without any reference to rule 10(3), which provides:

“Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

- [17] Besides the rules, the common law also provides for multiple defendants to be joined on the grounds of convenience. In *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* 1980 (3) SA 415 (W), Nichols J opined (at 419 E);

“The Rule [10(3)] is not and was not intended to be exhaustive of the cases in which a plaintiff may join separate defendants in one action (cf Lewis NO v Schoeman NO and Others 1951 (4) SA 133 (N)). Under the common law a number of defendants may be joined whenever convenience so requires subject to the power of the Court to order separation of the actions (see Van der Lith v Alberts and Others 1944 TPD17).”

- [18] Under Rule 12(1) of the union rules, which was replaced by rule 10(3), a plaintiff could only sue more than one defendant where it was unclear which of them were liable, but in terms of the common law, it was always subject to convenience to join more than one defendant (see Herbststein and Winsen: The Civil Practice of the High Courts of South Africa, 5th ed, 213). Rule 10(3) has widened the scope for multiple defendants to be sued in one action, but, as held in Rabinowitz (supra), the rule is not exhaustive of cases where a party may be joined, as the common law power to allow joinder still prevails where it is convenient to do so.
- [19] Mr Van der Merwe argued, correctly in my view, that the paramount reason for the plaintiffs joining each of the defendants in the main action is because the relief claimed against them depends on the determination of exactly, or substantially, the same questions of law and facts. Each of the defendants have a direct and substantial interest in the subject matter thereof. I agree with him that it will be convenient for the claims against the five defendants to be dealt with in one trial. The claims are all based on the same principles of law in terms of section 29 of the Insolvency Act. It will save the court substantial time and costs if the claims are considered in one single action instead of five different trials having to be conducted.
- [20] It is obvious that the same witnesses will have to testify for the plaintiffs in five different hearings had five different actions been instituted against the five defendants. This would have been a waste of the court's time, would be extremely cumbersome, and would have come at considerable more costs. The state of Moor Fruit's liquidity when each of the impugned dispositions was made and the effect of Moor Fruit's liquidity of each of these dispositions are relevant to all the parties concerned. It is therefore convenient and in the interest of all the parties that the claims against all five defendants be dealt with in one trial.
- [21] In my view, Funky Fruit will not suffer any prejudice in the matter constituted as is with the five defendants, but the contrary is true – it is for the benefit of all the parties involved that the claims by the applicants proceed against the various defendants in one action.
- [22] For the reasons set out above and, in my view, the effective administration of justice dictates against the granting of the rule 30(1) application. The same reasons pertain against the granting of an order in terms of rule 10(5), i.e. for the separation of trials as belatedly requested for by Ms Forster during oral argument.

The late filing of the rule 30(1) application and condonation

- [23] Having already found that the rule 30(1) application stands to be dismissed on its merits, it is not necessary to deal with the late filing of the application. I however, do so in any event with the conclusion that I would not have granted condonation given the willful disregard by Funky Fruit of the rules.
- [24] As already noted, Funky Fruit first notified the plaintiffs on 16 January 2020 of the purported irregular step. Despite the plaintiffs' indication that they would not withdraw or amend their particulars of claim, Funky Fruit did not bring a rule 30(1) application within the requisite 15 day period after expiry of 10 days of the notification as required by rule 30(2)(c). Instead, Funky Fruit served a second notice in terms of rule 30(2)(b) on the plaintiffs on 18 February 2020, but again neglected to bring a rule 30(1) application within the prescribed time period thereafter. Only after a notice of bar was served on Funky Fruit, and when it faced an application for default judgment, it indicated to the presiding judge that it wanted to bring a rule 30(1) application. The application was eventually brought, as already indicated, without prejudice of the plaintiffs' right

to challenge same, on 5 June 2020.

- [25] What is also disturbing of Funky Fruit's conduct in these proceedings, is that it only brought an application for condonation belatedly, only reaching me on the morning of the hearing. This application was brought together with an application for condonation of the late filing of Funky Fruit's heads of argument, as well as an application for the upliftment of the bar which was served on it. It is trite that condonation for non-compliance with the rules is not there for the asking (see *Uitenhage Transitional Council v SA Revenue Service* 2004 (1) SA 292 at 297). In this regard, it was held by Ponnar JA in *Mulaudzi v Old Mutual Life Assurance* 2017
- (6) SA 90 (SCA), (at para 26) (this matter concerned a delay in the prosecution of an appeal, but in my view, the principles are equally applicable to the present situation);

"An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condemnation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefore, the importance of the case, a respondent's interest in the finality of the judgment ..., the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

- [26] As for the late filing of Funky Fruit's heads of argument, it was explained that counsel was timeously briefed to prepare such heads, but unfortunately counsel suffered a bereavement by the passing away of his mother. Apart from the loss of his mother, it took the family three weeks to bury counsel's mother due to the constraints caused by the Covid-19 pandemic. This court has sympathy with this situation, and it was for this reason that the late filing of the heads of argument was condoned (without any objection from counsel for the plaintiffs) at commencement of the hearing.

- [27] The reasons for the late filing of Funky Fruit's heads of argument, however, do not apply to the late filing of the applications in relation to rule 30(1), nor for the upliftment of the bar. (I deal with the upliftment of the bar below.)
- [28] Funky Fruit proffered no reason for the late filing of the rule 30(1) application, but instead avers that the plaintiffs will suffer no prejudice as they have been given more time to remove the cause of complaint. This derisory explanation makes no sense and is telling of Funky Fruits unacceptable attitude in relation to this this matter.
- [29] For the reasons set out above, and in addition to its lack of merit, I would dismiss the application for condonation of the late filing of the rule 30(1) application.

The notice of bar and default judgment

- [30] Funky Fruit alleges that the notice of bar is irregular as it was served subsequent to the filing of its notice in terms of rule 30 (the reference can only be the notice in term of rule 30(2)(b)). It avers that the plaintiffs cannot disregard the said notice and Funky Fruit's right to plead to the merits of the dispute. These contentions, in my view, are without merit. The first rule 30 notice, which in my view is the relevant one, was sent to the plaintiffs on 16 January 2020. At best, the 10 day period for the commencement of the 15 day period within which Funky Fruit had to bring the rule 30(1) application was 18 January 2020, and the application had to be brought by latest 18 February 2020. The notice of bar was served on Funky Fruit on 28 February 2020, ten days after the time period within which Funky Fruit could bring a rule 30(1) application had elapsed.
- [31] On the morning of the hearing, I received an application for the upliftment of the bar. This application is allowed for in terms of Rule 27(1), but I am also mindful of the court's inherent power to remove a bar. In *Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (D) it was held per Henochsburg J (at C – D) (at para 30):

"...The Court has an inherent jurisdiction to raise the bar notwithstanding that the Rules of Court may make no provision therefor. In any such application, if the applicant can show good cause for the indulgence of the court which is asked, the Court will come to his assistance and remove the bar unless it appears that he is recklessly disregarded his obligation under the Rules of Court, or the case appears to be a hopeless one, or the Court is convinced that he does not really intend to proceed. The Court exercises its discretion according to the circumstances of each case, and generally leans towards the grounding of relief where it is satisfied that the defendant is bona fide in his belief that he has a good defense and that his delay is reasonable an excusable..."

- [32] Rule 27(1) provides as follows:

"In the absence of agreement between the parties, the court may on 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."

[33] It is obvious that, by the use of the word “may” in rule 27(1), the court has a discretion to grant condonation or not. This discretion of the court was considered, with reference to the authorities, in *Smith N.O. v Brummer N.O. and Another* 1954 (3) SA 352 (OPD). The conclusion of the court is summed up in the headnote as follows:

“In an application for the removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where

- (a) the applicant has given a reasonable explanation of his delay;
- (b) the application is bona fide and not made with the object of delaying the opposite party's claim; (c) There has not been a reckless or intentional disregard of the Rules of Court; (d) The applicant's action is clearly not ill-founded and
- (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs. The absence of one or more of these circumstances might result in the application being refused. Where the delay in filing the pleading is due to the negligence of the applicant's attorney, the Court will not on that ground refuse the application. It will refuse it where the negligence or inattentiveness is, in the opinion of the Court, of so gross and nature that, having regard to the other circumstances, the applicant is not entitled to the indulgence prayed for.”

[34] I am mindful that even with the bar in place, this court cannot grant default judgment given that a court must in the circumstances of the matter first set aside the impugned payment to Funky Fruit before Funky Fruit can be ordered to repay the disposition to the trustees of the insolvent estate. In terms of section 29(1) of the Insolvency Act;

“Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.”

[35] The relevant portions of section 32 of the Insolvency Act provides:

“(1)(a) Proceedings ..., to set aside any disposition of property under section ...29... may be taken by the trustee.

...

- (3) When the court sets aside any disposition of property under any of the said sections [including section 29], it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.”

- [36] In terms of section 29(1) of the Insolvency Act, therefore, in an endeavour to have a disposition set aside under this section, the onus is placed on the trustee of an insolvent estate (or a creditor, in terms of section 32(1)(b), if the trustee fails to take action), to show; that the disposition was made within a six months before the sequestration of the estate; the disposition had the effect of preferring one creditor above another; and immediately after the disposition, the insolvent's liabilities exceeded the value of its assets. Once these requirements had been proven, the onus shifts to the person in whose favour the disposition was made to show that the disposition was made in the ordinary course of business and was not intended to prefer one creditor above another (see *Paterson NO v Trust Bank of Africa Ltd* 1979 (4) SA 992 (AD) at 996 E – G).
- [37] It is only after the requirements in section 29 have been considered, and only if the court found that the disposition should be set aside, that it will declare the trustee entitled to recover the property, or its value which was improperly disposed of by the debtor. The trustee may then thereafter recover the property under section 32(3) of the Insolvency Act. In *De Hart N.O. v Kleynhans and Others* 1970
- (4) SA 383 (OPD), it was held (at 389 F – G);
- “The Legislature clearly intended, by the provisions of sec. 32(3), to ensure that a Court, when setting aside any disposition which is liable to be set aside in terms of the sections mentioned in sec. 32(1), would also grant a judgment in favor of the trustee whereby he would be enabled to obtain, for the benefit of the estate, the return of the asset disposed of, or its value. The trustee would thereafter be in the same position as any other judgment creditor and would be obliged to have recourse to the ordinary methods and processes of execution, should the defendant not obey the order of his own accord.”*
- [38] I deal with the above to illustrate why it is not competent for this court, in the present proceedings to grant default judgment as applied for by the plaintiffs. The requirements set out in section 29(1) must first be satisfied before judgment can be granted. I must mention, to his credit, Mr Van der Merwe raised the concern regarding the competency to grant default judgment at the hearing of this matter, despite him appearing for the plaintiffs.
- [39] I considered, since the fact that default judgment is not competent at this stage whether, this is a factor and aspect which should lean in favour of lifting the bar against Funky Fruit. However, the flagrant disregard of the rules and non-compliance with timelines remains a major concern. I am therefore of the view that the bar should remain. Funky Fruit has not shown “good cause” why I must exercise my discretion in favour of granting condonation as set out in rule 27(3). In reaching this conclusion, I am fortified by the following passage from *Chetty v Law Society, Transvaal* 1985
- (2) 756 (AD) (at 765 A – E) (This case concerns an application for rescission of judgment, but the principles are equally applicable in casu):

“The term “sufficient cause” (or “good cause”) defies precise or comprehensive definition common for many and various factors required to be considered. (See Cairn’s Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of “sufficient cause” for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defense which, prima facie, carries some prospects of success....

It is not sufficient if only one of these two requirements is met; for obvious reasons I party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the one hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the grounds that he had reasonable prospects of success on the merits.”

[40] Also, in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) in a judgment by the full court, it was held (at para 22):

“An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable.”

Funky Fruit has given no reasonable explanation why the bar should be lifted. It only avers in its founding affidavit, which, I might add, was deposed to on the morning of the hearing of 20 October 2020), that the notice of bar “is quite evidently irregular”, which it was not as I have already concluded.

Costs

[41] The plaintiffs have been substantially successful on the issues between them and Funky Fruit and failed only in respect of the application for default judgment. I nevertheless am of the view that given the disregard of the rules by Funky Fruit, the latter must pay the plaintiffs’ costs in respect of all the issues between these parties.

THE ISSUES BETWEEN THE PLAINTIFFS AND TARGET BRAND

[42] As in the case between the plaintiffs and Funky Fruit, the main action by the plaintiffs against Target Brand is a claim for certain monies which were paid by Moor Fruit to Target Brand within six months prior to the Moor Fruit’s liquidation, to be set aside as voidable preferences and to be repaid to the insolvent estate.

[43] In the present interlocutory application, the plaintiffs seek an order compelling Target Brand to furnish them with further and better particulars pertaining to a request for particulars in terms of rule 21.

[44] The relevant subrules for present purposes (i.e. subrules 2 and 4) of rule 21 provide as follows:

“(2) After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further

particulars as are strictly necessary to enable him to prepare for trial. Such requests so be complied with within 10 days after receipt thereof.

(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or striking out of the defence, whereupon the court may make such order as to it seems meet.”

[45] The oft-quoted judgment of Galgut J in *Thompson v Barclays Bank*, DCO 1965 (1) SA 365 sets out the purpose of further particulars for trial as three-fold, namely:”

“(a) To prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter applications...;

(c) having regard to the above nevertheless not to tie the other party down and limit his case unfairly at the trial.”

[46] Of importance to note is that a court has a wide discretion to compel the delivery of particulars for purpose of trial, or not. Subrule 4 is clear in this regard, as has been held by Leach J in *Szedlacsek v Szedlacsek*; *Van der Walt v Van der Walt*; *Warner v Warner* 2000 (4) SA 147 (ECD) (at 150 A – C):

“It is clear from the final words of this subrule [i.e. whereupon the court may make such order as to it seems meet]..., that this Court retains a discretion to grant or refuse an order for the delivery of further particulars. An applicant is accordingly not entitled to an order compelling a reply as of right should the opposing party fail to deliver further particulars timeously or sufficiently, but must set out sufficient information to enable the court to consider whether or not to exercise its discretion in his favour. It is impossible to lay down any test which can be slavishly applied to determine whether an order compelling delivery should be granted as each case must turn upon its own particular facts and circumstances, but it seems to me that in most cases it would probably be wholly insufficient for a party seeking relief under Rule 21(4) to rely solely upon the other party’s failure to timeously comply with the ten-day time period laid down by Rule 21(2).”

[47] In the matter before me, the plaintiffs served a request for further particulars on Target Brand on 11 May 2020. Target Brand failed to timeously comply with the request, and the plaintiffs accordingly brought the present application. It is necessary to mention that Target Brand did provide a reply to the request for trial particulars which was served simultaneously with its answering affidavit, but the plaintiffs, not satisfied with the replies, persisted with this application. The application is opposed on various grounds, including;

47.1 The application is premature as pleadings have not yet closed;

47.2 The Trial particulars are not strictly necessary to enable the plaintiffs to prepare for trial; and

47.3 The court should exercise its discretion against the granting of an order to compel the particulars on the basis set out in the Szedlacsek; Van der Walt; Warner matter.

[48] It is the plaintiffs' case that the pleadings between them and Target Brand has indeed closed. Target Brand's contention, on the other hand, is that Funky Fruit had not yet delivered its plea and therefore, pleadings have not closed. I have dealt with the issues between the plaintiffs and Funky Fruit, from which it is clear that Funky Fruit had been served with a notice of bar on 28 February 2020 and had failed to serve its plea within the five day period thereafter. At the time when the plaintiffs' application to compel delivery of the trial particulars was served on Target Brand, therefore, Funky Fruit had been debarred and there was no application pending to uplift the bar. Target Brand cannot therefore rely on the argument that pleadings had not yet closed as Funky Fruit had not yet served its plea, in my view.

[49] There are however other issues that concerns me about the request to compel Target Brand to provide the plaintiffs with trial particulars. I must mention that after the request for trial particulars was served on Target Brand, the latter corresponded with the plaintiffs' attorneys requesting copies of the pleadings relating to the other defendants in the matter, but the latter was prepared to provide such pleadings only against payment of the costs associated with making of copies thereof. The plaintiffs' attorneys adopted this position despite the fact that pleadings had been exchanged with the defendants per electronic mail and such pleadings were therefore available electronically. Instead, the plaintiffs' attorney adopted the position that he was not aware of any obligation or duty in terms of the rules to serve all pleadings and notices in the matter on each and every defendant.

[50] At this point, I want to refer to the following general observations about civil procedure by Slomowitz AJ in *Khunou and Others v M Fihrrer & Son (Pty) Ltd AND OTHERS* 1982 (3) SA 353 (W) (at 355 – 356):

“The proper function of a Court is to try disputes between litigants who have real grievances and so to 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 off 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 at the true issues which I have mentioned or clarified and tried in a just manner.

It follows that the principles of adjective law, whether expressed in the Rules of Court or otherwise, all 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. Courts must be ever vigilant against this and other types of abuse. What is more important is that the Court's officers, and especially its attorneys, have an equally sacred duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute"

[51] The above observations by Slomowitz AJ were "wholeheartedly" endorsed by Leach J in the Szedlacsek, Van der Walt, Warner case (as do I) and he then proceeded to repeat the trite principle 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 appear to be designed merely to inflate costs to the advantage of the practitioner's pocket."

See also the judgment of Rogers J in Absa Bank v Zalvest Twenty (Pty) Ltd and Another 2014 (2) SA 119 at par 11.

[52] In the present matter, whilst the attorney for Target Brand was seeking to get the pleadings and notices exchanged between the plaintiffs and other defendants, and whilst he had already briefed counsel to settle the draft reply to the plaintiffs' request for trial particulars, he received the plaintiffs' application to compel.

[53] In a case such as this, where the plaintiffs are seeking to set aside dispositions against multiple defendants as voidable preferences, it is important for a defendant to have regard to all the pleadings, in order to consider at what stage the liabilities of the insolvent entity exceeded its liabilities. In Mars: The Law of Insolvency in South Africa, 9th ed at 262, the trite position in this regard is stated as follows:

"The question whether the liabilities of the debtor, fairly estimated, exceeded the assets fairly value, must be determined objectively.

In order to succeed in setting aside a disposition, his trustee must be able to prove clearly and conclusively that immediately after making the disposition the insolvent's liabilities exceeded his assets..."

- [54] As already stated, Target Brand did serve a reply to the plaintiffs' request for trial particulars, a copy of which was attached to its answering affidavit, but the plaintiffs, not satisfied therewith, persisted with its application to compel.
- [55] It cannot be ignored that the above events played themselves out whilst our country was in the midst of a national lockdown due to the national state of disaster that endured as a result of the international Covid-19 pandemic. A courtesy letter forewarning Target Brand that they were going to bring the application to compel may well have resulted in the attorney for Target Brand apprising the plaintiffs' attorney of the reasons for the delay and that a reply was in the process of being settled. In its answering affidavit to the application to compel, it is stated (at para 33):

"The lockdown and work load made it difficult to comply with the time periods. In addition thereto, Van Rooyen [a director of Target Brands from whom the attorney received his instructions] has been diagnosed with cancer and he is currently undergoing treatment. The second Respondent's farm is furthermore situated near Uniondale, which is about 2 hour's drive from Port Elizabeth. The Plaintiffs' attorneys are fully aware of this."

In reply to the above paragraph, the plaintiffs' reply reflect a rather unsympathetic, unaccommodating and uncollegial stance, as follows:

"50. We are indeed aware that Van Rooyen was diagnosed with cancer last year and that he underwent treatment. To date hereof, we have been very accommodating to Mr Van Rooyen in this regard, especially in structuring the interrogations to suit him."

51. However, neither this fact nor the lockdown period nor the distance of Mr Van Rooyen's farm were at any time raised as reasons why Target Brand was not in a position to comply with its obligations in terms of the Rules. This is not a request for condonation. Target Brand is actively opposing the Plaintiffs' application to compel, and the issues dealt with in this paragraph cannot remotely constitute a defense to such application."
- [56] The above factors, in my view are relevant when exercising my discretion whether to grant the application to compel or not. Also relevant is the plaintiffs' disregard of the sound practice for a party to call upon his opponent to remedy the default or failure to comply with the request for trial particulars, especially during the trying times that our country was in lockdown, and more so with the plaintiff's, by their own admission, knowing of the difficulties faced by the attorneys. In the Szedlacsek, Van der Walt, Warner matter, Leach J had this to say:

"..., It is of course sound practice for a party to call upon his opponent to remedy a default or failure to timeously comply with a request for particulars for trial and put him to terms before leaping into Court and incurring substantial costs in an application of this nature. Accordingly, A Court will be slow to come to a party's aid by granting an order directing the opposing party to comply with a notice or request where no such early demand has been made. In my view, an application to compel compliance with a procedural step should really be regarded as a last option, to be exercised when other reasonable and far less costly alternatives have been unsuccessful and the defaulting party has shown himself to be

unreasonably dilatory.”

- [57] In my view, for the reasons already dealt with, the present matter is the quintessential case where there should have been a call on the respondent to comply with the request for particulars before the plaintiffs brought the present application.
- [58] A further problem with the application to compel is the fact that in the founding affidavit, the plaintiffs rely primarily upon Target Brand's lateness in providing the requested trial particulars. The founding affidavit contains no information as to why the requested particulars “are strictly necessary”, as required in rule 21(2), to enable the plaintiffs to prepare for trial and contain no information on which this court can base its discretion in favour of granting the application or not. All that the plaintiffs state in the founding affidavit and repeated in its replying affidavit is that the information sought is based on the triable issues raised by the pleadings. This, in my view, is insufficient. Leach, in the *Szedlacsek, Van der Walt, Warner* matter, made it clear that an applicant, seeking the delivery of further particulars, “must set out sufficient information to enable the Court to consider whether or not to exercise its discretion in his favour.”
- [59] In my view, what I have dealt with thus far in this judgment are sufficient grounds to justify dismissal of the plaintiffs’

application for particulars. There are, however, further matters which I need to mention, and I do so briefly.

- [60] The first relates to the plaintiffs’ replying affidavit, which Mr Beyleveld, who appeared on behalf of Target Brand argued raised new matter and which he initially sought to have struck out. When the matter was on the roll on 25 August 2020, however, the parties agreed to an order, without prejudice and without Target Brand admitting that the application to strike out was incorrectly, or improperly launched. In terms of that order, it was agreed that Target Brand would withdraw the application to strike out. In relation to what Target Brand alleged were new material, it retained the right to file a further answering affidavit and the plaintiffs retained the right to file a further replying affidavit thereto. This resulted in five different sets of affidavits filed in this matter, which perverts the aim of the rules to dispose of these types of interlocutory applications as expeditiously as possible in order to get to the real issues between the parties.
- [61] Secondly, I do want to mention that by the time that the plaintiffs filed their replying affidavit, Target Brand had already delivered its reply to the particulars sought. The plaintiffs, however, not satisfied with the replies, persisted with the application and sought better particulars in respect of certain requests. Mr Beyleveld argued that this required a new application, or at least, an amendment of the notice of motion. Because of the conclusion I reached, I find it unnecessary to deal with this issue any further.

[62] Lastly, I must mention that I did consider the merits of those requests persisted with, and I am of the view that these, in the exercise of my discretion, should be denied. The information sought are, in my view, not strictly necessary for the plaintiffs to prepare for trial. I agree with Mr Beyleveld, that in respect of certain of the particulars sought (those in paragraphs 6.2 to 6.2.4 and paragraphs 15 to 15 to 15.4) the plaintiffs are trying to elicit evidence that do not form part of their cause of action or the defence pleaded by Target Brand. In respect of much of the other particulars sought, Target Brand indicated that they have no knowledge of the allegations pleaded by the plaintiffs. It is argued on behalf of the plaintiffs that Target Brand should have such knowledge because Van Rooyen was a director of Moor Fruits. It is trite however, that a party cannot be compelled to provide particulars which is unknown to it. In this regard, it has been held in *Houtlands Investments (Pty) Ltd v Traverso Construction (Pty) Ltd* 1976 (2) SA 261 (CPD) (per Rose-Innes AJ at 266 A -) that:

‘[a] party who has been ordered to reply to a request for further particulars may answer that the information sought is unavailable and unknown to him.... In *Wilson v Die Afrikaanse Pers Publikasies* (Edms) Bpk [1971

(3) SA 455 (T)] it was pointed out that an order to compel further particulars is an interlocutory order and is not the final word on the matter which forms the subject of the order. It was held accordingly, in an application for dismissal of a plea for failure to furnish further particulars thereto in compliance with an Order of Court, that the Court hearing the application for dismissal may

accept the answer that the defaulting party is unable to furnish the particulars ordered because they are unavailable and unknown to that party. I am in respectful agreement with the decision...”

Where Target Brand pleaded that it has no knowledge of the allegations pleaded by the plaintiffs it would serve no purpose to compel it to provide further particulars thereto.

[63] On the issue of costs, it is obvious that the plaintiffs, having been unsuccessful, should pay the costs, such costs to include the costs relating to the appearance on 25 August 2020. I do not think this is a matter that calls for a cost order on a punitive scale, nor that the complexity of the matter warranted the use and consequent costs of two counsel.

[64] In the result, I order the following:

(A) IN RELATION TO THE ISSUES BETWEEN THE PLAINTIFFS AND THE SECOND DEFENDANT

1. The second defendant’s application in terms of rule 30(1) is dismissed.
2. The second defendant’s application for the upliftment of the bar is dismissed.
3. The plaintiffs’ application for default judgment is dismissed.
4. The second defendant is to pay the plaintiffs’ costs.

(B) IN RELATION TO THE ISSUE BETWEEN THE PLAINTIFFS AND THE FIRST DEFENDANT

5. The plaintiffs' application for an order to compel the first defendant to deliver further and better trial particulars, is

dismissed.

6. The plaintiffs are to pay the first defendant's costs.

S. HOCKEY

ACTING JUDGE OF THE HIGH COURT

For Plaintiffs: Adv JA van der Merwe SC

Instructed by: Mostert & Bosman

For 1st Defendant: Adv A Beyleveld SC and Adv H De Wet

Instructed by: Schoeman Oosthuizen Inc.

For 2nd Defendant: Adv J Foster

Instructed by: Muller, Bean Janse van Rensburg Inc.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2020/183.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bester-no-and-others-v-target-unknown-topic-awchc-2020>

Prepared on 9 October 2026 · Esheria