

SOUTH AFRICA / JUDGMENT

Cooper and Another v Mckenzie and Associates (Pty) Ltd and Another (036942/2022) [2023] ZAGPJHC 1214 (24 October 2023) [2023] ZAGPJHC 1214

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

036942/2022

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBERS:

036942/2022
Judgment: 24 October
2023
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
24/10/23
In

the matter between: CARRIE
 LEIGH COOPER
 First
 Applicant
 THE
 COOP (PTY) LTD
 Second
 Applicant
 And
 MCKENZIE
 AND ASSOCIATES (PTY) LTD
 First
 Respondent
 WILLIAM
 GLEN MILFORD MCKENZIE
 Second
 Respondent
 In

Re: MCKENZIE
 AND ASSOCIATES (PTY) LTD
 First
 Plaintiff
 WILLIAM
 GLEN MILFORD MCKENZIE
 Second
 Plaintiff
 And
 CARRIE
 LEIGH COOPER
 First
 Defendant
 THE
 COOP (PTY) LTD
 Second
 Defendant

JUDGMENT

STRIJDOM AJ

INTRODUCTION

- [1] This is an application to condone the late filing of the applicants Rule 7 notice, the application is opposed by the respondents.

- [2] The Respondents have agreed that should the condonation application be granted that their application to set aside the Rule 7 notice will be dismissed. In the event that the condonation application is unsuccessful, the respondents' application to set aside the Rule 7 notice will proceed unopposed. As such, the merits of the Rule 7 notice need be considered only in so far as it is required for the purpose of condonation being sought.

THE SALIENT FACTS

- [3] On 24 October 2022 the respondents issued summons against the applicants. The summons was served on the applicants on 15 November 2022 (first applicant) and 27 October 2022 (on the second applicant).
- [4] In the summons, the respondents seek to enforce a claim against the applicants based on the shareholders' agreement concluded between the first applicant and the second respondent. The first applicant and the second respondent are shareholders of the first respondent.
- [5] The claim is premised upon alleged breaches of terms of the shareholders' agreement.
- [6] The Rule 7 notice was delivered on 18 January 2023 thus 10 weeks after the service of the summons. The Rule 7 notice was served 41 days after service of the summons on the first applicant and 54 days after service of the summons on the second applicant.
- [7] The first applicant (the sole shareholder and sole director of the second applicant) became aware, upon the service of the summons on the second applicant (27 October 2022) that the first respondent was represented by Hutcheon Attorneys[1].
- [8] The applicants filed a notice to defend on 25 November 2022.
- [9] The applicants filed an exception to the particulars of claim on 20 January 2023[2].
- [10] On 23 January 2023 the respondents delivered a notice in terms of Rule 30(2)(b) contending that the applicants Rule 7 notice was an irregular step[3].
- [11] On 26 January 2023 the respondents delivered a notice in terms of Rule 28(1)[4].
- [12] The Applicants condonation application was only filed on 03 March 2023[5].

CONDONATION

- [13] In the founding affidavit the applicants state the following to explain the delay in filing the Rule 7 notice:

13.1 "during the process of formulating and finalizing the exception , the applicants attorney drew my attention to paragraph 7.22 and thus filed the Rule 7 notice"[6]

13.2 " I did not willfully and/or unnecessarily delay the filing of the Rule 7 notice and same was attended to as soon as the relevance of same was drawn to the applicants attention"[7].

13.3 “The delay is I submit not inordinate, taking into account that I as well as my attorneys were aware over the December break and only determined during January 2023 that this litigation instituted purportedly on behalf of the first respondent is unauthorized”[8].

13.4 “I have also not delayed any further in launching this application”[9].

13.5 “I have also not recklessly disregarded the ten day period referred to in Rule 7 and confirm that the issue of the unauthorised litigation was only realised in early 2023 when my legal team and I were required to draft the plea”[10].

[14] Uniform Rule 7(1) provides “a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed”.

[15] Rule 27(3) of the Uniform Rules of Court provides that:” The court may and on good cause shown, condone any non-compliance with these rules”.

[16] In *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)*[11] it was held that the requirements are:

16.1 giving a reasonable explanation of his default

16.2 showing that the party seeking the indulgence is acting bona fide; and

16.3 showing that the party seeking the indulgence has a bona fide defence which prima facie has some prospect of success.

[17] When considering whether to grant condonation the court is also required to take into account the explanation for the delay and the interests of justice as well as the applicant’s prospect of success in the main application and the respective prejudice that would be caused to the parties should condonation be granted.[12]

[18] The explanation given by the applicants for the delay is neither detailed or sufficient.

18.1 It does not set out:

18.1.1 when the applicants consulted their attorneys;

18.1.2 the names of the attorneys consulted;

18.1.3 when the process of formulating the exception was undertaken;

18.1.4 who undertook that formulation;

18.1.5 for which period the first applicant was away over the “December break”;

18.1.6 for which period the attorneys were away over the “December break”;

18.1.7 the names of the attorneys that were away;

18.1.8 why other attorneys could not attend to the Rule 7 notice.

[19] The explanation of the applicants is also contradictory.

19.1 in paragraph 23 of the founding affidavit the applicants state that the Rule 7 notice was filed during the process of formulating and finalizing the exception, whereas

19.2 in paragraph 32 of the founding affidavit the applicants state that the need for a Rule 7 notice was only realized in early 2023 “when my legal team and I were required to draft the plea”.

[20] The applicants mala fides is exhibited by the applicants’ failure to bring to the courts attention that on 21 September 2022, Hutcheon Attorneys addressed a letter, Annexure POC 2 to the combined summons, to the applicants’ attorneys in terms of which letter Hutcheon Attorneys clearly stated that they act on behalf of both first and second respondents and made various demands on behalf of both respondents. The applicants were aware over two months before the service of the summons, that Hutcheon Attorneys represented both respondents.[13]

[21] The applicants also failed to launch their condonation application timeously.

21.1 On 20 January 2023 the applicants are advised that the Rule 7 notice constituted an irregular step; however

21.2 the applicants delayed in launching the condonation application until 03 March 2023, a period of 30 days.

PROSPECT OF SUCCESS

[22] The applicants rely on clause 7.22 of the Shareholders’ agreement.

[23] In the applicants’ notice in terms of Uniform Rule 7 the applicants contend

23.1 the institution of any legal proceedings, other than those arising in the ordinary, normal and regular course of business of the first plaintiff, requires a unanimous resolution duly passed by shareholders’

23.2 the legal proceedings by the first plaintiff against the first defendant are not in the ordinary, normal and regular course of business of the first plaintiff;

23.3 “The first defendant as shareholder of the first plaintiff has not passed a resolution consenting to and authorizing the directors of the first plaintiff to initiate legal proceedings”[14].

[24] In my view, clause 18.1 of the shareholders’ agreement specifically caters for a court to be approached for the orders contended for in the particulars of claim.

[25] Parties are defined in the shareholders’ agreement as being the shareholders and the company. The only signatures to the shareholder’s agreement are – the first applicant and the second respondent. On this basis alone the action was properly and duly authorized by both the respondents.

- [26] In my view clause 7.22 can never be interpreted to operate that an aggrieved shareholder (or the company) who seeks to protect and/or enforce his rights (or the rights of the company) against a breaching shareholder can be prevented from doing so by the guilty or offending shareholder refusing to agree to a unanimous resolution.
- [27] It was argued by the respondents that the clause is only of application in the instances where a shareholder and/or the company institutes proceedings against persons who are not party to the shareholders' agreement. I agree with this submission.

PREJUDICE

- [28] The only prejudice the applicants suggest they would have to endure if the condonation is not granted is that "I would be required to continue to defend myself against unauthorised litigation. Litigation is extremely costly, and this litigation may take a number of years to be resolved."
- [29] It is not sufficient for the applicants to show that condonation will not result in prejudice to the respondents. An application, for relief under the rule, must show good cause and the question of prejudice does not arise if it is unable to do so.
- [30] I am not persuaded that the applicants will be prejudiced should this court refuse condonation. The applicants consistent non – compliance with the rules of court has prejudiced the respondents.

CONCLUSION

- [31] On a conspectus of all the evidence before me and the submissions made by the Counsel for the parties I concluded that the applicants have failed to make out a case for condonation.
- [32] In the result, the following order is made:

32.1 The application for condonation is dismissed with costs.

32.2 the respondents unopposed application in terms of Rule 30(2)(b) is granted and the applicants' Rule 7 notice set aside as an irregular step with costs.

JJ STRIJDOM

Acting Judge of the High Court

Gauteng Division, Johannesburg

Appearances

For Applicant:

Advocate C Gibson

Instructed by:

Senekal Simmonds Inc.

Respondent:

Advocate PL Carstensen SC

Hutcheon Attorneys

[1] Caselines: 03-9 paragraph 13 (FA)

[2] Caselines 03-9, paragraph 8 (FA)

[3] Caselines 03-9, paragraph 12 (FA); AA 03-36 paragraph 5.7

[4] AA 03-36, paragraph 5.8; RA 03-61 paragraph 18

[5] AA 03-37, paragraph 5.11; FA 03-4

[6] FA, 03-12, paragraph 23

[7] FA, 03-12, paragraph 26

[8] FA,03-13, paragraph 31

[9] FA,03-13, paragraph 31

[10] FA,03-13, paragraph 32

[11] 2003

(6) SA 1 (SCA) at paragraph 11 See also Mynhardt v Mynhardt 1986 (1) SA 456 (T)

[11] 2003

(6) SA 1 (SCA) at paragraph 11

See also Mynhardt v Mynhardt 1986 (1) SA 456 (T)

[12] Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (5) BCLR 465 (CC)

[13] Caselines, 01-21, paragraph 15 and annexure POC2, 01-42

[14] Caselines, 02-6 and 02-7

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