

SOUTH AFRICA / JUDGMENT

Cowin N.O. and Another v Arnold (4523/2022) [2024] ZAGPJHC 368 (12 April 2024) [2024] ZAGPJHC 368

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

4523/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

LOCAL DIVISION, JOHANNESBURG.

Case No:4523/2022

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: NO

12

April 2024

In

the matter between: MONICA-
COWIN N.O.
1st
Applicant
ANKIA
VAN JAARSVELDT N.O.
2nd
Applicant
And
PHILIP
HENRY ARNOLD
Respondent

JUDGMENT

NOKO J

Introduction

- [1] The first and second applicants, in their capacities as joint liquidators of Silver Touch IT Solutions (Pty) Ltd (in liquidation) (Silver Touch) launched an application for an order compelling the respondent to deliver certain documents set out in the Notice of motion. The respondent is sued in his capacity as a director of the Silver Touch.
- [2] The respondent opposes the application and has delivered the answering affidavit deposed to by his attorney of record, Mr Adams Creswick (Mr Creswick).

Background

- [3] In view of the order made in this lis the background of the matter is truncated. The respondent took a resolution on 11 May 2020 to place Silver Touch under voluntary liquidation which was lodged with the office of the Companies and Intellectual Property Commission (CIPC). The liquidators were duly appointed with one being appointed at the instance and recommendation of the respondent.
- [4] The first meeting of creditors was convened at which EOH submitted its claim in the sum of 1 million rand. The respondent objected thereto and disputed liability on behalf of Silver Touch. EOH subsequently launched an application to convert the voluntary liquidation into a compulsory liquidation in terms of section 286(1)(e) of the Companies Act 61 of 1973. The application was granted by Crutchfield AJ (as she then was) on 20 March 2021.

- [5] As set out above the applicants had subsequent to their appointment requested certain information/ documents from the respondent through correspondence on several occasions. The respondent replied through his attorney, Mr Creswick and provided copy of the CM 100 which was allegedly filed with the CIPC. The applicants contend that the CM 100 was not properly completed and signed.
- [6] The applicants avers that further attempts were made to obtain outstanding information and record/documentation from the respondent and have been frustrated by the respondent. The lack of cooperation cannot also be noted from the respondent's failure to delivery an answering affidavit which compelled the applicants to enrol the mater on the unopposed roll. An order was made by agreement on 13 February 2023 in terms of which the respondent was ordered to deliver, inter alia, the answering affidavit on 28 February
2023. The order specifically provides that in the event the respondent fails to comply therewith the application would proceed on unopposed basis.
- [7] The applicants contended that the respondent failed to comply with an order of court in that he failed to deliver the answering affidavit on 28 February 2023. The respondent subsequently delivered the answering affidavit but failed to deliver an application for condonation. The parties did not comprehensively proffer arguments on condonation during the hearing before me but the point in limine raised by the applicants thereon has not been withdrawn.
- [8] It is trite that applications for condonation are not there just for asking. Such applications should address aspects which were identified in Phasha[1] judgment, namely, the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance, the importance of the case and the respondent's interest in the finality of the judgment, convenience of the court and the avoidance of the unnecessary delay. It is therefore important that the respondent deliver the application setting out all the necessary averments for the court's consideration. That notwithstanding the decision on such applications are within the discretionary enclaves of the presiding officer.[2]
- [9] I am hamstrung to consider the issue of the late delivery of the answering affidavit more particularly when the respondent, duly represented, acceded to the order by Opperman J. on the date on which the affidavit was supposed to be delivered. Without any facts being put forward requesting condonation for non-compliance with the court order of Opperman J. I cannot consider the contents of the answering affidavit or even consider granting condonation where same is not requested.
- [10] Opperman J. has specifically ordered that the application should proceed on an unopposed basis if the respondent fails to comply with an order of court. The respondent failed to grant this court a courtesy of explaining himself and also requesting condonation. It can therefore safely be assumed that the respondent or his attorney do not believe that the court deserves any explanation or they dispute that the respondent failed to comply with an order of Opperman J., either way an affidavit should have been delivered addressing the issue of

condonation (or denying lateness) as raised by the applicants. Alternatively, as it seems to be the respondent's stratagem, he probably intends to later approach court and request the indulgence for the infractions and therefore further delaying the finalisation of the matter. Either way the court should demonstrate its displeasure for flagrant disregard of the rules and worse of the court orders.

- [11] I therefore conclude that the respondent's answering affidavit should be struck out and the application should proceed on unopposed basis.
- [12] The applicants have uploaded the draft order for certain specific orders and same is granted excluding prayer under para 1.2 for which it was conceded that the respondent has complied and what is sought is only the costs relative thereto.[3] Prayer 2 on the contempt of court is not necessary as a party does not require leave to approach court for contempt of court.

Costs

- [13] It is trite that the question of costs are within the reserve of the presiding officer and they are awarded generally on a scale between party and party. There are instances where the court will be persuaded to upset the general principle and award costs on a punitive scale. The court in *The Public Protector v African Bank* judgment (at para [8]) referred with approval to a decision of the Labour Appeal Court in *Plastic Converters Association of South Africa on behalf of Members v National Union of Metal Workers of South Africa* 2016 (ZALAC 39) and stated as follows: "The scale of an attorney and client is an extra ordinary one which should be reserved for cases where it can be found that the litigant

conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to

be very punitive and indicative of extreme opprobrium".

- [14] In the case before me the orders sought by the applicants appear not to be complicated or unreasonable. It is just a request to access records of a company from the director who voluntarily decided to place the company under liquidation. The respondent should have reasonably foreseen that the liquidator/s would need the records of the company and for some odd reasons it appears that he is going all the way to ensure that the applicants are frustrated. Secondly, the respondent failed to file answering affidavit timeously and ultimately an order was made in terms of which the respondent agreed to deliver the affidavit on a specific date. The respondent still failed to comply with the order.[4] Thirdly, the applicants made the respondent aware in the replying affidavit that the rules enjoin a party to apply for condonation where such a party has not complied with the rules (and in this instance as crystalized in the Opperman J. order). The respondent decided to ignore the advice and still failed to apply for the condonation. The respondent prepared heads of argument and still failed to address the question of condonation. The respondent appears to be a party hell-bent not to comply with the rules of court and deserves no mercy of the court. The judicial resources are over-stretched and should be engaged in an appropriate

and considerate manner. To this end the costs on a punitive scale is warranted.

[15] I therefore order that the draft order is made an order of court excluding prayers 1.2 and 2 and shall be marked X.

NOKO MV.

JUDGE OF THE HIGH COURT.

This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 12 April 2024.

Date of hearing:

7 November 2024

Date of judgment:

12 April 2024

Appearances

For the Applicants: Adv

J Brewer.

Attorneys for the Applicants: Mouyis

Cohen Attorneys.

For the Respondent: Adv

C Read.

Attorneys for the Respondent

Adam Creswick Attorneys.

[1] Phasha v Morudi N.O. and Others (3046/2018)

[2019] ZALMPPHC (7 May 2019. See also Van Wyk v Unitas Hospital 2008 (2) SA 472.

[2] See rule 27 of the Uniform Rules of Court. The court would, consider granting condonation in the interest of justice and frustrate

finalization of matters based on trivialities and technicalities. See also Rampai J in Louw v Grobler and Another (3074/2016)

[2016] ZAFSHC 206 (15 December 2016) “the prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of embracing the civil justice system. It was stated in Louw v Grobler that “The rules set the parameters within which the course of litigation

has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made.”

[3][3] See para 25.4 of the Applicant’s Replying Affidavit.

[4] It appears that the respondent’s attorney is a party active in the proceedings and has personal knowledge and more should ordinarily be expected of him.

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Prepared on 11 October 2026 · Esheria