

SOUTH AFRICA / JUDGMENT

**Farrington Farming (Pty) Ltd and Others v Volcano
Agrosciences (Pty) Ltd and Another; In re: Frikton
CC v Chris Hani District Municipality (75/2008,
3245/2009) [2010] ZAECGHC 134 (18 March 2010)
[2010] ZAECGHC 134**

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B C Hartle

CASE / FILE NUMBER

75/2008, 3245/2009

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE, GRAHAMSTOWN)

In

the matters of:

CASE

NO. : 75/2008

DATE:

18 MARCH 2010

A.

FARRINGTON

FARMING (PTY)

LTD.....1st

Applicant

MONTGOMERY

FARMING (PTY)

LTD.....2nd

Applicant

MAROLTA

FARMING (PTY)

LTD.....3rd

Applicant

SISONKE

FARMING (PTY)

LTD.....4th

Applicant

("THE

APPLICANTS")

And
VOLCANO
AGROSCIENCES (PTY)
LTD.....1st
Respondent
FARMERS
AGRI-CARE (PTY)
LTD.....2nd
Respondent
("THE
FIRST RESPONDENT")
B.
CASE
NO. 3245/2009
FRIKTON
CC.....Applicant

CHRIS
HANI DISTRICT
MUNICIPALITY.....Respondent
Date
of application: 11 March 2010
Date
of judgment: 18 March 2010

JUDGMENT

Hartle A J:

- [1] The Applicants in the above matters issued out separate applications to compel discovery.
- [2] In order to distinguish them, I will refer to the applications as the Farrington and Frikton matters respectively.

The Farrington matter:

- [3] In this matter the Applicants applied, on nine days' notice, for an order directing the First Respondent - the Second Respondent is no longer involved in the action - to deliver a notice as near as may be in accordance with form 14 of the first schedule to the uniform rules stating a time within five days from delivery of such notice when certain documents may be inspected at the office of its attorneys. The anticipated inspection relates to numerous documents (originally numbering 86 in total) which are described more fully in the application.
- [4] The purpose of the application, as described by the Applicants, is to compel the First Respondent to both properly respond to a rule 35(3) notice and to produce for their inspection the documents averted to therein to the extent described in the founding affidavit.

- [5] The Applicants traverse in their founding affidavit the history of the matter to set the tone, as it were, as to the dilatoriness of the First Respondent and no doubt as a basis to persuade the court ultimately, which has a discretion to be exercised in the light of the particular circumstances of the matter, to order compliance with rule 35. Of particular significance in this regard, as far as the Applicants are concerned, is the fact that the original Notice in terms of rule 35(3) requiring the First Respondent to make discovery of the several documents was served as early as 5 October 2009. It was only after a considerable exchange of correspondence, on 3 February 2010, that the First Respondent purported to comply with the notice by the filing of a formal rule 35(3) response. It had failed, however, to annex the documents and spreadsheets referred to therein, thus necessitating the issue of the application.
- [6] The First Respondent filed a notice to oppose the application, which was delivered on 5 March 2010, but no answering papers were delivered before the hearing of the matter on 11 March 2010. It was contended on its behalf that, since the matter had become opposed, it ought to be removed from the roll for the customary time periods referred to in rule 6(5)(d) and (e) to run their course.
- [7] The Applicants contend, on the other hand, that, since the First Respondent was afforded nine clear court days within which to respond on affidavit (which period was more than reasonable), and due regard being had to the already long delays as averted to above, the matter ought to proceed.
- [8] Notwithstanding this, the Applicants tendered to afford the First Respondent further time to respond - whilst not conceding the latter's entitlement thereto - as follows:

“.1 The Respondents Opposing Affidavits should be filed on or before the 13th March 2010; (this date was amended to 15 March 2010 since the 13th fell on a Saturday)

.2 Applicants' reply if any on or before 19th March 2010;

.3 The matter to be postponed to the 25th March 2010 for argument.”

The Frikton matter:

- [9] In this matter the Applicant sought an order compelling the Respondent to deliver a reply, by noon on 19 March 2010, to the

Applicant's rule 35(3) notice served on its behalf on 3 February 2010.

- [10] The application was served on six court days' notice to the Respondent.

- [11] The Applicant alleges that the reply to the rule 35(3) notice should have been received by 17 February 2010 but, when the Respondent

failed to comply with the rule, a letter was sent on 22 February 2010 requesting the reply by the 24th of that month, failing which - it threatened - the application to compel would be launched. The Respondent ignored the demand foreshadowing the application. The Applicant claimed that, as a result of the Respondent's failure to comply with the notice, it was embarrassed and prejudiced in its preparation for trial.

- [12] Correspondence which had been exchanged between the parties pursuant to service of the application to compel was handed up from the bar by Mr Brooks, who appeared for the Applicant. In a letter dated 9 March 2010 addressed by the Respondent's attorneys to the Applicant's, the former purports to "respond" to the Applicant's Notice in terms of rule 35(3). In respect of some items the Respondent tenders inspection, but reservations are expressed regarding the description of others being too vague or having no relevance to the action.
- [13] The letter concludes with a remark that: "Furthermore, you will have received our Notice of Opposition. The matter is now opposed and cannot, obviously, proceed on the 11th instant. If (sic) must be postponed for the filing of answering papers by the Respondent."
- [14] In response, in a letter dated 11 March 2010, the Applicant's attorneys noted that the letter under reply followed five weeks after the Applicant's rule 35 Notice was filed and a week after the current application to compel was launched. The Applicant insists that the documents requested are relevant and discoverable and warns the Respondent that its rights are reserved to continue with the application to compel and seek a costs order.
- [15] Mr Brooks argued that the Applicant was entitled to an order in terms of prayers (a), (b) and (c) of the Notice of Motion, not only because the Respondent had been afforded six court days within which to file a response on affidavit (which period was reasonable), but on the further basis that - in the light of what the correspondence conveyed - there was no merit in the Respondent's opposition, nor the promise thereof.

The

submissions:

- [16] In neither matter was I called upon to deal with the merits of the applications, the parties merely seeking directions as to the further conduct of the now opposed applications, given that they were unable to agree "a timetable". Although the concession that the Respondents should be provided with an opportunity to respond was reluctantly made, I am of the view that it was both proper and fair in the circumstances to permit them an opportunity to answer the proceedings.
- [17] Submissions were made in respect of the Farrington matter by Mr Lowe, who appeared together with Mr Huisamen, for the Applicants, and by Mr Nettelton, who appeared for the First Respondent. Messrs Brooks and Mvulana, who appeared for the Applicant and the Respondent respectively in the Frikton matter, aligned themselves with the relevant arguments in the former matter.

- [18] The stance taken by the Respondents in both matters was to the effect that, since the applications had become opposed, the ordinary time limits provided for in rule 6(5)(d) for the filing of answering papers in opposed motions became applicable, as there exist no “special circumstances” for a contrary situation to pertain, nor for the court to order otherwise.
- [19] More specifically, so it was contended in the Farrington matter, the First Respondent enjoys fifteen clear court days from delivery of notice of opposition (5 March 2010) within which to file answering affidavits, i.e. on or before 29 March 2010, with the Applicants being entitled to reply within ten days thereafter, i.e. on or before 14 April 2010.
- [20] Thereafter, it would be incumbent upon the Applicants to direct a notice of set down to the registrar in the form prescribed by the rules relating to the conduct of proceedings “of the Eastern Cape Division of the Supreme Court of South Africa” as published in Government Notice R3289 of 12 September 1969 (with the form of such notice being set out in the first schedule to the rules).
- [21] The registrar is then obliged to assign a date for the hearing of the matter, as an opposed motion.
- [22] It may well be, so Mr Nettelton argued, that the parties could agree on timeframes, but the date agreed between them for the actual hearing of the application would nonetheless be subject to the approval of the registrar who manages the motion court roll and who would have to be satisfied that there are not an excessive number of opposed matters on the motion court roll for the agreed or chosen date.
- [23] It was submitted that, in the absence of any such agreement between the parties, the Applicants, as dominus litis in the proceedings, could not prescribe time frames as they have sought to do.
- [24] He went on further to argue that the complete and utter absence of any prejudice alleged, or allegations of urgency which would justify the ordinary time frames applicable to opposed motions being truncated in any way should the “normal” time frames applicable to opposed applications apply, meant that there were no compelling or special circumstances to elevate this matter beyond that of an opposed motion court application to be heard in the ordinary course with due regard being had to the prescribed time periods for such proceedings. In the same vein, neither had the action been set down for hearing yet.
- [25] In conclusion he urged upon the court to rule that the ordinary time frames in respect of opposed applications (including counter-applications which might be filed *pari passu* with such applications) should apply, as also the rules regulating the conduct of proceedings of this court in relation to set down as averted to above. He submitted further that the costs of the application should be costs in the cause, but that the costs incurred in relation to the orders specifically sought by the Applicants be paid by them jointly and severally, the one paying the other to be absolved.

[26] The parties were in agreement that the applications were interlocutory in nature, or incidental to the pending proceedings on the basis contemplated in rule 6(11).

[27] Rule 6(11) provides as follows:

“Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a Judge.”

[28] There is no prescribed form of notice of motion for interlocutory applications but the authorities are to the effect that the somewhat cumbersome procedure laid down in rule 6(5) need not be followed where the parties are already litigating. (See *Herbstein and van Winsen*, the Civil Practice of the High Courts of South Africa, 5th Ed 2009, at 424, and the authorities referred to therein)

[29] The practice is to use a short form of Notice of Motion similar to form 2, but citing the Respondent.

[30] Such applications are brought “on notice” and not on “notice of motion”. The requirements of Rule 6(5)(d) need therefore not be complied with in such cases. (See *Yorkshire Insurance Company Limited v Rueben* 1967 (2) SA 263 (E); *Rueben v Yorkshire Insurance Company Limited* 1967 (3) SA 166 (E); *Viljoen v Federated Trust Limited* 1971 (1) SA 750 (O); *Hendriks v Santam Insurance Company Limited* 1973 (1) SA 45(C)).

[31] The sub-rule is silent as to the procedure to be adopted when an interlocutory application or one incidental to pending proceedings

becomes opposed with regard to delivery of notice of intention to oppose or the filing of answering affidavits. The prevailing

authority is to the effect, however, that answering and replying affidavits, when they are necessary, should be filed within a

reasonable time. (See *Gisman Mining and Engineering Company (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W) at 27 H – 28 A)

[32] In this regard it has been held that the Applicant can prescribe any reasonable period he deems fit between delivery of such an application and the hearing of it, but bears the risk of the Respondent having inadequate opportunity to oppose the application.

(See *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* 1981 (4) SA 329 (O) at 332 B – C)

[33] It seems therefore that the parties are left somewhat at large to make their own rules relating to the delivery of documents for purposes of an interlocutory application, but if a court is not satisfied that the application is ripe for hearing when it comes before it, either because the Respondent has not been afforded adequate time in which to deliver an answering affidavit, or because heads of argument are required to be filed, appropriate directions may be given as to the arrangements for the hearing of the application. The risk

envisaged may entail nothing more than that the application is removed from the roll, or postponed

- and finality thus suspended pending the exchange of opposing papers until the matter is heard - but in some instances, the absence of a reasonable period between delivery of an application and the hearing thereof may well attract a costs order against an applicant. (For the reasons which follow, I am not persuaded that these are such matters)

[34] I am therefore inclined to find that the Applicants were indeed entitled to “prescribe” that the applications be enrolled for hearing on 11 March 2010 on the assumption that they were affording the Respondents a reasonable opportunity to answer the proceedings, if they so wished, well in time before the set down of the matter on that date. The Applicants would also not have been out of order if they had set out in their notices specific time frames which they thought were suitable in the circumstances regarding the dates by when notice to oppose should be filed and answering papers delivered.

[35] In practice interlocutory applications are routinely set down on the unopposed motion court roll and the future conduct of the matter determined with reference to time frames reached between the parties, alternatively directions being issued by the court as and when circumstances dictate such intervention.

[36] As long as the Registrar does not indicate that the set down of the matter is problematic, the placing of it on the roll on notice to the Respondent is consistent with a set down at a time assigned by the Registrar on the basis contemplated in rule 6(11).

[37] I cannot agree that the provisions of Eastern Cape rule 3 apply in respect of the “set down” envisaged in rule 6(11), whether at the time when the initial date is assigned by the Registrar upon issue of the application, or later at the request of an applicant enrolling such an application on the opposed motion court roll once it becomes opposed. I am fortified in my findings in this regard by the explanation of Mullins J in the matter of Chelsea Estates & Contractors CC v Speed-O-Rama 1993 (1) SA 198 (E) at 200G – 202D regarding the practice in the Eastern Cape in respect of the set down of opposed motion proceedings.

[38] The application of Eastern Cape rule 3, instead of Rule 6(5)(f), would not only operate against the principle that less cumbersome

procedures are indicated for interlocutory applications, but would also offend against an applicant’s entitlement to the

expeditious disposition of litigation.

[39] Further, regard being had to the Respondents’ contention that they are permitted to hold out to the maximum of their perceived entitlement, I am not persuaded that any of the authorities are to the effect that, once an interlocutory application becomes opposed, the provisions of rule 6(5)(d) with regard to the time frames applicable in respect of the exchange of further affidavits applies as a matter of course. Rather, rule 6(5)(d) is a “good

guide” only as to the amount of time which should be given to the Respondents to reply to the Applicants’ allegations. (See Muller v Paulsen 1977 (3) SA 206 (E))

- [40] In my view the authorities are against the proposition that simply by virtue of an interlocutory application becoming opposed, a respondent is entitled to the benefit of as much time as would be afforded to him in an ordinary opposed application. Such an interpretation would be absurd given the nature and necessity of interlocutory applications especially when invoked as a tool to enable parties to advance the main action. Rule 6(11) is an exclusionary sub-rule, (distinguished from the rest of rule 6) which provides a sui generis model and procedure for simple interlocutory and other applications incidental to pending proceedings.
- [41] It would be entirely inconsistent with the nature of, particularly an application to compel in terms of rule 35 (7), for a respondent to profit from his own tardiness, by claiming that he is entitled to hold out for the maximum period that rule 6(5)(d) will allow for the exchange of affidavits in ordinary opposed motions, and then for the set down to be delayed even further while a formal request is made on the basis provided for in Eastern Cape rule 3. Such opportunism can never be countenanced. It is trite law that, in order for justice to be done, the uniform rules must be interpreted so as to provide for the speedy and inexpensive resolution of disputes.
- [42] Further, whilst factors such as the absence of any allegations of urgency or prejudice, or the fact that an action has yet to be enrolled for hearing, may well be circumstances which a court, or a Judge, would have regard to in determining that an interlocutory

application is not ripe for hearing and bearing on the directions which ought to be given in the circumstances, I am not persuaded that it follows automatically that some burden rests on an applicant issuing out an interlocutory application to convince the court that there are compelling or special circumstances which elevate the matter beyond that of an ordinary opposed motion. Such an interpretation assumes that a respondent is entitled, in respect of an interlocutory application, to the rights created by rule 6(5)(d) pertaining to ordinary opposed applications. In my view a respondent has no right to be allowed the more extensive time periods applicable to such applications

- [43] Neither do I believe that any of the authorities support such a proposition. On the contrary, a proper interpretation of them leads me to the conclusion that there is an onus on the respondent in such an application rather to put up the special circumstances which would justify a court in allowing him to file a reply later than (at most) the customary time periods permitted for the exchange of opposing papers in an ordinary opposed motion.
- [44] I turn now to deal with the directions to be given in the matters before me.
- [45] The Farrington application runs to 230 pages and concerns itself with a number of documents which the Applicants contend the First Respondent has failed to discover. While it may appear “obvious” that the First Respondent has failed to comply with the clear

provisions of rule 35, what is not so clear is the reason for such failure. The First Respondent may well argue that it has complied, or cannot comply, or that there is some basis on which it was or is entitled to withhold discovery. I do not have to concern myself with the merits of the matter, but the fact is that, having advised of its wish to contest the application, it must be provided with a full opportunity to answer the proceedings.

Such a period must be reasonable, and take into account the prolixity of the papers.

Notwithstanding the benefit to it already of the time which has lapsed since the application was issued, I must accept that it proceeded on an assumption, albeit incorrect, that it had the right to be allowed the extended period to file opposing papers applicable to normal opposed applications.

[46] I therefore propose to direct that the First Respondent's answering affidavit be filed on or before Wednesday, 24 March 2010, and the Applicants' replying affidavit, if any, by the ensuing Wednesday. The matter can thereafter be enrolled for hearing at the earliest date on the opposed motion court roll in accordance with the standard practice applicable in the Eastern Cape to the set down of ordinary opposed motions. (See rule 6 (5)(f) and my comments in paragraph [37] above)

[47] With regard to the issue of costs, I believe that it would be proper to reserve these for determination of the court hearing the application. Similarly I hold that the question whether it was a wise and reasonable precaution to have engaged the services of two counsel should fall to be determined by the court hearing the interlocutory application.

[48] My comments above regarding the Applicants' rights, presently and notwithstanding the period which has lapsed since the issue of the application, to be permitted to file an answering affidavit apply equally to the Frikton matter, except that the latter application is less complex and voluminous than the Farrington matter. I accordingly propose to direct that a shorter time frame be applicable in respect of the exchange of affidavits in that matter.

[49] What must be considered finally is the Respondents' contention that the costs incurred in relation to the order hereby made should be paid by the Applicants in the respective matters. I am not inclined to make such an order. I believe that the Applicants could not reasonably have anticipated that the applications would have become opposed, neither was their assumption that the applications

could be set down on 11 March 2010 out of order. Indeed rule 6(11) caters for exactly such situations. Further, I am not persuaded that the notice given to the respective Respondents of the interlocutory applications was unreasonable or such as to attract a risk of costs in this regard. The Respondents have further given no indication why they could not have delivered their answering affidavits in time for the applications to be disposed of on 11 March 2010.

[50] In the result I issue the following orders:

Case No. 75/2008:

1. The First Respondent is directed to file its answering affidavit in respect of the interlocutory application to compel on or before Wednesday, 24 March 2010.
2. The Applicants are to file their replying affidavits, if any, on or before Wednesday, 31 March 2010.
3. The Registrar is requested to enrol the interlocutory application for hearing on the opposed motion court roll for the earliest date after the expiry of the period referred to in paragraph 2 above, in accordance with the procedure provided for in rule 6(5)(f).
4. The issue of the costs of the interlocutory application, including the Applicants' contention that the costs of second counsel should be allowed, are reserved for determination by the court hearing the matter.

Case No. 3245/2009:

1. The Respondent is to file its answering affidavit on or before Monday, 22 March 2010.
2. The Applicant is ordered to file its replying affidavit, if any, on or before Friday, 26 March 2010.
4. The costs of the interlocutory application are reserved for determination by the court hearing the matter.

B C HARTLE

ACTING JUDGE OF THE HIGH COURT

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