

SOUTH AFRICA / JUDGMENT

Kayser N.O and Others v Rajkumar (2020/10390) [2021] ZAGPJHC 638 (3 November 2021) [2021] ZAGPJHC 638

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

2020/10390

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: Not
- (2) OF INTEREST TO OTHER JUDGES: Not
- (3) REVISED.

03 November 2021

CASE NUMBER: 2020/10390

In the matter between:-

ANDREW WALTER KAYSER N.O

First Applicant

PATRICIA JANET DEYSEL N.O.

Second Applicant

EBRAHIM SULIAMAN RAHIMTULLA N.O.

Third Applicant

AND A DYNAMIC DISTRIBUTORS (PTY) LTD

Fourth Applicant

And

TAHILRAM, RAJKUMAR

Respondent

JUDGMENT

Molahlhehi J

Introduction

- [1] The issue for determination in this matter is whether the withdrawal of a plea and the filing of the exception by the respondent, Rajkumar constitute an irregular step in terms of rule 30 of the Uniform Rules of the High Court (the Rules).
- [2] The main complaint by the applicants is that the respondent withdrew his plea which included various factual admissions made by therein.
- [3] The respondent opposed the application and contended that there is no merit in the complaint by the applicant concerning the withdrawal of the plea and the filing of the exception.

The parties

- [4] The first to the third applicants instituted the action proceedings in their representative capacity as trustees of the Lukamber Trust IT 4085/1998 and duly authorised by the Master of the High Court. The fourth applicant is a company registered as in terms of the company laws of the Republic of South Africa.
- [5] The respondent is a shareholder together with the Trust in the fourth applicant. The shares in the Trust are held by both the Trust and the respondent on a 70% and 30% respectively.

The rule 30 application

- [6] This interlocutory application is related to the action proceedings instituted by the applicants during
- 2020. In the action proceedings, the applicant claims payment of the drawings and benefits in the amount of R1 484 749.76 made by the respondent.
- [7] After issuing the summons, the respondent delivered a notice of intention to except to the particulars of claim (the first exception). In response to the exception the applicants amended the particulars of claim. After the amendment of the particulars of claim, the respondent invoked the provisions of rule 35 (14) of the Rules and requested discovery of certain documentation.
- [8] After the discovery of the requested documents the respondent filed his special plea and counterclaim on 6 October 2020.

- [9] The applicant contends that the respondent in his plea did not dispute the following averments made in the particulars of claim:
- (a) the citation of the plaintiffs.
 - (b) the conclusion of the shareholders' agreement.
 - (c) the shareholding of the fourth plaintiff.
 - (d) the claim for overpayment and the amounts related to it.
- [10] In response to the above, the applicants delivered a replication to the special plea on 20 October 2020. The applicants delivered a notice in terms of rule 23 (1) of the Rules on the same day concerning the plea and a counterclaim. Following this the respondent withdrew his plea and counterclaim on 18 November 2020.
- [11] In the meantime, the applicants filed a notice of bar on 24 November 2020. In response the respondent filed the second exception on 30 November 2020.
- [12] The notice of bar was followed by a notice of irregular step on 10 December 2020 by the applicants. The applicants contended in this respect that the respondent took an irregular step in withdrawing the plea and the counterclaim. They contended that the withdrawal constituted an irregular step for the following reasons:
- (a) the plea and the counterclaim contained various admissions in respect of the averments made in the particulars of claim.
 - (b) The withdrawal was not made with leave of court.
- [13] After the withdrawal of plea and the counterclaim, the respondent filed the notice of exception on 30 November 2020. In that notice, the respondent contends that the claim against him does not set out facts to sustain a cause of action.

Point in limine

- [14] The respondent has raised a point in limine relating to the affidavit in support of rule 30 of the applicants. He contends that the evidence contained therein concerning prejudice is inadmissible as it is hearsay evidence. The allegation of prejudice in the founding affidavit is made by the applicants' attorney and not by any of the applicants.
- [15] It is trite that an application in terms of rule 30 requires prejudice to be alleged and proved. Proof of the existence of prejudice has to come from the person with knowledge of those facts that would support the existence of prejudice. It was in this respect stated in the *Shackleton Credit Management (Pty) Ltd v Micrzone Trading 88 CC and Another*,^[1] that:

“[7] The requirement that the founding affidavit be deposed to by the applicant or some other

person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of those facts is purely a matter of hearsay. Thus a person who deposes to such an affidavit on the basis that their information comes from another source, whether another person or from documents, is not a person who can swear positively to the facts giving rise to the claim. It is for that reason that the application for summary judgment in *Rafael & Co v Standard Produce Co (Pty) Limited* was held to be defective. The deponent to the affidavit was the applicant's Cape Town attorney and the court said (at 245 D): "There is nothing from the circumstances of his making of this affidavit which can lead the court to the conclusion that it is within his knowledge. The ordinary presumption would be that they are facts which have come within his knowledge through his acting for the applicants in this matter." An affidavit by an attorney based on information given to the attorney by the client does not comply with the rule because the attorney is not in a position to swear positively to the facts. Such an affidavit is nothing more than an affidavit of information and belief containing inadmissible hearsay. An application founded on such an affidavit is as a result defective.

[16] The principles governing the approach to an application in terms of rule 30 are summarised in *BSB International Link CC v Readman (Pty) Ltd and Another, IN Re ; Readam SA (Pty) v The City of Johannesburg Metropolitan Municipality and Another*,^[2] as follows:

"Before I deal any further with the application it is necessary to briefly re-stated the principles applicable to an application in terms of rule 30. Is designed to provide for the setting aside of irregular steps taken in proceedings. The rule endows court with a wide discretion (30(3)). Important for present is the well-settled requirement of prejudice: proof of prejudice is a pre-requisite for success in an application in terms of rule 30(1) . . . A party may apply to court to set aside. The applicant in a rule 30 application accordingly, must allege and prove prejudice, if not substantial prejudice."

[17] In the present matter, as stated earlier, the evidence of prejudice is presented by the applicant's attorney in the affidavit in support of the application. Suppose there is anything to be made of the evidence by the attorney; it is nothing but information derived from the instructions she received from the applicants or, at best, information that could serve as advice to them.

[18] In my view, the applicants' contention that prejudice arose from the timelines relating to the prosecution process of the matter and thus, the attorney has direct knowledge of the process is unsustainable.

[19] The other point made by the applicants is that prejudice arises from the legal consequences of the withdrawal of the admission made in the withdrawn plea. The essence of the applicants' case in this regard is that the prejudice is related to the delay in the prosecution of the matter caused by the respondent's conduct. As will appear later in this judgment, the delay in the prosecution of the action is not limited to the withdrawal of the plea and the counterclaim but there are other factors that contributed to the delay. In other words, the delay cannot be attributed to the withdrawal of the plea and counter claim only.

[20] The other complaint by the applicants is that the respondents did not provide the reasons for the withdrawal of the plea. This is incorrect as the explanation is found in the letter dated 16 November 2020 wherein amongst others the respondent states:

“3. It appears that with the passing of time the threat of the service of Notice of Bar morphed into a belief that a Notice of Bar had, in fact, been served. After having perused the contents of our files (as you are aware there are two simultaneous matters running in this matter the one pending in the Supreme Court of Appeal and the current action instituted by your client) and the inability to finalize the Plea as for the information was being awaited from client, in time, the mistaken impression was harboured that a notice of bar had been (due to a multiplicity of met tests been dealt with) served.”

[21] For the above reason, I find that the applicants have failed to make out a case that they have suffered prejudice because of the step taken by the respondent in withdrawing the plea and the counterclaim and the filing of the second exception. Accordingly, the applicants' application stands to be dismissed for this reason alone.

The merits

[22] In my view, the applicant's application stands to fail even if it was to be found that the proper evidence was placed before the court in support of the application.

[23] It is trite that the court has the discretion to be exercised judicially in determining whether to grant or refuse an application under rule

30. The consideration has to be balanced by what is fair to both parties. In this respect the then Appellate Division per Holmes JA in *Northern Assurance Co. Ltd. v Somdaka*,^[3] said the court has a discretion:

"to be exercised judicially upon consideration of the circumstances, to do what is fair to both sides."

[24] As indicated earlier, central to the applicants' complaint is the withdrawal of the plea, including the admissions made therein. It is trite that a withdrawal of admission in a plea has to be properly motivated and justified.^[4]

[25] The respondent's explanation for the withdrawal of the plea and the counterclaim was mentioned earlier. The respondent further states in the answering affidavit that the applicant acquiesced to the withdrawal of the plea and the counterclaim by way of withdrawal of their replication and the delivery of the notice of bar. The contention that the applicants acquiesced to the withdrawal of the plea is supported by the averment made by the applicants' attorney in paragraph 12 of the founding affidavit wherein she states the following:

“On 11 December 2020, a Notice of an Irregular Step was served on the Respondent's Attorneys of Record. As set out in the Notice of an Irregular Step, the Respondent withdrew his Plea and Counterclaim without any leave from the above Honourable Court. Subsequent to the withdrawal of his Plea and Counterclaim, the Respondent served a Notice of Exception to the Applicants' Particulars of

Claim in which he inter alia alleged that the claims advanced against the Respondent do not set out the facts to sustain a cause of action, this whilst the Respondent was previously able to answer fully to the claims advanced against him by way of his earlier Plea and Counterclaim. The Respondent was afforded 10 (ten) days in which to remove the causes of the complaint.”

- [26] The respondent explained that he had to file both the plea and a counterclaim together, and he was unable to do so because of the pending judgment in the rule 24 (1), application. There is consequently no plea or counterclaim before this court.
- [27] I agree with the respondent that the issue of the withdrawal of the admissions made in the withdrawn plea does not arise at this stage. The issue will arise once the second plea has been filed.
- [28] As stated earlier, to succeed in an application in rule 30, an applicant has to show prejudice, and it is also pointed out that prejudice must be substantial.
- [29] The applicants contend that the issue of prejudice arises from the delay in the prosecution of the action proceedings due to the respondent's conduct. This issue has been dealt with somewhere in this judgment. It should be emphasised that the respondent cannot be blamed for the delay in the prosecution of the action. The two years delay was caused by both the applications in terms of rules 24 and 30 of the Rules.
- [30] The applicants' application further stands to fail for lack of compliance with the requirements of rule 30(2) of the Rules. Rule 30(2) of the Rules requires that complain about the alleged irregularity or impropriety of a step taken by the respondent should be made within ten days of becoming aware of such a step.
- [31] It is apparent from the reading of the papers that the applicants filed their rule 30 application ten days after becoming aware of the alleged irregularity. They have not sought condonation for this non-compliance with the rules.
- [32] In light of the above I find that the applicants have failed to make out a case that the withdrawal of the plea, the counterclaim and the filing of the exception by the respondent constitutes an irregular step as envisaged in rule 30 of the Rules.

Order

- [33] In the circumstances the applicants' application is dismissed with costs.

E Molahlehi

Judge of the High Court of South Africa, Gauteng local Division, Johannesburg.

Representation:

For the applicant: ADV. I L Posthumus

Instructed by: Pagel Schulenberg Incorporated

For the respondent: adv. Charles E Thompson

Instructed by: Chiba – Jivan Incorporated

Date of the hearing: 28 July 2021

Delivered: 03 November 2021

[1] 210

(5) SA 112 (KZN) at paragraph [7].

[2] (2013/14167)

[2014] ZAGPJHC 28 (7 march 2014).

[3] 1960(1) S A 588 at 595A.

[4] See JR Janisch Ltd v WM Spilhouse and Co Ltd 1962 (1) SA167 [C] at 170.

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