

SOUTH AFRICA / JUDGMENT

Mostert NO v Sable Group Holdings (Pty) Ltd In re: Mostert NO v Sable Group Holdings (Pty) Ltd and Others (2011/43945) [2013] ZAGPJHC 143 (13 June 2013)

[2013] ZAGPJHC 143

COURT

South Gauteng High Court, Johannesburg

BEFORE

T.V. Ratshibvumo

CASE / FILE NUMBER

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SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 2011/43945

DATE:13/06/2013

In the matter between:

MOSTERT ANTHONY LOIS NO

.....Applicant

and

SABLE GROUP HOLDINGS (PTY)

LTD.....First

Respondent

In re:

MOSTERT ANTHONY LOIS NO

.....Applicant

SABLE GROUP HOLDINGS (PTY)

LTD.....First

Respondent

SABLE GROUP HOLDINGS

.....Second

Respondent

GAVIN BARRY JOHN

BOWES.....Third

Respondent

PAUL HARWOOD

NASH.....Fourth

Respondent

IAN ROBERT

KEMP.....Fifth

Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. Introduction. This is a Rule 30 (1) application brought by the Respondents in the main application. In the main application, the Applicant initially instituted an action against the first Respondent only. He now seeks to join the second to the fifth Respondents in the action. The joinder application is scheduled to be heard on a future date. It will be heard together with application to amend the notice of motion and the application to supplement the Founding Affidavit. It was due to the notice of joinder application that the Respondents now bring the Rule 30 (1) application which aims to the set aside of the joinder application.
2. According to the papers before the court, Rule 30 application is brought by the Respondents (all 5 of them). Reading through the papers I fail to see why the First Respondent who had been a party to the proceedings now joins the other four who are opposed to being joined into the proceedings. As for the First Respondent, he has been a Respondent from the beginning. If his application is meant to support the other Respondents with the intentions that he should remain as the only Respondent it would be something else. But the filed papers are silent on that.
3. I refer to these parties as Respondents because they have been referred to as such in the notice of this application. But the second to the fifth Respondents are strictly speaking not yet Respondents until after they would have been joined as such in the future. Should this application succeed, they will never be Respondents at all. For purposes of this application, I will refer to all the Respondents as the Applicants and the Applicant as the Respondent.
4. Rule 30. Rule 30 (1) provides, “a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.” Four alleged irregularities form the basis of this application. All these irregularities emanate from the notice of application to join the second to the fifth Respondents in the main application.
5. The irregularities. First, the application for joinder is said to be impermissible and incompetent under the Uniform Rules of Court in that the Respondent seeks to institute proceedings against the Applicants on the grounds not previously sought in the Notice of Motion, making it look like a new action altogether. Second, the application to supplement the Founding Affidavit by the Respondent could be an attempt to introduce new evidence. Third, the Respondent seeks in prayer 3 and 4 to amend the notice of motion without invoking the relevant Rule (Rule 28), making this prayer incompetent and impermissible. Fourth, the Respondent

seeks in the same application, a blanket order for condonation for failure to comply with any Rule without showing which of the Rules he failed to comply with, or showing a good cause for such an application as it is provided for in Rule 27.

6. It is worth noting that most of the attacks levelled against the Respondent in this application are not based on any particular Rule or authority. The first alleged irregularity for example, the Applicants make a bold statement to the effect that joining them into an application on grounds not contained in the main application is incompetent and impermissible under the Rules. There is no mention of any such Rules that brandishes such acts as impermissible or incompetent.
7. It is necessary to visit the main application to verify the Applicants' allegation that the Respondent seeks to join them on grounds not alleged in the main application (I presume this refers to the second to the fifth Respondents).
8. In the main application, the Respondent claims R21 806 241.00 and after his notice of joinder application, the claim is still in the same figure. An affidavit by the Respondent in support of the joinder of the second to the fifth application alleges the following,

"after further investigation it has become necessary to join the 2nd to 5th Respondents to the main application, by virtue of the contents of the answering affidavit in the main application deposed to by Mr. Gavin Barry John Bowes filed on behalf of the first Respondent, now cited as the third Respondent herein... [T]he third to fifth Respondents were directors of the first and second Respondents. Mr. Kemp (acting with the knowledge and/or cooperation of the third and fourth Respondents) signed for the transfer of the Fund shares to the first Respondent's broker in the name of an account held for the benefit of the first Respondent... The second Respondent, according to Bowes, was the recipient of the proceeds of illegal removal and sale of the Fund shares..."

9. Reading the allegations in the preceding paragraph I am unable to reach the conclusion to the effect that joining the Applicants be as if a new application is instituted against them. The cause of action is still based on same reasons as it was in the Notice of Motion unlike a situation where the main application was to recover money stolen from a pension fund while the action after the joinder would now be based on other grounds unrelated to theft of such funds.
10. Even if joining the Applicants could result in a new application, it would not be incompetent and impermissible as they argue. I am in agreement with the reasoning by Mullins J in *Nedbank LTD v Hoare*¹ when he says,

"[T]he amendment of a cause of action in motion proceedings has moreover received judicial approval. In Berg v Gossyn (1) 1965 SA 702 (O), an application obtained on affidavit a rule nisi relating to a right of way. On the return day it appeared that he had misconceived his cause of action, but that he might be able a relief on a different cause of action. The Court (Hofmeyer J) granted the Applicant leave to amend his founding affidavit by way of supplementary affidavits in which the new cause of action would be set out."

In *Shepherd v Mitchell Cotts Seafreight (SA) (PTY) LTD*² the court held that the general rule that in motion proceedings a party has to make out his case in the Founding Affidavit and may not introduce new matters in the Replying Affidavit is not absolute. This general rule would not find application where it is overridden by the court's discretion and in exceptional circumstances. In *Registrar of Insurance v Johannesburg Insurance Co Ltd*³, Hiemstar J said "since rules of procedure are made to facilitate litigation, they are always subject to the overriding discretion of the Court."

11. An authority referred to by the Applicants in arguing that the amendment to the application would be irregular unless it refers to Rule 27 does not support their contention. The chief finding by the Constitutional Court in the case of *Affordable Medicines Trust v Minister of Health*⁴ was that amendments in motion proceedings will always be granted unless made in bad faith or would cause injustice to other parties which cannot be cured by costs order or parties cannot be put back for purposes of justice in same position as they were when pleading. This authority seems to counter the submission by the Applicants. This view is strengthened by the absence of Applicants' affidavits which could help the court in exercising its discretion in making a finding regarding the absence or presence of prejudice.
12. I have noted that Applicants searched deep and wide for mistakes and errors in the Respondent's papers and uncovered a number of them. They now present these as irregularities. To have perfectly drafted papers in application proceedings is admittedly not easy. While the standards of drafting the papers can be improved, it was too ambitious in my view to suggest that every little error in drafting the application papers should be construed as irregularities.⁵ Slomwitz AJ said in *Khunou and Others v M Fihrer and Son (Pty) Ltd and Others*,⁶

"[O]f course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Court retains an inherent power exercisable within certain limits to regulate their own procedure."

13. In *Hart and Another v Nelson*⁷ Horn AJ (as he then was) said,

"[W]here strict adherence to a Rule of court would give rise to a substantial injustice the court would grant relief which will prevent such an injustice. The court has an inherent power to grant relief where an insistence upon the exact compliance with a Rule of court would result in substantial injustice to one of the parties. (Moluele and Others v Deschatelets NO 1950 (2) SA 670 (T) at 676; also Matyeka v Kaaber 1960

- (4) SA 900 (T).) It is inconceivable that a Court would give effect to a Rule where the implication of such a Rule would clearly cause undue hardship to one party and present an unfair advantage to the other. In *Ncoweni v Bezuidenhout* 1927 CPD 130 Gardner JP remarked as follows at 130.

'The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go so far as I can in granting orders which would help to further the administration of justice.'

14. It is therefore clear from the above authorities that before Rule 30 application can be successful; prejudice on the part of the Applicant must first be proved. With no affidavit in support of this application, the application was doomed to fail since there is no way the court would have been able to exercise its discretion in evaluating the absence or presence of prejudice before granting the request.

15. For the reasons aforesaid, I make the following order.

The application is dismissed with costs.

T.V. RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

Date Heard: 21 May 2013

Judgment Delivered: 13 June 2013

For the Applicants: Adv. D Wood

Instructed by: Mahons Attorneys

Johannesburg

For the Respondent: Adv. LJ Van Tonder

Instructed by: AL Mostert & Company Inc

Bryanston

1 1988 (4) SA 541 at 543 H

2 1984 (3) SA 202 (T) at p 205

3 1962 (4) SA 546 (W).

4

[2005] ZACC 3; 2006 (3) SA 247 (CC)

5 See Pangbourne Properties v Pulse Moving 2013 (3) SA 140.

6 1982 (3) SA 353 (W) at 355H-356A

7 2000 (4) SA 368 (E) at 374G-375F

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