

SOUTH AFRICA / JUDGMENT

West Dunes Properties 92 (Pty) Ltd and Others v Kruger N.O (046444/2024) [2025] ZAGPPHC 19 (10 January 2025) [2025] ZAGPPHC 19

COURT
North Gauteng High Court, Pretoria

BEFORE
T E Joyini

CASE / FILE NUMBER
046444/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 046444/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

DATE

10/01/25

SIGNATURE

In

the matter between:

WEST
DUNES PROPERTIES 92 (PTY) LTD
1st Applicant
(REG
NO: 2004.006372/07)
MOREWAYS
TRADING CC
2nd Applicant
(REG
NO: 2007/163420/23)
ZUIKERBOSCH
BIOCAL PRODUCTS CC
3rd Applicant
(REG
NO: 2007/163403/23)
SILVER
SPADE PROPERTY BROKERS CC
4th Applicant
(REG
NO: 2007/163395/23)
STONE
EDGE PROPERTIES CC
5th Applicant
(REG
NO: 2007/170025/23)
HENDRIK
PETRUS HERMANN PISTORIUS
6th Applicant
(IDENTITY
NO: 7[...])
MILLS
INCORPORATED T/A MILLS & GROENEWALD
7th Applicant
ATTORNEYS
(REG NO: 1997/015884/21)
and
DEREK
JOHAN KRUGER N.O.
Respondent
(in
his capacity as executor in the
deceased
estate HPH Pistorius)

JUDGMENT

Joyini J

INTRODUCTION

- [1] This is an opposed application in terms of Rule 30(1) of the Uniform Rules of the Court (“Rule 30”). The applicants are the respondents in the main application. The applicants raised the issue of an alleged non-joinder, in the main application, by making use of the provisions of Rule 30. It is accordingly this opposed Rule 30 application that is before court.
- [2] It is the applicant’s contention that they are entitled to the relief sought against the respondent. The applicants seek a cost order against the respondent in his personal capacity.
- [3] It is the respondent’s contention that the applicants are not entitled to any relief and that the application stands to be dismissed with costs on a scale as between attorney and client.
- [4] I am indebted to the parties’ counsel for their contribution to this judgment through their submissions, oral arguments, Heads of Argument, affidavits, etc. In crafting this judgment, I have relied a lot on their contribution.

BACKGROUND FACTS

- [5] This is an interlocutory application in terms of Rule 30(1) notice. The applicants in this interlocutory application are the first to seventh respondents in the main application, and the respondent in this interlocutory application is the applicant in the main application.
- [6] The respondent is the sole executor of the deceased estate of the late Mr Pistorius. The sole heir is Mrs Johanna Adriana Pistorius, who is the surviving spouse of the late Mr Pistorius.
- [7] In the main application, the respondent, as applicant, seeks an order that the first to ninth respondents be ordered to supply a veritable multitudes of documents, some going back to 2014.
- [8] The respondent cited neither Mrs Pistorius nor the Master as parties in the main application.

ISSUES REQUIRING

DETERMINATION

- [9] The issues that require the court’s determination are as follows:
 - [9.1] Whether condonation for the late launching of this application should be granted;

[9.2] Whether it is competent for the applicants to raise the issue of non-joinder of a party in application proceedings in the main application by utilising the provisions of Rule 30 of the Uniform Rules of the Court;

[9.3] If so, whether the applicants have made out a case in the founding affidavit to whether there has been non-joinder of the sole heir and the Master; and

[9.4] Whether the Rule 30 application has an ulterior motive of object and whether it constitutes an abuse of proceedings.

[10] In assessing this matter, I shall first consider the point in limine to determine whether condonation for the late launching of this application should be granted.

POINT IN LIMINE: CONDONATION

[11] Rule 30(2) of the Uniform Rules of the Court requires that an application may be brought in terms of Rule 30(1) to set aside an irregular step only if, in terms of paragraph 30(2)(b), 'the applicant has, within ten days of becoming aware of the step by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days.'

[12] The delay is five (5) days. The applicants seek condonation for the late filing of the notice in terms of Rule 30. The respondent will not suffer any prejudice if condonation is granted.

Legal Principles applicable to condonation

[13] Since the judgment in *Melane v Santam Insurance Co Ltd*:^[1], the test has been slightly broadened. Now the test for determining condonation is whether it would be 'in the interests of justice' to do so. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances.

[14] The Supreme Court of Appeal (SCA) in *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited*,^[2] restated the factors that are to be given due consideration in a condonation application as stated in *Melane*. It is stated: "Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[15] In *Grootboom v National Prosecuting Authority*,^[3] the following is stated: "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

Conclusion

on condonation

- [16] In determining this matter, I must be guided by the well-established principles (referred to above) applicable to condonation. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of arguments and oral arguments by their counsel.
- [17] On whether condonation for the late launching of this application should be granted, I am of the view that an applicant for condonation must give a full explanation for the delay. The applicants, in this case, did give a full explanation. The applicant's explanation must cover the entire period of delay and it must be reasonable. In casu, the applicants' explanation did cover the entire period. It is my considered view that the explanation given by the applicants has managed to meet all these requirements. In view of these considerations, it follows that the applicants' application for condonation must succeed.

APPLICANTS' ARGUMENT ON THE JOINDER OBJECTION RAISED IN TERMS OF RULE 30

- [18] According to the applicants, the first question which must be answered is whether an objection of non-joinder can be raised in terms of Rule 30? They are of the view that this question has been answered in the affirmative.
- [19] The applicants quoted the following dictum of Trengove J (as he then was) in *Skyline Hotel v Nickloes*:^[4] "From my experience, it has still always been the practice to raise an objection of this nature by way of a special plea. The advantage of this procedure is that, if it were to be necessary, the Court would hear evidence in regard to the objection. Although it is the practice to raise this kind of objection by way of a plea, it nevertheless appears to me that the procedure of Rule 30 can also be used for this purpose."
- [20] The applicants argue that this passage was referred to without demur by van Niekerk J in *Smith v Conelect*.^[5] According to them, the same views were expressed more recently in *Sherenisa v Minister of Safety*.^[6] They are therefore of the view that non-joinder objection can be raised in terms of Rule 30.

RESPONDENT'S ARGUMENT ON THE JOINDER OBJECTION RAISED IN TERMS OF RULE 30

- [21] The respondent submits that any authority to the effect that Rule 30 may be used to invoke an issue of non-joinder, is firstly, on a factual level different and secondly, must be obiter remarks and thirdly, must be old authority, and fourthly, must have been wrongly decided. The respondent further submits that, for instance, in *Skyline Hotel v Nickloes*,^[7] a judgment on which the applicants rely, it appeared ex facie the contract annexed to the particulars of claim on which the plaintiff sued, that other parties must possibly be joined, but importantly the court did not decide the point, and said on the very next page of the reported judgment (at page 172 A): ".....met die meriete van die aansoek kom, is dit vir my egter nie nodig om uitsuitsel oor hierdie bepaalde punt te gee nie."

[22] According to the respondent, the Skyline judgment is therefore not authority that Rule 30 may be used to raise non-joinder, and it follows also then that the *Smith v Conelect* (that dealt with an exception rule 23) judgment relied on by the applicants, is also not authority for the proposition that Rule 30 may be used to raise matters of non-joinder as the applicants did in this matter. The respondent argues that the last-mentioned judgment was different because the court in that matter decided an exception and not an application in terms of Rule 30.

[23] The respondent further argues in *De Polo v Dreyer and Others*,^[8] that what was said in *Skyline* was obiter, and confirmed that the court in *Skyline* did not decide the point. He is therefore of the view that what *Skyline* said was obiter and *Smith v Conelect* confirms *Skyline*. In other words, *Smith v Conelect* does not assist because it relies on the obiter in *Skyline*. The respondent is, on this basis, adamant that Rule 30 cannot be used for raising alleged non-joinder.

LEGAL PRINCIPLES APPLICABLE TO RULE 30 AND ANALYSIS

[24] The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of suit but upon the manner in which and extent to which the court's order may affect the interest of third parties^[9]. The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal

interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.^[10]

[25] The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might take or if such an order cannot be sustained or carried out into effect without prejudicing that party.^[11]

[26] In *Bester N.O and others v Target Brand Orchards (Pty) Ltd and Others*^[12] Hockey AJ discussed the requirements of Rule 30 as follows: “[13] A court will grant a rule 30(1) application if it is satisfied that there is an irregular step, that the party bringing such application has not taken any further step in the cause of the matter with knowledge of such irregular step, has given its opponent notice to remove such step within 10 days of the former becoming aware of the step, and importantly, if the applicant will suffer prejudice unless the irregular step is removed. In this regard, see *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999(2) SA 599 (TPD) where it was held by Southwood J (at 611 C-F); ‘With regard to the Rule 30 application Mr Van der Linde pointed out that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside. In support of this argument he referred to *Trans-African Co Ltd v 7 Maluleka* 1956 (2) SA 273 (A) at 276 F-H; *SA Metropolitan Lewensversekering-maatskappy Bpk v Louw* NO 1981 (4) SA 329 (O) at 333 D-F and 333 H-334 E; *De Klerk v De Klerk* 1986 (4) 424 (W) at 426 F- 427 B; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabriek GmbH* 1991 (1) SA 823 (T) at 824 G-H; and *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at

496 G. The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored.”

CONCLUSION

- [27] The Uniform Rules of the Court seek to regulate procedure (form) and not substance. Any complaint raised in terms of Rule 30 therefore speaks to an alleged procedural irregularity in the conduct of the litigation. Therefore, in law, Rule 30 deals with procedural irregularities relating to the rules of court. The issue of non-joinder is not a procedural issue, because the substantive law dictates when a party needs to be joined to litigation.
- [28] Rule 30 envisages that any irregular step complained of must cause prejudice to the party seeking to set it aside. It is accepted though, that even if a procedural step may be found to be irregular but if it presents no prejudice in the further conduct of the case to the party complaining thereof, there would be no need to set it aside. See *Trans-African Insurance Co Limited v Maluleka* 1956
- (2) SA 273 (A) at 276F-H. In *Maluleka's* case Schreiner JA held that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.
- [29] In an application under Rule 30, a court will set aside the complained-of irregular step only if it would cause prejudice to the complaining party. On the other hand, even if a case is made out for the relief sought, a court has a discretion not to yield to the aggrieved party's request.
- [30] There is no case before court to the effect that the applicants are prejudiced, or that the applicants will experience any prejudice in the further conduct of the case if the alleged irregular step is not set aside.
- [31] On a conspectus of all the evidence placed before court, I am satisfied on a holistic evaluation of the evidence presented that the applicants have not made out a case for the relief they seek. In view of these considerations, it follows that the applicants' interlocutory application in terms of Rule 30(1) of the Uniform Rules of the Court must fail.

COSTS

- [32] I have considered both parties' argument relating to the costs of this application. I am accordingly not inclined to grant costs in either party's favour.

ORDER

- [33] In the circumstances, I make the following order:

[33.1] The applicants' application for condonation for the late filing of the notice in terms of Rule 30 of the Uniform Rules of the Court is granted.

[33.2] The applicants' interlocutory application in terms of Rule 30 of the Uniform Rules of the Court is dismissed.

[33.3] No order as to costs.

T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicants: Adv BD Hitchings Instructed by: Mills & Groenewald Attorneys Email: bjmills@mgp.co.za or anneri@mgp.co.za For the respondents: Adv Jacques Eastes Instructed by: Tim Du Toit & Co. Attorneys Email: kstoffberg@timdutoit.co.za Date of Hearing: 15 November 2024 Date of Judgment: 10 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 10 January 2025 at 10h00.

[1] 1962

(4) SA 531 (A), at 532C-G.

[2] 2017 ZASCA 88.

[3] 2014

(2) SA 68 (CC) at paragraph [23].

[4] 1973

(4) SA 170 (W) at 159.

[5] 1987

(3) SA (W) at 691H to 692B.

[6] 2012 JDR 0469(FB) at paragraph [8].

[7] 1973

(4) SA 170 (W) at 159.

[8] 1989

(4) SA 1059 (WLD) at 1063.

[9] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 627 (A) at 657.

[10] Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O) at 168-70.

[11] Kethel v Kethels' Estate 1949 (3) SA 598 (A) at 610.

[12] (22593/2019)

[2020] ZAWCHC 183 (21 December 2020).

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