IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: **58561/1021**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
20/03/2023

DATE SIGNATURE

In the matter between:

NEUTRON ENERGY AFRICA (PTY) LTD **Applicant/Defendant**

and

HENGYI ELECTRICAL CO. LTD
Respondent/Plaintiff
(Registration Number: 2008/001180/07)

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:
Introduction

[1] This is an opposed interlocutor application in which the applicant seeks relief in terms of rule 24 (1) of the Uniform Rules of Court. ("the Rules") The relief sought is on the following basis:

1. Condoning the applicant's non-compliance with the time periods for the delivery of its counterclaim in terms of Uniform rule 24 of the Uniform Rules of Court;

2. That the applicant herein be permitted to deliver its counterclaim within 10 (ten) days from the date of this order;

3. Costs of the application, on an attorney and client scale.

[2] The respondent is resisting the application on the following grounds:

2.1. Firstly, that the applicant's conduct showed that it has no *bona fide* intention to file a counterclaim in the matter and the application is an attempt to delay the trial proceeding.

2.2. Secondly, that the applicant did not comply with the requirements set out in rule 24(1).

[3] The respondent on the other hand, seeks an order for the condonation of the late filing of its answering affidavit as well as leave to file a supplementary affidavit.

[4] The applicant is opposing the relief sought by the respondent in this regard.

Factual Matrix

[5] The respondent (plaintiff in the main action) instituted an action against the applicant (defendant in the main action) by way of combined summons on 13 December 2021. The basis of the claim against the applicant is that the respondent delivered goods to the

applicant in terms of a series of purchase orders, despite rendering invoices to the applicant, the applicant failed to make payments to the respondent, which payments amounted to USD189 541.20.

[6] Prior to summons being issued, on 18 March 2021, the respondent issued a written demand for payment in the sum of USD189 541.20, being the amount due, owing and payable by the applicant.

[7] On 29 March 2021 the legal representative of the applicant, acting on its behalf and its instruction, admitted the applicant's liability of the outstanding amount owed to the respondent.

[8] The summons in the main action was served on the applicant on 12 January 2022, whereafter, on 26 January 2022 the applicant delivered its intention to defend the summons. The plea was delivered on 17 March 2022.

[9] On 20 April 2022 the applicant's attorneys of record, Borchardt & Hansen Inc, delivered a notice to withdraw as attorneys of record, and on 22 June 2022 the current attorneys came on record on behalf of the applicant.

[10] The following day, 21 June 2022 correspondence was addressed to the respondent's attorneys informing them of the applicant's intention to amend its plea and to deliver a counterclaim. The applicant addressed further correspondence to the respondent's attorneys on 4 August 2022 requesting consent for the late delivery of the counterclaim. The request for consent was refused.

[11] As a result, the applicant launched the present application in terms of rule 24(1) on 23 August 2022.

[12] A notice to opposed the rule 24(1) application was delivered on 25 August 2022 and the respondent's answering affidavit was delivered on 19 September 2022. It is evident that the answering affidavit was filed out of the stipulated prescribed period of 15 (fifteen) days.

[13] The applicant delivered a replying affidavit on 3 October 2022 and its heads of argument, practice note and list of authorities on 8 November 2022.

[14] On 15 November 2022 the respondent addressed correspondence to the applicant, consenting to the filing of the counterclaim by 29 November 2022.

[15] On 21 November 2022 the defendant filed an application to condone the late filing of its answering affidavit and furthermore it sought leave to file a supplementary affidavit in terms of rule 6(5)(e).

Issues requiring Determination

[16] The following issues need to be determined;

16.1. Should the late filing of the answering affidavit be condoned and furthermore, should the respondent be granted leave to file a supplementary affidavit in terms of rule 6(5)(e).

16.2. Whether a reasonable and acceptable explanation has been advanced by the applicant for the delay in delivering its counterclaim.

16.3. Whether the applicant has shown that it is entitled to institute a counterclaim.

Condonation- Late filing of Answering Affidavit/Filing of Supplementary Affidavit

[17] The applicant argued that the respondent did not tender any explanation for the late filing of its answering affidavit and therefore, the answering affidavit stands to be disregarded or struck and the matter ought to be dealt with on an unopposed basis.

[18] Counsel for the respondent conceded that the answering affidavit was due on Thursday, 15 September 2022 and was only delivered on Monday, 19 September 2022, thus two days late. The reasons for the lateness were extensively set out in its replying affidavit. Due to the applicant persisting with its refusal to consent to the late filing, a condonation application was brought seeking condonation of the two days.

[19] The respondent argued that there is good cause and a reasonable explanation for the delay and therefore condonation should be granted.

[20] Rule 27(3) of the Rules provides the following:

> "The court may, on good cause shown, condone any non-compliance with these rules."

[21] The Constitutional Court in *Grootboom v National Prosecuting Authority*[1] said the following:

> "[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummerand and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant."

[22] In *Pangbourne Properties Ltd v Pulse Moving CC*[2] Wepener J held:

> "On the facts of the present matter I deem it unnecessary for either of the parties to have brought a substantive application for condonation. See *McGill v Vlakplaats Brickworks (Pty) Ltd* 1981 (1) SA 637 (W) at 643C-F, *Hessel's Cash and Carry v SA Commercial Catering and Allied Workers Union* 1992 (4) SA 593 (E) at 599F-600B and the unreported matter of The National Director of Public Prosecutions referred to above. In the matter under consideration all the papers are before me and the matter is ready to be dealt with.
>
> To uphold the argument that the replying affidavit and consequently also the answering affidavit, fall to be disregarded because they were filed out of time will be too formalistic an

[1] 2014 (2) SA 68 (CC) at para [22].
[2] 2013 (3) SA 140 (GSJ) at 147G-148I.

exercise in futility and leave the parties to commence the same proceedings on the same facts *de novo*."

[23] In the present matter the explanation for the delay was explained as follows, the respondent is a Chinese company, situated in Wenghzhou, China. The point of contact for the respondent and the person issuing instructions to its attorneys on behalf of the respondent was a Mr LU Yongqiang ("LU"). LU is also based in China, as such the time zone of 6 (six) hours played a significant role in the delay, because the respondent is at a natural disadvantage when interacting with its clients as the time difference requires that all parties had to synchronise the South African morning with China's afternoon, in order to keep to reasonable office hours for all parties. Taking instructions on, and the commissioning of the respondent's answering affidavit proved difficult. Moreover, LU was away on leave during the period that the affidavit was executed (in September 2022) and the respondent experienced difficulties to reach him. The situation was compounded by the fact that the Commissioner of Oaths, who was arranged to commission the affidavit (electronically), became busy and the appointment had to be postponed to a later date, which led to further delays.

[24] I am of the view that there is clearly no allegation of prejudice to any party nor have I been referred to any such prejudice if the matter is to disposed of on its merits. I can find no reason as to why condonation should not be granted, also taking into consideration the long history of the matter.

[25] The respondent further seeks leave to file a supplementary affidavit in the application for condonation. Rule 6(5)(e) authorizes a court in appropriate circumstances to, in its discretion, permit the filing of further affidavits. Whilst there are normally three sets of affidavits in motion proceedings, a court may, in the exercise of its discretion permit the filing of further affidavits where a consideration of the fundamental issues relevant requires such affidavit to enable the true facts (relevant to the issues and dispute) to be adjudicated.[3]

[3] *South Peninsula Municipality vs Evans* 2001 (1) SA 271 (C) at 283A – H; *Dawood vs Mohamed* 1979 (2) SA 361 (D) at 365H.

[26] The test is no more nor less that of justice and equity, that is a question of fairness to both sides as to whether or not further sets of affidavits should be permitted. This requires a proper explanation as to why such an affidavit was required to be filed, and the court must be satisfied that there is no prejudice in this regard.[4]

[27] In this matter there is a reasonable explanation as to why the evidence was not produced previously. The respondent explained that the supplementary affidavit was filed due to the applicant's refusal to consent to the late filing of its answering affidavit. The facts disclose that it was of considerable materiality to the matter and there was in essence no prejudice to applicant in the interlocutory application, if leave is granted to deal with the supplementary affidavit.

[28] Furthermore, it is in the interests of justice that the affidavits filed to be taken into account and that the matter be finalised and that unnecessary additional costs be avoided.

[29] I therefore condone the late filling of the answering affidavit and the filing of the respondent's supplementary affidavit, I do so in order to decide the present application in terms of rule 24(1) in order to limit further delays so that the main application can proceed in the near future.

Applicant's explanation for the delay to file the Counterclaim

[30] In its founding affidavit the applicant stated that the claim in the main actions relates to alleged disputes between the parties dating as far back as 2018 and 2019. Following its delivery of its plea on 17 March 2022, it became apparent to the applicant that there had been a failure, by its erstwhile attorneys of record, to fulfil its mandate which the applicant provided to them.

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[4] In Erasmus Superior Court Practice 2nd Ed vol 2 D1 – 68 sets out the factors that the Court will consider in such an application.

[31] Subsequent to the realization, the applicant sought a second legal opinion on the issue and it was evident that its mandate was not fulfilled by the attorneys of record. During May 2022 the applicant instructed its current attorneys. Due to administrative issues the parties were only able to consult on 10 June 2022. During the consultation concerns were confirmed that the applicant's plea needed to be amended and that a counterclaim would be filed. This was immediately conveyed to the respondent on 23 June 2022 after the current attorneys came on record. It was further conveyed to the respondent that additional documentation was required to formulate its counterclaim and as soon as the documents were scrutinized the counterclaim would be filed.

[32] The additional documents were received in August 2022 and following a further consultation, the applicant addressed correspondence to the respondent requesting consent for the late delivery of its counterclaim in terms of rule 24(1), which in the end led to the present application.

Legal Principles

[33] In an instance where a plea is delivered without a counterclaim, a party seeking to introduce a counterclaim at a later stage has to have consent of the plaintiff. If consent is denied, the respondent may approach the court in terms of rule 24 (1) for leave to do so.

[34] Rule 24 (1) provides as follows:

> "A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed "Claim in Reconvention". It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention."

[35] The requirements for a successful application in terms of rule 24(1) are the following:

35.1. The applicant has to give a reasonable and acceptable explanation for the delay of the proposed counterclaim, and

35.2. He must show an entitlement to institute the counterclaim.

[36] The starting point in the South African law when deciding on whether to permit an amendment of a pleading had always been the proper ventilation of the dispute between the parties. From this starting point flows the fact that amendments will always be allowed, unless the application to amend is *mala fide*, or unless such amendment would cause an injustice to the other side, which cannot be compensated by an appropriate cost order.

[37] As stated by Bava AJ in *Randa v Redopile Projects. CC*,[5] previous case law makes it clear that an amendment cannot be granted for the mere asking without some explanation being offered therefor, and if the amendment is not sought timeously, some reason must be given for the delay.[6] (par 36, with reference to *Commercial Union Assurance Co Limited v Waymark supra* 77 F–I)

[38] It is trite law that a court hearing an application to permit an amendment has a wide discretion, which should be exercised judicially.[7] The approach that should be followed when deciding whether to permit an amendment has been stated as follows in the *locus classicus* of *Moolman v Estate Moolman*:[8]

> "[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[39] In *Lethimvula Health Care (Pty) Ltd v Private Label Promotion (Pty) Ltd*[9] the court recorded the criteria and principles applicable in an application in terms of rule 24 (1)

[5] 2012 (6) SA 128 (GSJ)
[6] *Commercial Union Assurance Co Limited v Waymark*
[7] *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) 694G–H.
[8] (1927 CPD 27 29)
[9] 2012 (3) SA 143 (GSJ)

in the following terms, there must be a reasonable and acceptable explanation for the delay and the defendant must show an entitlement to institute a counterclaim. All what the defendant is expected to do is to show that, had it not been for the delay, the defendant, would have been entitled to deliver the plea encompassing the counterclaim setting out the material facts thereof in accordance with rule 18 and 20 of the Uniform Rules of Court.

[40] The court in *Lethimvula Health Care (Pty) Ltd supra* also held that defendant is not required to establish a more onerous requirement in order to succeed in an instance where he seeks leave from the court to allow introducing a counterclaim subsequent to the delivery of a plea. The defendant does not have to show that there is a prospect of success in the action for him to be entitled to institute the counterclaim.[10] [*my emphasis*]

[41] The question to be answered is therefore, whether the applicant has succeeded in proving that its explanation is reasonable and that it is entitled to introduce the counterclaim as required in terms of rule 24 (1).

Analysis

[42] The applicant attributes the delay in filing its counterclaim to the failure of its erstwhile attorneys to comply with his mandate. Furthermore, after consulting with its current attorneys, correspondence was immediately forwarded to the respondent's attorneys, informing them of the predicament that the applicant founded itself in. The respondent was at all times kept abreast of the applicant's intention to file a counterclaim.

[43] The respondent contends that the explanation is insufficient and not reasonable because it failed to provide particularity of facts in support of a *bona fide* intention to file its counterclaim.

[44] The respondent further argued that the applicant seeks an indulgence and condonation for non-compliance with the Rules, therefore the applicant must demonstrate that a

[10] Also see *Wigget v Wannenburgs* 2022 JOL 54178 (GP).

valid and justifiable reason exists for the non-compliance. The burden lies with the applicant to prove good cause for the relief it seeks.[11]

[45] In considering good cause, the Court has a wide discretion and should consider all the facts in order to satisfy itself that there is a reasonable and acceptable explanation for the non-compliance of the Rules.[12] The principles upon which such a discretion is exercised have been set out in several cases, namely that there must be a satisfactory explanation furnished for the delay and that the party requesting the condonation must have a *bona fide* case.[13]

[46] The applicant did not deal with the detail of the counterclaim, no draft in this regard was placed before me in order to assess the contents of the counterclaim. I am not in a position to make any conclusions about the strength of the averments in the counterclaim. However, in *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others*[14] the court was seized with a similar application under rule 24(2), Schabort J discussed the requirements of such an application and found that;

> "The need to establish a *prima facie* case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf Shield Insurance Co Ltd v Zervoudakis **1967 (4) SA 735** (E) at 737G – 738A. I do not think that the condition in Rule 24(2) must be construed in this way."

[47] In my view, the substance of the counterclaim would be dealt with in the main application. The applicant has to demonstrate that the counterclaim it wishes to file is valid in law, it does not have to show that it will *prima facie* succeed in the claim.

[48] It is apparent from the applicant's papers before me, that the applicant had for all intents and purpose wanted to file a counterclaim. Had it not been for the conduct of his erstwhile attorneys the applicant would have filed its the counterclaim.

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[11] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A and *Federated Employers Fire General Insurance Co Ltd v Mckenzie* 1996 (3) SA 360 (A) at 362F-G.
[12] *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 CC at 238G-H.
[13] See: Erasmus: Superior Court Practice B1 – 71 - 72
[14] 1990 (1) SA 393 (W) at 395H.

Immediately on upon realising the *omission* the respondent was informed of the applicant's discission to file its counterclaim.

[49] The question is whether the applicants' condonation application should be granted due to its erstwhile attorneys' failure to fulfil their duty to the applicant. Courts in general are not ordinarily loath to penalise a litigant on account of his attorneys' negligence.[15] This was also confirmed in *Reinecke v Incorporated General Insurance Ltd*[16] where it was held that a litigant should not be punished for an error of its attorneys of record.

[50] It is important to note, that the dispute between the parties arose as far back as 2018/2019 and invoices and documents had to be scrutinized prior in filing the counterclaim. Again, the applicant kept the respondent informed of its progress in this regard. I am not in a position at this stage to conclude that the applicant does not intent pursing its claim against the respondent as argued. Further actions will inevitably result, if the leave sought in terms of rule 24(1) is refuse, this will result in further delays and costs which can be avoided if all disputes between the parties are ventilated in the trial.

[51] The respondent will suffer no prejudice if leave is granted to the applicant to file its counterclaim, the respondent will not lose its procedural and substantive rights in terms of the rules. Any prejudice the respondent may suffer can be cured by an appropriate cost order at the end of the trial.

[52] The applicant stands to be prejudiced if the application is refused. The applicant seeks a refund from the defendant regarding faulty goods delivered by the respondent. If the counterclaim succeeds the respective claims can be set off. If leave is refused, the court hearing the main application will not have all the facts before it in order to come to just and fair conclusion. No harm will ensue from the disputes being ventilated in a single trial.

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[15] *Huysamen & another v Absa Bank Limited & others* (660/2019) [2020] ZASCA 127 (12 October 2020) para [14].

[16] 1974 (2) SA 84 (A) at 92K-H.

[53] In my view, a good and *bona fide* explanation is offered as to the reason for the delay in the matter. The applicant has successfully discharged its onus in terms of rule 24(1) and therefore, has succeeded in proving its entitlement to institute a counterclaim.

[54] The wording of rule 24(1) indicates the conferment of a discretion on the court. In the exercise of my discretion, for the reasons stated together with considerations of justice, equity and convenience, I am of the view that I should exercise my discretion in favour of the applicant and therefore leave should be granted to the applicant to introduce its counterclaim in terms of rule 24(1).

[55] It follows that the application must succeed.

Costs

[56] The applicant argued that it was put under unnecessary trouble and expenses to proceed with the application and as such the respondent should pay the costs on a scale between party and party alternatively the costs should be costs in the cause.

[57] The view of the respondent was that the application be dismissed with costs as it failed to comply with the provisions of rule 24 (1).

[58] An award of costs is a matter of judicial discretion by the court and that the successful party should as a general rule be awarded costs.[17] It is also generally accepted that a party seeking an indulgence from the court is to be seized with the costs of that indulgence.

[59] Considering the facts of this matter and its circumstances, I am of the view that that costs should be costs in the action.

Order

[60] I therefore make the following order:

[17] *Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC) at 624.

1. Condonation for the late filing of the answering affidavit is granted.

2. The respondent is granted leave to file its supplementary affidavit

3. Leave is granted to the applicant to deliver its counterclaim to the notice of motion, within 10 days of the date of this order.

4. The costs of this application are ordered to be costs in the action.

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 20 March 2023.

DATE OF HEARING: **28 February 2023**

DATE JUDGMENT DELIVERED: **20 March 2023**

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