

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 011884/2022

DOH: 20 September

1)REPORTABLE: NO
2)OF INTEREST TO OTHER JUDGES: NO
3)REVISED.

.....**28 May 2024**
SIGNATUREDATE

In the matter between:

NEW SALT ROCK CITY (PTY) LTD

First Applicant

ZAMIEN INVESTMENTS 102 (PTY) LTD

Second Applicant

CSHELL 80 (PTY) LTD

Third Applicant

And

KILKEN PLATINUM (PTY) LTD

First Respondent

KILKEN HOLDINGS (PTY) LTD

Second Respondent

KILKEN INVESTMENTS (PTY) LTD

Third Respondent

KILKEN ENTERPRISES (PTY) LTD

Fourth Respondent

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 28 MAY 2024

BAM J

A. Introduction

1. Before the court are two interlocutory applications. The first is the respondents' Rule 30 application to remove the reply filed by the applicants on 2 November 2022 as an irregular step. The second is the application for condonation brought by the applicants. Both applications arise against the background of the application to wind up the first respondent, on the basis that it is just and equitable, as envisaged in Section 81 (1) (d) (iii) of the Companies Act¹ (the main application).

B. Background

¹ Act 71 of 2008.

2. I shall, since it is convenient to do so, refer to the parties as they are in the main proceedings. The applicants launched a motion to liquidate the first respondent on 8 August 2022. The answering affidavit was filed on 14 September and the applicants' reply was due on 28 September 2022. It was filed on 2 November and, in the event, 25 court days out of time. On 15 November, the respondents served a notice in terms of Rule 30 (notice). The Notice was followed by a Notice of application in terms of Rule 30, filed on 13 December 2022. Both the notice in terms of Rule 30 and the Notice of Application did not elicit any response from the applicants.

3. In advancement of the Rule 30 application, the respondents deal with the question of prejudice in the following terms; they say:

- a) The relief sought by the applicants is draconian and far reaching, thus the applicants' failure to timeously prosecute the application continues to prejudice the respondents.
- b) For as long as the respondents have the sword of the application over their heads, they are prejudiced.
- c) The respondents are entitled to know the case they are invited to meet but, in this case, they do not because they do not know whether the replying affidavit will be admitted.
- d) The respondents are prejudiced by the applicants' failure to seek condonation so that they can understand the reasons for the delay and motive for the applicants' conduct.
- e) The fundamental difficulty is that the applicants have raised a new matter in the replying affidavit, which, if the court is to adjudicate the

matter on the correct factual position, will necessitate that the respondents be afforded the opportunity to file a fourth affidavit to address the new matter.

4. On 17 April 2023, the applicants delivered a composite affidavit opposing the Rule 30 application and at the same time initiating a condonation application. Since the application in terms of Rule 30 will atrophy in the event the application for condonation is granted, it makes sense to address the merits of the condonation.

C. Merits of Condonation

Applicants' case

5. The applicants commence their case by addressing the nature of the relief sought in main application, the extent of the application and its complexities. They say the application is not an ordinary run of the mill liquidation application. The papers were lengthy and comprised voluminous pages of annexures to illustrate the breakdown of a commercial relationship between various corporate entities which are shareholders in the first respondent. The answering affidavit was equally lengthy, about 165 pages and 410 pages of annexures. The applicants, in hindsight, realise that it would have never been possible to file the reply within the period set out in Rule 6 (5) (e) and, for this reason, they should have sought an extension in terms of Rule 27.
6. Although the applicants' attorney of record had briefed junior and senior counsel, and the junior had to start preparing the draft reply as of 15

September, they only managing to prepare a memorandum to senior counsel on 18 September and, on 21 September, counsel was consulted at length for the preparation of the reply. In light of the voluminous nature of the answering and founding affidavits and annexures, the applicants submit it was impossible to complete the replying affidavit. Upon receiving the draft from senior counsel, the applicants sought the opportunity, where necessary, to review and supplement some of the annexures.

7. The applicants further submit that they succeeded to have the main application and three further applications between the parties certified as Commercial Court cases. The certification was completed on 17 November. As a consequence of the certification, all four matters involving the parties are now subject to the direction and the outcomes of the judicial case management meetings. To this end, a timetable has been authorised which makes provision for, *inter alia*, the respondents to file a fourth affidavit in the event the Rule 30 application is denied. The applicants conclude that, as a consequence of case management, the respondents' complaints about prejudice relating to the delay and questions about which papers will be before the court have thus been alleviated.

8. In response to the criticism levelled by the respondents regarding the defects in the application for condonation, the applicants submit that the paramount consideration in judging an application for condonation is what is in the interests of justice. They say it would be contrary to the interests of justice to exclude the replying affidavit. Lutzkie, they say, is accused of nefarious

conduct, of bullying and extortion. He must be afforded the opportunity to confront the allegations. On the matter of prospects of success, the applicants submit that it is not necessary for prospects of success to be evaluated in order to conclude on what is in the interests of justice in relation to this application.

9. It is further the applicants' submission that it would not be in the interests of justice to exclude the applicants' replying affidavit as the court is entitled to have all the relevant information before it in order to properly adjudicate the case.

10. As for the respondents' claim that the applicants have come to court with dirty hands, the applicants submit that, for this reason and in order for the court to validly assess the respondents' claims of abuse of process, the replying affidavit should be allowed.

Respondents case

11. In their reply to the applicants' composite affidavit answering Rule 30 and initiating the condonation application, the respondents launched trenchant criticism against the application for condonation. They opined about the real reason the applicants delayed their reply and accused them of coming to court with unclean hands. The respondents end their reply by stating, in the face of the applicants' glaring failure to deal with the prospects of success that, in any event, the main application lacks prospects of success. Thereafter, the respondents proffer reasons why the main application lacks

prospects. They ask the court to dismiss the defective application. Mindful that the court may, in the exercise of its discretion, grant condonation, the respondents state that, in such event, they would seek leave to file a fourth affidavit so that the court has the full factual context when it adjudicates the main application.

12. The respondents complain that both the Notice in terms of Rule 30 filed on 15 November and the application filed on 13 December elicited no response from the applicants. The applicants were prompted to bring the application for condonation only by the events arising from the case management meeting of 23 April 2023, in which dates were agreed for the exchange of the various affidavits amongst the parties. Only then did the applicants bring the application for condonation. They complain that the applicants have not explained the delay in bringing the condonation application.

13. On the substance of the application, the respondents complain that there are no dates and no mention of what occurred from 22 September to 1 November when the affidavit was commissioned. They state that the explanation is not full and frank. It lacks details such as when junior counsel was able to prepare drafts and when he gave the draft to senior counsel. There are no details as to why an extension was not sought or why the non availability was not disclosed at an early stage. The respondents complain that the explanation for the delay is given without an apology or contrition.

The fact that dates for exchanging affidavits were set in case management does not assist the applicants, they say.

14. Responding to the applicants' failure to deal with the prospects of success, the respondents argue that there are, in any event, no such prospects. The applicants have not made out a case for the winding up of the first respondent. Here, the respondents submit, inter alia, that the objective facts suggest it would be wholly inappropriate to grant the winding up, that the applicants have come to court with unclean hands and that the application is an abuse.

15. The further point raised by the respondents is merely recorded for completeness. It is sufficient to record that the applicants deny the respondents' claims. The respondents claim that the true reason for the delay has to do with the unauthorised and hence illegal access and downloading of electronic files by a former employee of the Moti Group in the name of one Clinton van Niekerk. It is said that during or about September or October 2021, Van Niekerk resigned his position with the Moti Group. It was subsequently discovered that he had caused about 4000 electronic files containing private and confidential information relating to Moti, his family and the Moti Group to be downloaded and stored in various servers in undisclosed locations and devices. Van Niekerk is said to have favoured Lutzkie with the information obtained by illegal means, which the latter has used to bolster the applicants' case in the main application.

D. The law

16. It is trite that an applicant for condonation must show good cause.

'Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor.' [12]...Good cause for the delay' is not simply a mechanical matter of cause and effect....'²

17. In deciding whether sufficient cause has been shown, the court in *Nair v Telkom SOC Ltd and Others*, explained, with reference to *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 C - F, that:

'... the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ...'³

18. Factors which usually weigh with the court in considering an application for condonation include:

'...the degree of non-compliance, the explanation therefor, the importance of the case, a 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.'⁴

² *Madinda v Minister of Safety and Security, Republic of South Africa* (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008), paragraph 10, 12.

³ (JR59/2020) [2021] ZALCJHB 449 (7 December 2021), paragraph 11.

⁴ *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* (98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) (6 June 2017), paragraph 26.

19. The standard for considering an application for condonation is the interests of justice, but whether it is in the interests of justice to grant condonation depends on the circumstances of a particular case.⁵

'The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'⁶

20. Prospects of success, though an important consideration, are not decisive⁷ of an application for condonation.

E. Discussion

21. I accept the fact of the extent of paperwork involved in the answering affidavit and the accompanying annexures. The allegations mapped out in the founding affidavit, the defences mounted by the respondents, and the details pertaining to the nature of the relationship between the shareholder groupings and the alleged causes of the breakdown put this application beyond the realm of the usual liquidation type of case. It is an unusual and complicated case and, on that basis, I accept that it required time.

22. It is to the question of prejudice that I now turn to. Since referral to case management, the four cases between the parties are now driven by way of

⁵ *Van Wyk v Unitas Hospital* (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20.

⁶ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* (CCT45/99) [2000] ZACC 3; 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) (30 March 2000), paragraph 6; *Aurecon South Africa (Pty) Ltd v City of Cape Town* (20384/2014) [2015] ZASCA (9 December 2015), paragraph 17; *Steenkamp v Edcon Limited* [2019] ZACC 17, paragraph 36.

⁷ *Darries v Sheriff of the Magistrates' Court Wynberg and Another* (25/96) [1998] ZASCA 18 (25 March 1998), paragraph 9.

case management. In that regard, I accept that whatever prejudice may have been suffered by the respondents as a result of the delay in filing the replying affidavit were indeed alleviating by corralling these matters and driving them through case management. I did not understand the respondents to be arguing for a contrary position in this regard.

23. On the question of not knowing what evidence would be before the court when the matter is finally adjudicated, it is common cause that the timetable that was eventually accepted at case management of 23 April 2023 makes provision for the respondents to file a fourth affidavit in the event the replying affidavit is admitted. This element of prejudice no longer obtains.

24. As a result of the certification process, there has been no inconvenience to the court. One must also keep in mind that one is dealing here with a delay of 25 court days. The *ratio* relied on by the respondents from *Darries v Sheriff*; and *Commissioner for the South African Revenue Service v Van der Merwe*, to mention a few, were addressing the circumstances presented in those cases, which included, *inter alia*, repeated conduct demonstrating disregard for the rules of the court through the stages of the appeals and lengthy delays. The stages at which this matter is also distinguishes it from the two appeals.

25. I am mindful that the applicants did not bring the application for condonation at the earliest possible time, but this is eclipsed by the

certification process which brought the cases under judicial case management.

26. I now consider the defects raised by the respondents against the application and start with the issue of prospects of success. The simple answer is this, each case is judged on its own merits. The court in *Madinda*⁸ makes plain that in any given factual matrix, it may be that one or more of the recognised factors that guide the court are relevant. In the present case, which is characterised by complexities, claims of breaches of company laws, allegations of dishonesty, of circumventing various governance rules, the size of the monies involved and the need to see justice being done, prospects of success are clearly not a relevant factor.

27. The matters mentioned in this paragraph 26 of this judgment all weigh heavily in favour of admitting the replying affidavit. For all these reasons, I conclude that the interests of justice demand that the replying affidavit be admitted. That means the respondents must be afforded the opportunity to file a fourth affidavit.

28. On the question of costs, the respondents are entitled to their costs. I am not persuaded that they are entitled to the costs of two counsel.

F. Order

⁸ Paragraph 16 *supra*.

- (i) The application for condonation is granted. The application in terms of Rule 30 in that event fails.
- (ii) The respondents must file their affidavit addressing the new matters within 20 days of this order.
- (iii) The applicants must pay the respondents' costs.

N.N BAM
JUDGE OF THE HIGH COURT,
PRETORIA

Date of Hearing: 20 September 2023

Date of Judgment: 28 May 2024

Appearances:

Applicants' Counsel: Adv J.J Brett SC with Adv
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First, Second, Third, & Fourth

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