



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1307/2021

In the matter between:

DESCHANEY INVESTMENTS (PTY) LTD

APPLICANT

and

ARDAIN COMMERCIAL CC

RESPONDENT

JUDGMENT

Msiwa AJ

[1] The applicant applies for the condonation of the late delivery of the notice to strike out a letter written "*Without Prejudice*" attached to a replication in a pending trial before this Honourable Court. It is contended that the letter constitutes inadmissible evidence and should not form part of the pleadings.

[2] The replication with the letter "*Without Prejudice*" was served on the respondent's attorneys on 20 July 2022. The application to strike out was served on the respondent's attorney on 19 August 2022.

[3] The notice was filed out of time—a period of 11 (eleven) court days outside the period referred to in Rule 23(2). On 2 September 2022, the respondent served a notice of intention to oppose the application to strike out.

[4] It is discernable that the applicant's grounds for not filing an application for condonation of late delivery of the notice to strike out the "*Without Prejudice*" is twofold;

- (a) Mr Michael Jackson states, expressly that, it never occurred to him that there would be an issue that would require a formal application for condonation.¹
- (b) There is an agreement between them to reciprocate each other on extension of time, regardless of the provisions of the Rules.²

[5] Further, they baffled their minds interpreting the case of *KLD Residential CC v Empire Earth Investments* [2017] ZASCA 98, which they believe was central to the issue of the litigation. The applicant's counsel held a view that the question to be determined at the hearing of the matter was whether or not the letter falls within the exception.

[6] It was argued that the application is brought in terms of Rule 6(11) by the applicant's counsel and seeks an order that paragraphs 29, 30, 36 and 42.3 of the respondent's replication as well as Annexure "J1" and "J2" to be struck out with costs.

[7] The respondent's opposing grounds are that the application is wanting of condonation for the late filing of the striking out application; secondly that the applicant has not made a case for striking out; thirdly, the respondent argues that the applicant's launching of the instant application amounts to piecemeal litigation. The issue will still be dealt with in the main trial.

Legal Principles Applicable

[8] Rule 6(11) provides that an application is incidental to pending proceedings if it is subordinate or an accessory to the main application, while at the same time being distinct from the main proceedings.

¹ Affidavit of Michael Jackson at para 6 – 'The parties have been reasonably relaxed regarding timelines in relation to the history of the litigation and it never occurred to me that there would be an issue that would require a formal application for condonation.'

² 'The plaintiff's attorney emailed me on 19th September 2021 requesting an extension of time from 22 September 2021 until 29 September 2021 and indicated that he would be happy to repay the indulgence if I never needed it...'

[9] An interlocutory application was described as an "*incidental*" application for an order at an intermediate stage in the course of litigation, aimed at settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties.³

[10] Rule 23(2) states that:

"Where any pleading contains averments which are scandalous, vexatious or irrelevant, the opposing party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for a hearing within five days of the expiry of the time limit for the delivery of an answering affidavit, or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for a delivery of a replying affidavit, referred to in rule 6(5)(f): Provided that –

- (a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleadings, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and
- (b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is granted.

[11] The court in this matter must take into account some of the following factors:

- (a) The extent and cause of the delay for delivery of the application;
- (b) The reasonableness of the explanation of the delay;
- (c) The effect of the delay on administration of justice; and
- (d) The importance of the issue.

[12] The particular circumstances of each case will determine which of these factors are relevant. In the instant case, the factors to be determined are (a) and (b).

³ *Graham v Law Society, Northern Provinces and Others* 2016 (1) SA 279 (GP).

[13] An applicant should, whenever he realises that he has not complied with a rule of court, apply for a condonation without delay.⁴ The applicant did not conform with this requirement, as shown above.

[14] The application is an interlocutory as it seeks to strike out J1-J3, the "*Without Prejudice*" letter in the replication, while the trial is still pending before the Honourable Court.

[15] The contention of the applicant is that the contents of the letter constituted irrelevant evidence and therefore inadmissible, hence the instant application.

[16] The opposition's argument is presented hereunder:

- (a) The application to strike out has been launched out of time without an application for condonation so argued by the respondent.
- (b) The applicant has not complied with Rule 23(2) and has failed to make a case for the relief sought.
- (c) It is also argued that the application is textbook piecemeal litigation and stands to be dismissed.
- (d) The application is an abuse of process, the applicant has accepted the position set out in the settlement letter, thus the relief is of no practical benefit.
- (e) The applicant's interpretation of *KLD Residential CC v Empire Earth Investments* [2017] ZASCA 98 is devoid of correctness.

[17] It is common cause that prescription is a live issue at trial, given the special plea. The application to strike out the letter will impact on the trial in the argument of the prescription.

[18] The issue to decide first is whether the late filing of the delivery of notice to strike out the letter can be condoned or not. Does it mean that the disposal of this intellectual application in terms of rule 6(11) has a final dispositive effect in the

⁴ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.

pending main trial before this Court? if not, is the issue in terms of rule 6(11) not amounting to a piecemeal litigation of issues still could be dealt with in the main trial.

[19] It is not in dispute that the condonation application was/is necessary when such issue was taken up by the respondent upon receipt of the applicant's response.

[20] The Rules of this court make it plain that interlocutory applications must be filed within a reasonable time, *prima facie* in the absence of special circumstances, this would not be longer than the times prescribed in Rule 6(5).⁵

[21] It is trite law that once there is non-compliance with a Rule of this court, the party must seek a condonation for such non-compliance before pursuing his application. That application for condonation must be satisfactory and give a full account for the delay occasioned for the filing of whatever pleading or affidavit.

[22] In the instant application, Mr Michael Jackson, concedes that for eleven days, the applicant did not file the application for condonation. His reasons are set out in his affidavit.⁶

[23] The Rules are set to regulate the litigation before court, hence the party breaching the Rule must purge the non-compliance. The Rules are enforceable prescripts which must be complied with by the legal representatives at all times when litigation serves before court.

[24] The applicant advises the court of the parties' relaxation in complying with the Rules. Secondly, they reciprocate each other with non-compliance with time frames stipulated by the Rules.

[25] While it is a plausible and commendable practice that practitioners should take any steps at their disposal to a possible settlement of the matter before court, such cannot be done at the disregard of the Rules of the court's authority.

[26] So long as the court is seized with the matter, it has authority over it and accordingly, its Rules are applicable in disposing of the matter. Once the parties run

⁵ *Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W) at 25H-26A.

⁶ Paragraphs 6, 8, 9 and 11.

litigation parallel to the court's Rules, substituting them with theirs, there will be anarchy.

[27] If such is to be countenanced, it will mean there is no value for the court's power and its Rules. It is absurd that practitioners are to have their own rules of understanding each other, and do as they please about the matter before court at a flagrant disregard of the Rules. Once the matter is serving before court, the Rules must be adhered to. The court always enforces rules judiciously.

[28] The court remains having an inherent authority in finalisation of litigation serving before it. It has authority to protect and enforce its rules in litigation before it. However, the parties are encouraged to discuss settlement proposals within the rules of the court.

[29] I am of the view that there are no reasonable and satisfactory explanations submitted for the non-compliance with the Rules for filing out of time the application for condonation for striking out.

[30] Further I am persuaded by the respondent's counsel's argument that the interlocutory application serving before this Court amounts to a piecemeal litigation of the main case. The issue of irrelevance can be raised during the hearing of the main case still to serve before this Court.

[31] In the light of the above, I am loathe to deal with the merits and demerits of the striking out of the paragraphs in question of the replication as well as annexure "J1-J2".


[32] I am not satisfied that the applicant will be prejudiced by refusal of this instant application in the future conduct of his case in the main trial pending before this court.

Order

[33] In conclusion, I make the following order:

- (a) The application for condonation of the late filing / delivery of the notice to strike out is hereby refused;

- (b) The application to strike out 'paragraphs 29, 30, 36 and 42.3' of the plaintiff's replication as well as annexure "J1" – "J2" thereto is dismissed; and
- (c) The applicant is ordered to pay the costs of the application.

A handwritten signature in dark ink, appearing to read 'M. Siwa', is written over a horizontal line.

MSIWA AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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| Case Number | : D1307/2021 |
| Applicant | : DESCHANEY INVESTMENTS (Pty) Ltd |
| Represented by | : ADVOCATE PILLEMER SC |
| Applicant attorney | : COX YEATS |
| Respondent | : ADRIAN COMMERCIAL CC |
| Represented by | : ADVOCATE REECE RENAE KISTEN |
| Respondents attorney | : PATHER & PATHER ATTORNEYS INC |
| Date of Hearing | :07 MARCH 2023 |
| Date of Judgement | : 31 MAY 2023 |