



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 2310/2019

In the matter between:

KEVIN NASH

Plaintiff

and

CORNELIUS ROELOFSE

Defendant

REASONS FOR JUDGMENT

LAING J

[1] The court previously made an order in relation to several interlocutory applications pertaining to the above matter. The reasons follow in the paragraphs below.

Background

[2] The plaintiff, in the main action, alleges that he and the defendant concluded a commercial partnership agreement in 2007. Pursuant thereto, they operated the Tranquil House Bed & Breakfast, which carried on business in both Komani (Queenstown) and Dundee. Subsequently, pleads the plaintiff, the agreement was

dissolved but the defendant has refused to render an account of the business of the partnership. The plaintiff claims, *inter alia*, an order for the appointment of a receiver or a curator to realise and liquidate the partnership assets, discharge its liabilities, and prepare a final account.

[3] The defendant denies that any partnership agreement was concluded. He pleads that he previously started the Tranquil House Bed & Breakfast on his farm as a sole proprietor and later converted the business to a private company, of which he is the sole director and shareholder. At some stage, he and the plaintiff jointly purchased a property situated at 10 Berry Street, Komani ('the property'), from which the defendant conducted his business. Although the parties were involved in a personal relationship with each other, the defendant pleads that they were never business partners. He counterclaims for, *inter alia*, an order terminating joint ownership of the property, and directing that he pays to the plaintiff half of the net proceeds thereof pursuant to the registration of the property in the defendant's name, less monthly bond instalments, rates and taxes, and related expenses already incurred by the defendant.

[4] The plaintiff, in his plea to the counterclaim, raises a special plea to the effect that many of the expenses claimed by the defendant in relation to the property have since become prescribed. In his plea over, the plaintiff denies that the defendant paid for the expenses in his personal capacity and avers that these were paid from the revenue generated by the partnership itself and (later) the private company.

[5] The registrar previously allocated 2 March 2023 as a trial date. The matter was postponed, however, until 21 August 2023, upon which date only the defendant's condonation application and the plaintiff's application in terms of rule 30A of the Uniform Rules of Court ('URC') would be heard. These were the matters that came before this court.

Defendant's condonation application

[6] The defendant's attorney, Ms Joanne Anthony-Gooden, deposed to a founding affidavit and stated that, on 26 April 2022, the defendant delivered notice in terms of rule 36(9)(a) of his intention to call Mr Arno Kruger as an expert witness for the forthcoming trial. His evidence was necessary as he was the accountant for the defendant's business. Ms Anthony-Gooden alleged that the defendant held back on delivery of a summary of the evidence to be led, as contemplated under rule 36(9)(b), because he had hoped that the dispute could be resolved by way of mediation. He had also hoped to curtail his legal expenses.

[7] When it became clear that mediation had failed, the defendant served the summary on 15 February 2023, considerably out of time. On the same date, the plaintiff gave notice of his intention to amend his particulars of claim. A couple of days later, the plaintiff wrote to the defendant, pointing out that the summary was out of time and did not satisfy the requirements of the relevant rule. The defendant responded, saying that Mr Kruger's evidence was mostly factual in nature. On 23 February 2023, the plaintiff gave notice of his intention to amend his plea by introducing a special plea of prescription and delivered an application for the postponement of the trial. The trial was indeed postponed, as already mentioned.

[8] On 6 March 2023, the plaintiff delivered a notice in terms of rule 30A. He indicated that the defendant's notices in terms of rule 36(9)(a) and (b) were both served out of time and that the defendant had failed to provide a summary of Mr Kruger's opinion and reasons upon which such opinion was based. This prompted the defendant to bring the present application on 17 March 2023.

[9] Ms Anthony-Gooden contended that the plaintiff would not suffer any prejudice if condonation was granted. He would have sufficient time to deal with the annual financial

statements ('AFS') attached to the defendant's notice in terms of rule 36(9)(b) and could appoint his own expert where necessary. It was, moreover, for the trial court to decide what to make of Mr Kruger's summary. Ms Anthony-Gooden averred that the defendant deemed it necessary to deliver an addendum to Mr Kruger's summary considering the approach adopted by the plaintiff. Consequently, the defendant sought condonation for non-compliance with rules 36(9)(a) and (b) and leave to file the above addendum.

Plaintiff's rule 30A application

[10] The plaintiff responded to the defendant's condonation application by delivering a rule 30A application. He sought the striking out of the defendant's notice to appoint Mr Kruger as an expert witness and the striking out of his summary.

[11] The essence of the plaintiff's argument was that the defendant had given notice of his intention to call an expert witness without the permission of either the plaintiff or the court, after the close of pleadings, and outside the relevant time limits. Furthermore, asserted the plaintiff, the defendant had delivered a 195-page summary which made no recommendations or reasons in relation thereto. It said nothing about the evidence to be led and comprised 'a morass' of the defendant's annual financial statements ('AFS') as well as those of the private company for various periods.

[12] The plaintiff went on to contend that the defendant intended to call Mr Kruger both as a factual witness and as an expert witness but failed to explain what his opinion was and the basis thereof. Moreover, the plaintiff alleged that Mr Kruger used to be involved in a personal relationship with the defendant. Overall, the integrity and independence of Mr Kruger had to be called into question.

[13] Importantly, the plaintiff drew attention to the amendments made to rule 36, which had taken effect on 31 May 2019. Expert witnesses can only be appointed by consent between the litigants or with the leave of the court, in accordance with the applicable time limits. The defendant had simply failed to comply.

[14] The plaintiff argued that there was no need for the opinion of an expert witness regarding the factual dispute as to whether a partnership agreement had come into existence. To call an expert witness in those circumstances, averred the plaintiff, would be a fruitless and wasteful exercise.

[15] In his *ad seriatim* response to Ms Anthony-Gooden's founding affidavit, the plaintiff pointed out that he would indeed suffer prejudice. The defendant had not explained what the addendum to the summary would comprise or why it would even be necessary. He had, in the end, failed to provide an acceptable summary of the evidence of his expert witness and the reasons for Mr Kruger's opinion.

Defendant's answering and replying affidavit

[16] In the defendant's response to the rule 30A application, Ms Anthony-Gooden averred that the plaintiff had never objected to the late delivery of the defendant's notice in terms of rule 36(9)(a) until 6 March 2023. This was because the parties' legal representatives had agreed that if mediation efforts failed then the defendant would be afforded an opportunity to deliver an expert witness summary in terms of rule 36(9)(b).

[17] Ms Anthony-Gooden reiterated that the annexures to the summary comprised the AFS for the defendant's business, previously operating as a sole proprietorship, then a private company. They also pertained to the defendant in his personal capacity. Mr Kruger would be able to attest to how the AFS were drafted, who had instructed him,

and whether there was any evidence to confirm the existence of a partnership agreement, as the plaintiff alleged. She asserted that the purpose of rule 36(9) was to remove the element of surprise by alerting the plaintiff, in this case, to the nature of the evidence to be led so that he could prepare his cross-examination accordingly and arrange for his own expert witness where necessary. It was for the trial court, contended Ms Anthony-Gooden, to decide on the weight to be attached to Mr Kruger's testimony. His relationship with the defendant and his prior relationship with the plaintiff, which the latter had failed to mention, were irrelevant to the question of whether condonation should be granted. Importantly, on 3 April 2023, the defendant had provided the plaintiff with a copy of the addendum that he sought to file. This would have addressed any shortcomings in relation to Mr Kruger's summary and cured the prejudice that the plaintiff alleged. The plaintiff, nevertheless, proceeded with his rule 30A application on 14 April 2023.

[18] Turning to the condonation application, Ms Anthony-Gooden emphasised in reply that the trial had been postponed because the plaintiff had given notice of his intention to amend his plea. The defendant had consented to the postponement. She confirmed that Mr Kruger would testify as both a factual witness and an expert witness in relation to the defendant's business and personal finances. The plaintiff had been aware of the contents of the addendum as the defendant had sent a copy to him to dissuade him from continuing with his opposition to the condonation application. This notwithstanding, the plaintiff had launched his rule 30A application.

[19] The defendant, in his confirmatory affidavit, stated that he had become romantically involved with Mr Kruger after the former's relationship with the plaintiff had ended. They were, at present, no more than friends. The defendant indicated that he had been reluctant to draw Mr Kruger into the litigation but had deemed it necessary, ultimately, since his testimony both as a factual witness and an expert witness would be required in relation to whether a partnership agreement had come into existence.

Severe prejudice would be caused if the defendant was not permitted to call Mr Kruger as an expert witness.

Plaintiff's replying affidavit

[20] In his reply for purposes of the rule 30A application, the plaintiff alleged that he had never objected to the defendant's notice in terms of rule 36(9)(a) because the latter had indicated that he intended to call Mr Kruger as a factual witness, not an expert witness. This had changed, however, after the plaintiff gave notice on 23 February 2023 to amend his plea.

[21] The plaintiff went on to reiterate that Mr Kruger's dual role as a factual witness and an expert witness was problematic. His previous romantic relationship with the defendant was a relevant factor in deciding the condonation application. Turning to the defendant's allegation that he had provided the plaintiff with a copy of the addendum before the launching of the rule 30A application, the plaintiff argued that this had formed part of settlement discussions in relation to the condonation application; the allegation had to be excluded from consideration. Ultimately, the plaintiff's amendment of his particulars of claim did not require an opinion from an expert witness, it gave rise to a factual issue.

Further developments

[22] At about the time that the plaintiff delivered his replying affidavit, he also delivered an amended rule 30A application. In terms thereof he sought, in the alternative to the striking out of the defendant's notice to appoint Mr Kruger as an expert witness and the striking out of his summary, an order that the defendant be directed to ensure compliance with rule 36(9)(b) by delivering a reasoned summary; in a further

alternative, the plaintiff sought the referral of the issues in the rule 30A application to case management for decision.

[23] A couple of weeks later, the plaintiff gave notice of his intention to amend, once more, his rule 30A application. He sought additional alternative relief in the form of a declarator to the effect that the summary delivered by the defendant on 15 February 2023 had not been done in compliance with rule 36(9)(b).

[24] This led, in turn, to the defendant's making application to file Ms Anthony-Gooden's supplementary affidavit to oppose the amended relief sought by the plaintiff. In that regard, Ms Anthony-Gooden pointed out that the plaintiff had delivered amended rule 30A applications without having met the requirements of rule 28 and without having attached a supporting affidavit. She averred, moreover, that the defendant had already demonstrated why the alternative relief should not be granted. The referral to case management was unnecessary as the matter had already been declared trial ready.

[25] The defendant also made application, in terms of rule 6(15), for the striking out of certain portions of and annexures to the plaintiff's affidavits. This was for reasons of duplication, irrelevance, and inadmissibility. The plaintiff opposed the application, raising various points of law in that regard, *inter alia*, that the application was brought out of time and rule 6(15) did not allow striking out for duplications.

Issues to have been decided

[26] The main issues to have been decided were: (a) whether condonation should be granted for the defendant's non-compliance with rules 36(9)(a) and (b) and whether leave should be granted to file the addendum to the summary; (b) whether to order the striking out of the defendant's notice to appoint Mr Kruger as an expert witness and the

striking out of his summary, or whether to grant any of the relief sought in the alternative; and (c) whether to grant the remaining applications brought by the parties.

[27] There was a considerable amount of overlapping between the issues that arose in the condonation and the rule 30A applications. To all intent and purposes, the determination of (a), above, was decisive of (b), as shall be explained.

A brief overview of the relevant principles follows.

Legal framework

[28] In terms of rule 27(3), a court may, on good cause shown, condone any non-compliance with the rules. Case law indicates that the court enjoys a wide discretion.¹ In his commentary on civil procedure,² DE van Loggerenberg observes:

‘The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes “good cause”, because to do so would hamper unnecessarily the exercise of the discretion.’³

[29] The learned writer remarks that case law indicates that there are two main requirements for the granting of condonation. These are discussed as follows:

‘The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the *dominus litis*....The second requirement is

¹ See, for example, *Smith NO v Brummer NO* 1954 (3) SA 352 (O), at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O), at 216H- 217A.

² DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022).

³ At D1-323.

that the applicant should satisfy the court on oath that he has a *bona fide* defence or that his action is clearly not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum that the applicant must show is that his defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence.¹⁴

[30] Reference is also made to a third requirement, as the learned writer goes on to remark:

'The grant of the indulgence sought must not prejudice the plaintiff (or defendant) in any way that cannot be compensated for by a suitable order as to postponement and costs.'¹⁵

[31] The starting point for a litigant seeking condonation is entirely logical: he or she must explain how and why the delay came about. The litigant must then demonstrate that he or she has a case that, on the face of it, is properly based on facts and law. Finally, the litigant must show that the granting of condonation will not cause such harm to the other side as cannot be sufficiently ameliorated by an order of the court.

[32] The subject of the non-compliance in the present matter is rule 36(9). In that regard, the amended text provides that:

'9 (a) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless—

- (i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

⁴ *Op cit*, at D1-324.

⁵ *Op cit*, at D1-325.

- (ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

(b) The summary of the expert's opinion and reasons therefor referred to in subparagraph (a)(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is—

- (i) in such expert's own words;
- (ii) for the assistance of the court; and
- (iii) a statement of truth.'

[33] The rule was amended with effect from 1 July 2019.⁶ Prior to the amendment, both parties were required to give notice at least 15 days before trial of their intention to call an expert witness, and to deliver a summary of such expert witness' opinion and reasons at least ten days before trial. The amendment seems to allow greater opportunity for parties to consider their respective positions and to prepare properly for the presentation of opinion evidence. This could be done, for example, by instructing their own expert witness.

[34] It is generally accepted that the main purpose of rule 36(9) is to remove the element of surprise from a trial by providing the other side with sufficient information, in advance, about the nature of any opinion evidence to be presented.⁷ It also encourages expert witnesses to reach agreement on some of the issues involved, thereby saving costs and time.⁸ However, it has also been recognised that the rule in question intrudes

⁶ The amendment was made in terms of GNR 842, published in GG 42497 on 31 May 2019.

⁷ See Van Loggerenberg, *supra*, at D1-488B (RS 21, 2023).

⁸ *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A), at 371F.

upon the right of a party to call a witness and places him or her at the disadvantage of having to indicate beforehand what the expert witness will say. The rule should be construed strictly.⁹

[35] Before explaining how the principles were applied to the facts in the present matter, it is necessary to mention that rule 30A serves as a general remedy for non-compliance with the URC. It permits a party, after having given notice to the defaulting party, to apply for an order that requires compliance with the relevant rule of the URC or that strikes out the defaulting party's claim or defence. The court may, in terms of rule 30A, make such order as it deems fit. It must exercise a discretion in this regard.¹⁰

Discussion

[36] It was common cause, in the present matter, that the defendant's notice and summary were out of time. Although his explanation for the delay was acceptable on its own, it was probable that the defendant's legal team mistakenly applied the time limits as they existed prior to the amendment of rule 36(9). The defendant himself could not be penalised, in the circumstances, for any error in that regard. Based on the facts and arguments made in the founding affidavit of Ms Anthony-Gooden, the court was also satisfied that the defendant had demonstrated that he had a *bona fide* case, both in relation to his plea to the plaintiff's claim, and the defendant's counterclaim.

[37] Importantly, however, it was the absence of any real prejudice to the plaintiff that persuaded the court to grant to the defendant the condonation sought. It would have been difficult to ignore the shortcomings of the defendant's summary, delivered on 15 February 2023. The document could simply not have been described as a summary of

⁹ *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C), at 508H; *Doyle v Sentraoer (Co-operative) Ltd* 1993 (3) SA 176 (SE), at 180G-J. See, too, the discussion in *Van Loggerenberg*, *supra*, at D1-489.

¹⁰ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC), at paragraph [79].

Mr Kruger's opinion and his reasons therefor, as required in terms of sub-rule (a)(ii); it also failed to meet the requirements listed in sub-rules (b)(i), (ii), and (iii). That the summary was unacceptable, on its own, was all but admitted by the defendant. Nevertheless, the addendum proposed by the defendant and previously given to the plaintiff effectively cured the shortcomings complained about. It may not have complied exactly with the provisions of sub-rules (b)(i), (ii), and (iii), but, in relation to its contents, it most certainly satisfied the provisions of sub-rule (a)(ii). Substance must be elevated above form. To put it another way, the rules are made for the courts, not the courts for the rules.¹¹

[38] The defendant's addendum, ultimately, gave effect to the objects of rule 36(9) by providing the plaintiff with the information necessary for him to consider his position and to prepare properly for the presentation of Mr Kruger's expert evidence. The addendum, as proposed at the time, was provided to the plaintiff's legal team on 3 April 2023, well in advance of the new date for trial, viz. 21 August 2023. The main purpose of rule 36(9) was achieved.

[39] For the plaintiff to have contended that no expert evidence was required was not convincing. His claim, essentially, pertains to whether a partnership agreement ever came into existence. The defendant denies this, pleading that he operated a sole proprietorship and later a private company; he and the plaintiff were never business partners. The parties will rely on evidence of their respective conduct to prove or disprove their pleaded cases. This will entail, for the defendant, the introduction of the AFS as evidence. It cannot be asserted that the proper analysis and interpretation thereof can be accomplished without the involvement of an expert witness.

¹¹ This is an old and oft-quoted adage. See, for example, *Standard Bank of SA Ltd v Dawood* 2012 (6) SA 151 (WCC), at paragraph [12].

[40] Regarding the plaintiff's misgivings about the integrity and independence of Mr Kruger, that is for the trial court to consider in relation to its credibility findings. It was not relevant to the immediate matter.

[41] As far as the rule 30A application was concerned, it was common cause that the plaintiff served the prerequisite notice on 6 March 2023. The defendant made application for condonation on 17 March 2023 and provided the plaintiff with a copy of the proposed addendum on 3 April 2023. Notwithstanding the defendant's obvious attempts to remedy the shortcomings of his non-compliance with rule 36(9), the plaintiff nevertheless proceeded with his rule 30A application on 14 April 2023. The issues that arose in relation thereto were the same as those for the condonation application. It was entirely unnecessary for the plaintiff to have proceeded in this manner.

[42] Nothing much turned on the defendant's application to file Ms Anthony-Gooden's supplementary affidavit. It was apparent that the defendant, in the end, accepted the plaintiff's amendment of the relief sought, which Ms Anthony-Gooden had addressed previously. The court exercised its discretion in permitting the filing of the supplementary affidavit in question.¹² A matter should be adjudicated upon all the facts relevant to the issues in dispute.¹³

[43] Finally, the court dismissed the defendant's application to strike out. Whereas there may have been aspects of duplication, irrelevance, and inadmissibility in certain portions of and annexures to the plaintiff's affidavits, the same accusation could easily have been levelled at the defendant. The record consisted of some 337 pages. The dispute, once distilled to its essence, was whether the defendant's non-compliance with rule 36(9) could be condoned. This ought not to have been an overly complicated matter. The defendant's application to strike out, once added to the plaintiff's rule 30A

¹² Rule 6(5)(e). See, too, *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A), at 628F.

¹³ *Ibid.*

application, as well as the numerous amendments to the relief sought by the plaintiff, merely served to unduly burden the proceedings at the expense of the litigants.

[44] Overall, it was questionable whether the nature and magnitude of the record was warranted in the present matter. The dispute was straight-forward. The impression gained, however, was that the parties had been at considerable risk of not seeing the wood for the trees and of being drawn into costly and time-consuming skirmishes.

Relief and order

[45] The only remaining issue to be discussed is that of costs. Whereas the court was satisfied, ultimately, to grant the condonation and leave sought by the defendant, he sought, nevertheless, an indulgence in relation to his patent non-compliance with rule 36(9). It was not unreasonable for the defendant to have been required to bear the costs of his application. The plaintiff's rule 30A application, as already mentioned, was entirely unnecessary. The court was not prepared to grant the relief sought, as amended, and awarded costs against the plaintiff.

[46] In the exercise of its discretion, the court made no costs orders regarding the remaining applications. This seemed the fairest approach in the circumstances.

[47] The following order was made:

- (a) Regarding the defendant's application, brought in terms of rule 27 and dated 17 March 2023:
 - (i) prayers 1 and 2 are granted;
 - (ii) prayer 3 is granted, subject to the amendment of the proposed addendum such that it complies with the provisions of rule 36(9)(b), more

particularly that it must be compiled by the expert himself, with the necessary statement; and

(iii) the defendant is directed to pay the plaintiff's costs.

(b) Regarding the plaintiff's application, brought in terms of rule 30A and dated 14 April 2023:

(i) the application is dismissed; and

(ii) the plaintiff is directed to pay the defendant's costs.

(c) Regarding the defendant's application to file a supplementary affidavit, dated 24 May 2023:

(i) the application is granted in terms of prayer 1; and

(ii) there is no order as to costs.

(d) Regarding the defendant's application to strike out, dated 29 May 2023:

(i) the application is dismissed; and

(ii) there is no order as to costs.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

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Date of request for reasons:

24 August 2023.

Date of delivery:

24 November 2023.