REPUBLIC OF SOUTH AFRICA

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

CASE NO: 7100/2019

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

10 SEP 2019

SIGNATURE DATE

In the matter between:

ALPINE ECO NOTEBOOKS & DIARIES (PTY) LTD Applicant

and

CAPITAL ACCEPTANCES (PTY) LTD Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicant seeks an order rescinding part of the order granted by Mabesele J on 20 April 2018 under case number 12742/2018, in terms of which the return of certain equipment, namely, a Sigloch 3600 Book Block Preparation Line (the 'equipment') was ordered in favour of Capital Acceptances (Pty) Ltd (the respondent in this matter). The respondent in that application (the 'first application') was Y-Land Printing and Promotions CC ('Y-Land').

[2] The applicant was not a party to the first application in terms of which the order was granted; its claim is based on its alleged ownership over the equipment.

[3] The applicant argues that the Court should reject the respondent's condonation application in respect of the late filing of the answering affidavit as it has failed to show sufficient cause to justify the grant of such indulgence. The applicant relies for this argument on the following cases: *Fortman v South African Railways and Harbours* 1947 (3) SA 505 (N) at 509 and *Palmer v Goldberg* 1961 (3) SA 692 (N).

[4] The respondent served the notice of intention to oppose on 8 March 2019, and the answering affidavit had to be filed on by 1 April 2019. The respondent states that the reason for the delay in filing the answering affidavit was that it had to wait for the outcome of the opposed counter-application between the respondent and Y-Land, which was set down for hearing on 18 March 2019. The first opportunity that it had to consult with its legal team and settle the affidavit was on 3 May 2019.

[5] It is trite that a court has the discretion to allow deviation from the rules and allow the late filing of an affidavit, provided there is no prejudice to a party. In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*[1] Brand JA held:

'I am not entirely sure what is meant by the description of the application as "irregular". If it is intended to convey that the application amounted to a deviation from the uniform rules of court, the answer is, in my view, that, as has often been said, the rules are there for the court and not the court for the rules. The court *a quo* obviously had the discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived

[1] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 32.

of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application, the respondent had already responded – in its rejoining affidavit – to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in pointless waste of time and costs....'

[6] In the present matter, the interest of justice favours the allowing of the affidavit despite its late filing. All papers are before the Court, and the matter is ripe for hearing. The applicant has not alleged any prejudice it will suffer if the matter is disposed of on the merits. The applicant elected not to utilise the provisions of Rule 30 regarding the setting aside of irregular proceedings, which demonstrates that it did not suffer prejudice.[2]

[7] As I shall illustrate, there are material disputes of fact in this matter that cannot be resolved on paper, making it unnecessary for the Court to consider an application to strike out certain portions of the answering affidavit.

[8] The respondent submitted that the application has to be determined on the respondent's version as the applicant has persisted with the application, even in light of the material factual disputes, and has not asked that it be referred for the hearing of oral evidence.

Background

[9] The applicant alleges that it had bought the equipment from the liquidators of an entity called Platinum Diary Solutions CC. The director of the applicant, Mr Farhaad Mahomed ('Mohamed'), who is the deponent to the founding affidavit, was the sole member of Platinum Diary Solutions CC, an entity that was placed in liquidation. The deponent alleges that on 26 January 2016 an agreement was concluded between the applicant and the liquidators of Platinum Diary Solutions CC in terms of which it acquired, *among other things*, the equipment.

---

[2] *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) para 18.

[10] The respondent alleges that it purchased the machine from Wilro Printing Machine Sales CC ('Wilro') for the sum of R3 361 860.00, and has attached proof of payment of the purchase price to the answering affidavit. As can be seen from Wilro's tax invoice in respect of the equipment, Wilro confirmed that it had delivered the equipment to Y-Land on behalf of the respondent.

[11] Wilro provided the respondent with a letter from an entity called Future Cast Trading 1063 CC ('Future Cast') dated 9 April 2016 in terms of which this close corporation confirmed that it had been the owner of the equipment and that it had sold it to Wilro. Wilro also provided a copy of an invoice from Future Cast addressed to it, for the sum of R3 201 432.00, which according to the deponent to the answering affidavit, Wilro paid to Future Cast.

[12] Mr Robert Boshoff ('Boshoff'), a member of Wilro, also deposed to an affidavit which was submitted by the respondent. He states that he is a machinery dealer. Boshoff explained that in March 2016, a certain Mr Marshall Prosothma ('Prosothma') of Y-Land, approached him for assistance with the purchasing of assets from Mohamed (the deponent to the founding affidavit and director of the applicant) of Eco-Tech Book Binders (Pty) Ltd ('Eco-Tech').

[13] According to the applicant's founding affidavit, Eco-Tech was a 'book bindery business and during or about 2014 ceased trading due to certain financial constraints, and the Applicant was incorporated.' However, according to Boshoff, Eco-Tech was experiencing financial difficulties at the time, and the arrangement was that Y-Land would purchase the equipment with finance sourced from the respondent. He states that the purpose of the transaction was as follows: Y-Land and Eco-Tech would enter into a joint venture; the income of the sale of the equipment would be used to fund the venture; and the funds would be used to settle arrears which were owed to Eco-Tech's landlord, who had locked Eco-Tech's premises.

[14] Boshoff states that he was accompanied by Mohamed when he performed an inspection of the equipment, who confirmed the existence of a 'joint venture' between Eco-Tech and Y-Land.

[15] Boshoff states that when the sale materialised, the respondent called for an invoice which Wilro issued on 2 June 2016. He questioned Prosothma as to why he had been invoiced by the respondent and not Eco-Tech. He also queried why proof of ownership of the equipment had not been provided by Eco-Tech. Prosothma informed him that the ownership of the asset had been transferred to Future Cast.

[16] On 23 June 2016, Prosothma provided Boshoff with a document which was a letter by Cynthia Govender of Eco-Tech Bookbinders CC. This letter confirmed that the equipment was unencumbered, that it was owned solely by Eco-Tech, and that it was ceded to Y-Land. It had been ceded to Y-Land in lieu of monies owed to it by Eco-Tech in the amount of R1 300 000.

[17] In its replying affidavit, the applicant denies that the equipment belonged to Eco-Tech and states that the applicant is the owner of the equipment. The applicant attaches an affidavit from Cynthia Govender denying that the signature on the document is hers.

[18] Different entities claim ownership of the equipment and have produced the documents purporting to prove their ownership of the equipment.

[19] Rule 6(5)(*g*) of the Uniform Rules of Court provides for the cases that cannot be resolved on papers, it states:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[20] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[3], the Transvaal Provincial Division stated as follows:

---

[3] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

'It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event, the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.'

[21] There are material disputes of fact as far as ownership is concerned, and it would be impossible to determine this issue in this application. That would mean that the facts upon which the matter would have to be decided would be determined on the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[4]

[22] The result would still be the same if I decided this issue on the respondent's version as is suggested.

[23] In the result, the application is dismissed with costs.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 13 August 2019

Date of judgment: 10 September 2019

[4] *Plascon–Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Appearances:

Counsel for the Applicant:	Adv. SB Friedland
Instructing Attorneys:	Beder-Friedland Inc
Counsel for the Respondent:	Adv. D T v R du Plessis SC
Instructing Attorneys:	DRSM Attorneys