**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE DIVISION** **Cases no 2735&2748/2006**

**In the matter between**

**KHULISA PLANT HIRE & FINANCE (PTY) LTD** **Applicant**

**and**

**FIRSTRAND BANK t/a BELL EQUIPMENT** **Respondent**

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***JUDGMENT***

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**Froneman J.**

[1] On 29 September 2006 the respondent ('Firstrand') instituted an application ('the vindication application') against the applicant ('Khulisa'), claiming the return of certain plant and equipment on the basis of a breach and resultant cancellation of a number of agreements under which the plant and equipment came into Khulisa's possession. On 3 October 2006 Firstrand launched a further application for Khulisa's liquidation ('the liquidation application'). Up until 8 March 2007, the date of the present hearing, Khulisa had failed to deliver its opposing papers in either the vindication application or the liquidation application. It had been ordered to do so, after its initial failure to deliver these papers timeously, by respectively 4 January 2007 and 10 January 2007. It once again failed to do so timeously by these dates, and only launched an application for condonation for the late delivery of the opposing papers on 26 January 2007. That application and the main applications came before court again on 2 February 2007, when the condonation application was postponed to

8 March 2007, the date for the present hearing. The main applications were postponed *sine die*.

[2] On the morning of the hearing on 8 March 2007 opposing papers were served on Firstrand and also irregularly filed with the registrar. Shortly before court was due to start a member of the registrar's office brought a set of these papers to me in chambers, but I refused to accept them for the simple reason that the papers could and should only have been delivered once condonation had been granted, not before then. Their purported delivery was not in accordance with the arrangements agreed to and made an order of court on 2 February 2007. Firstrand has nevertheless accepted, without conceding that a proper case had been made out for such relief in the condonation application, that condonation be granted and that leave should be granted for the delivery of the opposing papers in the two main applications. Mr.Hellens, who appeared for Firstrand, was content to argue that Firstrand's opposition to the condonation application was reasonable and that Khulisa should also pay its costs in relation to an application it had in the meantime brought under rule 35(11) for the production of a forensic auditor's report that had to be produced on 13 February 2007 in terms of court order of 2 February 2007, as well as a further application for oral evidence from the authors of the report. Both these applications also fell away for practical reasons upon production of the opposing papers and the attachment of a forensic report thereto on the morning of the date of the present hearing.

[3] In my judgment the opposition to the condonation application was obviously reasonable.

[4] On the papers as they presently stand in the condonation application Khulisa has offered no explanation of what steps were taken, either to comply with the court order to file opposing papers by 4 and 10 January 2007, or to bring a speedy application for condonation of its non-compliance with these orders, for the period between 28 December 2006 and 15 January 2007. The auditors informed Khulisa's legal representatives at least by 28 December 2006 that they had a problem with some of the documentation, but that special arrangements had been made by them to proceed with the matter over the festive period. Khulisa's attorneys apparently simply closed up shop for that period and only brought the application for condonation on 26 January 2007. No explanation for this conduct has been offered. At best this is a misguided understanding of not only the requirements for a condonation application but also with the requirements of compliance with a court order. At worst it amounts to a wilful default in respect of condonation and contemptuous disregard of a court order. Taking the best interpretation for Khulisa it means that the requirement of a proper explanation for its default in relation to the condonation application, as well as for the late bringing of the condonation application, has not been met. This may in the appropriate instance in itself be sufficient ground to refuse the application for condonation (see, for example, *Moraliswani v Mamili* 1989(4) SA 1 (AD) at 9D-F and 10D-F).

[5] Nor has Khulisa set out in any detail or consistency its alleged defences to Firstrand's claims in the condonation application. If it had any *bona fide* defences based on its own records and documentation there was no reason for it not to have set that out in properly delivered opposing papers in the main applications. It did not do so. A reasonable inference is that because it did not do so it either did not have any

valid defences that could be gleaned from its own records or that it did not know whether it had such defences. None of the forensic efforts since December 2006 has been directed at substantiating its defences based on its own documentation, or at least there has been no indication in Khulisa's papers in the condonation application that it has taken any such steps. No explanation is given for this. Again, this failure on its own may have been sufficient to refuse condonation.

[6] Instead of stating in clear and consistent terms what its defences to the claims were in properly delivered opposing papers in the main applications, or then at least in the condonation application, Khulisa has concentrated its energy on an extraordinary attempt at gaining access to Firstrand's documentation in order to either discover or substantiate its defences to the main claims. That was the purpose of the earlier discovery applications at the end of 2006 and it was also explicitly the basis upon which a further postponement and further access to Firstrand's documentation was sought at the court hearing on 1 and 2 February 2007. Khulisa alleged that further access was needed to some illegible Firstrand documentation by its forensic auditors in order to substantiate or validate an initial inconsistency on those documents of some R13m in its favour. The allegation was that the R13m inconsistency was found by the forensic auditor, Mr. Swartz, and that they needed further access to confirm this fact. Paragraph 3 of the court order gives explicit recognition to the purpose of the further access to the documentation by ordering Mr. Swartz to produce the report he had been mandated to produce by Khulisa by 13 February 2007 and that Khulisa may supplement its papers in the condonation application by 20 February 2007.

[7] Surprisingly however, to put it in mild terms, Khulisa not only made no mention of the report or its findings in the supplementary replying affidavit it delivered under this order, but also failed to mention what its defences were, other than to state that it would file its opposing papers as soon as it could. When Firstrand called for the production of the forensic report under rule 35(11), Khulisa refused to hand it over. Firstrand then subpoened the auditors to come and give oral evidence about what they found when they further inspected the Firstrand documents. Khulisa opposed this too. The result of this obfuscation by Khulisa was that at the end of the day it had not stated in any clear, consistent and unequivocal terms in the condonation application what its defences to the main claims were. This, once again, would have been sufficient, independent reason for refusing the condonation application.

[8] Independently, for any of the reasons referred to above, the condonation application could legitimately have been refused. Cumulatively, in my judgment, these factors presented an almost insuperable obstacle to the application having been granted. Practical considerations have obviated the necessity of making that finding but I think enough has been said to make it clear that Firstrand's opposition to the condonation application was reasonable and that, accordingly, it is entitled to its costs of opposition thereto.

[9] What remains is the issue of costs relating to the ancillary applications by Firstrand for production of the report ordered by the court on 2 February 2007 and the oral evidence application.

[10] Had Khulisa given effect to the purpose of the order of 2 February 2007, namely to disclose whether the further inspection and access indeed confirmed defences to the main claims or not, there would have been no necessity for the two ancillary applications. Without the earlier disclosure by Khulisa that its forensic auditor had picked up an alleged R13m discrepancy in Firstrand's books which needed to be confirmed by further inspection and access, this further inspection and access would not have been necessary. Khulisa should in that case have been able to formulate its defences to the main claims. In the light of this Khulisa's refusal to produce the report and refer to its outcome in its allowed supplementary papers appears to me on the face of it to be an abuse of the court process whereby it obtained court approval for further inspection and access. Its claim that its refusal to produce the report (the production of which, by 13 February 2007, was ordered by the court) is covered by privilege adds insult to injury. By partially disclosing one aspect of the forensic investigation (the alleged R13m discrepancy) in order for a specific purpose (namely to complete the investigation) it clearly in my view waived any privilege it might have had in respect of that particular forensic investigation, or at least in regard to one specific aspect thereof – whether the R13m discrepancy was confirmed by the further access and inspection or not. In the particular circumstances of this matter fairness and consistency justifies this finding of waiver (compare Schwikkard & Van der Merwe, *Principles of Evidence*, 2nd ed, at 140, para 10.3.4). Khulisa's failure to disclose the result of the further inspection and access justified the application by Firstrand. In my judgment Khulisa should pay the costs of that application. I will add to that by saying that even if I am wrong on the legal issue of privilege I would nevertheless make the same costs order to express the court's displeasure at what I consider to be an abuse of the court process for obtaining further inspection and access to the documents.

[11] The application for oral evidence stands on a different footing, however, despite the understanding one may have for this measure of last resort. If the report was indeed privileged I cannot see how that effect could be circumvented by asking for oral evidence on essentially the same subject matter. And if the report, or the specific aspect of it that I have referred to, is not privileged, as I have found, then oral evidence is unnecessary. Firstrand is liable for the costs of the forensic auditors and their legal representatives having to attend court to oppose the application for oral evidence on 8 March 2007. Again, for the reasons of disapproval of Khulisa's conduct set out above, I make no order in Khulisa's favour in this respect.

[12] The following order will issue:

1. By agreement the applicant's (Khulisa's) delivery on 8 March 2007 of its answering affidavits in cases no. 2735/2006 and 2748/2006 is condoned and in respect of case no. 2735/2006 Khulisa is granted leave to file further answering affidavits within 10 days.
2. The applicant (Khulisa) is directed to pay the costs of the condonation application, including the costs of the hearing on 1 and 2 February 2007 and the reserved costs of 14 December 2006.
3. The applicant (Khulisa) is ordered to pay the costs of the application brought by the respondent (Firstrand) under rule 35 (11) and rule 30A.
4. The respondent (Firstrand) is ordered to pay the costs of Price Waterhouse Coopers in respect of the application for oral evidence.

J.C.Froneman 17/5/07

Judge of the High Court.