IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

Case number: 52161/2013

42993/2013

Date:22/9/2017

In the matter between:

TENKE FUNGURUME MINING S.A.R.L

PLAINTIFF

And

SUMENTHERAN SHELDON ARMOGAN

FIRST DEFENDANT

EE AND H DISTRIBUTORS CC

SECOND DEFENDANT

PPOVENDRAN MOONSAMY

THIRD DEFENDANT

JUDGMENT

PRETORIUS J.

(1) The applicant/plaintiff seeks the striking out of the first to third respondents'/defendants' defences; judgment in the amount of R1 459184.00; interest of the above sum at the relevant rate and costs against the defendants and their attorney *de bonis propriis.*

(2) There are six applications before court in two matters where the applicant and the respondents agreed that the application in the two matters should be heard simultaneously as the applications in both cases are similar and the judgments will apply equally in all six applications.

(3) The request was to deal with the applications in case number 52161/2013 simultaneously as the same findings will apply in case number 42993/2013. The first matter the court has to deal with is a condonaiton application for the late serving and filing of the applicant's replying affidavit in an application brought by the applicant to strike out the respondent's defences in terms of Rule 35(7) of the Uniform Rules of Court. The respondents oppose condonation and seek costs *de bonis propriis* against the applicant's attorney. The second application is an application in terms of Rule 35(6) of the Uniform Rules of Court by the respondents. The third application is an application in terms of Rule 35(7) by the applicant.

THE PARTIES:

(4) The applicant is Tenke Fungurume Mining S.A.R.L., a company duly incorporated and registered in accordance with the company laws of the Democratic Republic of the Congo, Lubumbashi, under Commercial Registry Number 7325, and which has its registered address at Top Floor, Buffalo Park Building, The Oval Office Park, Meadowbrooke Lane, Bryanston, Johannesburg. The applicant is the plaintiff in the main action filed under the above case number.

(5) The first defendant is Sumentheran Sheldon Armogan, an adult male with residential address at [….]. The first respondent is the first defendant in the

main action.

(6) The second defendant is EE and H Distributors CC, a close corporation duly incorporated and registered in accordance with the laws of the Republic of South Africa, and which has its registered address at 1 Vlier Place, Bloubosrand, Randburg, Johannesbur.g The second respondent is the second defendant in the main action.

(7) The third defendant is Poovendran Moonsam,y an adult male with residential address at[….]. The third respondent is the third defendant in the main action.

BACKGROUND:

(8) On 12 July 2013 the applicant instituted an action against the respondents for the court to declare the respondents liable for payment of the amount of R10 237 440.00, alternatively an amount of R8 832 190.00 and for an order for payment of these amounts. A further order is sought that the court declares the respondents liable for the return of the amount of R2 488 260.00 alternatively an amount of R2 226 214.15 and for payment of such amounts. Further to these claims, in the alternative the applicant claims from the third, fourth and fifth respondents these amounts in their personal capacity.

(9) It is common cause that on 13 October 2015 the respondents delivered an answering affidavit in the present main application. The applicant's replying affidavit was due on 3 November 2015. The replying affidavit was only delivered during June 2016. The explanation by the applicant is that on 13 October 2015 the attorney, Ms Ngakane, was on compassionate leave and unaware that the answering affidavit had been filed. As soon as she became aware that the replying affidavit had to be drafted and filed, she sent it to counsel to settle the replying affidavits in both matters in May 2016. The attorney was of the opinion that she could keep the replying affidavit and file and serve it with the heads of argument. At the return of the instructing attorney, Ms Ngakane, from maternity leave, Ms Ngakane instructed that the replying affidavits had to be filed immediately, which

was done. It is so that the deponent neglected to set out the relevant dates in the affidavit as to when she became aware that the replying affidavit had not been filed and when the papers were sent to counsel. The court does not draw a negative conclusion regarding the explanation, although it is rather scant in providing detail.

(10) The court has to consider whether there are prospects of success before granting condonation. In opposition to the application the respondents make a bald allegation that the applicant's application has no prospect of success and should therefore be dismissed.

(11) The issue of prejudice is one of the most crucial factors to be considered in these circumstances. In **Melane v Santam Insurance Co Ltd**[1] Holmes JA held:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has* a *discretion, to be exercised judicially upon* a *consideration of all the facts, and in essence it 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 interrelated: they are not individually decisive, for that would be* a *piecemeal approach incompatible with* a *true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate* a *rule of thumb would only serve to harden the arteries of what should be* a *flexible discretion."*

(12) In **Brenner's Service Station v Milne and Another**[2] Leveson AJ held:

> *"In the first place I am mindful of the remarks of SCHREINER JA in Trans-African Insurance* Co *Ltd v Maluleka 1956 (2) SA 273 (A) at 278F -* G *to the following effect -*
>
> "*... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere*

[1] 1962 (4) SA 531 (AD) at 532 C-E

with the expeditious and, if possible, inexpensive decision of cases on their real merits".

I think it emerges from the passage quoted that, in appropriate cases, the Court is entitled to refuse to take heed of a *technical irregularity in* a *procedure which does not cause prejudice to the opposite party."*

(13) If I apply the principles as set out in the above case I must find that the applicant has prospects of success and that no prejudice to the defendants has been proven. The main argument against the applicant is that the legal representatives of the applicant did not comply with the rules. In **Rose and Another v Alpha Secretaries Ltd**[3] Tindall JA found that a court may grant relief even where the attorney or legal representatives were negligent. I cannot find on the facts on the papers that the applicant's legal representatives were wilful, ma/a *fide* or dishonest when filing the replying affidavit late.

[14] The respondents, at no stage, endeavoured to set the matter down in terms of Rule 6 or take any other steps to have the matter finalized, thereby confirming that they did not suffer any prejudice by the late filing of the replying affidavit. In **Pangbourne Properties Ltd v Pulse Moving CC and Another**[4] Wepener J held:

There are a large number of matters that come before us in this division in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that these are not, without more, before the court. Without attempting to tabulate all instances where affidavits which are filed out of time may indeed be validly before a *court, I refer to two examples only. Affidavits can validly be before the court pursuant to an agreement between the parties -*

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[2] 1983(4) SA 233 WLD at 237 G-H
[3] 1947(4) SA 511 (AD)

see rule 27(1) which provides for such an agreement. They can also be validly before the court if the interests of justice require it. See the unreported judgment of In re Application for the Issuing of a Letter of Request (GNP case No 377110,714 September 2007) where Van der Merwe J (as he then was) said: 'Though the replying affidavit was well out of time it had to be taken into account in the interests of justice.'"

(15) Taking all these facts and the explanation, albeit spare in detail, by the applicant's attorneys into consideration, I find that it is in the interest of justice to condone the late filing of the replying affidavit.

CHRONOLOGY:

(16) In this application the chronology of the filing of pleadings and papers are important. On 23 August 2013 the applicant instituted action against the respondents for the sum set out above. On 29 August 2013 the respondents delivered a notice of intention to oppose the action. On 12 December 2013 and 17 January 2014 respectively, the respondents delivered their pleas, way out of time. The applicant delivered a notice to discover in terms of Rule 35(1) on 29 April 2014 and on 29 May 2014 no response had been received. The respondents discovered on 17 December 2014 , after the applicant had issued an application to compel. On 27 November 2014 the applicant delivered its discovery affidavit. On 10 or 11 December 2014 at a pre- trial conference between the parties the respondents undertook to discover and provide the discovered documents on 11 December 2014. The discovery affidavits delivered by the respondents on 17 December 2014 did not include the discovered documents. It is important to note that the schedule of discovered documents replicated the applicant's discovery affidavit to such an extent that even the mistakes in the schedule to the applicant's discovery affidavit had been copied. It is common cause that the applicant’s and

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[4] 2013(3) SA 140 (GSJ) at paragraph 16

respondent's schedule of discovered documents is identical. On 20 January 2015 the applicant's attorneys reminded the respondents' attorneys of the undertaking at the pre-trial conference on 10 and 11 December 2014, by letter and once again did not receive any response.

(17) A Rule 35(6) notice was served on the respondent’s attorneys on 9 February 2015 and the five day period expired on 16 February 2015, without any compliance with the notice. This resulted in a second application to compel by the applicant on 26 May 2015. On 28 May 2015 the respondent’s attorneys requested copies of items 1 to 71 to the applicant's discovery affidavit, trying to source the discovered documents from the applicant. Despite delivering a notice of intention to oppose the second application to compel the respondents failed to deliver an answering affidavit on 1 June 2015.

(18) At an enquiry by the respondent’s attorneys whether the applicant had received the request for items 1 to 71 on 8 July 2015, the applicant advised that these documents would not be provided. On 10 July 2015 the court granted an order to compel the respondents to deliver the discovered documents. This order was served on the respondent's attorneys by e-mail on 15 July 2015. Once more the respondents did not comply and the five day period to comply expired on 22 July 2015. The respondent’s attorneys informed the applicant’s attorneys that the respondents discovered documents would be available for inspection on 28 July 2015 - and not on 22 July 2015 as ordered by the court. Although the applicant's attorneys addressed a letter to the respondents' attorneys noting the failure to comply, they inform that they will attend the inspection on 28 July 2015.

(19) On 28 July 2015 the applicant's attorneys attend the respondent's attorneys' office for inspection of the discovered documents. Once more the applicant's attorneys are advised that not all the documents are available, as the first respondent could not locate the documents discovered by him. All the other respondents had confirmed under oath that all the discovered documents were in the first respondent's

possession. Furthermore the documents were not marked according to the discovery affidavits and were not in order. The respondents undertook to rectify this and have the documents available on 31 July 2015. On 28 July 2015 the applicant's attorneys were informed that the first respondent would file a supplementary discovery affidavit, indicating which previously discovered documents were no longer in his possession.

(20) Once more the respondents endeavoured to obtain the documents from the applicant's attorneys on 29 July 2015, to be able to discover by the respondents on 30 July 2015. On 31 July 2015 a bundle of documents, the respondent's discovered documents, were supplied to the applicant's attorneys. This was accompanied by a schedule of missing documents. The applicant's attorneys requested an explanation from the first respondent, under oath, explaining the missing discovered documents on 31 July 2015 . The respondents' attorneys undertook to deal with this request on affidavit on 3 August 2015 by 5 August 2015.

(21) On 5 August 2015 when said affidavit was not forthcoming, the applicant's attorneys once more enquired as to why it had not been delivered timeously. Later in the afternoon an affidavit that was aimed at explaining as to why some of the discovered documents could not be produced, was served on the applicant's attorneys. On the same date the respondents' attorneys requested the applicant's attorneys to supply dates on which the applicant’s discovered documents could be inspected. The applicant's attorneys informed the respondents' attorneys on 7 August 2015 that due to the non-compliance by the respondents' attorneys with the court order and non-compliance with Rule 35(6) the applicant would not permit any inspection of the discovered documents until the respondents had complied with the court order.

(22) This, once more, resulted in the respondents' attorneys asserting that they had complied with the order to compel and therefor the applicant was obliged to comply with the respondents' Rule 35(6) notice. On 14 August 2015 the respondents delivered a supplementary discovery affidavit which contained similar allegations as to that in the initial explanatory discovery

affidavit. A subsequent explanatory discovery affidavit was delivered on the same date which accords verbatim with the other respondents' explanatory affidavits. On 9 September 2015 the respondents launched an application to compel discovery. On 11 September 2015 the current application to strike out the respondents' defence was served on the respondents' attorneys. On 17 September 2015 the respondents served their notice to oppose this application. On 12 October 2015 the respondents served their answering affidavit.

RULE 35(6) AND RULE 35(7) APPLICATIONS:

(23) Rule 35(7) of the Uniform Rules of Court provides:

> *"If any party fails to give discovery as aforesaid or, having been served with* a *notice under subrule (6), omits to give notice of* a *time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to* a *court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."*

(24) It is important to note that Rule 35(6) specifically provides:

> *"If any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days* a *notice as near as may be in accordance with Form 14 of the First Schedule, stating* a *time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at*

their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a *period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise."*

(25) Therefor the respondents will not be able to use the undiscovered documents or tape recordings for purposes of trial, unless the court allows it, on good cause shown.

(26) The main complaint by the applicant is that the respondents acted improperly and dishonestly, over an extended period, by not discovering documents timeously and properly. The respondents copied the applicant's discovery documents without even attempting to correct mistakes in the applicant's discovery affidavits. The only difference to the discovery affidavit of the respondents was that the respondents had merely removed the headings in the applicant's affidavit, pretending that it was the respondent's discovery affidavit.

(27) It is peculiar that the respondents discovered some of the documents, only to claim later, firstly that these documents had been lost and then, secondly, later on, that these documents had been handed to the arbitrator in 2013.

(28) It is not enough for the respondents to try and obtain discovery from the applicant, only to discover the same documents to the applicant. This manner of trying to obtain documents in this matter has not been denied by the respondents.

(29) It is further strange that the respondent's attorney deposed to the answering affidavit in both these applications and the applications under case number 42993/2013, instead of the first respondent. It could be expected that the first respondent would depose to such an affidavit

explaining where the relevant documents were and why these documents could not be discovered. He would have had first-hand knowledge in this regard. The respondents' confirmatory affidavits did not explain the discrepancies in the answering affidavit. There is no reason set out by the first respondent, as to why the respondents did not depose to the answering affidavit. The respondents allege for the first time in the answering affidavit that the documents which had been "lost" were handed to the arbitrator. This belated explanation seems to be extremely strange as the matter of discovery had been contentious since 2014. There is no cogent explanation as to why it was only revealed now. The explanation that the documents that had been discovered and were "lost" had been handed to the arbitrator in 2013 cannot be true. The discovery affidavit was only signed on 17 December 2014 and these documents could, according to the respondent's version, never been part of the discovered documents on that date as they were not in possession of the respondents at the time.

(30) In the initial discovery affidavit the first respondents explained:

> "5. *Subsequent to service of my discovery affidavit onto the Plaintiff's Attorneys, it came to my attention that certain documents as listed in my discovery affidavit could no longer be found.*
>
> *6.*
>
> 7.
>
> *8. It is respectfully submitted that after* a *thorough and diligent search,* some *of the documents as listed in Schedule* ' " *of the Discovery Affidavit could not be found. For ease of reference, annexed hereto is* a *list of the aforesaid documents which could not be found marked "PM1*"."

(31) This is further" explained in the subsequent explanatory discovery affidavit

where the first respondent alleged:

> *"3.1 Subsequent to service of my discovery affidavit onto the Plaintiff's Attorneys, it came to my attention that certain documents as listed in my discovery affidavit, after* a *thorough and diligent search could no longer be found."*

(32) The loss of documents is only explained 8 months after the first discovery affidavit has been disposed to, setting out the loss of the relevant documents to the arbitrator in 2013. I cannot find that this allegation is true, as the first respondent would and could not have discovered these documents in December 2014, if the arbitrator had been in possession of these documents since 2013.

(33) It is further important to note that in the initial discovery affidavits 70 items were listed by the respondents, but on 31 July 2015 a schedule, reflecting 22 missing documents are provided. The respondents failed to explain the inconsistencies in the discovery affidavits.

(34) In the answering affidavit the respondents, when evading direct answers, alleged that certain facts were common cause, where it was patently not so. The respondents contention that the initial explanatory discovery affidavit of 5 August 2015 had advised that the respondents were no longer in possession of the listed documents in the initial discovery affidavit was incorrect.

(35) Although the respondents submitted that the respondents had complied with the order to compel, which they had received on 15 July 2015, it is clear that it is untrue as they had missed the deadline on 22 July 2015. On 22 July 2015 the respondents attorneys only confirmed that the applicant's attorney may inspect the discovered documents on 28 July 2015, 6 days after the time set out in the court order had expired. Even at that stage the applicant was not informed that the respondents no longer had all the discovered documents in their possession.

(36) In **Gunn NO v Marendaz**[5] Bekker J held:

> *"With reference to the discovery affidavit I wish to emphasize in the first place that an affidavit of discovery is* a *solemn document, it is not just* a *scrap of paper. It is* a *document to which the deponent swears as to the correctness of the contents thereof under oath and in para. 2 whereof she stated under oath as follows:*
>
> *'I have in my possession or power the documents relating to the matters in question of this suit set forth in the first and second parts of the schedule hereto.'"*

(37) It is thus evident that a party who has to produce a document or documents for inspection in terms of Rule 35(6) is required to give a full explanation as to why it cannot be done. The reasons given for having discovered the documents, but not being able to produce the documents are unacceptable due to the timeline when the documents were given to the arbitrator in 2013 and the deposing to the discovery affidavit in 2014. The excuse that the applicant's attorney placed the respondents under pressure is untrue, as the respondents had eight months to discover, which in no sense can be regarded as being under pressure.

(38) In the answering affidavit[6] the respondents declare:

> *"Unfortunately, the Respondents' have been trying to locate these documents, but have not been able to do so".*

(39) In **Natal Vermiculite (Pty) Ltd v Clark**[7] the court held:

> *"Attorneys are responsible for the technical side of litigation and they have a duty to see that their clients understand the importance of complying with the Rules of this Court."*

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[5] 1963(2) SA 281 W at 282 H-1
[6] pp . 208 paragraph 21
[7] 1957(2) SA 431 (N) at 432

(40) This matter is apposite in the present application as it was the respondents' attorney's duty to impress upon the respondents the importance of the discovery affidavit and that only documents in the possession of the respondents would be discovered.

(41) The respondents seek to compel the applicant in terms of Rule 35(6) of the Uniform Rules of Court to make available, for inspection and copying, documents that the applicant has discovered.

(42) On 29 July 2015 the respondents delivered a Rule 35(6) notice in this action. A bundle of documents was collected from the respondents' attorney on 31 July 2015. The applicant had to comply with the Rule 35(6) notice on 5 August 2015, on which the respondent’s attorney requested compliance with the Rule 35(6) notice. On 7 August 2015 the applicant's attorney informed the respondent’s attorney by letter that they would not provide the documents discovered to the respondents, as the respondents had failed to comply with Bertelsmann J's order. The applicant was of the view that it could wait for the respondents to discover, before complying with the Rule 35(6) notice. This cannot be so as it is expected of each party to discover fully.

(43) The applicant contends that its discovery affidavit was delivered on 19 November 2014 and on 10 December 2014 the respondents delivered their discovery affidavit. The applicant has steadfastly refused to provide the discovered documents until the respondents had complied with the court order.

(44) I am not prepared to strike out the defence as requested, I cannot find it unreasonable of the applicant to have launched such an application in the circumstances where the first respondent has, up to today, not set out in a discovery affidavit the true facts pertaining to the discovered documents. However, it will not be in the interest of justice where the applicant has not discovered as well. The applicant cannot rely on the non-discovery by the respondent to decide not to discover either. The striking out of the defence will lead to injustice in these circumstances.

(45) I find that both the applicant and respondents were dilatory and obstructive

in bringing the action to finality. The respondents were blatantly dishonest regarding the discovery documents, but the applicant was obstructive in not discovering the documents in its possession when required to do so.

COSTS:

(46) Due to the dishonesty of the respondents in dealing with the discovery affidavits, a suitable costs order is required. Even more so where the respondent's attorney deposed to the affidavits.

(47) Consequently I make the following order:

1. Condonation is granted for the late filing of the replying affidavit;
2. The respondents/defendants defence will be struck out unless the respondents/defendants have within 10 days of this order, made and served a proper discovery affidavit on the applicant's/plaintiff's attorneys;
3. The applicant is compelled within 10 days of this order to make available, in terms of Rule 35(6), for inspection and copying, documents that the applicant has discovered;
4. The respondents to pay the costs of the condonation application and the Rule 35(7) application on an attorney and client scale;
5. The applicant to pay the costs of the Rule 35(6) application;
6. These orders are applicable to case number 42993/2013 in all three applications as well.

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Judge C Pretorius

Matter heard on	:	23 August 2017
For the Applicant	:	Adv C van der Merwe
Instructed by	:	Edward Nathan Sonnenbergs Inc
For the Respondent	:	Adv N Alli
Instructed by	:	Saleem Ebrahim Attorneys

Date of Judgment : 22 September 2017