IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 3996/19

In the matter between:

MZONTSUNDU TRADING (PTY) LTD	**1st Applicant**
DAN MZONTSUNDU DABULA	**2nd Applicant**

and

LAVELIKHWEZI INVESTMENTS (PTY) LTD	**1st Respondent**
WANDISILE SIPHO MTI	**2nd Respondent**

JUDGMENT

MBENENGE JP:

Background

[1] On 23 October 2019, the applicants[1] instituted action proceedings against the respondents[2] for payment of R10 156 158. 56, together with interest thereon and costs. The action arose out of a transaction that involved the sale of a service station.

[2] After entering an appearance to defend the action, on 09 January 2020, the respondents delivered a plea and counter-claim based on the sale of the service

[1] The first and seconds plaintiffs in the main action from which this application arises.
[2] The first and second defendants in the action.

station. Contrary to the provisions of rule 18 (1) of the Uniform Rules,[3] the pleading embodying the counter-claim is signed once, and not twice, by the respondents' attorney of record.

[3] The applicants thereupon launched a summary judgment application, which was opposed by the respondents on the ground that the counter-claim constituted a defence to the applicants' claim.

[4] On 18 August 2020, this court[4] granted summary judgment for payment by the respondents, jointly and severally the one paying the other to be absolved, of the entire amount claimed, together with interest and costs.

[5] Leave to appeal the judgment was refused by Dukada AJ on 30 September 2020, and by the Supreme Court of Appeal[5] on 22 February 2021.

[6] On 30 April 2021, the respondents applied to the SCA for a reconsideration of the SCA's decision refusing leave to appeal. The SCA dismissed the application on the ground that no exceptional circumstances warranting reconsideration or variation of the decision refusing the application for leave to appeal had been established.

[7] On both occasions the matter served before the SCA, reliance was placed on the existence of the respondents' counter-claim as constituting a defence to the summary judgment application.

[8] On 10 May 2021, the respondents delivered a purported notice to amend, introducing a different claim for the performance of an oral sale agreement requiring the applicants to pay the respondents R12 857 804. 67, together with interest and costs.

[3] The Rules
[4] *Per* Dukada AJ
[5] SCA

[9] Thereafter, the respondents filed a document headed "*counter-claim*", purporting to perfect the notice to amend. This document, too, is signed once, and not twice by the respondents' attorney of record.

[10] On 20 May 2021, the respondents lodged an application to the Constitutional Court seeking leave to appeal the SCA's decision dismissing the respondent's application for special leave to appeal. Reliance for this application was placed on the counter-claim in its un-amended form.

[11] The respondents delivered a discovery affidavit and copies of the discovered documents, on 09 June 2021.

[12] On 15 June 2021, the applicants delivered a notice in terms of rule 30 (2) (b) calling upon the respondents to remove the following causes of complaint on pain of an application being brought to set aside the steps as being irregular, namely:

[12.1] the delivery of a notice of intention to amend a counter-claim in an action that has been determined;

[12.2] the substitution of a new claim under the guise of an amendment to a counter-claim in action proceedings that have been determined; and

[12.3] the delivery of discovery affidavits and documents in support of or in connection with proceedings that have been determined.

The instant proceedings

[13] The respondents gave no heed to the notice, with the result that the instant proceedings were launched on 12 July 2021, for an order-

(a) condoning the applicants' failure to deliver a notice to remove the causes of complaint within 10 days of 10 May 2021 and extending the time limit accordingly;

(b) setting aside the respondents' notice to amend delivered on 10 May 2021;

(c) setting aside the respondents' discovery affidavit attested on 09 June 2021; and

(d) directing the first and seconds respondents to pay the applicants' costs on the attorney and client scale.

The issues

[14] The issues that fall to be determined in these proceedings are -

[14.1] whether the applicants' have made out a case for the grant of condonation for the late delivery of the notice to remove causes of complaint;

[14.2] whether the respondents'-

[14.2.1] notice to amend delivered on 10 May 2021; and

[14.2.2] discovery affidavit attested on 9 June 2021,

constitute irregular proceedings; and

[14.3] what cost order should be made.

Condonation

[15] In terms of rule 30 (2) (b), a party to a cause in which an irregular step has been taken by any other party must, within 10 days of becoming aware of the step, by written notice, afford his opponent an opportunity of removing the cause of complaint within 10 days.

[16] It has been held that the purpose of this rule is to prevent unnecessary applications being brought and to put a defaulting party on notice as to the consequences of his default.[6]

[17] Rule 27 gives the court, on good cause shown, the power to condone any non-compliance with the Rules. "*Good cause*" confers on the court a wide discretion[7] which must, in principle, be exercised with regard also to the merits of the matter seen as a whole.[8]

[18] The impugned notice to amend was delivered on 10 May 2021. That step was immediately followed by the delivery of an application to the Constitutional Court, on 20 May 2021, and the delivery of a discovery affidavit and copies of the discovered documents, on 09 June 2021.

[19] It is not in dispute that counsel's advice was sought on 15 June 2021. Counsel advised that the Constitutional Court was unlikely to grant leave to appeal and that the applicants should rather await the dismissal of the application or a refusal to consider the application

[20] In my view, the advice given was sound and had the prospect of resolving the issues without incurring additional legal expenses.

[21] When the respondents did not remove the causes of complaints, on 21 June 2021, the applicants wrote to the Registrar of the Constitutional Court seeking information in relation to the developments in the matter. The Registrar advised, on 06 July 2021, that the matter was still pending and that no directions or orders had been issued.

[6] *Khunou and Another v M Fihrer and Son (Pty) Ltd* 1982 (3) SA 353 (W) at 360 H.
[7] *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H – 217A.
[8] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307 C - 308 A.

[22] The notice to remove the causes of complaint is 16 days late. The degree of delay is, in my view, not unreasonable. The same goes for the explanation proffered namely, an attempt to avoid costly litigation.

[23] I was not pointed to any prejudice the respondents will suffer as a result of the grant of the condonation sought. Nothing prevents them from pursuing a claim against the applicants in a separate action.

[24] Good cause for the delay has been shown. The application passes muster. Therefore, the condonation sought ought to be granted.

The merits

[25] A perusal of the relevant judgment reveals that Dukada AJ granted judgment in favour of the applicants upon being satisfied that the deponent to the affidavit opposing the summary judgment application was not creditworthy.

[26] On no less than two occasions, the respondents' counter-claim was rejected as not constituting a *bona fide* defence.

[27] As far as I could have ascertained, the respondents' contention is that only the claim of the applicants has been determined, and not the counter-claim of the respondents. It was further urged upon me to note that there is support in law for the pursuit of the counter-claim as an independent action.

[28] In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*[9] the court held:

> "[11] With regard to the court's overriding discretion to refuse summary judgment even where the defendant's affidavit does not measure up to the requirements of rule 32 (3) (*b*), it has been said that, in view of the extraordinary stringent nature of the summary judgment remedy, that discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiffs case is unanswerable and there is a reasonable possibility that the defendant's is good . . . The reason why the remedy of summary judgment is referred to as '*stringent*' and '*extraordinary*' is because it effectively closes the door of the Court on the defendant without affording an opportunity to ventilate the case by way of a trial. When the answer raised in the opposing affidavit is in the nature

[9] 2004 (6) SA 29 (SCA) 35, paras E - F

> of a counter-claim instead of a plea, the position is, however, somewhat different**. Even where summary judgment has been granted for that part of the claim that would be extinguished by the counter-claim, the defendant can still pursue the counter-claim by issuing summons in a separate action."** (emphasis added)

[29] In light of this clear and trite legal position, the respondents' continued stance based on the counter-claim as still extant and remaining to be pursued in the main action is hard to comprehend.

[30] Before concluding this judgment, it is necessary to comment, in passing only, on an aspect that was, in hindsight, regrettably not pertinently raised with the parties at the hearing; the pleadings relied on by the respondents[10] are self-evidently, in and by themselves, an irregular proceeding, in as much as they have not been signed, either by counsel and the respondents' attorney of record, or by the attorney, twice as the attorney with the right of audience in the high court, and as attorney of record.[11]

[31] Where the attorney signs the pleading not as an individual but on behalf of the firm representing the litigant, it is appropriate for the attorney to sign the pleading twice, once as an attorney certified in terms of section 4 (2) of the Right of Appearance in Court Act 62 of 1995 and then again in the usual format on behalf of the firm of attorneys.

Conclusion

[32] The applicants have also made out a good case for the grant of the order they are seeking in terms of rule 30 (1) of the Rules. The steps taken by the respondents fall to be set aside as constituting irregular proceedings.

[33] The issue of costs remains to be considered.

[10] The respondents' plea and counter-claim delivered on 09 January 2020 and the "*counter-claim*" referred to in paragraph 9 above.
[11] *Fortune v Fortune* 1996 (2) SA 550 (C) at 551 H - I.

Costs

[34] Mr *Quinn* who, together with Ms *Young* appeared for the applicants, argued with much vigour that the respondents should pay costs on the punitive attorney and client scale, such costs to include those consequent upon the employment of two counsel.

[35] The award of costs, including the costs associated with the employment of counsel, is a matter within the discretion of the court.[12]

Is a punitive costs order warranted?

[36] Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. In this regard, it was held, in *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA*[13]:

> "[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[37] In *Fisheries Development Corp v Jorgensen and Another*[14] "*vexatious"* was held to mean:

> "[F]rivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious proceedings no doubt include proceedings which, although properly instituted, continued with the sole purpose of causing annoyance to the defendant; '*abuse*' connotes a misuse, an improper use, a use *mala fides*, a use for an ulterior motive."[15]

[12] *Maart v Minister of Police* [2016] JOL 36662 (ECG) para 41.
[13] [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).
[14] 1979 (3) SA 1331(W) at 1339 E – G.
[15] Also see *Marsh v Odendaalsrus Cold Storage Ltd* 1963 (2) SA 263 (W) at 270 C – F, where it was held that vexatious proceedings include proceedings which put the other side to unnecessary trouble and expense. The proceedings did not need to be reprehensible or malicious or misleading.

[38] It is as well to refer to *In Re Alluvial Creek Ltd*[16] where, in the context of a punitive costs order, Gardiner J remarked:

> "Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

[39] In *Riemhoogte CC and others v Jacob Durr Trust and Others*[17] the court found the respondents' conduct had the effect of being vexatious, although the court did not find the respondents' conduct was vexatious or *mala fide.* It held that where a party proceeds from vexatious reckless and malicious motives, such party will normally be ordered to pay the wasted costs. Vexatious proceedings were held not to be limited to the vexatious intent of a party; even though a party might not have had such intent, the consequences of his litigation may be vexatious. The court marked its displeasure with the respondents' conduct in the proceedings by making a cost award on the attorney and client scale.

[40] I am satisfied that the conduct of the respondents can fairly be described as vexatious. It is reprehensible and cries out for an award of a punitive costs order. This conduct was persisted in at all twists and turns in proceedings preceding the instant case.

Costs of two counsel

[41] The factors that the court takes into consideration in deciding whether costs of two counsel should be allowed include the volume of evidence; the complexity of facts or the law relating to such facts; the importance of the matter, and whether

[16] 1929 CPD 532 at 535.
[17] [2020] JOL 47879 (ML) para 45.

there are any difficulties or other challenges present in respect of the legal principles or their applications to the facts of the matter.[18]

[42] This application happens to be one of no unusual difficulty; the issues are of no great complexity. The case revealed nothing out of the ordinary and was disposed of on a fairly trite legal principle.[19]

[43] I am, therefore, of the view that the employment of two counsel was not justified.

Order

[44] In all these circumstances, the order that I make is the following:

(a) The applicants' failure to deliver a notice calling upon the respondents to remove causes of complaint within 10 days of 10 May 2021 is condoned and the time limit extended accordingly.

(b) The respondents' discovery affidavit attested on 09 June 2021 and the documents subsequently delivered pursuant to the affidavit are hereby set aside as irregular proceedings.

(c) The first and second respondents are directed to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on a scale as between attorney and client.

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JUDGE PRESIDENT OF THE HIGH COURT

[18] Maart (supra).
[19] *Cf Fluxmans Incorporated v Levenson* [2017] 1 All SA 313 (SCA); [2016] JOL 36970 (SCA); 2017 (2) SA 520 (SCA), para 45.

Applicants' counsel	:	*R Quinn SC* (with him, *C Young*)
Applicants' attorneys	:	Yandiswa Sonamzi Attorneys East London C/o Fono Attorneys Mthatha
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Date matter heard	:	04 November 2021
Date judgment delivered	:	07 December 2021