

SOUTH AFRICA / JUDGMENT

B & B Markets Rooftop (Pty) Limited v Hyprop Investments Limited (19451/15) [2019] ZAGPJHC 233 (24 July 2019)

[2019] ZAGPJHC 233

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

19451/15

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO.: 19451/15

In

the matter between:

B
& B MARKETS ROOFTOP (PTY)
LIMITED Plaintiff
and
HYPROP
INVESTMENTS
LIMITED Defendant

JUDGMENT

OPPERMAN J

INTRODUCTION

1. I am required to determine a rule 30 application in the context of a commercial court matter. The plaintiff has instituted action

against the defendant for damages arising from the alleged breach of a contract of lease ('the lease agreement'). The plaintiff operated a market in the covered parking area of a shopping centre owned by the defendant known as the Mall of Rosebank.

2. After the plaintiff had served its particulars of claim, but before the defendant had filed a plea, the plaintiff sought to amend

its particulars of claim by introducing an additional claim for damages. In this additional claim plaintiff alleged that the defendant had intentionally breached the lease agreement under circumstances where it sought to expand and develop its shopping mall with scant regard for the rights of the plaintiff as a lessee. The deliberate nature of the alleged breach gave rise, so plaintiff contends, to an exceptional remedy of damages, being the disgorgement of profits earned by the defendant in the development of the shopping mall ('the disgorgement claim').

3. The defendant objected to the amendment on the basis that the cause of action upon which it was based, and the damages sought, did

not constitute a cause of action or relief recognised in our law. It contended the amendment would render the particulars of claim

excipiable. This issue was considered by Siwendu J who allowed the amendment and declined to find that the disgorgement claim was

excipiable.

4. Following Siwendu J's judgment allowing the amendment – effectively overruling the proposed exception and allowing the

introduction of the disgorgement claim, the defendant filed an exception to the amended particulars of claim. The defendant raised

exactly the same grounds of excipiability as it did during the amendment proceedings which Siwendu J had considered and dismissed.

5. Accordingly, by raising the exception the defendant seeks to argue precisely the same legal objection which was considered and decided by Siwendu J – this time before a different judge in the same division in the same proceedings, albeit in a different form.

6. Following receipt of the exception, the plaintiff delivered a notice in terms of Rule 30(2)(b) in which it contended that the defendant's exception constituted an irregular and improper step. The plaintiff now applies in terms of Rule 30(1) for the setting aside of the defendant's exception.
7. The plaintiff in support of its contention that the exception to its duly amended particulars of claim is an irregular step as contemplated in rule 30 argues that the filing of the exception in these circumstances is an abuse of the process of court and an irregular step. It is contended that the effect of Siwendu J's judgment is that the issue relating to the disgorgement claim is one on which the trial court should hear evidence and upon which it should finally decide. The filing of defendant's exception, so the plaintiff's argument continues, is to undermine that judgment by requiring the exception to be argued a second time before the trial is heard. This approach, it is contended, should not be countenanced.
8. I am guided by the comments of the Constitutional Court in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd*[1]

"[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."

- [31]In some cases a mechanical application of a particular rule may lead to an injustice. For example, the Supreme

Court of Appeal issued directions dated 28 February 2011 in terms of which parties are given permission to deliver applications for leave to appeal to the Registrar of that Court even if some documents required by its Rules are outstanding. These directions also excuse parties from lodging formal applications for condonation for not complying with section 21(2) of the Supreme Court Act, regarding the period within which an application for leave should be submitted to the Court. It is therefore necessary for courts to have the power to adjust the application of rules to avoid injustices. Moreover, the court rules are tailored to facilitate introduction and management of cases under the courts' supervision." (emphasis provided)

9. Chronologically, the events in the present matter occurred as follows:

9.1. Action was instituted during May 2015.

9.2. No plea and no notice of bar was filed.

9.3. On 24 March 2017, the plaintiff filed its notice of amendment introducing its disgorgement claim.

9.4. On 7 April 2017, the defendant filed its notice of objection.

9.5. The Judgment of Siwendu J was delivered on 20 September 2018.

9.6. The plaintiff's amended pages were filed on 18 October 2018.

9.7. Defendant's exception was filed on 7 November 2018.

9.8. Plaintiff filed its rule 30 notice to remove the cause of complaint on 20 November 2018.

9.9. The parties applied for the matter to be certified as a Commercial matter, which was granted.

9.10. The first case management meeting was held on 18 March 2019 where it was agreed that:

9.10.1. The rule 30 application would be heard on 29 May 2019 (more than 2 months later);

9.10.2. The plaintiff would file its heads of argument on 13 May 2019 (2 months after the first case management meeting);

9.10.3. The defendant would file its head of argument on 20 May 2019.

DOES THE EXCEPTION CONSTITUTE AN IRREGULAR STEP?

10. Rule 30 contemplates irregularities of form and not substance.[2] The object of the Rule is to remove any hindrance to the future conduct of litigation caused by the non-observance of what the Rules of Court intended.[3]

11. The starting point is thus to ascertain what non-observance with the Rules was caused by the defendant's exception.

12. Rule 23(1) provides as follows:

"Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

13. The exception was duly delivered in accordance with the provisions of Rule 23. There is no dispute on this. The exception was thus a prima facie permissible procedural step in the litigation process. The defendant appears to have done no more than exercise its procedural rights afforded to it by Rule 23(1).

14. The jurisdictional prerequisite of an irregularity in the sense of a non-observance of the Rules is therefore on the face of it,

absent. However, consideration needs to be given to the facts of the matter and here a vital fact is that the grounds of the proposed

exception are exactly the same in the now-overruled objection to the amendment, and the test for excipiability is the same in both forms of proceedings.

15. Mr Redding SC representing the plaintiff in these proceedings, argued that what would inform a determination of whether the

exception is to be heard at all, are the particular facts of the proceedings that the parties find themselves in. This is self-evident. Although the action was instituted in the ordinary course, the parties agreed, after Siwendu J's judgment, that the rules of the Commercial Court of this Division were to apply to this action. He argued that because it was exactly the same argument,

it constituted an abuse of the process of this court. This was particularly so, submitted counsel, as the Commercial Court rules

imported additional considerations of fairness, efficiency and cost effectiveness. It is not as if these considerations are absent from any exercise of the High Court's inherent jurisdiction, if they were the rules of the commercial court would require careful reconsidering.

16. Mr Babamia SC representing the defendant, argued that the plaintiff had brought the defendant to court to deal with a rule 30 application. The plaintiff had shifted the goal posts during oral argument as nowhere in its heads of argument, or elsewhere, had it relied on the considerations now argued. He also emphasised that an abuse and what constitutes irregular proceedings, are two different concepts.

17. In SA Metropolitan,[4]the court held thus:

"I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed. A party who takes a procedural step which advances the finalization of the case may not, unless he is unaware of the irregularity, ask for the setting aside of the relevant irregularity."

18. The plaintiff's complaint is that because the defendant had objected, in terms of Rule 28, to the plaintiff's notice to amend on the basis that the particulars of claim would be rendered excipiable were the amendment to be allowed, on substantially the same basis as advanced in the exception, the defendant is, according to the plaintiff, precluded from raising the same issue in terms of an exception delivered pursuant to Rule 23(1). On the face of it rule 28 would permit this, but in my view, not where the facts are as they are in this case. To do so, would, so the plaintiff contends, result in an abuse of this Court's process because the defendant would be permitted to re-argue the same point before a different Judge thus giving it a second bite at the proverbial cherry. As a matter of pure form there is nothing in the Rules that precludes the defendant from filing a bad exception following the dismissal of a bad objection to an amendment. Rule 28(8) and Rule 23(1) in fact provide for that procedural step, but just because a rule permits a step to be taken does not mean that a court must mechanistically allow it and endure the indignity of a re-hearing, as the present case demonstrates.

19. Of course, where an exception is dismissed the point may be re-argued at trial if properly pleaded.[5] The excipient would in such circumstances have “a second opportunity, before a different judge, to argue the same point” There would be nothing irregular or abusive about this. However, at the trial, there is, unlike in exception proceedings, the prospect of evidence which may influence the determination of the point raised on exception and result in a different conclusion. In this sense Siwendu J’s finding was not the final word on the issue and was merely interlocutory.[6] Clearly, the trial court could come to a different conclusion.
20. The authorities appear to be clear – Rule 30 is aimed at removing impediments which would hinder the future conduct of the

matter. Rule 30 is however aimed at irregularities of form and not of substance and using this rule in the context of what serves before me, is, in my view, nonetheless misplaced. Rule 28(8) permits an exception to be filed once an amendment has been allowed. As a matter of form alone the exception could be filed. Whether it was good or bad as a matter of substance is a different question.

21. The parties were in agreement that a rule 30 application would be decided by this court. No affidavits were filed. The rule 30 application was argued having regard only to the rule 30 notice and the heads of argument. Within these confines and within the scope of what the parties themselves had agreed would confine their arguments, I intend dismissing the rule 30 application.

DIRECTIONS IN RESPECT OF THE FUTURE CONDUCT OF THE MATTER

22. The enquiry does not end there. Mr Babamia SC, during argument, conceded that the right to raise an exception is not an absolute

right and that, depending on the circumstances of a case, the arguing of an exception on the same points after the exact points had been argued and ruled upon where the test was the same, could constitute an abuse.

23. I am not going that far here but, in applying the Constitutional Court judgement cited above and the considerations applicable to the running of trials in accordance with the Commercial Court Practice directives which expressly provides that considerations of fairness, efficiency and cost effectiveness, are to guide a court in determining the procedure, I cannot but conclude, that I should direct that this exception on these points, shall not be argued again until the trial.
24. It may be that the substance of the exception could at a future date, in terms of rule 33(4), be separated out and argued again, but those are considerations for another day.

25. It bears emphasis that it was conceded during argument by Mr Babamia that the test for excipiability in the context of an objection to an amendment (the lack of a cause of action) and the test for excipiability taken thereafter (the lack of a cause of action), are the same. It was also common cause between the parties that the point to be argued would be the same. In my view, to permit a re-hearing in the context of this case, would be a waste of time.
26. I intend directing the defendant to plead to the amended particulars of claim. I cannot see any prejudice to the defendant

that cannot be cured by an appropriate costs order in the fulness of time i.e. if the disgorgement claim proves to be without merit either because legally it is unsustainable or because the facts don't support the claim, the plaintiff will be burdened with the costs of raising a bad claim.

ORDER

27. I accordingly make the following order:

27.1. The rule 30 (1) application dated 20 November 2018 is dismissed.

27.2. The Defendant's exception dated 7 November 2018 ('the 7 November 2018 exception') is set aside.

27.3. The defendant is directed to file its plea to the plaintiff's amended particulars of claim – or an exception different to the 7 November 2018 exception - within the time periods allowed in the Rules of Court.

27.4. The costs are reserved.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 29 May 2019

Judgment

delivered: 24 July 2019

Appearances:

For Applicant/Plaintiff: Adv AIS Redding SC & Adv A Laher

Instructed by: Andrew Bagg & Associates

For Respondent/Defendant: Adv Babamia SC & Adv MTA Costa

Instructed by: Bowman Gilfillan Inc

- [1] 2013 (1) SA 1 (CC)
- [2] Singh v Vorkel 1947 (3) SA 400 C at 406.
- [3] SA Metropolitan v Louw 1981 (4) SA 329 O at 333G-H.
- [4] SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981
- (4) SA 329 (O) at 333G - H
- [5] Maize Board v Tiger Oats Ltd & Others 2002
- (5) SA 365 (SCA) at p373B-D.
- [6] Wellington Court Shareblock v Johannesburg City Council 1995
- (3) SA 827 (A) at 833A-D.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2019/233.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/b-b-markets-rooftop-pty-limited-v-hyprop-unknown-topic-agpjhc-2019>

Prepared on 14 October 2026 · Esheria