

SOUTH AFRICA / JUDGMENT

Du Toit v Du Toit and Another (46677/2021) [2023] ZAGPPHC 1923 (15 November 2023) [2023] ZAGPPHC 1923

COURT

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

46677/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,
PRETORIA)

Case No. 46677/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

(3)

REVISED

DATE: 15 NOVEMBER 2023

SIGNATURE

In the matter between:

JACOBUS
CHRISTIAAN FAURE DU TOIT
Applicant
and
FOTEINI
MARIA DU TOIT
First
Respondent
THE
LEGAL PRACTITIONERS'
INDEMNITY
INSURANCE FUND
Second

Respondent

This

judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for handing down is deemed to be 15 November 2023.

JUDGMENT

RETIEF J

INTRODUCTION

- [1] The parties in this matter have been embroiled in a technical tug of war. The constant two and for technical points taken over the past 2 years since the action was initiated by the applicant in 2021 has undoubtedly retarded the furtherance of the proceedings. Litis contestatio still not achieved.
- [2] According to the first respondent, the trigger is the applicant's alleged deficient particulars of claim and according to the applicant the trigger the first respondent's irregular step subsequent upon a notice of bar.
- [3] There are, inter alia, no less than 5 (five) rule 30(1) notices, two exceptions and 2 (two) applications for condonation filed in this matter. In other words, to avoid confusion I shall refer to the applicant as 'Jacobus' and the first respondent as 'Foteini'.
- [4] Presently, by agreement, three separate opposed applications are before me. The applications for determination are:
- 3.1 Jacobus's rule 30(1) notice [second rule 30 notice];
- 3.2 Foteini's condonation application in terms of rule 28(8) in respect of an exception dated 7 September 2022 [second exception]; and
- 3.3 the merits of the second exception.
- [5] At the outset, Counsel for Foteini submitted that in the event I do not find in favour for Jacobus in the second rule 30 notice application, the condonation application in terms of rule 28(8) becomes obsolete. I agree with the submission provided that the rule 28(8) is applicable on the facts and qualify further that, if rule 28(8) is not applicable, the converse may be true namely: both the condonation in terms of rule 28(8) and the second exception application may become obsolete.

- [6] The second rule 30 notice application and applicability of the rule 28(8) enquiry are intertwined. This Counsel for Foteini appreciated when he, in his heads of argument, stated that the central issue was whether the first exception was finalised at the time the particulars of claim were amended. Simply put, was the first exception capable, at that time, to be consequentially adjusted in terms of rule 28(8). I deal with this enquiry hereunder but scrutiny of the chronology of the procedural steps taken by both Jacobus and Foteini are required before I can settle the procedural disputes.

PROCEDURAL CHRONOLOGY

- [7] Jacobus issued summons against Foteini and the Second Respondent on 21 September 2021 [initial particulars]. Jacobus has subsequently withdrawn his claim against the Second Respondent.
- [8] Foteini raised an exception, constituting a validity challenge as against the initial particulars, contending that the initial particulars lacked essential averments to sustain a cause of action and in doing so, relied on five grounds of exception [first exception].
- [9] The first exception was never set down for

determination.

- [10] Jacobus effected an amendment to the initial particulars of claim on 7 March 2022 in terms of rule 28(5) without objection [amended particulars].
- [11] On 19 April 2022, after the expiry date in terms of rule 22(1) and/or for that matter a rule 28(8) adjustment, Jacobus caused a notice of bar in terms of rule 26 [notice of bar] to be served. The notice of bar providing Foteini with 5 (five) days to plea and warned that failure would result in being ipso facto barred.
- [12] Foteini did not file an answer to the amended particulars. The notice of bar within the 5-day window period was rather met with the first rule 30 notice which essentially contended that the notice of bar was an irregular step in that the first exception was a pleading and in consequence, Foteini had pleaded and could not be barred from pleading [first rule 30 notice]. The first rule 30 notice was also not set down for adjudication by Foteini.
- [13] Instead of the first rule 30 down being set down for adjudication Jacobus answered by filing a second rule 30 notice on 12 May 2022. Jacobus contended that the first rule 30 notice was an irregular step, stating that the first exception could not have been considered as a validity challenge to the amended form of particulars. The amended particulars unanswered.
- [14] Jacobus then set the second rule 30 notice down for determination. The first application before me.

[15] On 7 September 2022, more than 5 (five) months later, Foteini filed the second exception and requested condonation for the late filing thereof in terms of rule 28(8). This being the second and third application before me.

[16] This was followed by yet another rule 30 notice however the further procedural steps taken by the parties is not before me.

[17] I now turn to deal with the second rule 30 notice application together with the rule 28(8) enquiry and if necessary, the second exception.

Was the notice of bar an irregular step in light of the filed first exception and was the first exception responsive to the pleadings at the time?

[18] To answer the questions, I begin with understanding the use of Rule 30 proceedings. Rule 30 contemplates irregularities of form not substance.[1] In SA Metropolitan Lewensversekeringsmaatskappy Bpk. v Louw N.O,[2] the Court held that Uniform Rule 30 is:

“...intended as a procedure whereby a hinderance 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...”

[19] In the present context the “hindrance” according to the relief is the first rule 30 notice dated the 25 April 2022 which Jacobus wishes to remove from future conduct in these proceedings.

[20] The relief sought in the notice of motion headed “Application in terms of rule 30(1) and rule 6(11)”, is:

“1. That the First Respondent’s Rule 30 notice dated the 25 April 2022 under case number: 46577/21 is an irregular step and is set aside in whole;

2. The First Respondent is directed to pay the cost of the application.”

[21] The relief is slightly confusing on the face of it, as it appears that the determination is whether taking the first rule 30 notice itself, was an incorrect procedural step however during argument both parties understood the determination to be whether the notice of bar complained of in the first rule 30 notice of the 25 April 2022 was an irregular step.

[22] To confuse the issues yet further, Jacobus, set his second rule 30 notice down by notice on affidavit in terms of rule 6(11), now an opposed interlocutory application. This is when it is procedurally trite that the determination of any rule 30 need not be supported by an affidavit. All that the subrule requires is that the notice must specify the particulars of the irregularity or impropriety complained of. The procedure is analogous to an exception and does not provide for a reply. None of the parties raised issue to

the form of the opposed interlocutory application before me and as such, I shall deal with matter on the papers and as confine by the papers. What is clear as the dust settles, is that the notice of bar is the elephant in the proceedings and needs to be resolved as raised, as an irregular proceeding at the material time.

- [23] In context, the starting point is to ascertain what non-observance with the rules was caused by the filing of the notice of bar. In other words, was the bar notice irregular having regard to the procedural landscape at the material time of its filing?
- [24] Foteini contended in its papers that the notice of bar is irregular in that the first exception is already a pleading filed, and that if you have filed an exception to particulars of claim, the provisions of rule 23(4) indicate that no plea, replication or other pleading over is necessary. The notice of bar an irregular step.
- [25] In appreciating Foteini's contention on the papers, I first consider the purpose of an exception to place rule 23(4) in context.

An exception is a legal objection to a pleading. It complains of a defect inherent in a specific pleading at that time. It therefore

follows why, when an exception is taken, a court must look at that pleading excepted to as it stands at the time the exception is taken: no facts outside those stated in the pleading can be brought into issue and no reference may be made to any other document.[3]

- [26] It is common cause that the first exception was raised as against the unamended particulars. In other words, the first exception was raised in harmony with the unamended particulars raising a validity objection on 5 grounds which were specifically aimed and drafted bearing the unamended particulars in mind. The exception stated that the unamended particulars did not disclose a cause of action and stood to be set aside.
- [27] It is common cause that the first exception was not set down for determination.
- [28] It is also common cause that the unamended particulars were amended in terms of rule 28 without objection. The effect of the amendment was that the form of the unamended particulars changed. The first exception remained unamended at the time of the filing of the notice of bar.
- [29] In this case, the first exception at the time of the amended particulars was also the only document filed by Foteini.
- [30] I consider of the common cause facts, I consider the judgment referred to by Jacobus's Counsel in his heads of argument that of Sutherland J in the matter of Nqabeni Attorneys Incorporated v God Never Fails Revival Church and 2 Others [Nqabeni matter].[4] Reference to this matter is helpful as Sutherland J was faced with a similar procedural background including the necessity to consider the applicability of rule 28(8). Sutherland J discussed and compared the nature and use (responsiveness) of an exception raised in respect of a pleading in its unamended form as against the amended form. He too dealt the test when a consequential adjustment in terms of rule 28(8) was triggered. Of significance for present purposes, Sutherland J stated that to determine whether a party possess an election to make a consequential adjustment to a filed document assists in determining what the next regular procedural step is to be taken. Logically then, whether the step indeed taken was in

observance of the Court Rules.

- [31] Sutherland J correctly stated that an election to “...make a consequential adjustment to the documents filed by him...”[5] must first be possible [the possibility test]. In context the possibility test is to determine whether the document to be adjusted

is still responsive to the amended pleading. If it is, then an adjustment is possible as the document then only requires an ‘adjustment’ and not a fresh initiative. If not, plainly then rule 28(8) can’t apply.

- [32] Applying the possibility test to the facts, Sutherland J stated:

“In this case, the exception filed by the church to the initial declaration in its unamended form, which is the only document of the church which has been filed, does not require any adjustment as it is redundant after the amendment. Logically, only a plea to the declaration might attract the risk of requiring a ‘consequential adjustment’. The term ‘adjustment’ is well chosen because it implies an adaption as a response to something that ‘affects’ it; it cannot be a fresh initiative, such as a document filed for the first time.”[6]

- [33] The consequence of the possibility test was that at the material time, filing a plea on the facts was the next step. The material procedural chronology in the Nqabeni matter is similar and as such the possibility test is helpful. Foteini’s Counsel did not argue that the Ngabeni case was incorrect nor that it was not applicable however, the his argument was expanded stating that the issue now turns on whether the first exception was finalised when the amendment to the particulars was affected and if not, reliance is made on rule 23(4) that when an exception is taken to particulars of claim, a plea or other pleading shall not be necessary. In other words, as I understand the argument, the exception was open to be determined at the time of the affected amendment and that until such time as it was not finalised, no further exchange of pleadings is required.

- [34] Applying the possibility test at the material time the first exception was not raised as a challenge to the amended particulars. Yes, it had not been finally determined, but logically to what end? This was not addressed sufficiently in the papers nor by Counsel in argument, when prompted.

- [35] The procedural chronological events demonstrate that both parties did not deem it necessary to set it down. It appeared irrelevant as the unamended particulars no longer existed because of the affected amendment. Its relevance not relied on nor explained in the papers. Furthermore, what useful purpose would it have served in the furtherance of the process, considering that the first exception was not in harmony nor responsive to the amended particulars? The first exception was raised against the unamended form of the particulars and was no longer relevant vis a vis a validity attack on the pleading as it stood. As Sutherland J stated in the Nqabeni matter the exception served its purpose, it was redundant and not in harmony with the amended form. And not capable of a consequential adjustment. A step required. No step was taken. The notice of bar followed.

[36] I was as invited by Foteini's Counsel to consider the Supreme Court of Appeal [SCA] matter of Jugwanth v Mobile Telephone Networks (Pty) Ltd [Jugwanth matter].[7] Although its relevance was not expanded in argument nor clearly set out in the heads of argument, reference was made to paragraph 12 and I considered it, as invited. The SCA at the end of paragraph 12 made the following remark about the exception raised in context:

"Exceptions are decided on the pleadings as they stand at the time the exception was taken."

[37] This statement appears to support Sutherland J's remark of the use and nature of exceptions in the Nqabeni matter. Applying the statement in Jugwanth matter, at the time the first exception was taken the pleadings were unamended. The relevance of referring to this matter is unclear.

[38] Furthermore, in context, paragraph 12 demonstrates the ineffectiveness of raising prescription by way of an exception in circumstances when it is trite that a plaintiff does not have to allege that its claim has not prescribed when instituting a claim. In consequence, a challenge that no cause of action is disclosed due to a lack of alleging that the matter has not prescribed, does not render the pleadings expiable. It too, is a futile exercise as the exception, in this case, will be decided on the pleadings as they stood, at that time (i.e., without having filed a special plea).

[39] The application of the Jugwanth matter, although distinguishable on the procedural facts, supports the principles applied in the Nqabeni matter and favours Jacobus' argument.

[40] Finally, the reliance on rule 23(4) in circumstances when an exception is not final. The reliance on rule 23(4) is misguided as it is suggested in argument that a proper understanding and application of the subrule allows a litigant to hold the proceedings to ransom in circumstances when an exception, although unresponsive to the pleadings filed, has not been determined. This can never be the intended application but rather that an exception is raised in respect of a particular pleading, the intended pleading. The first exception was redundant. Foteini having served the second exception notwithstanding the argument advanced, demonstrates this point.

[41] Applying the possibility test into the procedural steps, Foteini did not have an election in terms of rule 28(8) at the material time, in consequence the first exception was not susceptible to an adjustment. Moreover, it contained issues which were extraneous to the amended pleading. Rule 28(8) expressly precludes the raising of issues which are extraneous to the pleadings in that the amendment must be 'consequential on the amendment'. [8] The first exception, although not finally decided, was of no moment as once the amendment had been affected a finality outcome was of no relevance nor did requiring or insisting on its finality further the process. The next step lay in another initiative.

[42] Foteini failed to do take any step at the material time. Jacobus served the bar notice which was a competent procedure next step in the observance of his procedural rights at the time.

- [43] In consequence the second rule 30 notice application must succeed as prayed for.
- [44] The consequence of this is that Foteini remains barred. Procedurally and on the facts, Foteini filed a second exception which is susceptible to yet a further rule 30 notice which is not before me and requests condonation in terms of rule 28(8) for the delay of affecting the consequential adjustment. No application for the upliftment of the bar in terms of rule 27 is before me.
- [45] Having found, in this case, that the second rule 30 notice was a permissible step and for the reasons I did, this outcome may be dispositive of the remaining issues. Jacobus Counsel concede this point in argument.
- [46] However, in so far as it is not dispositive, I deal with condonation as prayed for in terms of 28(8).
- [47] The reasons proffered by Foteini's attorney for the delay of more than 5 (five) months to deliver the second exception on the papers is insufficient and lacks particularity. Firstly, it is common cause that there was a delay. The delay of 5 months compared to the 15 days prescribed by rule 28(8) is lengthy. Secondly if the delay is lengthy should the delay be condoned and what, inter alia, are the reasons, for such delay that a court may be in apposition to exercise its discretion?
- [48] The reasons for the lengthy delay are set out in general terms only, the time not detailed nor accurately specified[9] are, it took time to fathom and address the amended particulars to answer and that following the bar notice the parties became side tracked and embroiled in technical exchanges. Apart from the general allegations no further particularity is provided. Furthermore, no further explanation for the delay in bringing the condonation the application itself[10] is dealt with, even though, on their own version they knew it would take time to sufficiently address the amended particulars and some of the grounds in the first exception may be similar.
- [49] Considering the present outcome, the prospect of success does not favour Foteini. Foteini's papers address prejudice by simply shifting the blame onto Jacobs for taking an extended period to amend his particulars. This makes no sense in context and fails to bolster the general allegation relied on that Jacobus would not be prejudiced.
- [50] Condonation is simply not for the taking and must be clearly, concisely set out that a court can determine the exact reason. I exercise my discretion having regard to all the facts placed before me and find that the lengthy delay is not to be condoned, the application for the rule 28(8) condonation fails.
- [51] Costs
- [52] There is no reason why the costs should not follow the result. However, of consideration is the agreement between the parties to have all three applications determined and as such I will deal with the costs accordingly.

[53] In the premises the following order:

1. The first respondent's rule 30(1) notice dated 25 April 2022 is hereby set aside;
2. The first respondent's application for condonation in terms of rule 28(8) is dismissed;
3. The first respondent is ordered to pay the applicant's costs, including the wasted costs, if any, occasioned by the adjudication of the first respondent's second exception dated the 7 September 2022 at this time.

L.A. RETIEF

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Appearances:

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[1] Singh v Vorkel 1947 (3) 400 C at 406.

[2] 1981

(4) SA 329 (O) at 333 G-H.

[3] Makgae v Sentraboer (Koöperatief) Bpk 1981 (4) SA 239 at 244H-245 A.

[4] Nqabeni Attorneys Incorporated v God Never Fails Revival Church and 2 Others (40739/2017)

[2019] ZAGPJHC 51 (7 March 2019).

[5] supra at par [7].

[6] Footnote 5 at para [8].

[7] [2021] 4 All SA 346 (SCA) par [12].

[8] See City Square Trading 522 (Pty) Limited v Gunzenhauser Attorneys (Pty) Ltd and Another (27365/2021) [2002] ZAGPJHC 81; 2022 (3) SA 458 (GJ) (18 February 2022).

[9] See Uitenhage Transitional Local Council v South Africa Revenue Service 2004 (1) SA 292 (SCA) at par 6.

[10] See Mulaudzi v Old Mutual Assurance CO (SOUTH AFRICA) Ltd and Others 2017 (6) SA 90 (SCA).

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