

SOUTH AFRICA / JUDGMENT

M and M Quantity Surveyors CC v Orvall Corporate Designs (Pty) Ltd (84202/19) [2021] ZAGPPHC 343 (27 May 2021)

[2021] ZAGPPHC 343**COURT**

North Gauteng High Court, Pretoria

BEFORE

JF Barnardt

CASE / FILE NUMBER

84202/19

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: 84020/19****REPORTABLE****OF****INTEREST TO OTHER JUDGES****REVISED****In**

the matter between:

M
AND M QUANTITY SURVEYORS CC
(REG.

NO:

2006/130127/23)

Plaintiff

And

ORVALL

CORPORATE DESIGNS (PTY) LTD

(REG

NO:

2012/091962/07)

Defendant

JUDGMENT**BARNARDT AJ**

1. The plaintiff's application for default judgment is opposed inter alia on the basis that the defendant filed notices in terms of Rule 30 and 30A of the Uniform Rules of Court which should be decided

on due to the plaintiff's failure to remove the causes of complaint.

PROCESS**BACKGROUND**

2. A simple summons was issued on 6 November 2019 and since a notice of intention to defend was filed, the plaintiff filed a declaration on 16 January 2020.
3. On 5 February 2020, the defendant excepted against the plaintiff's declaration and in answer to the exception, the plaintiff filed a notice of intention to amend the declaration on 27 February 2020. A notice of intention to oppose the application to amend the declaration was served on 13 March 2020, being one day to late and the plaintiff's amended declaration was filed on 19 March 2021.
4. On 11 June 2020, the defendant served a notice in terms of Rule 30 and/or Rule 30A of the Uniform Rules complaining about the following irregular step

"1. There has been a failure by the Plaintiff to comply with the provisions of Rule 18(10) which requires particulars of damages given to enable the Defendant to assess them.

2. The Plaintiff has prayed for payment of R555 446, 55 damages without properly setting it out so as to enable the Defendant know how it is quantified.
3. The Defendant is therefore prejudiced by the said irregular step alternative the non-compliance in that it does not know how the amount was quantified, especially since the Plaintiff alleges to have rendered services from stage 1 to 4."
5. On 17 June 2020, the plaintiff served a notice of bar on the defendant and in reply the defendant filed a second notice in terms of Rule 30 and/or 30A on 22 June 2020 complaining about the following irregular steps.

"1. The Plaintiff has served the Defendant with a notice of bar after having being served with a notice of irregular step for failure to comply with rule 18(1) in its amended particulars of claim.

2. The Plaintiff has been cautioned about the irregularity of serving a notice of bar whilst the notice of irregular steps for failure to comply with rule 18(10) is still pending but has dismissed this caution.

3. The Defendant is being prejudiced by the Plaintiff's actions and is unable to plead to the particulars as it is not in a position to assess how the R555 446, 55 is quantified.
4. Thus, the Plaintiff is serving of the notice of bar in the light of the pending notice of irregularity for failure to comply with Rule 18(1)) shows total disregard of the rules of court and amounts to abuse of the court processes."
6. The defendant filed its application in terms of Rule 30 and/or 30A on the plaintiff on 14 July 2020 and on 26 August 2020 the plaintiff filed its notice of set down of the application for default judgment. Although the default judgment application was dated 6 July 2020, I could find no proof of service of the application but for the proof of service of the notice of set down of the application on 26 August 2020.
7. The defendant filed its notice of intention to oppose the default judgment application on 11 September 2020, but no notice of intention to oppose the Rule 30 and/or Rule 30A application was filed and the defendant never applied to have its Rule 30 / 30A application enrolled.

ALLEGATIONS IN THE DECLARATION

8. The relevant parts of the declaration read as follows:

"4.

On or about the 19th of January 2018, the Plaintiff duly represented by its member, Siyupwa Mataa attended to a consultation meeting with the Defendant duly represented by its chief executive officer in Pretoria, in which meeting the parties concluded a written Sub-Consultancy Agreement attached hereto marked as Annexure "MM1".

5.

The material, express and/or alternatively implied standard terms and conditions of the agreement are the following:

- 5.1. The parties to the agreement are the Plaintiff, referred to as the sub-consultant and the Defendant, referred to as the company;
- 5.2. The sub-consultant undertakes and agrees to that it and its employees, representatives, contractors and/or agents shall:
 - 5.2.1. carry out the services and any other obligations contained in this agreement with professional skill, care, diligence and efficiency;
 - 5.2.2. act in absolute good faith and shall follow any and all reasonable written instructions provided to the sub-consultant by the company, effectively and efficiently;
 - 5.2.3. complete the services or any portion thereof by no later than the dates set by the company;

5.2.4. regularly report to and inform the company of progress made in relation to the provision and finalization of the services, the project, the works and/or any portion thereof;

5.2.5. submit invoices and portfolio of evidence that are clear and that accurately account for the services that have been provided;

5.3. The company agrees to pay the sub-consultant the professional fees for the services rendered as set out in annexure c;

5.4. The sub-consultant shall ensure that any invoices submitted to the company for payment shall clearly and expressly contain information as per clause 6 of the agreement".

6.

The Plaintiff fulfilled its obligations in terms of the agreement in that it completed services as contemplated in stage 1 to stage 4 of the agreement and invoiced fees as per the 2013 Tariff of Professional Fees Schedule attached hereto marked as Annexure "MM2".

The invoice for professional fees incurred was submitted to the defendant on the 9th July 2018, which invoice is attached hereto marked as Annexure "MM3".

9. Specific reference is made, in subparagraph 5.3 to annexure c, dealing with the professional fees to be paid for services rendered, which reads as follows:

"ANNEXURE C

PROFESSIONAL FEES AND CASH FLOW PLAN

1. FEES

Fees based on Guideline for Services and Processes for Estimating Fees for registered Persons in terms of the Quantity Surveying Profession Act, 2000 (Act 49 of 2000 with 35% Discount. FEE AMOUNT TO BE DETERMINED (sic) AFTER CONDITIONAL ASSESSMENT IS FINALISED AND THE COST ASSESSMENT PREPARED.

2. ESCALATION

N/A"

10. Reference is also made to clause 6 of the agreement, which reads as follows:

"6. PAYMENT

6.1 The Company agrees to pay the Sub-consultant the Professional Fees for the Services rendered as set out on -annexure C;

6.2 The Sub-consultant shall ensure that any invoices submitted to the Company for payment shall clearly and expressly contain the following information:

6.2.1. the words "tax invoice" prominently stated;

6.2.2 a serialised tax invoice number;

6.2.3 date of invoice;

6.2.4 the registered and trading (if applicable) names and address of the Sub-consultant;

6.2.5 the Sub-consultant's VAT Number (if registered as a VAT vendor);

6.2.6 registered name and address of the Company;

6.2.7 the Company's VAT number (if registered as a VAT vendor);

6.2.8 detailed and accurate description of the services provided which forms the subject matter of the invoice;

6.2.9 quantity or volume supplied, if applicable, for example, the hours of services provided where the services supplied are on a time-cost basis;

6.2.10 unit price (excluding VAT);

6.2.11 VAT charged; and

6.2.12 total amount payable.

6.3 The Company shall not be obliged to make payment of any invoice unless it strictly complies with the requirements set out in this clause 6.

6.4 The Sub-consultant shall ensure that invoices are sent to the Company Representative's email address that the Sub-consultant has been liaising with as well as to accounts@orvallcorporatedesigns.co.za Should the Sub-consultant omit to send the invoice to accounts@orvallcorporatedesigns.co.za then the invoice will be deemed to have not been received for the purpose of payment.

6.5 The Company submits its invoices to the Client on the last day of the month. Should the Sub-consultant wish for the Company to include their invoice for that month, the Sub-consultant must submit its invoice/costing on the 22nd day of that month. Should the project be phase-based, then the Sub-consultant shall submit its invoice when requested by the Company.

6.6 Notwithstanding the foregoing, the Sub-consultant acknowledges that the Company relies on the Client for payment of the Professional Fees. Accordingly, the Company shall only be obliged to make payment of the Professional Fees if:

6.6.1 the Sub-consultant has complied with the invoicing requirements as set out in this clause; and

6.6.2 the Company has received payment for the Sub-Consultant's Professional Fees, in which event payment will be made within 14 (fourteen) days of receipt of payment from the Client."

11. According to the invoice Q/S Services: Stage 1- 4 were rendered and an amount of R643 996,00 was invoiced.

12. As indicated above the defendant initially excepted against the plaintiff's first declaration and tried to oppose the application to amend the declaration but served its notice to oppose a day to late and the amendment was effected on 19 March 2020. The defendant then, on 11 June 2020, (almost three months later) served his first notice in terms of Rule 30 and/or R30A of the Uniform Rules of Court. He served his second notice on 22 June 2020, after the plaintiff served a notice of bar on 17 June 2020 and the application in terms of Rule 30/30A on 14 July 2020.
13. On behalf of the defendant it was argued that its application in terms of Rule 30 and/or 30A should first be adjudicated before the plaintiff's application for default judgment can be considered.

RULE 30

14. Rule 30 reads as follows:

"30 Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
 - (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
 - (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
 - (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."
15. This rule can only be used if the conditions referred to in Rule 30(2) are satisfied. This is of importance since there are strict provisions applicable, in breach of which, the rule may not be utilised and if the stipulated periods have elapsed the rule cannot be used unless an extension of time application in terms of Rule 27 is brought.

16. The defendant in casu did not, within ten days of becoming aware of the irregular step, notify the plaintiff thereof, (the Rule 30 notice was only served almost 3 months after the amended declaration was filed) and did not ask for an extension of time.
17. The ultimate application in terms of Rule 30 and/or 30A was filed in accordance with the stipulated periods provided for in Rule 30(2)(c), but the defendant did not file an affidavit in support of its application. Erasmus, Superior Court Practice,[1] discussed the requirement of an affidavit in support of the application as follows:
- “In Chelsea Estates & Contractors CC v Speed-O-Rama 1993 (1) SA 198 (E) at 202E-F and Scott v Ninza 1999 (4) SA 820 (E) at 823A-C it was held that an application under subrule (2) need not be supported by an affidavit and that all that the subrule requires is that the notice must specify the particulars of the irregularity or impropriety complained of, although, in the latter case, the court took note of the facts mentioned in the affidavits in support of and opposing the application. These decisions, obviously, lost sight of the fact that proof of prejudice is required in the affidavit in support of the application and can be rebutted by evidence in the affidavit opposing the application.”*
18. In Bester N.O and others v Target Brand Orchards (Pty) Ltd and Others[2] Hockey AJ discussed the requirements of Rule 30 as follows:
- “[13] A court will grant a rule 30(1) application if it is satisfied that there is an irregular step, that the party brining such application has not taken any further step in the cause of the matter with knowledge of such irregular step, has given its opponent notice to remove such step within 10 days of the former becoming aware of the step, and importantly, if the applicant will suffer prejudice unless the irregular step is removed. In this regard, see Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999(2) SA 599 (TPD) where it was held by Southwood J (at 611 C-F); ‘With regard to the Rule 30 application Mr Van der Linde pointed out that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside. In support of this argument he referred to Trans-African Co Ltd v 7 Maluleka 1956 (2) SA 273 (A) at 276 F-H; SA Metropolitan Lewensversekering-maatskappy Bpk v Louw NO 1981 (4) SA 329 (O) at 333 D-F and 333 H-334 E; De Klerk v De Klerk 1986 (4) 424 (W) at 426 F- 427 B; Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabriek GmbH 1991 (1) SA 823 (T) at 824 G-H; and Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992 (4) SA 466 (W) at 496 G. The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored.”*
19. With due regard to the requirements of Rule 30(2), it is clear that the defendant did not comply therewith and cannot rely on his Rule 30 notice.

RULE 30A

20. Rule 30A reads as follows:

“30A Non-compliance with rules

- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
 - (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”
21. This rule has far less stringent requirements than Rule 30(2), and no reference is made to specific time limits or a requirement that no “further steps” may have been taken.
22. The question is whether Rule 30A may be used in casu. Rule 30A provides a general remedy for non-compliance with the rules.
23. in *Minister of Police v Nobesuthu Irene Bacela*[3] Lowe J discussed the applicability of Rule 30A:

“[18] In ABSA Bank Ltd v The Farm Klippan 490 CC the Court made it clear that if a provision in the rules provides a specific remedy for non-compliance with the rule, a party need only follow the specific rule and need not give notice in terms of, or follow, Rule 30A.

[19] Harms, Civil Procedure in the Supreme Court: LexisNexis provides that:

‘The rule applies only if compliance with the rules is sought and then only if the relevant rule does not have its own inbuilt procedure

such as rule 21(4), which provides for an enforcement procedure in the event of a failure to provide particulars for trial.

...

Under rule 30A, a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of 10 days, application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the 10 days mentioned, application may then be made to court and the court may make an appropriate order.’

[20] This makes complete sense as the remedies provide for non-compliance with the rules which have their own requirements, benefits and disadvantages which should then be utilised.

...

[31] In the result it is my view that Rule 18(12) read with Rule 30 is in fact in conflict with and contradictory to Rule 30A. It seems to me perfectly clear that the procedure referred to in Rule 18(12), that an irregular step is to be dealt with in terms of Rule 30, is a specific rule with its own requirements and time limits. Rule 30A is a rule of general application as to non-compliance with the Rules. As pointed out in Norman (supra) it can hardly be that Rule 30A was intended to override or amend the special provision of Rule 18(12), as read with Rule 30, as per the presumption *generalia specialibus non derogant*.

[32] The Rules in this regard are in fact in conflict. If a party fails to meet the time limits in Rule 30, or takes a further effective step with knowledge of the irregularity (absent time extension by a Court), the party may no longer take the point of an irregular step. It would make no sense then that Rule 30 could then simply be bypassed to Rule 30A with far less stringent requirements.

[33] The requirement that Rule 30 be utilised for a Rule 18 breach is precisely what must have been intended by the Rules as to the result sought to be achieved. To hold otherwise would effectively supersede Rule 18(12), read with Rule 30, which cannot have been the intended result.”

24. I therefore find that that the defendant’s reliance on Rule 30A in this matter is unfounded and cannot be upheld.

DEFAULT

JUDGMENT

25. Rule 31(2) provides as follows:

“(2)

(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.”

26. It is common cause that the defendant in casu, was in default for failure to file its plea even though it was represented at the hearing. In *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm*[4] a decision by Makgoba JP (Kganyago J and M S Sikhwari AJ concurring) the question of default was decided as follows:

“[2] The question to be decided is twofold, namely:

2.1. Whether the Appellant was in default despite the attendance of its Counsel in Court when judgment was granted; and

2.2. Whether the Appellant whose application for rescission of judgment was dismissed by single Judge of this Division had made out a case for the relief sought.

[3] The judgment sought to be rescinded was granted on 2 August 2016 when M G Phatudi J refused an adjournment sought by the Appellant’s Counsel and granted judgment in the absence of any answering affidavits by the Appellant and on the Respondent’s version alone.

[4] . . .

[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant’s Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a “default” even if the Respondent in the matter or his legal representative is present in Court. See: *Morris v Autoquip (Pty) Ltd* 1985

(4) SA 398 (WLD); *First National Bank of SA Ltd v Myburgh and Another* 2002

(4) SA 176 (CPD).

[12] The question of what is meant by “default” was considered in *Katritsis v De Macedo* 1966

(1) SA 613 (A). In this matter the Appellate Division (as it then was) held that “default” which then as is the

case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a “default judgment” even if it was not a default in the sense of the absence of the party.”

27. However, despite the defendant’s default, I accept that it intended, throughout, to defend the action. This is evident from the fact that it filed an exception to the first declaration, tried, albeit to late, to oppose the plaintiff’s application to amend its declaration and filed a Rule 30 application, once again too late, to complain about the fact that the particulars of claim did not comply with Rule 18(10) of the Uniform Rules.

28. I considered the agreement, with annexures referred to therein, and the defendant's complaint that the plaintiff sued for payment of R555 446, 55 damages without properly setting out how it is quantified, in consideration of the application for default

judgment.

29. As stated above, the invoice was for "Q/S Services: Stage 1- 4" claiming an amount of R643 996,00 without a "detailed and accurate description of the services provided which forms the subject matter of the invoice" as required in Clause 6 of the agreement.
30. Although I am not convinced that the defendant was prejudiced by the plaintiff's failure to give a more detailed description, it is accepted that the defendant 'tried' (although without proper adherence to the rules) to obtain more information to enable it to plea.
31. Therefore, with due consideration of the history of the matter, I am not prepared to grant default judgment.

COSTS

32. Both the plaintiff's application for default judgment as well as the defendant's application in terms of rule 30 and/ or 30A were unsuccessful and I therefore order that each party should pay its own costs in respect of the default judgment and /or Rule 30 applications.
33. I grant the following order:
1. The defendant's Rule 30 and or Rule 30A application is dismissed.
 2. The plaintiff's application for default judgment is dismissed.
 3. The defendant should file its plea within 20 days of uploading of this judgment on Caselines.
 4. Each party to pay its own costs.

ACTING JUDGE JF BARNARDT

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected 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 hand-down is deemed to be 27 May 2021.

APPEARANCES

For the plaintiff: Adv Ramarumo

Instructed by: MATAA Matsebula Attorneys

For the defendant: Adv BM Lukhele

Instructed by: KX Mkhawane Attorneys

Date of hearing: 10 March 2021

[1] Volume 2 -D1-354 [Service 3, 2016] footnote 3

[2]Saflii (22593/2019)

[2020] ZAWCHC 183 (21 December 2020)

[3] Saflii (275/2019) [2020] ZAECHC 19 (8 September 2020)

[4] Saflii (HCA15/2017)

[2017] ZALMPPHC 35 (7 November 2017)

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Prepared on 10 October 2026 · Esheria