

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: N/A
.....	
DATE	23 August 2023
SIGNATURE	[REDACTED]

CASE NO: 322/2022

IN THE MATTER BETWEEN

AFHCO CALGRO M3 CONSORTIUM (PTY) LTD

APPLICANT

and

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

FIRST RESPONDENT

JOHANNESBURG WATER (PTY) LTD

SECOND RESPONDENT

FLOYD BRINK

THIRD RESPONDENT

JUDGMENT

BENSON AJ

Introduction

- [1] The applicant in the main application, on the 20th of June 2022, served and filed a Notice in terms of Rule 28(1) to amend its Notice of Motion herein, which amendment sought to rectify a date, which reduces the period relating to the main claim, in which, *inter alia*, the applicant seeks that the first to third respondents ("the Respondents") reverse various charges billed to the applicant's account for water and sewer consumption at its premises. Initially the applicant sought that the charges be reversed from March 2017. The amendment sought to reduce the period from May 2018.
- [2] Simultaneously to serving and filing the Notice in terms of Rule 28(1), the applicant further served a Notice of Motion seeking leave to supplement the founding affidavit, with a supporting affidavit setting out the grounds upon which the applicant sought such leave to supplement.
- [3] Whilst one would have assumed that this was beneficial to the respondents and that the amendment would be welcomed, this was not that case.
- [4] Rather, the respondents, in response to the intended amendment, served a Notice in terms of Rule 30 and Rule 30A on the 27th of June 2022, alleging that

the applicant's Notice in terms of Rule 28(1) constituted an irregular step ("the respondents' first Rule 30 Notice").

- [5] On the 4th of July 2022, the respondents served and filed a second Notice in terms of Rule 30 and Rule 30A, alleging that the applicant's application for leave to amend, constituted a further irregular step ("the respondents' second Rule 30 Notice").
- [6] No Notice in terms of R28(3) was served by the respondents objecting to the proposed amendment however, and the applicant filed its amended pages on the 11th of July 2022. On the same day, the applicant further served and filed its own Notice in terms of Rule 30 and Rule 30A, alleging that the respondents' first Rule 30 Notice was an irregular step, as, *inter alia*, the respondents were only at liberty to avail themselves of Rule 30 and Rule 30A in terms of Rule 28(8) – and only if the respondents had objected in terms of Rule 28(3), which they have not ("the applicant's first Rule 30 Notice").
- [7] On the 18th of July 2022, the applicant served a second Notice in terms of Rule 30 and 30A, alleging that the respondents' second Rule 30 Notice was an irregular step ("the applicant's second Rule 30 Notice"). The basis for this second Rule 30 Notice was that the respondents ought to have complied with the provisions of Rule 6 and opposed the application for leave to supplement, instead of filing the respondents' second Rule 30 Notice.
- [8] On the 1st of August 2022, the respondents launched the first interlocutory application in terms of Rule 30 and Rule 30A ("the First Rule 30 Interlocutory

Application”), seeking that the applicant’s amended Notice of Motion be set aside (that being the amended pages served and filed on the 11th of July 2022). The applicant opposed this application, and launched a counter-application dated the 15th of August 2022, seeking to set aside the respondents’ first Rule 30 Notice.

[9] On the 5th of August 2022, the applicant launched its own application in terms of Rule 30 and Rule 30A, seeking to set aside the respondents’ second Rule 30 Notice (relating to the application for leave to supplement) (“the Second Rule 30 Interlocutory Application”).

[10] Both the First and Second Interlocutory Applications came before this Court on the 24th of May 2023.

[11] The papers filed on record herein are voluminous and the order in which they have been uploaded is confusing and required an inordinate amount of time in order to properly analyse the arguments put forward. To avoid further such confusion, I shall in this judgment, refer to the applicant and respondents as they are cited in the main application.

THE FIRST RULE 30 APPLICATION

[12] The respondents’ first Rule 30 application seeks to set aside the applicant’s amended notice of motion, on the grounds that the filing of the amended pages on the 11th of July 2022 constitutes an irregular step, *alternatively* that the applicant failed to comply with the Rules of Court.

[13] Upon a perusal of the founding affidavit, no mention is made of which rule it is alleged that the applicant failed to comply with, which would constitute an irregular step as contemplated in the provisions of Rule 30 and Rule 30A. Reliance is placed squarely on the grounds as set out respondents' first Rule 30 Notice.

[14] Upon a further perusal of the respondents' first Rule 30 Notice, the grounds in support of the alleged irregularity, are as follows:

"1. The cause of action adopted by the defendant herein is irregular and highly prejudicial to the plaintiff in that:

1.1. Pleadings closed on 5 April 2022.

1.2. The applicant seeks to reopen and/or restate its case after respondents answered the case instituted by the applicant.

1.3. It would be unfair and contrary to the interest of justice for this Court to decide allow the applicant to recommence its case de novo, after close of pleadings, and without any legally justifiable reason(s).

1.4. The amendment is and/or will be prejudicial to the respondents, and such prejudice cannot and/or will not be cured by a costs order.

2. The applicant has, simultaneously with the above-mentioned notice to amend the Notice of Motion, filed and application for leave to file a supplementary affidavit. The notice to amend the Notice of Motion as well as the application to file supplementary affidavit cannot and/or ought

not be considered by the above honourable Court, in isolation and/or to the exclusion of each other.

3. *It would be unfair and contrary to the interest of justice for the Court to allow an amendment to the notice of motion, without factual and legal substantive reasons being put forward for consideration by the above honourable Court:*

- 3.1. *well after pleadings have closed; and*

- 3.2. *such amendment not necessitated and/or caused by the conduct associated with the respondents but was due to the negligent conduct of the applicant in pursuing its matter.*

4. *Both the applicant's Notice of Motion and Founding affidavit face impending amendments and the respondents cannot plead/ or respond with certainty as to which pleadings will be before the above honourable Court, for arguing by the parties and determination thereof.*

5. *The respondents are therefore extremely prejudiced and/or unable to respond to the notice to amend the Notice of Motion of/by the applicant."*

(-sic) (-own emphasis added)

[15] It appears from the wording of the respondents' first Rule 30 Notice, that essentially, the respondents have confused the purpose of a Rule 30 and Rule 30A Notice with what ought to have been an objection to the applicant's Notice of Intention to Amend, in terms of Rule 28(3). Rule 28(3) provides

the correct mechanism to object to the intended amendment. Only insofar as a procedural or other technical irregularity can be gleaned from a Notice in terms of Rule 28(1), would the respondents have been entitled to avail themselves of Rule 30 and Rule 30A in these circumstances.

[16] Uniform Rule 30A prescribes that where a party fails to comply with Rules of Court or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process, and other party may notify the defaulting party that he or she intends, after the lapse from the date from date of delivery of such notification, to apply for an order:

[16.1.] That such Rule, notice, request, order or direction be complied with, or

[16.2.] That the claim or defence be struck out.

[17] The respondents fail to seek relief in alignment with the Rule. In addition, and importantly, the respondents seek in the First Rule 30 Interlocutory Application, that the applicant's filing of its amended pages (constituting the amended notice of motion), be set aside as irregular.

[18] Upon a conspectus of the respondents' first Rule 30 Notice however, they sought instead, that the applicant withdraws its Notice in terms of Rule 28(1), being the Notice of Intention to amend, dated the 20th of June 2022. Accordingly, and even assuming it was the correct course of action to follow, no Notice in terms of Rule 30 or Rule 30A was dispatched calling upon the applicant to withdraw its amended pages.

[19] The respondents' first Rule 30 Notice, it must be mentioned, further appears to be a proverbial 'copy and paste' effort. It is perhaps for this reason that it is

fraught with typographical errors and refers to the 'defendant' having caused an irregularity, when what the drafter must have intended was that the applicant had done so.

[20] Even assuming that the correct Rule had been used in answer to the Rule 28(1) Notice, by objecting in terms of Rule 28(3), I am not persuaded that the correction of an error in the initial Notice of Motion, constituting a rectification of the date relevant to the claim, causes any prejudice to the respondents as alleged or at all¹. To the contrary, the reduced period relevant to the claim, serves to the benefit of the respondents. This means that should the applicant succeed in the main claim, the respondents will have a lower amount to reimburse to the applicant. In any event, the principles relevant to 'prejudice' as contemplated within the confines of Rule 28 are trite and I do not intend to traverse them herein.

[21] In all of the circumstances, I am of the view that the respondents have invoked the provisions of Rule 30 and Rule 30A opportunistically and in a dilatory fashion. The applicant has no other means open to it to amend the Notice of Motion – in the absence of agreement between the parties – but by utilising the provisions of Rule 28(1). The respondents were open to utilise the remaining provisions of Rule 28 to object, or to utilise the provisions of Rule 30 and Rule 30A, through the provisions of Rule 28(8).

[22] Rule 28(8) provides as follows:

¹ *Sasol Industries (Pty) Limited t/a Sasol 1 v Electrical Repair Engineering (Pty) Limited t/a L Marthinussen* 1992 (4) SA 466 (W) at 469 G

“Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential amendment to the document filed by him/her, and may also take steps contemplated in rules 23 and 30.” (-own emphasis added)

- [23] It was confirmed in *Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Limited*² that “...*These steps must be taken within 15 days after the amending party has effected the amendment...*” (-own emphasis added).

Thus, were there to be any valid grounds to invoke the provisions of Rule 30 or Rule 30A, this could only have been done once the amendment is perfected.

THE APPLICANT’S COUNTER-APPLICATION

- [24] The applicant’s counter-application to the First Rule 30 Interlocutory Application is unopposed. Be that as it may, and for the reasons stated above in relation to the respondents’ misguided application of Rule 28, Rule 30 and Rule 30A, I am of the view that the respondents’ first Notice in terms of Rule 30 constituted an irregular step, and the respondents – had they had any merit to their objection to the insignificant (yet beneficial) amendment - ought to have utilised the provisions of Rule 28(3).

- [25] In *Trans-African Insurance Co Ltd v Maluleka*³ which was quoted with approval in the case of *Life Healthcare Group (Pty) Ltd v Mdladla & Another*⁴ the court stated the following:

² 2007 (5) SA 19 (W) at [8]

³ 1956 (2) SA 273 A

⁴ (42156/2013) [2014] ZAGPJHC 20 (10 February 2014)

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[26] In the present matter, and although the respondents followed the incorrect procedure to object to the applicant's Rule 28(1) Notice or the ensuing perfection of the applicant's amendment on the 11th of July 2022, and in the absence of any actual prejudice being demonstrated, the technical objection has caused more than a year's delay in the furtherance of the main application, and over burdened this Court with a host of interlocutories, in what ought to have been an uncomplicated application in the main.

[27] Be that as it may, and correctly so, the respondents' first Rule 30 Notice dated the 27th of June 2022, was indeed irregular, and stands to be set aside as sought.

THE SECOND INTERLOCUTORY APPLICATION

[28] It is trite that it is upon the litigant who seeks to file a further affidavit to seek leave to do so, and further to provide the Court with a plausible explanation to the satisfaction of the Court that it was malicious in its endeavour to file the further affidavit, and that the other party will not be prejudiced thereby as envisaged within the confines of the provisions of Rule 28.

[29] It is important to note, that the applicant, when filing its Notice in terms of Rule 28(1), simultaneously served and filed an application for leave to supplement its papers, supported by an affidavit which concisely sets out the reasons for the intended amendment and the need for the supplementation of its papers before Court. The applicant did not attempt to file a further affidavit without observance of the need to ask this Court for an indulgence to do so, as often occurs in our courts.

[30] As stated above, this was surprisingly followed by the respondents' second Notice in Terms of R30.

[31] Upon a perusal of this second Notice, it is clear that the respondents relied on similar grounds as in the respondents' first Notice in terms of Rule 30, albeit altered in certain respects. Whilst the respondents' displeasure to the filing of the application for leave to supplement is obvious, there appears to have been no consideration by the respondents, of the content of the affidavit filed in support of the application by the applicant. I repeat that the rectification of the date as sought in the amended Notice of Motion, could only benefit the respondent as it relates to a shorter period for which the applicant seeks reimbursement of monies. The prejudice alleged remains mystifying in all of the circumstances.

[32] The applicant has however, been forced to approach this Court to set aside the respondents' second Notice in Terms of Rule 30.

[33] It was held in ***Meropa Communications (Pty) Ltd & Another v Verb Media (Pty) Limited*** [GLDH] Case No: 29646 (Unreported) as follows:

"The mere filing of the supplementary founding affidavit does not constitute an irregular step. The affidavit will in any event not be considered admitted until leave is granted by the Court dealing with the application. If good cause is shown why the supplementary affidavit should not be permitted, and the court, in its discretion allows the affidavit, it will in effect retrospectively condone the filing of the affidavit. If the respondent had filed the affidavit without seeking the leave of the court, the affidavit at best, in the discretion of the court, could be regarded as pro non scripto."

- [34] It is common that litigants regularly file applications for leave to amend their papers for a myriad of reasons. Certainly, the respondents themselves are well versed in litigation, and have several matters in our courts daily. Accordingly, it is inconceivable on what basis the respondents served their second Notice in terms of Rule 30. It was imperative for the applicant to file such an application if it sought to supplement its papers.
- [35] What was incumbent on the respondents – as their representatives ought to have known – was that they ought to have filed a notice of intention to oppose the application, and filed an answering affidavit detailing the merits of their opposition. Such merits are not apparent from the respondents' second Notice in Terms of Rule 30.
- [36] Accordingly, the applicant followed the correct procedure in all of the circumstances, and the respondents second Notice in Terms of Rule 30 was ill-founded in all of the circumstances.

[37] The fact that the respondents are seasoned litigants, and that they utilise public funds to finance such litigation, also warrants censure. The obstructive attitude which they have displayed in relation to the applicant's approach to the intended (and now perfected) amendment, is unfathomable, yet warrants an adverse costs order as against them.

[38] In the result I make the following orders:

First Interlocutory Rule 30 Application:

- 1.) The application is dismissed.
- 2.) The applicants' (being the respondents in the main application) notice in terms of Rule 30 and Rule 30A, dated 27 June 2023, is set aside as an irregular step.
- 3.) The applicants (being the respondents in the main application) are to pay the applicant's costs in the application and the counter-application, on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

Secondary Interlocutory Rule 30 Application:

1. The respondents' notice in terms of Rule 30 and Rule 30A to the applicant's application for leave to supplement, dated the 4th of July 2022, is set aside as an irregular step.

2. The respondents are to pay the applicant's costs in the application, on an attorney and client scale, jointly and severally, the one paying the other to be absolved.



G.Y. BENSON

ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 24 May 2023
Date of Judgment : 23 August 2023
Date Judgment Delivered :

For the Applicant : Adv. Lombard
Instructed by : Mervyn Smith & Associates

For the Respondents : Adv. T. Mhlanga
Instructed by : Madhlopa & Thenga Inc.