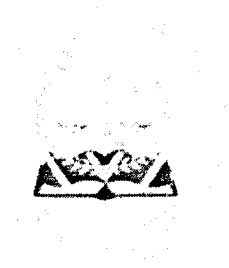


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

29/4/2016

CASE NO: 21915/2013

(1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED

29 APRIL 2016

  
FHD VAN OOSTEN

In the matter between

**THE STANDARD BANK OF SA LTD**

**APPLICANT**

and

**FRANCINA ALTA VAN DYK**

**RESPONDENT**

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**J U D G M E N T**

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**VAN OOSTEN J:**

[1] This is an application in terms of rule 30. The issue requiring determination is whether the respondent (the defendant in the pending action between the parties) was entitled, without having served a notice of bar in terms of rule 26, to bring an application to dismiss the applicant's action, based on the bank's failure to amend its particulars of claim pursuant to a court order upholding an exception against the bank's particulars of claim and granting it leave to amend within the time period laid down.

[2] The procedural background to this application is the following. The order upholding the exception was by agreement and handed down by Jansen J, on 14 February 2014. In terms of paragraph 3 of the order, the bank was ordered 'to amend its papers within 15 days of the date of this order'. The order was duly served on the bank's then attorneys of record on 26 February 2014, but the bank failed to comply with the order. Almost 17 months later, on 2 July 2015 the respondent filed an application for the dismissal of the bank's claim with costs, based on the bank's failure to comply with paragraph 3 of the order (the dismissal application). The bank then filed a notice in terms of rule 30(2)(b) of its intention to apply for an order setting aside the dismissal application as an irregular step which, after no response was received, prompted the rule 30 application which is presently before me. The application is opposed by the respondent.

[3] The effect of a failure to comply with a court order granting leave to amend in upholding an exception was dealt with in two conflicting judgments. The first is *Santam Insurance Co Ltd v Manquele* 1975 (1) SA 607 (D&C) where the court, per James JP, held that in such instance the provisions of rule 26 applied, which required a three days' notice of bar to be served, before application could be made for a dismissal of the claim. The judgment was not followed in *Natal Fresh Produce Growers' Association and Others v Agroservice (Pty) Ltd and Others* 1991 (3) SA 795 (N) 800F-802C, where Hugo J held the opposite: in the event of a failure to amend the particulars of claim in a combined summons within the specified time period in the court order, the party is barred from amending and the whole action falls away. The finding is premised on a distinction the learned judge had drawn between a case initiated by a summons followed by a declaration, on the one hand, and a combined summons on the other. In the latter case, the learned judge reasoned, neither the summons nor the particulars of claim can in law exist separately with the result that a successful exception results in 'if one falls, the other must do as well'. On the other hand a successful exception against a declaration may leave the summons, which is a pleading in its own right, standing as an 'empty husk'.

[4] The dicta in *Natal Fresh Produce* must however be considered in the light of the well-known judgment of the then Appellate Division in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land*

*Affairs*) 1993 (2) SA 593 (A), in which Corbett JA (as he then was), writing for the court, finally coined the rule applicable as a corollary to successful exceptions, which is that leave to amend within a certain period of time, if so advised, must always be granted to a plaintiff, even where the pleading was set aside on the ground that it disclosed no cause of action. In arriving at this conclusion Corbett JA (*Group Five* 603C-H) specifically disapproved of the distinction drawn by Hugo J, to which I have referred above, for the reason that it would lead to the anomaly that it would leave no room for the grant of leave to amend when an exception is successfully taken to the particulars of claim in a combined summons on the ground that no cause of action is disclosed, a proposition that was considered to offend the law and the practice in our courts. As correctly argued by counsel for the bank, the disapproval of Hugo J's distinction in *Group Five*, effectively overrules the judgment in *Natal Fresh Produce*. It is interesting to note that the judgment of Harms J (as he then was) in *Princeps (Edms) Bpk en 'n Ander v Van Heerden NO en Andere* 1991 (3) SA 842 (T) 845D-846D, which was delivered after the judgment in *Natal Fresh Produce* but reported in the same volume of the South African Law Reports, without a reference thereto, contradicts the distinction in *Natal Fresh Produce* and, as a forerunner thereto, is fully consonant with the judgment in *Group Five*.


[5] Rule 26 applies to 'a replication or subsequent pleading within the time stated in rule 25' and further to 'any other pleading' which a party fails to deliver within the time laid down in the rules 'or within any extended time allowed in terms thereof..'. The application of the rule was confirmed in two cases which, by way of background, I shall briefly refer to. In *Beukes v MEC, Agriculture and Environmental Affairs, Eastern Cape* 1999 (4) SA 772 (TkD) where in regard to the plaintiff having failed to deliver the amended particulars of claim consequent upon a notice to amend to which no notice of opposition had been filed, Petse AJ (as he then was) held that the defendant should have invoked Rule 26 before resorting to an exception in terms of rule 23. In *Woolf v Zenex Oil (Pty) Ltd* 1999 (1) SA 652 (W) the plaintiff's failure to deliver a declaration within the time laid down in the order referring the application for trial, was held not sufficient to ground the defendant's application for the dismissal of the action, as the defendant was required to invoke rule 26 in order to place the plaintiff *ipso facto* under bar. Joffe J reasoned that the referral for trial was ordered under the provisions of rule 6(5)(g) and, therefore, clearly with the intention

that the rules of court should apply thereto generally, and in particular, in regard to the filing of pleadings. The learned judge concluded that the period laid down for filing of the declaration in the order is 'a time period', or on the facts of that matter, 'an extension thereof', falling within the ambit of 26.

[6] The fundamental question to be extracted from the above cases is whether the amended particulars of claim in the present instance can be classified as a pleading. Counsel for the respondent, on a parity of reasoning in regard to an amendment following upon a notice of intention to amend in terms of rule 28(1), clearly being a pleading, was driven to concede that the amendment provided for in the judgment of Jansen J, likewise was a pleading. That being so, the amended particulars of claim fell into the category of 'any other pleadings', under rule 26. The respondent accordingly, should have invoked rule 26 and awaited the bank's continued inaction thereafter before resorting to an application to dismiss the action. The application to dismiss was lodged prematurely and, accordingly, constitutes an irregular step as contemplated in rule 30(1).

[7] In the result the following order is made:

1. The respondent's application to dismiss the applicant's claim, dated 2 July 2015, is declared to constitute an irregular step and is set aside.
2. The respondent is ordered to pay the costs of the application.

  
FHD VAN OOSTEN  
JUDGE OF THE HIGH COURT

**COUNSEL FOR APPLICANT**

**APPLICANT'S ATTORNEYS**

**COUNSEL FOR RESPONDENT**

**RESPONDENT'S ATTORNEYS**

**ADV M REINEKE**

**RAMSAY WEBBER**

**ADV JM PRINSLOO**

**GN DRACATOS**

**DATE OF HEARING**  
**DATE OF JUDGMENT**

**25 APRIL 2016**  
**29 APRIL 2016**