

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 7585/2021

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

30 July 2021

.....

DATE

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SIGNATURE

In the matter between:

WAG INVESTMENTS (PTY) LTD

Applicant

and

SOUND LOUDER (PTY) LTD

1st Respondent

TEBOGO CHRIS MOTHIBA

2nd Respondent

In re:

SOUND LOUDER (PTY) LTD

1st Plaintiff

TEBOGO CHRIS MOTHIBA

2nd Plaintiff

and

WAG INVESTMENTS (PTY) LTD

Defendant

JUDGMENT

JOUBERT AJ

1. The present applicant (Wag Investments (Pty) Ltd) instituted proceedings against the respondents in the Pretoria Magistrates' Court. The nature of those proceedings is not before me.
2. The present respondents had applied for a stay of the action in the Magistrates' Court in terms of section 47 of the Magistrates' Court Act, 32 of 1944 on the basis that their counterclaim exceeds the jurisdiction of the Magistrates' Court.
3. On 3 December 2020, Magistrate Khoele delivered an order in the following terms:

“The proceedings instituted in this Court under case number 20136/2020 are stayed for a period of 30 court days to afford the Applicant [the present respondents] an opportunity to institute the counterclaim or the action in the Court of competent jurisdiction.

No order of costs.”
4. The respondents issued their counterclaim by way of combined summons under case number 7585/2021 in this court on 15 February 2021.

5. On 1 March 2021, the applicant delivered its notice of intention to defend the counterclaim and further served a notice in terms of Rule 30A stating:

***“BE PLEASED TO TAKE NOTICE** that the Defendant hereby notifies the Plaintiffs, in terms of Rule 30A it intends after the lapse of 10 days to apply for an Order that the Plaintiffs’ claim be dismissed in that the Plaintiffs have failed to comply with the Court Order issued in the Magistrates Court under case number: 2020/1203 on the 3^d of December 2020, ordering the Plaintiffs to institute its counterclaim in the Court of competent jurisdiction within 30 court days, which the Plaintiffs did not comply with.*

***BE PLEASED TO TAKE NOTICE FURTHER** that should the Plaintiffs not withdraw its combined summons (counterclaim) dated 12th of February 2021 within 10 days, the Plaintiff shall apply to the above Honourable Court for an order setting aside the combined summons (counterclaim).” (sic)*

6. The respondents did not respond to this notice and consequently, on about 1 April 2021, the applicant instituted this application whereby it seeks an order:

- “1. That the First and Second Respondents be ordered to withdraw their Combined Summons dated 12 February 2021;*
- 2. That, in the event that the Respondent fail to comply with prayer 1 supra within 5 days of service of this Order, that the Respondent’s claim be struck out.*
- 3. That the Respondents be ordered to pay the cost of this application on an Attorney and Client scale;*
- 4. Further and/or alternative relief.” (sic)*

7. The respondents gave notice of their intention to oppose the application but did not file answering affidavits.

8. From the parties' joint practice note, it is stated that the following are common cause between them:

“Common Cause facts:

1.
 2. *In ordering the stay of proceedings the Respondent was ordered to file its Counterclaim (counterclaim to the action in Magistrate's Court) within 30 (thirty) days.*
 3. *Should calendar days be used to calculate the time period within which the Counterclaim was to be issued, the Respondent had until 2 January 2021 to do so.*
 4. *Should court days be used to calculate the time period within which the Counterclaim was to be issued, the Respondent had until 18 January 2021 to do so.*
 5. *Should the period within which the Counterclaim had to be issued be calculated taking into account that the period 16 December and 15 January be regarded as dies non the Respondent had until 16 February 2021 to do so.*
 6. *The Summons was issued on 15 February 2021.”*
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9. The relief sought by the applicant is, in effect, however it is stated in the notice of motion, an application for an order striking the respondents' claim in the High Court.

10. Rule 30A states 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, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.*
- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.”*

11. The provisions of Rule 30A make it clear that, in the event of there being a non-compliance with a rule and an application is brought for the striking out of a pleading, it is within the discretion of the court as to what relief it sees fit to grant. Mere non-compliance does not entitle an applicant in terms of Rule 30A to a pleading being struck without more.

12. The following quotation is taken from Erasmus Superior Court Practice at D1 – 358:

“The court may make such order thereon as it deems fit.’

This subrule confers a discretion on the court which, it is submitted, must be exercised judicially on a proper consideration of all the relevant circumstances. Striking out a claim or defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. Consequently, the necessary affidavits

in support of and opposing such relief should be delivered. Relevant factors will include

(a) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations;

(b) whether the defaulting party's case appears to be hopeless; and

(c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor."

13. The applicant appears to have accepted that, once it has established a non-compliance with the time period as laid down by the Magistrates' Court order, it would follow that it would be entitled to the relief sought. The founding affidavit to this application is particularly sparse as to information and merely records the content of the Magistrates' Court order, the fact of the date of filing, and the statement as to non-compliance with the time periods laid down by the Magistrates' Court.
14. The founding affidavit does not contain any information of the kind required in order to allow me to exercise my discretion in favour of the drastic remedy of striking out the respondents' claim.
15. Quite apart from this, it is not immediately clear that non-compliance with the Magistrates' Court order would fall within the scope of Rule 30A. The rule is quite clear as to the scope of its application. The type of order referred to in this rule is "*an order or direction made in a traditional case management process referred to in Rule 37A*".

16. Counsel for the applicant was unable to point me to any specific authority which would allow for the application of Rule 30A to an order made by another court.
17. Although this was not raised in argument, it appears to me that the remedy available to the applicant would have been to approach the Magistrates' Court to uplift the stay of the action instituted in that court. In its clear terms, the Magistrates' Court order does not provide a time limit for the institution of the counterclaim (and nor would it be within the power of the Magistrates' Court to impose such a limitation). The limitation is upon the duration of the stay of the proceedings in the Magistrates' Court.
18. That having been said, I find that the applicant has not made out a case for the relief sought in the application. I therefore need not decide whether or not the respondents' calculation of the 30 (thirty) day time period referred to in the Magistrates' Court order included the *dies non* period from 16 December to 15 January.
19. I am further of the view that the costs should follow the result.
20. In the premises, I make the following order:
 - 20.1. The application is dismissed with costs.



I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: DA de Kock

Instructed by: Mark Efstratiou Incorporated

Counsel for the PC Mampuru

Respondents:

Instructed by: PM Inc Attorneys

Date heard: 29 July 2021

Date of judgment: 30 July 2021