




**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 038205/2023**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

Date: 16 October 2024 Signature: 

In the matter between:

**LIBERTY GROUP LIMITED**

First Plaintiff

**2 DEGREES PROPERTIES (PTY) LTD**

Second Plaintiff

**PARETO LIMITED**

Third Plaintiff

(All of whom are herein represented by **JHI RETAIL (PTY) LTD**)

And

**TIKKA 'N KEBAB CC t/a GHAZAL EXPRESS**

First Defendant

**BHOUPINDER GRILL**

Second Defendant

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## JUDGMENT

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### NYATHI J

- [1] The second defendant having delivered a notice in terms of Rule 23(1) read with Rule 30 on 7 June 2023, affording the plaintiffs an opportunity to remove the cause of complaints therein set out, and the plaintiffs further having failed to amend their particulars of claim within the required period, spurred the second defendant on to launch an exception to the particulars of claim.
- [2] On 22 November 2023 the Honourable Acting Justice Naude granted an order upholding the exceptions and granting the plaintiffs leave to amend the particulars of claim within 20 days from date of said order.
- [3] After the granting of the Order, the Plaintiffs delivered a notice of intention to amend their particulars of claim on 14 December 2024. An objection was delivered to this notice by the Defendant, within the prescribed period, and on 29 January 2024 the plaintiffs withdrew the notice of intention to amend of 14 December 2023 and on the same day delivered the second amendment.
- [4] The second defendant submitted that the withdrawal of the first amendment was a capitulation and agreement by the plaintiffs to the objections raised to the first amendment.

[5] The defendant in this interlocutory application before me, contends that the second amendment is an irregular proceeding and should be declared as such as contemplated in Rule 30. Alternatively, that it be declared that the second amendment is not in compliance with the court order of the Honourable Acting Justice Naude on 22 November 2023.

[6] At the moment that the first amendment was withdrawn, the Plaintiffs became non-compliant with the Order, even on its most generous interpretation, as the withdrawal created the position that no amendment was before the Court, and the second amendment was now brought more than a full calendar month later some 22 Court days after the expiry of the period allowed for in the Order.

[7] The order by Naude AJ read as follows:

“1. The exceptions are upheld

2. The plaintiffs are granted leave to amend the particulars of claim within twenty (20) days from date of this order...”

[8] So clearly, for the plaintiffs to comply with the order, all they needed to do was file their amendment and serve on their opponents without further ado, at any rate within the twenty-day timeframe provided for in the order.

[9] A party seeking to amend the particulars of its claim consequent to a successful exception by the defendant should still comply with the provisions of Rule 28 by

notifying the defendant of the specifics of the intended amendment to enable the defendant to object or acquiesce thereto.

[10] In the event that the defendant does not object to the intended amendment, the amendment would take effect. All this should take place within the 20-day period. As it turns out, the defendants filed a notice of objection to the plaintiff's Rule 28(1) Notice dated 29 January 2024 on the grounds that it constitutes irregular proceedings in terms of Rule 30, alternatively constitutes non-compliance with the court order in terms of Rule 30A. It is this objection that is before me for consideration.

[11] The grounds for objection are as follows:

1. On 22 November 2023, the Second Defendant's Exception against the Plaintiffs' Particulars of Claim was upheld and the Plaintiffs were afforded 20 days within which to amend its Particulars of Claim.
2. On or about 14 December 2023, the Plaintiffs delivered a Rule 28(1) Notice of its intention to amend their Particulars of Claim.
3. On or about 18 December 2023, the Second Defendant objected to such amendment in terms of Uniform Rule 28(2) on the basis that the proposed amendment would give rise to particulars which were excipiable and/or did not disclose a cause of action.

4. On or about 26 January 2024, the Plaintiffs withdrew the notice of amendment dated 14 December 2023.
5. As at the date of withdrawing that amendment, more than 20 days had expired from the Court Order dated 22 November 2023.
6. On 29 January 2024, the Plaintiffs sought to deliver a new notice of amendment.
7. That amendment is –
  - a. without leave of the Court;
  - b. outside the 20 days;
  - c. an irregular step; alternatively
  - d. not in compliance with the Court Order of 22 November 2024.

[12] The defendants afforded the plaintiffs ten (10) days within which to withdraw the notice of amendment, failing which they would bring an order striking out the notice. The current application is exactly that.

[13] The plaintiffs oppose this application. They refer to correspondence between their respective attorneys, and the propriety of the Rule 30 application and demand the filing of Heads of Arguments by the defendants.

[14] The plaintiffs acknowledge that the notice to amend was filed outside the time period allowed for in terms of the Court Order.<sup>1</sup>

[15] It is submitted on behalf of the Plaintiffs that they exercised a “choice as to whether an application to amend should be instituted or, if deemed that the objection held any merit, to consider addressing the issues raised in the objection in a further notice of intention to amend.”<sup>2</sup>

[16] The Plaintiffs make no attempt whatsoever to explain their non-compliance with the order granted on 22 November 2023 by Naude AJ. There is also no effort at seeking a condonation for the delay in complying.

[17] It is trite law that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.

[18] The rule governing amendments was stated many years ago by Watermeyer J in *Moolman v Estate Moolman*<sup>3</sup> as follows:

*‘[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment*

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<sup>1</sup> Plaintiff’s Heads of Argument para 8.2.

<sup>2</sup> *Ibid* paras 8.3 and 8.4.

<sup>3</sup> 1927 CPD 27 at 29.

*would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'*

[19] In *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin*<sup>4</sup>, Pullinger AJ held that if a party who desires to make an amendment gives notice of the amendment but thereafter fails, as required by rule 28, to bring an application for leave to amend or to deliver the amended pages, as the case may be, the intended amendment, as a matter of practice, lapses. The notice of intention to amendment is therefore of no force or effect. In these circumstances, notice of the proposed amendment would have to be given afresh, and the process prescribed by rule 28 would then follow.<sup>5</sup>

[20] Rule 30 provides that a party to litigation in which an irregular step has been taken by any other party may apply to court to set it aside. Such aggrieved party will have 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. A court will set aside the complained-of irregular step if it would cause prejudice to the complaining party.

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<sup>4</sup> 2024 (1) SA 272 (GJ).

<sup>5</sup> *Sasol v Penkin* at para [42].

[21] Rule 30A in turn deals with non-compliance with rules and Court Orders.  
[emphasis added].

[22] The defendant would in terms of the rule be entitled to in turn, effect consequent amendments in response. In this case the defendant would be expected to plead accordingly to the amended particulars of claim.

[23] In the instant case, the plaintiffs missed the deadline afforded by the order. The expectation was that they should have sought condonation for their delay. Only with the court's condonation, can the plaintiffs venture to file their amendments.

[24] On a reading of the two subrules, I am persuaded that the plaintiffs have taken an irregular step in their choice of steps when faced with the defendant's objection in light of the time frame provided by the Court Order, effectively not complying therewith.

[25] In the result the following order is granted:

1. The defendant's application succeeds.
2. The delivery by plaintiffs of the notice of amendment dated 29 January 2024 is declared an irregular step and is set aside.
3. The plaintiffs are afforded a period of 10 (ten) from the grant of this order, within which to give notice of their intention to file an amended particulars of claim under Uniform Rule 28.



4. If the plaintiffs' fail to amend their particulars of claim in the time period referred to in paragraph 3, then the defendants are given leave to set the matter down, with notice to the plaintiffs, for an order striking out the plaintiffs' claim and granting judgment in favour of the defendants with costs.
5. The application to strike out is removed from the roll, the plaintiffs are ordered to pay the defendants' costs.



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J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 10 September 2024

Date of Judgment: 16 October 2024

On behalf of the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs: (Adv.) Ms. LA Pretorius

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**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 16 October 2024.