NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. 1269/2020

In the matter between:

BUSINESS CONNEXION (PTY) LTD	Plaintiff (Respondent)
And	
BUFFALO CITY METROPOLITAN MUNICIPALITY	Defendant (Excipient/Applicant)

JUDGMENT IN RESPECT OF RULE 30
APPLICATION DATED 28 MARCH 2022

HARTLE J

[1] The defendant seeks an order setting aside the plaintiff's "amended particulars of claim" filed on 15 February 2022 on the basis that they constitute an "irregular step" within the meaning envisaged by rule 30 (1).

[2] The particulars of claim are the fifth iteration of the plaintiff's particulars, the last version having been filed after an exception taken to them was upheld by this court. On 25 January 2022 the court afforded the plaintiff a period of fifteen days to "deliver its amended particulars of claim".

[3] As an aside the defendant complained in this application that the plaintiff filed its amended particulars without complying with the provisions of rule 28 which would in the ordinary course have afforded it an opportunity to object to the newest impugned version, a layer of courtesy usually afforded a litigant at the receiving end of an amended pleading.[1] Nonetheless, the defendant filed a notice in terms of rule 30 (2)(b) as a prelude to the present application, evidently accepting the last iteration of the claim as the properly filed "amended" particulars of claim as envisioned by the court's order dated 25 January 2022. Instead of addressing the causes of complaint raised in the notice, the plaintiff filed a notice of bar and a request for default judgment. These steps taken will obviously fall by

[1] The exception order would have had the effect of setting aside the fourth iteration of the plaintiff's claim entirely as if it had not existed before. Therefore, there would have been nothing left as a premise to "amend" from. The order required the filing of a fresh set of particulars. In my view the provisions of rule 28 do not feature in such a scenario.

the wayside, given the view I take in this matter. In the result I need not consider their import any further.[2]

[4] The plaintiff's claim is for payment of the sum of 15 864 539.90 ostensibly based on a variety of invoices for services rendered pursuant to underlying agreements. These agreements allegedly comprise of a financial information management system master agreement (referred to by the plaintiff as the "first master agreement" ("POC1")), a service level agreement ("POC2"), and a master agreement ("POC4"). The plaintiff also references a "Contract Schedule" ("POC 6") as playing a role in the whole scheme of things. Evidently it is pursuant to these agreements and within the ambit of their terms, including pricing specifications and payment protocols, that the plaintiff says the defendant requested precognized resources ("services") that were duly provided to it. The defendant was invoiced for the agreed upon services which it has failed to pay. The plaintiff also relies on "requests" by the defendant for the resources that triggered its performance and supposedly gave rise to the defendant's obligation to pay in each scenario.

[5] Under the heading "COMPLIANCE" in the plaintiff's amended particulars of claim, it alleges that:

[2] The defendant alleged that the filing of the notice of bar and request for default judgment were both further irregular steps in the proceedings, notably because the plaintiff had failed to respond to the plaintiff's notice in terms of rule 30 (2)(b) in the first instance as was required of it to do.

> "23. Around February 2018 to March 2019, and *in terms of the SLA read with the first request*, the plaintiff supplied resources to the defendant which services the defendant accepted.
>
> 24. From around March 2019 to March 2020, and *in terms of the SLA read with the second request and the schedule*, the plaintiff supplied resources to the defendant which services the defendant accepted." (Emphasis added.)

[6] The plaintiff outlines the invoices furnished to the defendant over the relevant period making up its claim "in respect of the services rendered", copies of which it has attached to its particulars marked "POC7.1-7.45". It pleads in paragraph 25 in relation to these that:

> "Notwithstanding the plaintiff having rendered services and (having) furnished the defendant with invoices as aforesaid, the defendant has failed to make payment to the plaintiff in the amounts set out in the invoices."

[7] Tracking backwards, the invoices are for services rendered. The peculiar services were rendered pursuant to the several agreements alluded to by the plaintiff that appear to be inter-connected and in terms of which the anticipated services and their price were contemplated. Also evidently anticipated were how the parties would engage with each other if and when such services were to be requested and, in that event, what protocols would be adhered to around billing and payment in due course. In this context the first and second requests relied upon by the plaintiff assume a pivotal significance and appear to be part of the *essentialia* of the contract(s) on which its claim is predicated.

[8] The plaintiff has annexed the purported copies of the agreements referred to above to its particulars of claim. It has set out the "material terms" of each agreement which it avers are "relevant to the dispute (in the action)" even though in the end it asserts that the it is "in terms of the SLA read with the first request" and "in terms of the SLA read with the second request and the schedule" that the parties' legal obligations arise.

[9] The plaintiff pleads in this respect that the "first request" for services was made in writing on 5 February 2018 "in terms of the SLA".[3] These services were intended to assist in the MSCOA phase 2 project outlined in the SLA that were ultimately invoiced and form the subject matter of the claim.

[10] The plaintiff pleads that it "accepted" the first request and executed the request by supplying the defendant with the resources mentioned.

[11] It pleads further that the defendant "accepted the resources at the respective rates" and that it "accepted the services provided by the supplied resources".

[3] I could not help but notice that the SLA postdates the "first request" for services.

[12] The second request for services is alleged to have been made by the defendant to the plaintiff in writing on 24 January 2019. The plaintiff pleads that the requests were "both subject to the Master Service Agreement and the Service Level Agreement Schedule Amendment" (Sic).[4] The plaintiff pleads as follows in this respect:

> "16.1 The first request was for the contract extension[5] of certain resources already deployed pursuant to the first request of 5 February 2018 referred to above. The defendant requested the extension of specific resources whose deployments were due to end in February 2019. The defendant requested that their deployment be extended from 1 February 2019 to 31 March 2020.
>
> 16.2 The second request was for additional resources for a period of 12 months from 1 February 2019 to 31 March 2020 the stated purpose of which was "to ensure that the BCMM [i.e., the defendant] utilize the same local resources from the MSCOA phase 1 Project in the Phase 2 Project to completion to ensure business continuity and overall compliance." To this end the defendant requested that the plaintiff provide:
> …"
>
> (and thereupon follows an outline of the particular services.)[6]

[13] The plaintiff alleges further that the defendant accepted this second request and "accordingly agreed to extend the terms of certain resources supplied in terms of the first request read with the SLA and it agreed to supply the additional resources contemplated in the second request".

---

[4] This appears to contradict what is stated in paragraphs 23 and 24 of the plaintiff's particulars.
[5] The use of the phrase "contract extension" read with the next two sentences implies a primary contract or pre-existing arrangement. If the obligation flows from the first master agreement, this has not been clearly stated.
[6] The services billed for on the invoices do not equate in every instance with the services listed in this clause.

[14] The plaintiff then references "the Contract Schedule" attached as "POC 6" regarding which it pleads that "the parties understood and accepted that (it) was a Services Annexure contemplated by the second master agreement *alternatively* first master agreement". It then relates the material terms of this "schedule" concerning the provisioning of services, their costing and payment terms, concluding as follows:

> "21. The plaintiff complied with its obligations in that it supplied the services pursuant to the second request and in accordance with *inter alia* the terms of the SLA read with the schedule.
>
> 22. The defendant accepted the resources at their respective rates and accepted the services provided by the supplied resources."

[15] The purpose of providing this background is to demonstrate the interconnectedness of all the agreements and the two requests referenced by the plaintiff.

[16] Even before I traverse the complaints forming the subject matter of the present application, it is necessary to point out that certain of the agreements annexed to the plaintiff's claim cannot represent final or true copies thereof. Their order and significance one to the other and the whole sequence of cascading obligations is also confusing.

[17] The first master agreement ("POC 1") was ostensibly signed by the plaintiff on 18 April 2016 at Pretoria and by the defendant at East London on 21 October 2016. The effective date is recorded as 1 September 2015. In clause 6.1 the agreement provides that "the main agreement shall start on the effective date and terminate on … 30 June 2018."

[18] The copy attached to the plaintiff's claim appears to be a true copy of the main agreement although the initials appearing at the foot of each page are not complete.[7]

[19] The service level agreement ("POC 2") is referenced in the document itself as an addendum (annexure "10"), although to what primary agreement, it is not entirely clear. It is ostensibly signed by the plaintiff only and lacks a reference (left blank) to another annexure mentioned in the first paragraph of its preamble.[8] It is a very poor copy and is also illegible in places. This agreement seems to have been effective over the period 1 March 2018 to 28 February 2019, although it is unclear when it was signed or by whom representing the defendant. It is also clearly postdates the "first request" for services.

[7] This in itself is not objectionable.
[8] This is at page 139 of the indexed papers.

[20] The copy of the second master agreement ("POC 4") attached to the plaintiff's particulars of claim ostensibly reflects a signing by the defendant's municipal manager at East London on 21 January 2019 but does not reflect a signature by or on behalf the plaintiff.

[21] Then of further significance according to the plaintiff's particulars of claim, is the contract schedule ("POC 6") which is headed "Annexure 6" and purports to be a schedule number "11C", although again to what primary agreement this is not clear. The commencement date is recorded as being 1 March 2019 and the termination date 29 February 2020. The author's printing reference at the foot of the schedule reads "Revised: 2019/ 01/29 BCX Annexure to SLA". The particular copy attached to the claim and on which the plaintiff relies was ostensibly signed at East London on 31 January 2019 by an agent of the defendant but does not reflect any signing by the plaintiff.

[22] The complainant raised by the defendant's notice in terms of rule 30 (2)(b) (repeated in the present application) is to the effect that although the plaintiff invokes contracts between itself and the defendant, it has failed to comply with the provisions of rule 18 (6) of the uniform rules of court in this regard.[9]

[23] Rule 18 (6) provides as follows:

[9] This is the enduring complaint of the defendant also in respect of prior iterations of the plaintiff's claim, namely that the plaintiff has failed to comply with the peremptory provisions of rule 18 (6).

> "(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

[24] It complains that the plaintiff in this instance does not state whether the contracts it relies on for its claim are written or oral and when, where and by whom they were concluded and, if written, without annexing a true copy thereof or the part relied upon in the particulars of claim as required by the sub-rule aforesaid.

[25] More particularly the defendant complains as follows:

> "3. Thus, in paragraph 11 of the particulars of claim the plaintiff avers that the first request was accepted by one of two people without indicating whether such acceptance was written or oral and, if written, without annexing a true copy thereof or of the part relied upon.
>
> 4. In paragraph 12 the plaintiff avers that the Defendant accepted the resources at their respective rates and accepted the services provided by the supplied resources without stating whether such acceptance was written or oral and by whom it was so accepted and, if written, without annexing a true copy of such written acceptance or of the part relied upon.
>
> 5. In paragraphs 16 and 17 the Plaintiff avers that on or about 24 January 2019 the Defendant issued two written requests to the Plaintiff and on or about 24 January 2019 the Plaintiff accepted the second request thereby agreed to extend the term of certain resources supplied in terms of the first request, again without stating whether the acceptance was written or oral and where and by whom it was made

and, if written, without annexing a true copy thereof or of the part relied on in the particulars of claim.

6. In paragraph 19 the Plaintiff claims that the parties understood and accepted that the written contract schedule referred to in paragraph 18 was a service annexure contemplated by the second master agreement; alternatively, the first master agreement, without stating whether such acceptance was written or oral and when, where and by whom it was arrived it and, if written, without annexing a true copy thereof or of the part relied on in the particulars of claim.

7. The same objections apply to paraphs 21 and 24.

8. Furthermore, in paragraphs 7, 11, 17 and 18 the Plaintiff claims to have been represented, for purposes of the conclusion of the contracts referred to in those paragraphs, by Modise Nyawane or Vish Rajpal, a methodology which is also non-compliant with rule 18 (6) which requires particulars of the identity of the person who concluded the contract."

[26] The plaintiff was afforded the customary opportunity to remedy the defendant's objections within 10 days of a notice delivered on 7 March 2022.[10] It is common cause that the notice was filed 4 court days out of time in relation to the filing of the plaintiff's particulars of claim, for which delay the defendant seeks condonation. (I deal with this aspect below.)

[10] See rule 30 (2)(b). This fixes the second date by when the application must be delivered provided for in subrule 2(c), which is within fifteen days after the expiry of the ten day chance afforded to the party who has taken the impugned step, to remove the cause of the complaint.

[27] It was alleged on behalf of the defendant's by its attorney that it is prejudiced by the plaintiff's particulars of claim in that, since the institution of the action, the plaintiff has filed five sets of particulars of claim and that it is still unable to plead for the reasons complained of in its present notice in terms of rule 30 (2)(b).[11] Further it's legal representative alleges that the plaintiff's present failure to have complied with the provisions of rule 18 (6) has prejudiced it, such prejudice being manifest in the fact that it is (still) impossible for it to plead to the plaintiff's amended particulars of claim for the reasons outlined in its pre-application notice to remove the cause of its complaint.

[28] The plaintiff however denies that the filing of its latest particulars of claim is irregular in the manner suggested by the defendant or at all or that it was obliged to respond to or comply with the defendant's notice to remove the cause of its complaint. It also raises a number of technical issues which I deal with briefly below.

[29] Rule 30 indicates the circumstances under which its provisions may be invoked, the prerequisites to make the application envisaged thereby if a proceeding or step taken in the cause is alleged to be irregular, and what relief the court can grant if in its opinion the impugned step is indeed found to be irregular or improper. The rule reads as follows:

[11] Counsel for the defendant in their heads of argument allude to the plaintiff's "repetitive, torturous and inadequate" amendments to the plaintiff's particulars of claim and to its ill-fated attempts to cure its "fatally flawed" particulars of claim.

"**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 15 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.

(5)…."

[30] I have above set out above the provisions of rule 18 (6), but it is also necessary to allude to the provisions of rule 18 (4) which provide the standard that a pleading generally should aspire to, given the defendant's complaint that it is unable to plead to the plaintiff's latest set of particulars of claim:

> "4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[31] It is also apposite to allude to the provisions of rule 18 (12) applicable to the present matter:

> "(12) If a party fails to comply with any of the provisions of this rule (meaning rule 18), such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

[32] Rule 30 is a remedy peculiar to a step taken in a cause that in the court's opinion is irregular in that narrow context and for a defined period. Thus, it is not open to me to dwell on how the plaintiff has fared in the past in the conduct of its litigation against the defendant as the concern is with the impugned step taken by the filing of the plaintiff's latest set of particulars. Mr. Heunis who appeared for the defendant himself acknowledged that the filing of the latest particulars after this court's order in the exception application constitutes a *novus actus interveniens* as it were. I mention this since it was submitted on behalf of the defendant that the prior failed iterations of the particulars of claim in themselves constitute an offence and are relevant to the issue of prejudice. In this regard the defendant complains of a historical and enduring prejudice in that the plaintiff cannot seem to get its particulars of claim into a presentable format so that it can plead to them. Mr. Heunis submitted that this abject failure was also a ground for this court to grant the extreme remedy (not prayed for in the notice of application)

of finally setting aside the plaintiff's particulars and dismissing its action. It was further suggested that the costs following its anticipated success in the application should carry a punitive element because the defendant has been inconvenienced for a long time coming.

[33] However, the objective by an application of this nature is to address an obstacle[12] that is temporarily standing in the way of the conduct of the litigation moving forward.[13]

[34] In my view the defendant's objection to the latest iteration of the plaintiff's claim is well founded on the simple basis that the terms of the contract(s) on which the plaintiff relies to claim for the specific services rendered has become lost in verbiage and/or is not readily ascertainable from the several annexures provided.[14] Whether one approaches it from the defendant's broader complaint that the plaintiff has failed to strictly comply with the provisions of rule 18 (6), or one studies the adequacy of the pleadings as a whole read together with the various annexures that are not carefully brought into the orbit of relevance so as to understand where the defendant's alleged legal obligation to pay for these specific services rendered originated from exactly, the latest particulars of claim (regardless

[12] See Metr*opolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) 333 G – H.

[13] The irregular step is only open to be addressed for a short period once it has been taken in the cause. If the other party "condones" it or gets beyond it by taking a further step that indicates it is not bothered by it, it loses its sting and that is then the end of the matter. Contrariwise, if the other party complains that the step taken in the cause is irregular or improper and constitutes a hindrance to the future conduct of the litigation, which in itself is prejudicial, then it has this remedy at its disposal and own choosing to complain, and failing the removal of the cause of its complaint, to deliver a rule 30 application and make it the court's business to decide what to do about the complained of step.

[14] See in this regard the similar scenario in *Heugh v Gubb* 1980 (1) SA 699 (C) at 702 in which the plaintiff's particulars of claim contained extensive extracts from and references to other documents and sources which detracted from a clear basic formulation of the plaintiff's claim.

of what they did or didn't achieve in earlier iterations of them), come up wanting in their formulation. Each agreement's significance, one to the other, requires to be explained and the sequence followed through. It serves no purpose to refer to the material terms of each one if their inter connectedness, or their relation to the end goal (which is to claim payment for the cost of each service rendered), is not clarified. The same applies in my view to the "requests" and the plaintiff's acceptance of them. In the realm of public procurement, confirmation in writing begs itself.

[35] Although the alleged acceptance of the first and second requests by the plaintiff appear from the context of the plaintiff's outline to possibly be an incident of performance of the contract(s) in each scenario that will probably be established by evidence in due course, it seems unlikely (in the realm of public contract) that the invoking of the legal obligations *in casu* would not have been recorded in writing. However, if the plaintiff means to suggest by its latest particulars that there was no acceptance in writing by the defendant in either case in response to the two requests because this is to be inferred from conduct then the basis for that inference will need to be contextualized otherwise the narratives regarding the acceptance of the requests in each case mean nothing.

[36] There are two distinct elements that are required to be established in rule 30 applications. The first is the issue whether the party complained against has in fact taken an irregular step (the court must hold this opinion), and the second is that the

court must be satisfied that the party complaining will be prejudiced in the cause if the irregular step is not set aside. The question of prejudice goes to determine what, if any, relief ought to be granted in all the circumstances but could, and may, so it appears from case law gone before, be a strong indicator of an irregular step or proceeding. In other words, if it causes palpable prejudice, it will almost certainly look like an irregularity and be found to be one. The two issues are often conflated but are not necessarily synonymous because a court may find the objection, "standing on its own", to be technically irregular (as was found in *Gardiner v Survey Engineering (Pty) Ltd*),[15] but yet consider that, absent any prejudice, the irregularity should rather be condoned. Notionally the two aspects should be considered separately.

[37] In the matters of *Z Sihleko and Z Ncobe v MEC for Health, ECP*[16] this court had reason to deal with the issue of what constitutes an irregular step in the context of an application such as the present one.[17] I concluded thus:

> "25. An "irregular step" or the standard by which a step is to be judged as to be so irregular or defective that it constitutes a nullity is also not defined.[18] Nestadt J mused in Krugel v Minister of Police[19] that "(p)erhaps it is a question of degree". He also quaintly refers to an irregular pleading having "a germ of validity" in the context of it surviving the challenge of being accused of being so defective as to constitute a nullity, but his remark seems to relate more to the issue of prejudice

[15] 1993 (3) SA 549 (SE) at 551.
[16] Bhisho case no's 1016 and 1017/2018. Unreported judgment of Hartle J delivered on 6 June 2019.
[17] The claims in those instances were for damages in delict and the complained of non-compliance related to the non-observance of subrules 18 (4) and (10). The principles are however the same.
[18] Herbstein & Van Winsen, Civil Procedure of the High Court of South Africa, Volume 1, 5th Ed at 738. See also *Gardiner Supra* at 551 I.
[19] 1981 (1) SA 765 E.

than to the question whether the jurisdictional fact of the "taking of an irregular step" envisaged in rule 30 (1) is in fact present. In this sense, the contention on behalf of the plaintiff that the defendant has sufficient information to plead (hardly an answer to the defendant's complaint of *prejudice* by virtue of the plaintiff's failure to comply with the provisions of rules 18 (4) and (10) which flows obviously from the non-observance of what those sub-rules intend),[20] is tantamount to a stab at the existence of the jurisdictional fact that an irregular step has been taken by a party to a cause (rule 30 (1)). Alternatively put, the plaintiff's defence is rather a denial that the proceeding or step is irregular or improper on the basis envisaged by rule 30 (3) entitling the court to remediate it with the wide powers at its disposal.

26. In Nasionale Aartappel Koöp v Price Waterhouse Coopers Ing[21] the court remarked that there was no exhaustive test to determine whether a pleading contained "sufficient particularity" for the purposes of rule 18 (4), but that it was an issue of fact: "a pleading contained sufficient particularity if it identified and defined the issues in such a way that it enabled the opposing party to know what they were".[22]

27. Certainly, guidance as to the standard of "sufficient particularity" is also to be found in the Rules of Court, more especially in this instance rule 18 dealing with the directions relating to pleading generally. This must be read together with rule 18 (12) deeming a pleading non-compliant with any of these general rules to constitute an irregular step.

28. Another way to view the standard of sufficiency is to ask whether, under the old practice of requesting particulars in order to plead, it would have been necessary for the party complained against to supplement an incomplete or defective statement by a request for and supply of further particulars. The absence of such a procedure presently available to the complaining party to address such a request for particulars indeed enhances the prejudicial aspect of a pleader's failure to comply strictly with the requirements of rules 18 (4) and (10)."[23]

---

[20] *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 470 H.
[21] 2001 (2) SA 790 (T) as paraphrased in the English headnote.
[22] At 798 F/G – 799 J.
[23] *Minister of Law and Order v Jacobs* 1999 (1) SA 944 (O) at 954D – E/F.

[38] *In casu* and for the reasons I have already highlighted above, the plaintiff has pleaded its case awkwardly, raising more questions than answers. A court faced with an application for default judgment premised on these particulars, although appreciating what the plaintiff's case is about generally, would in my view struggle to understand how exactly the defendant's alleged obligation to pay for the invoiced services arose in each case. In the realm of public contracts, a written agreement takes centre stage and constitutional values may also enter the picture.[24] The plaintiff has referenced several agreements. The material terms of each and their significance one to the other and to the "requests" ought to follow seamlessly. It is not helpful to simply recite "material terms" of each relevant agreement. Their relevance to the terms of the other agreements as a collective are also required to be pleaded and bought into the collective context. Their natural sequence too is of vital significance to explain the manner in which the parties' contractual arrangement evolved or how primary obligations came to be extended. The plaintiff is further obliged, since its relies upon one or more contracts which it has randomly attached to its particulars, to spell out what in each of them is essential to the dispute and how the one flows from the other. A court (and the defendant in this instance) can't be expected to have to trawl through pages of contracts that coincidentally may not even purport to be final signed copies of them. The obligation of the plaintiff is indeed, in terms of the provisions of rule 18 (6), to annex a "true copy" of what it hopes to assert as the written premise for the relied upon obligation.

[24] *Baedica 231 CC & Others v Trustees for the Time Being of the Oregon Trust & Others* 2020 (5) SA 247 (CC) at [175] – [178].

[39] I am satisfied that the defendant has established the first requirement for its present application, namely that the plaintiff's latest particulars of claim constitute an irregular step. This is in my view a clear example of an "irregularity of form" and a non-observance of the provisions of both rule 18 (4) and (6).

[40] In *Sihleko & Ngcobe* I also dealt with the issue of prejudice as follows:

> "[19] In both *Gardiner*[25] and *Life Healthcare Group (Pty) Ltd v Mdladla Prince & Another*[26] the courts make reference to "proof of prejudice" as being a requisite to success in an application in terms of rule 30, but the choice of the word "proof" is in my view perhaps unfortunate. Prejudice is rather simply stated a requirement for the success of such an application. The converse of this is that, absent any prejudice, even if in the opinion of the court the step is irregular, the excipient is unlikely to be successful in the application.[27]

---

[25] *Supra*.
[26] [2014] JOL 31463 (GSJ).
[27] This is because the court exercises a discretion. See Herbstein & Van Winsen, *Supra* at 740 – 2 and especially footnote 46 under the mantle of "The Court's discretion and the requirement of prejudice".

> [20] One looks in vain in the rule itself for any mention of prejudice, but it is trite that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside.[28]
>
> [21] At the one end of the perspective the excipient complains of an irregular step or proceeding and asks for it to be set aside. At the other end of that perspective, the respondent argues that, even assuming the irregular steps or proceeding is established, condonation should rather be granted, or the irregularity left well alone because there is an absence of any or real prejudice. It is balancing of the interests of excipient and respondent. The presence of prejudice is what elevates the issue at the root of the objection to something of substance warranting the exercise of the court's discretion in favour of the excipient.

[41] There is of course also the assumed affect of a failure to comply with the necessary provisions of rule 18. When allegations in a particulars of claim are flawed for want of compliance with these provisions (in this instance subrule (4), and (6) that stipulate the necessary standard for a meaningful pleading) the pleading, in terms of subrule (12), is deemed to be an irregular step, a taint which in itself attracts prejudice. This accords with the approach adopted in Sasol Industries (Pty) Ltd,[29] articulated as follows:

> "In my view, if a pleading does not comply with the subrules of Rule 18 requiring specific particulars to be set out, prejudice has, *prima facie*, been established. Cases may well arise where a party would not be prejudiced by the failure to comply with these subrules, or where a pleader would be excused from providing the prescribed

[28] *De Klerk v De Klerk* 1986 (4) SA 424 (W); *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO, Supra*; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T).
[29] *Supra*.

> particularity because he is unable to do so. But in such cases the *onus* would in my view be on him to establish the facts excusing his non-compliance. The law reports abound with cases which lay down this principle in respect of other Rules of Courts, and the same principle applies in my view in relation to non-compliance with Rule 18."[30]

[42] The plaintiff *in casu* has not at all sought to justify why it cannot provide the copies of each agreement it contends is relevant to its claim (as in signed final copies), or why it cannot reformulate its claim accordingly to the acceptable standard to meet the defendant's objections to it. The prejudice to the defendant thereby is in my view not just assumed but is instead quite real as it cannot plead thereto.

[43] In my view this is further not one of those instances where, as Mr. Seape, who appeared for the plaintiff, sought to prevail upon this court that the complaints concern "mere details". These details are instead vital to put the plaintiff's cause of action into the prescribed format required by the provisions of rule 18 (6) and to make sense as a whole before the defendant can be expected to plead to its claim. The prejudice lies in the fact that the plaintiff has not observed the subrule leading to the confusion and uncertainty regarding the source of the obligations as highlighted above.

---

[30] At 470 H.

[44] Mr. Seape coincidentally suggested that the application should fail because the prejudice contended for by the defendant had not been stated under oath by the defendant itself. It is however not in my view a requirement for an affidavit to be put up by the complaining party at the receiving end of an irregular or improper step. I dealt with this aspect too quite extensively in *Sihleko & Ngcobe*[31] as follows:

> "[12] In Chelsea Estates and Contractors CC v Speed-O-Rama[32] the court was faced with an objection *in limine* in the course of hearing an opposed rule 30 application. The plaintiff in that matter had contended, *inter alia*, that the defendant's objection, being in the form of such an application, should be supported by an affidavit. In this respect Mullins J reiterated the peculiar nature of an application in terms of rule 30 and confirmed his view that the filing of affidavits in respect of such a procedure are unnecessary:
>
> > "Defendant's notice in terms of Rule 30 certainly did not require to be supported by an affidavit. All that Rule 30 (2) requires is that the notice must specify the particulars of the irregularities complained of. It is analogous to an exception. Nor does Rule 30 provide for any form of reply, Plaintiff was quite entitled to give notice of intention to oppose defendant's application, but whether an answering affidavit on behalf of plaintiff will in any way be justified can be decided by the Court hearing the application. It was held in *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O), in certain applications, in *casu* an application to strike out, 'the Court must have regard only to the pleadings filed and cannot consider any fresh matter introduced by way of evidence on affidavit or in any other manner'. In my view the Rule 30 applications are in a similar category."[33]

---

[31] *Supra*.
[32] 1993 (1) SA 198 (E)
[33] At 202 E - F

> [13] In Scott & Another v Ninza[34] Jansen J agreed with the view of Mullins J that applications in terms of rule 30 do not as a norm require the filing of a supporting affidavit. However, he held in that matter that it was exceptionally justifiable for the parties to file affidavits in support of their cases, which he sanctioned by having regard to the facts mentioned in the supporting and opposing affidavits.[35]
>
> [14] There is an obvious reason why an affidavit is not required in this instance, or why on the face of it in my view a supporting affidavit may not be justified. Rule 18 (12) spells out in no uncertain terms the consequences of a party's failure to comply with any of the provisions of rule 18, which consequence was highlighted by the defendant in her prior notice of the complaints on which she presently relies to assert her entitlement to act in accordance with rule 30, and to seek the relief which she does:
>
> > "(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

[45] Concerning the technical issues raised, Mr. Seape submitted that the defendant was barred from invoking the provisions of rule 30 because it in effect had taken a "further step" in the proceedings with knowledge of the irregularity. This knowledge was supposedly gleaned by virtue of the fact that the defendant had conceded or overlooked defects only raised now that were already there in prior iterations of the plaintiff's particulars of claim. (Ironically the defendant's attorney in his founding affidavit proclaimed that the defendant's present complaints "thus far essentially resolve around the same complaints".) The plaintiff argues that those would therefore have been quite apparent from the fourth

[34] 1999 (4) SA 820 (E) at 823 C
[35] At 823 D

iteration that the defendant chose to except to and that the plaintiff for this reason had "knowledge" within the meaning contended for by rule 30 (2)(a) of the irregularities that it is only now making capital of. Mr. Seape, also argued that the ten day period referred to in sub-rule (2)(b) should for the same reason have run earlier, that is from the date when the defendant became aware of the shortcomings (that were as much there then as they are now) in the fourth edition of the particulars of claim. The short answer to this submission however is that the irregularity only commenced when the plaintiff delivered its most recent particulars of claim pursuant to the exception order. Whatever imperfections existed before were overtaken by the court's order nullifying the last iteration of the particulars of claim. In any event knowledge of the irregularity means knowledge of the fact which constitutes the irregularity (the filing of the latest set of particulars) and not consciousness that the fact constitutes an irregularity.[36] Further, the procedural limitation referred to in rule 30 (2)(b) referred to now makes it clear that a party must give notice to remove the cause of complaint within 10 days of becoming aware of *the fact that the step concerned had been taken,* and not within ten days of *becoming aware of the irregularity of the step.*[37]

[46] Mr. Seape also argued quite vociferously that I should dismiss the application since the defendant by its own admission failed to timeously comply with the provision of rule 30 (2)(b) and paid mere lip service to its purported application for condonation for this delay. This notice, although a necessary requirement to give the offending party an opportunity to remedy the impugned

[36] See Erasmus, Superior Court Practice at page D1 – 355, read with footnote 49.
[37] Erasmus, *Supra*, with reference to footnote 50.

step so that it no longer poses a hindrance to the conduct of the litigation and can be remedied without resorting to an application, can be condoned.[38] The defendant evidently assumed that the four court days it had been delayed to file the necessary notice was not a substantial delay and could be condoned for the very brief reasons furnished by its attorney, namely that she was out of town and away for a week immediately after the date of service of the plaintiff's amended particulars of claim. She explained that she purported to serve an unsigned copy on a Saturday, 5 March 2022, via electronic mail. The formal signed copy was filed on 7 March 2022. She averred further that she could not imagine that the plaintiff could be prejudiced by such an insignificant delay and pointed out that its attorneys had in any event not taken issue with such late filing in correspondence entered into with her.

[47] The defendant's attorneys supplemented its case for condonation in a replying affidavit and pointed out *inter alia* that she had diarized her file for the date when the plea ought to have been delivered in the ordinary course, obviously without expectation that counsel who she had briefed to draft her client's plea would advise her to instead invoke the procedure under rule 30. (The time limit for the filing of a plea would have been longer.) To my mind she offered a *bona fide* explanation for what was in effect a short delay and sought to address her miscalculation immediately once she realized that it was necessary to file a notice in terms of rule 30 (2)(b). Evidently the defendant found itself in a quandary because it could not meaningfully plead to the plaintiff's particulars of claim and had to adopt a different approach within a shorter time frame. This was clearly not

[38] Erasmus, *Supra*, with reference to footnote 52.

anticipated by her. The particulars of claim including all the annexures entail a bulky set of documents that even this court required a lengthy period of time to traverse. The defendant's attorney cannot be faulted for expecting that the fifth iteration of particulars would probably be in an acceptable format to plead when she left it up to her counsel to draft a plea in the ordinary course.

[48] As for prejudice to it, the plaintiff's attorney has not suggested any real prejudice occasioned by the short delay. Indeed its response in this respect is somewhat curious:

> "13. The other matter that requires comment is the glib assertion that the plaintiff is not prejudiced by the late notice. The disorderly conduct of litigation is inherently prejudicial, and especially so in this case because addressing the notice involves expending time and resources to oppose the consequence of the notice which is this application. There is therefore no merit to the defendant's suggestion that the plaintiff is not prejudiced by the delays.
>
> 14. Finally, it is important to point out that the defendant would suffer no prejudice if this court dismissed the threatened application for condonation. In the event, the defendant would simply have to file its plea. The defendant cannot seriously complain that it would be prejudiced by the invitation to raise its defence."

[49] To the contrary, even if I non-suited the defendant, the obstacle standing in the way of the litigation proceeding would still be there, and the continuation of the

action confounded thereby. Therefore I propose to condone the late filing of the defendant's pre-application notice.

[50] On the issue of costs, I cannot agree with Mr. Heunis' submission that costs on the scale of attorney and client are justifiable. This is because the prejudice suffered by the defendant could only have related to the present irregular step taken. As I have opined above, the historical prejudice to the defendant is irrelevant. Further the matter involved a simple application in terms of the rule and did not in my view warrant the attention of a second advocate.

[51] In the result I issue the following order:

1. The late filing of the defendant's rule 30 (2) (b) notice is condoned.
2. The plaintiffs "amended particulars of claim" are set aside as an irregular step.
3. The plaintiff is permitted a period of 15 days within which to file a fresh set of particulars of claim.
4. The plaintiff is liable for the costs of the application on the party and party scale.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 9 September 2022

DATE OF JUDGMENT: 21 February 2023

APPEARANCES:

For the plaintiff: Mr. M Seape instructed by Mothle Jooma Saddia Inc c/o I Clark Inc., East London (ref. Ms De Azevedo).
For the defendant : Messrs J C Heunis SC & F T Pretorius instructed by Clark Laing Inc., East London (ref. F Van Rooyen).