

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO: 06609/2020

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

14/04/2023

SIGNATURE

DATE

In the matter between:

SASOL SOUTH AFRICA t/a SASOL CHEMICALS

Plaintiff

and

GAVIN J PENKIN

[Identity Number: [...]]

Defendant

Neutral Citation: *SASOL South Africa t/a SASOL Chemicals v Gavin J Penkin* (Case No: 06609/2020) [2023] ZAGPJHC 329 (14 April 2023)

JUDGMENT

PULLINGER, AJ

SUMMARY

Civil Procedure – *this application concerns a less than perfect procedural step taken by the respondent, the defendant in an action. The defendant is an unsophisticated lay person who sought to amend his plea. The applicant, the plaintiff in the action, considers the notice of amendment to be irregular because the aforesaid notice does not advise the applicant, who is represented by an attorney and counsel, ten (10) days' notice to object to the proposed amendment nor does it contain a tender for costs. The applicant did not object to the proposed amendment in terms of Rule 28(3), but elected to deliver a notice in terms of Rule 30(2)(b) complaining that the notice of amendment was irregular.*

Proper administration of justice and interests of justice – *this is an instance where there is no real prejudice to the applicant. The correct approach to less than perfect procedural steps is to consider them in the context of prejudice and the interests of justice. The interests of justice is the yardstick for the court's discretion to overlook such steps where objections thereto would have no effect other than to foment delay and increase costs. The rules of civil procedure exist to ensure that every litigant has an opportunity to place its case before the Court so that a proper ventilation of the dispute between can take place. Where a litigant takes steps to prevent this from happening, this undermines the right in section 34 of the Constitution, the proper administration of justice and results in unnecessary delays and increased costs. In the absence of real prejudice, this conduct should not be permitted, and ought to meet with strong censure from the Court.*

Failure to deliver amended pages within the time period permitted in Rule 28(5) and (7) – *By the time this application was launched, the respondent had not delivered amended pages as contemplated in Rule 28. There was, thus, no extant notice of intention to amend because the notice had lapsed when the amended pages were not delivered within the time permitted by the Rules. Accordingly, there was no offensive notice capable of occasioning prejudice to the applicant, even if the contentions of prejudice were sustainable.*

Costs – *The conduct of the applicant is wholly directed at preventing the proper ventilation of the disputes between the parties. But for the novel issue on which no apparent authority exists, the*

applicant's attorneys and its counsel would have been precluded from recovering any costs from the applicant.

INTRODUCTION

- [1] This is an application that ought never to have come before Court. But, because this matter raises an issue that has come before me at least once before, and because there is no apparent judicial pronouncement thereon, this judgment is necessary.
- [2] This application, an interlocutory application, is one brought in terms of Rule 30 of the Uniform Rules of Court. The applicant contends that a notice delivered by the respondent styled "*Notice to Amend Plea*" offends against the provisions of Rule 28 because it does not comply with two sub-rules, being that, a notice of intention to amend as contemplated in the Rule must contain a provision notifying the recipient thereof of its to object¹, and must contain a tender for the costs occasioned thereby.²
- [3] Thus, the applicant contends that it was prejudiced because it was not informed of these procedural rights.
- [4] For each of these reasons, the applicant contends that the "*Notice to Amend Plea*" is an irregular step as contemplated in Rule 30.

THE LAW OF CIVIL PROCEDURE

¹ Rule 28(2)

² Rule 28(9)

- [5] The applicant, which is the plaintiff in a pending action under the above case number, is represented by attorneys and counsel. The respondent, the defendant in the action, is a lay person and has no representation. As appears from the pleadings delivered by the respondent and his responses to the notices delivered by the applicant, he is an unsophisticated litigant who bears very little knowledge of the rules of civil procedure much less the Rules of Court.
- [6] Section 34 of the Constitution guarantees a litigant's right of access to Court for purposes of resolving a dispute.³ This right is an embodiment of an ancient common law principle that a person has a right to a proper and fair hearing, which has, at its core, the right to a litigant to tell his or her side⁴, before an impartial presiding officer⁵, albeit that this right is subject to limitation.⁶
- [7] It is for this reason that our rules of civil procedure exist. These rules are, to a large extent, codified in the Uniform Rules of Court which govern the manner in which proceedings take place so that every litigant's rights to a fair trial may be realised.

³ **Off-beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and others** 2017 (5) SA 9 (CC) at [61] to [64]

⁴ **Attorney-General, Eastern Cape v Blom and others** 1988 (4) SA 645 (A) at 660 F – J

⁵ Section 165(2) of the Constitution; **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 1999 (4) SA 147 (CC) at [35]; **Bernert v Absa Bank Ltd** 2011 (3) SA 92 (CC) at 102 D-E and at 102 G

⁶ Consider: **Beinash and Another v Ernst & Young and Others** 1999 (2) SA 116 (CC)

[8] But this does not mean that the Rules are to be applied rigidly, inflexibly or without due regard to the exigencies of a particular case.

[9] Support for this proposition may be found in the Constitutional Court's judgment in **Eke**⁷ where it was said that:

"[39] This issue concerns Mr Eke's complaint that the re-enrolled summary judgment application was legally incompetent; this because rule 32 of the Uniform Rules allows the filing of only one summary judgment application. Mr Eke argues that the causa for the re-enrolled summary judgment application was not the same as that of the earlier summary judgment application. As a result, he continues, the re-enrolled application was essentially a second summary judgment application. Without doubt, rules governing the court process cannot be disregarded. **That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'.**

[40] **Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and ... to further the administration of justice'.** I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions." (Emphasis added)

[10] In the context of summary judgment, for example, the it has frequently been pointed out that less than perfect papers or less than perfect procedural steps are not a basis upon which to punish a litigant.

⁷ **Eke v Parsons** 2016 (3) SA 27 (CC)

[11] A brief survey of the authorities demonstrates it is deeply entrenched in our law that, when dealing with less than perfect procedural steps, the correct approach is to evaluate them on the basis of prejudice and the interests of justice.

[12] Indeed, in **Matjhabeng**⁸ the Constitutional Court considered the interests of justice as paramount in a condonation application where delay (an element of 'good cause'⁹) had not properly been made out, and no prejudice had been suffered by the opposing party.

[13] One can readily understand why this approach has been adopted. In the absence of prejudice, rigid adherence to the Rules of Court is a catalyst for delay and further costs.

[14] The introduction of considerations of the interests of justice broadens the Court's discretionary powers to prevent unnecessary delays and the concomitant and unnecessary incurrence of legal costs, at the one end of the scale, or the deprivation of a legal remedy at the other end of the scale.

[15] But resistance to the rigid adherence to the Rules of Court where no real prejudice ensues is not new.

⁸ **Matjhabeng Local Municipality v Eskom Holdings Limited and others; Mkonto and others v Compensation Solutions (Pty) Ltd** 2018 (1) SA 1 (CC) at [72]

⁹ **Ferris and another v Firstrand Bank Ltd** 2014 (3) SA 39 (CC) at [10] and [24]

- [16] Already in 1956, the Appellate Division expressed that, while litigants and their attorneys should not be encouraged to become slack in their approach to litigation, less than perfect procedural steps should not be permitted to get in the way of the proper ventilation of disputes.
- [17] The Appellate Division pointed out that "*in the absence of prejudice to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits*" should not be permitted.¹⁰ I think it is correct that "*the proper administration of justice*" as expressed by the Appellate Division, and the concept of "*interests of justice*" as is emerging in our constitutional jurisprudence, are synonymous in that they both have the purpose, proper and fair resolution of disputes between litigants.
- [18] In the oft-quoted judgment of **Maharaj**¹¹, Corbett JA, as he then was, held, in the context of an application for summary judgment, that the rigid adherence to the Rules of Court should be eschewed in the absence of prejudice.¹²
- [19] In **Roestof**¹³, Blieden J was confronted with an application for summary judgment where the defendant, *in limine*, raised the objection that the affidavit in support of summary judgment was defective because it referred to defendants (plural) as opposed to defendant (singular).

¹⁰ **Trans-African Insurance Co Ltd v Maluleka** 1956 (2) SA 273 (A) at 278 E-G

¹¹ **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 481 (A)

¹² At 423 F

¹³ **Standard Bank of South Africa v Roestof** 2004 (2) SA 492 (W) at 496 G-I

- [20] The learned Judge, after analysing various earlier decisions, held that if papers are not technically correct due to some obvious and manifest error which causes no prejudice, it is difficult to justify an approach that prevents the adjudication of a matter on its true issues.
- [21] The learned Judge considered the defence raised by the defendant and, having found it not to be a *bona fide* defence, good in law, granted summary judgment.
- [22] The learned Judge was no doubt alive to the fact that upholding a very technical objection in circumstances where there was no doubt what the plaintiff's case was, would merely result in the plaintiff's rights being delayed, and a concomitant and substantial increase in costs that would be occasioned by an inevitable trial.
- [23] In **Pangbourne Properties**¹⁴, Wepener J dealt with the question of condonation in the context where an opposed application before him was ripe for hearing, but the respondent took the point that the replying affidavit was delivered out of time.
- [24] The learned Judge pointed out that both the answering and the replying affidavits had been delivered out of time, the matter was ripe for hearing and there was clearly no prejudice to either of the parties.

¹⁴ **Pangbourne Properties Ltd v Pulse Moving CC and Another** 2013 (3) SA 140 (GSJ) at [13] to [19] and the authorities therein cited

[25] The learned Judge held that even late affidavits can validly be before the Court if the interests of justice require it. He cited numerous, weighty authorities, each of which make the point that the Rules of Court are designed to secure the inexpensive and expeditious completion of litigation, that the Rules of Court must not be abused, particularly through the making of unnecessary procedurally related applications that prevent the speedy resolution of litigation, or are used for an undue or ulterior purpose, or where the upholding of an objection to a technical defect would only result in a pointless waste of time, or costs would result in the highly unsatisfactory result that the parties to the proceedings would be required to commence them *de novo* and on the same facts.

[26] The learned Judge concluded that, in the absence of prejudice to either of the parties, there was no basis upon which a condonation application must be brought.

[27] This progressive movement away from rigid formalism and slavish adherence to a codification that is intended to be facilitative and not obstructive has become so entrenched in our law that the Constitutional Court has remarked, in the context of amendments, the modern approach, predicated on the interests of justice, is to permit amendments unless they will cause real and substantial prejudice to a party.¹⁵

¹⁵ **Affordable Medicines Trust v Minister of Health** 2006 (3) SA 247 (CC) at [10]

[28] The Rules are to be applied sensibly and pragmatically to bring about the ultimate ventilation of the true issues between the parties.

[29] In **Ferreiras**¹⁶, De Villiers AJ, dealing with a Rule 30 application where the issue was whether a default judgment ought to be rescinded on the basis that a late answering affidavit was not considered, said in regard to a rigid and formalistic approach to litigation, that:

“[20] The formalistic approach of the applicant comes at a great cost to bringing the matter to finality. Many litigants would have had the matter removed from the unopposed roll before Louw J at the respondents' cost, delivered a replying affidavit, and the matter would have been finalised by now. Many others would simply have answered the rescission application, and the matter would have been finalised by now. The formalistic approach of the applicant will continue to involve the parties in much expense. If I were to decide the matter against the applicant (as I do), at least the rescission application would have to be answered, replied to, and argued (if my judgment is not appealed against). If the rescission application were to succeed (and no attempts were made to seek leave to appeal that decision), the application for payment would have to be replied to and argued.

[21] An applicant, prima facie desirous to be paid, has embarked on this technical, time-wasting route that may tie it and the respondents up in litigation for years to come, and tie it up in matters that take the matter potentially not one step closer to finality.”

[30] The learned judge went on find that the Rule 30 application had no merit and found that it should never have been brought.

[31] It is thus clear that where the Rules of Court are invoked to prevent, stymie or obfuscate the true issues, the Court should not permit such conduct.

¹⁶ **Ferreiras (Pty) Ltd v Naidoo and another** 2022 (1) SA 201 (GJ)

[32] Before addressing the substance of the applicant's complaint, a brief chronology of the steps taken in this litigation is necessary.

THE FACTS

[33] On 26 May 2020, personal service of the applicant's summons was effected on the respondent at an address in Constantia Kloof. On 1 June 2020, the respondent gave notice of his intention to defend the action, but failed to deliver a plea thereanent. This occasioned the delivery of a notice of bar on 22 June 2020. A plea was subsequently delivered on 25 June 2020. In this plea the respondent takes issue with this Court's jurisdiction. It was an issue that is tangential to this application which was debated in the hearing before me, and I return to it below.

[34] On 21 October 2021, the respondent delivered the offending notice. There is nothing before me which indicates what took place from 21 October 2021 until 3 November 2021, when the applicant delivered a notice in terms of Rule 30(2)(b).

[35] The Rule 30(2)(b) notice is in two parts. First, it takes issue with the omission on the part of the respondent to advise the applicant of its procedural rights in terms of Rule 28. The applicant does not suggest it is unaware of these rights, or would be prejudiced by having not been appraised thereof. Second, the notice complains that the "*notice to amend*" could be excipiable for various reasons.

[36] *En passant*, Rule 30 deals with issues of form and not substance. This, on a rigid application of the Rules, would make the Rule 30(2)(b) irregular in and of itself.

[37] The applicant did not, however, deliver a notice as contemplated in Rule 28(3) objecting to the offending notice notwithstanding its alleged prejudice.

[38] On 16 November 2021, the respondent delivered a notice in response to the applicant's Rule 30(2)(b) notice. The response provides:

"TAKE NOTICE THAT the Defendant is not an attorney and has not been trained in the Court Rules. The Defendant does not have the funds to secure the services of an attorney.

The Defendant apologises to the court for any rules which have not been adhered to.

The defendant will not remove the clauses [sic] of the complaint as the issues raised are valid inapplicable in this matter.

The Plaintiff further confirms that the debt was paid by Coface and therefore this legal proceeding is an attempt for the Plaintiff to "Double Dip" (Be paid twice for the same debt).

Coface has not subrogated the rights to the Plaintiff as suggested by the Plaintiff.

The amendment says to clarify the points already made in the Plea and the Discovery documents. No new points were mentioned in the "Notice to amend Plea". This document clarified the issues [sic] are already pointed out.

The Defendant acknowledges that the Plaintiff has not been afforded an opportunity to object to the amendment as the Defendant was not aware that reference needed to be made.

Take notice further that any party objecting to this amendment, must within 10 days of receipt of this notice, deliver its objection in writing, together with the statement of the grounds upon which it is based, failing which the amendment will be effected. The Defendant does however give the Plaintiff opportunity to object to the amendment within 10 days of this notice."

[39] It is plain that the respondent has endeavoured, through the notice of amendment, to place his defence to the applicant's action before the court in more precise terms.

[40] As inelegant as the notice wherein he attempted to do so may have been, the attempt to stymie the formulation and ventilation of the dispute between the parties runs contrary to the proper administration of justice, and is not in the interests of justice.

[41] I do not comment any further on the content of this document as there is no application for leave to amend before me.

[42] Notwithstanding the lapse of ten days, the respondent did not deliver amended pages as required by Rule 28(5).

[43] Now, it appears to me that, as a matter of practice, the respondent's proposed amendment lapsed when he failed to file amended pages. The notice of amendment is thus of no force or effect. In these circumstances, notice of the proposed amendment would be given afresh, and the process prescribed by Rule 28 would then follow. I could not find any authority, one way or another,

on this issue. But there seems to me that there is no good reason to meddle with long-standing practice.

[44] On this basis, and on 23 November 2021 when the applicant delivered a notice in terms of Rule 30(1), there was no extant “*notice of intention to amend*” as contemplated in Rule 28(1), it having lapsed for want of either the delivery of amended pages, or for want of an application for leave to amend, assuming the Rule 30(2)(b) notice had the same effect as a Rule 28(2) notice.

[45] Thus, by the time that this application came before me, it was much to do about nothing.

[46] It is in this context that Fleming J’s observation in **SA Metropolitan Lewensversekeringsmaatskappy Bpk**¹⁷ is apposite. The learned Judge said:

“I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed.”

[47] It is clear there was no hindrance to the action proceeding when this application was brought.

¹⁷ **SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO** 1981 (4) SA 329 (O) at 333 G–H

[48] Nonetheless, the applicant's counsel persisted in argument before me that the applicant was prejudiced because the status of the document was unclear and uncertain.

[49] Aside from this point not being an issue raised in the Rule 30 notice, the assertion is not based on fact or principle. The notice was no more than the respondent's notice of his intention to supplement his plea, but he did not do so by filing amended pages. Whether this was by design or through ignorance of the process matters not. The offending notice had lapsed and does not form part of the pleadings.

[50] The substantive prejudice asserted by the applicant is more imagined than real.

[51] Rule 28 affords a person wishing to object to a proposed amendment 10 days in which to do so. I cannot fathom how the absence of a statement to that effect deprives the person receiving a notice of intention to amend from exercising that procedural right, much less creates the sort of prejudice that Rule 30 is intended to overcome.¹⁸

[52] Rule 28(9) is clear in its terms. It provides:

“A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.”

¹⁸ SA Metropolitan Lewensversekeringsmaatskappy Bpk (*supra*)

[53] There is no obligation on a party giving notice of intention to amend in terms of Rule 28(1) to make a tender for the costs occasioned by the amendment. I was unable to find any authority for the proposition that the absence of a tender for costs renders the notice defective or irregular.

[54] Earlier in this judgment, I mentioned the tangential issue of the respondent's objection to this Court's jurisdiction. This issue has not been decided and was not before me to decide. The respondent's special plea may or may not be bad, but if it is upheld in due course, orders made in any interlocutory proceedings and which may have a material effect on any trial in due course, may well have been erroneously sought or granted. Fortunately, and by reason of the approach which I have taken above, this is not an issue that requires further comment.

[55] That which does require further comment is the applicant's approach to this case. It is no doubt anxious to prosecute its action and recover monies that it alleges are due to it from the respondent. This is part and parcel of its right in terms of section 34 of the Constitution.¹⁹ To achieve this, however, in circumstances where the respondent is an unsophisticated lay litigant, its approach ought to be facilitative and not obstructive.

[56] It may be fairly said of the applicant herein that this application was either not intended, or did not have the effect of removing any hindrance to the prosecution of the action.

¹⁹ **Off-beat Holiday Club** (*supra*)

[57] I am able to do little more than quote the eloquent exposition of the proper functioning of the rules of civil procedure and the Rules of Court made by Slomowitz AJ in **Khunou**²⁰ , where the learned acting judge said:

"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.

Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly, the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances.

This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.

It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible. Unfortunately this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay **or deny justice to so manipulate the Courts' procedures that their true purpose is frustrated. Courts must be ever vigilant against this and other types of abuse. What is more important is that the Court's officers, and especially its attorneys, have an equally sacred duty.** Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute. Nothing less is expected of them, and if they do not measure up a Court will mark its disapproval either by an appropriate order as to costs against the defaulting practitioner or, in a proper case, by referring the matter to the Law Society for disciplinary action." (Emphasis added)

²⁰ **Khunou and others v M Fihrer & son (Pty) Ltd and others** 1982 (3) SA 353 (W) 355 G – 356 C

[58] All that remains to be said is to record the fact of the respondent's non-appearance on the day this matter was called before me.

[59] In this Division, applications are set down for hearing on the Monday and will be allocated for hearing to a day in the week. It so happens that on the Monday of this week, I heard an opposed application from out of town counsel, and gave more than a week's notice to counsel (and the respondent) appearing in all other matters allocated to me for the week when their matters would be heard. Notice was given that this matter would be heard on the Tuesday.

[60] The respondent, in correspondence to my Registrar, contended that insufficient notice had been given to him that attending at court on the Tuesday was inconvenient, and that he would not be in attendance. As such, the proceedings proceeded in his absence. This sort of conduct is discourteous to a court, to opponents, and has a detrimental effect on the proper administration of justice. It stands to be deprecated in the strongest possible way.

[61] In the context of the foregoing, this application is a textbook example of what Gardener JP considered to be vexatious litigation in **Alluvial Creek**.²¹ Although I am minded to make a costs order depriving the applicant's attorneys and counsel from charging any fees in this case, it did raise the

²¹ *In re Alluvial Creek Ltd* 1929 CPD 532 at 535

important issue on which no authority exists, that being, the effect of a notice of amendment which is not objected to in accordance with the Rule, and the amended pages are not filed. But for the novelty of this issue, I would have made such a costs order.

[62] In the result, I make the following order:

The application is dismissed.



A W PULLINGER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 14 April 2023.

DATE OF HEARING: 28 February 2023

DATE OF JUDGMENT: 14 April 2023

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: Adv J A Du Plessis

ATTORNEY FOR THE PLAINTIFF: Gerrit Coetzee Attorneys

COUNSEL FOR THE DEFENDANT: In person / no appearance

ATTORNEY FOR THE DEFENDANT: N/A