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

REPUBLIC OF SOUTH AFRICA

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

Case Number: 13723/2020

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

DATE _____ SIGNATURE _____

In the matter between:

FIRST RAND BANK LIMITED TRADING Applicant

PRIVATE BANK AND AS FNB

and

DOOLA, RIYADH

(Identity number 731017 5228 085) Respondent

Neutral Citation: *FIRST RAND BANK LIMITED TRADING v PRIVATE BANK AND AS FNB and DOOLA, RIYADH* (Case No: 13723/2020) [2023] ZAGPJHC 456 (11 May 2023)

JUDGMENT

MALUNGANA AJ

[1] This is another bout of interlocutory proceedings in the history of litigation between

the bank (applicant, in the main application) and the respondent. I shall henceforth refer to the parties as they were cited in the main application. The initial applications served before Moorcroft AJ, who after hearing the matter dismissed the respondent's applications to compel compliance with rule 35 (12) and the striking out of certain averments contained in the applicant's answering affidavit.

[2] That brings me to the stage of the present application. Two further consolidated interlocutory applications came before me on 25 January 2023. The first one, was an application brought by the applicant in which it sought to set aside the rule 30 application launched by the respondent on 28 July 2021, as an irregular step on the basis that it is out of time and the respondent had already taken further step. The second application, brought by the respondent, was to strike out certain averments contained in the applicant's rule 30 (2)(c) dated 29 September 2021, and the applicant's replying affidavit in terms of rule 30(2)(c) dated 27 October 2021 on the basis that they are irrelevant, and do not advance the plaintiff's case.

[3] It cannot be overstated that rule 30, which confers upon the aggrieved person the right to set aside the irregular step, is concerned with the forms and not the substance of the matter. The party against whom the relief is sought is first and foremost afforded an opportunity to remove and cure the cause of complaint.[1] An application in terms of rule 30 will be granted only where the irregular step causes prejudice to the person seeking to set it aside. It follows that there is no prejudice if the further conduct of the case is not affected by the irregular step.[2]

[4] The causes of complaint set out in the applicant's notice in terms of rule 30(2)(b) are *inter alia* as follows:

(a) On 26 July 2021 the respondent attorneys, by way of email correspondence addressed to the applicant's attorneys, stated that they would not accept the late filing of the applicant's replying affidavit, and the answering affidavit to the respondent's counter-claim. The respondent also stated that the late filing thereof constituted an irregular and afforded the applicant 10 days to remove the irregular step.

(b) On 27 July 2021, the applicant objected to the aforesaid stating that the respondent's notice was out of time.

(c) On 28 July 2021, the respondent delivered an application in terms of rule 30 to set aside the applicant's answering and replying affidavit as an irregular step. Notwithstanding the fact that it was an interlocutory application it was brought in the long form.

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[1] *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others [2023] ZACC2.*

[2] *Trans-African Insurance Co Limited v Maluleka* 1956 (2) SA 273 (A) at 276F-H [1956] 2 All SA 382 (A); *Sasol Industries (Pty) Limited t/a Sasol 1 v Electrical Repair Engineering (Pty) Limited t/a LH Marthinusen* 1992 (1) SA 466

(d) On 29 July 2021, the respondent delivered a notice in terms of rule 35(12), calling on the applicant to produce various documents as they pertain to the applicant's founding, answering and replying affidavit within 5 days.

(e) In filing rule 35(12) the applicant avers the respondent has taken a further step in the proceedings with knowledge of the irregularity and is thus not entitled to bring an application in terms of rule 30.

[5] The respondent denies the applicant's assertion that its rule 35(12) notice advances the matter.[3] He contends further that a notice in terms of rule 35(12) does not constitute a pleading as envisaged by the rules of Court. According to him the Court must determine whether the rule has any effect in advancing the matter closer to finality.

[6] Meanwhile the applicant, submits that the respondent's notice in terms of rule 30(2)(b) was served out of time, being 21 days after the alleged irregularity. Moreover, the respondent took a further step in the proceedings with knowledge of irregularity, day after he brought the application to set aside the applicant's replying/answering affidavit. Counsel for the applicant further argued that requesting documents manifests the intention to advance the proceedings. Accordingly, the respondent has lost his right to proceed with rule 30.

[7] I was referred to the case of *Pangbourne Properties v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) (25 January 2023, which authority I believe is relevant to the questions raised in this matter. The learned Judge Wepener in the course of his judgment [para 16] referred to *Venter v Van Wyk (*GNP case No 30323/04, 27 June 2005) from which the following appear:

'*The first point in limine is, in my view, highly technical. It is correct that the replying affidavit was filed out of time and that no formal application for*

[3] 048-87 case lines. para,8 of the replying affidavit

condonation was filed by the respondent. However, there is a lot of mud-slinging to and fro between the parties which situation I do not prefer to entertain. It is a waste of valuable time. I therefore rule that I will admit all affidavits before me and deal with the important issues presented by the application.'

[8] Where one or the other of the parties has failed to comply with requirements of the rules or an order made in terms thereof and prejudice has already been caused to the opponent, it should be the Court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the rules were designed. See in this regard *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A), also referred to in *Pangbourne supra.*

[9] The relevant portion of Rule 30(2) reads:

"(2) An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of irregularity or impropriety alleged, and may be made only-

(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 fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2)."

[10] If I am reduced to technicality, which I would prefer to avoid, the request by the respondent of certain documents in terms of rule 35(12) not only amounts to taking further step as contemplated in rule 30(2)(a), but also leaves an impression that he acknowledges the impugned affidavits. The request to produce documents is a significant step in advancing one's case. It begs a

question as to why would a party be compelled to produce a document for any other reason if it is not intended to advance the pending litigation. Furthermore, some of the documents requested in the rule 35(12) relate to the affidavits which are seemingly under attack in the rule 30 application.

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[11] I find myself unable in light of all the authorities mentioned above, to align myself

with the submissions of the respondent's counsel that the respondent's lateness of filing the application is insignificant when compared to that of the applicant. I have to approach both cases of non-compliance with the rules on the same footing in the context of the established legal principles. Prejudice and reasons for the delay would be a factor to be considered in both cases in deciding what an appropriate remedy is in the circumstances.

[12] It appears from the record that both parties have filed affidavits, albeit late at the

height of Covid-19 pandemic. There is evidence that the parties were engaged in some discussion, and at some stage mediation was considered. At this stage no prejudice has been suffered as a result of the late filing of the affidavits. It is with this in mind that I find it prudent to disregard the merits of the condonation applications. The most appropriate remedy in the circumstances is for the parties to focus on the important issues set out in the main application.

[13] As regards the striking out application launched by the respondent, it is well established principle in our law, that rule 6(15) enjoins the court to strike out from an affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate costs order. The application for striking out in the present case is directed at certain paragraphs of the replying and founding affidavit in the rule 30 application. In particular, paragraphs 3;4;5;8;9;10; &12 of the applicant's affidavit in terms of rule 30(2)(c).

[14] In *Beinash v Wixley* (457/95) [1997] ZASCA 32; 1997 (3) SA 721 (SCA) the Court

had to consider an appeal relating to the striking out of certain parts of the affidavit from the judgment of Heher J. Mahomed CJ examined the requirements that must be met before the striking out of a matter from any affidavit can succeed, and stated in paragraph 27 as follows:

> "…*I am not persuaded that Beinash suffered any prejudice if this allegation, or any other allegation contained in the impugned paragraphs of the founding affidavit, was not strike out. No such prejudice was relied upon in the argument."*

[15] As in *Beinash*, there is nothing of substance in the papers before me to suggest that the respondent had suffered any prejudice as a result of any matter contained in the affidavit. It is accordingly my view that the application to strike out the impugned paragraphs falls short of the requirements in the context of rule 6(12).

[16] In the result therefore the following order is made:

1. The respondent's application in terms of rule 30 launched on 28 July 2021 is set aside as an irregular step;

2. The respondent's application to strike out parts of the applicant's affidavits is dismissed.

3. The respondent is ordered to pay the applicant's costs on attorney and client scale.

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P Malungana

Acting Judge of the High Court

GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For the Applicant	: Adv Ross Shepstone
Instructed by	: AD Heitzberg Attorneys
For the Respondent	: Adv G Nel SC
Instructed by	: Vally Chagan & Associates