1915. *October* 7. MASON, J.

Practice.—Notice of motion.—Waiver of technical objections.—Rule 9 (*b*).

Objections to a notice of motion as not in conformity with the terms of Rule 9 (*b*) are not waived by the respondent if he accepts the notice and files affidavits on the merits; nor is he bound to give notice of his objections to the other side.

Application for review of taxation on notice of motion.

H. H. Morris, for respondent: I take two preliminary objections. We have received two notices of motion regarding two separate sets of items. Both notices are bad under Rule 9 (*b*). In the one case we have not had 48 hours' notice. In the other, the notice does not bear the signature of the attorney who issued it. These are fatal objections. See *Schewe* v. *Schewe* (1909, T.H. 175).

Manfred Nathan, for applicant: I admit the notices are not in accordance with Rule 9 (*b*), but the respondent accepted them, and so, I submit, waived the irregularities. He has filed affidavits on the merits, and must be taken to have signified his willingness to have the matter heard to-day.

Morris, in reply: As to waiver, we are in the position of having excepted and pleaded over.

[MASON, J.: One of your objections depends on a question of fact—that the notice is not signed. Should you not, in fairness have brought this to their notice?]

No. Notice of a technical objection need never be given. See *Elephant Trading Company* v. *Smukler and Tosewsky* (1914, W.L.D. 7).

MASON, J.: The Rule under which these objections are taken is quite clear and imperative; and *prima facie* the objections are fatal. The sole question is whether there has not been waiver of the irregularities by the respondent who accepted the documents, and has filed replying affidavits on the merits. Does that amount to waiver? The general rule is that where a defendant excepts he ought also to plead over, and that rule has been applied to provisional cases also. Therefore, by filing his affidavits the respondent cannot be held to have waived his right to take these objections. And there is no obligation in law to compel him to give notice of them to the other side, though such a rule would certainly

be fair. He was within his rights in reserving the objections for production in Court, and, as they are both fatal, the application must be dismissed with costs.

[By consent the applicant was given leave to make the applications the following week as far as possible on the same papers, without prejudice to the right of the respondent to tender within the next three days.]

Applicant's Attorney: *A. B. van Os*; Respondent's Attorney: *P. Morris.*

[P. M.]

DAVIS v. CAPE TIMES LTD.

1915. *October* 1, 5, 11. MASON, J.

Lottery.—Law 7 of 1890, *sec.* 6.—*Purchase of newspaper as "subscription."*

In order to constitute a scheme a lottery within the meaning of Law 7 of 1890, sec. 6, it is not necessary that the subscription referred to in the section should have any value of any kind whatever, or that such subscription should go towards the prize-fund of the scheme.

Even apart from the definition in sec. 6 of Law 7 of 1890, a scheme is a lottery if, although it requires no actual contribution from the participants, it is calculated to induce them to purchase copies of a particular newspaper for the purpose of ascertaining the results.

Willis v. *Young & Stembridge* (1907, 1 K.B. 448) followed.

Action to recover £21,424 as damages for breach of contract. The facts appear from the judgment.

R. Feetham (with him *R. Norman*), for defendant: We ask for absolution. The agreement which has been set up by the plaintiff is illegal and he cannot recover under it. The scheme is a lottery within the meaning of Law 7 of 1890. See section 6. It is immaterial whether the "subscription" is a thing of value or not. It is part of the scheme to get people to buy the paper, and there are English decisions to the effect that an inducement to buy a paper is sufficient to constitute a scheme a lottery. See *Willis* v. *Young & Stembridge* (1907, 1 K.B. 448); *Taylor* v. *Smetten* (1883, 11 Q.B.D. 207); *Hall* v. *McWilliam* (85 L.T. 239); *Bartlett* v. *Parker and Others* (1912, 2 K.B. 497). The following