



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 15325/2010

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff/Respondent

and

ROLAND PIPER

First Defendant/Applicant

JOHANNES ALBERTUS VAN JAARSVELD

Second Defendant

ORDER

It is ordered:

1. The plaintiff is granted leave to withdraw the application in terms of s 27 of the Superior Courts Act 10 of 2013 and is directed to pay the costs occasioned by such application.
2. The application in terms of rule 30 is dismissed and the first defendant is directed to pay the costs occasioned by such application as well as the application for condonation.

JUDGMENT

Henriques J

Introduction

[1] This is an opposed application in terms of Uniform rule 30 in which the first defendant (applicant) seeks an order declaring the delivery of the plaintiff's (respondent's) notice of bar dated 12 December 2017, an irregular step, and seeks to have the notice set aside in terms of rule 30.

[2] The parties have agreed that the opposed motion be decided on the papers without the need for an oral hearing. For the sake of convenience, I will refer to the parties as they are cited in the action.

Issues

- [3] The issues which require determination in this application are the following:
- (i) whether the notice of bar is irregular;
 - (ii) whether the rule 30 notice and application is a dilatory step seeking to delay the finalisation of the merits of a jurisdiction debate;
 - (iii) whether the first defendant has suffered any prejudice; and
 - (iv) whether the first defendant has made out a case for the relief that it seeks.

[4] The parties have agreed that there are no material disputes of fact and in order to decide the application, a brief summary of the steps taken in the litigation between the parties is necessary.

Factual Matrix

[5] The plaintiff instituted action against the defendants in December 2010, in their capacity as sureties, in respect of a debt owed by the first defendant for monies loaned and advanced by the plaintiff to the defendants who operated a business current account with the plaintiff in the name of Minecom SA (Pty) Ltd. Only the first defendant

defended the action.

[6] Subsequently, in February 2011, the plaintiff instituted an application for summary judgment which was opposed by the first defendant. Certain in limine points were raised in opposition to summary judgment but in the main, the first defendant asserted that the court did not have jurisdiction, the reasons advanced are not relevant to this application. The other defences raised similarly are not relevant to this application.

[7] Summary judgment was refused and the first defendant was granted leave to defend. The plaintiff then applied for default judgment against the second defendant on 15 June 2016 which was placed before the Registrar of this court. On 16 August 2016, the Registrar refused to grant default judgment against the second defendant, as the Registrar was of the view that this court did not have jurisdiction.

[8] In November 2016, the plaintiff applied for the transfer of the matter to the South Gauteng High Court in terms of s 27(1)(a) of the Superior Courts Act 10 of 2013. This is approximately five years after the first defendant was granted leave to defend. The application to transfer the matter to the South Gauteng High Court was opposed by the first defendant. The plaintiff did not pursue the application to transfer the matter to the South Gauteng High Court. In July 2017, the plaintiff then amended its particulars of claim to reflect the residential address of the first defendant which is within the court's jurisdiction.. Such amendment was not opposed and was effected by the service of the amended pages.

[9] On 13 December 2017, the plaintiff served a notice of bar relating to the first defendant's failure to file a plea to the amended particulars. A notice in terms of rule 30 dated 14 December 2017 appears to have been served in December, however the first defendant failed to timeously set down the rule 30 application. Although a notice in terms of rule 30 was served on the plaintiff's attorneys, the application was not enrolled. This only came to the attention of the first defendant's attorneys in February 2018 when an application for default judgment was enrolled by the plaintiff for hearing on 14 May 2018. On receipt thereof, the first defendant then applied for condonation.

The first defendant was granted condonation for the late enrolment of his rule 30 application on 14 May 2018, and the costs of such condonation application were reserved and the plaintiff's application for default judgment was adjourned sine die, with the costs of such application similarly reserved.

Submissions of the parties

[10] The first defendant contends that the application to transfer the matter to the South Gauteng High Court is still pending and consequently, it ought not to be required to plead until the finalisation of such application, and secondly that such application to transfer the matter constitutes a concession by the plaintiff, that this court does not have jurisdiction.

[11] In support of such submission the first defendant relies on an averment in an affidavit filed in support of the application to transfer the matter to the South Gauteng High Court by the plaintiff's former attorneys of record. The relevant paragraph in the affidavit reads as follows:

'The Applicant's original Attorneys-of-Record was the firm of Harkoo, Brijlal & Reddy, as appears from the original Combined Summons in the matter. At that stage, the underlying action was instituted in the KwaZulu-Natal Durban Local Division. I cannot say with certainty why this was done'.¹

[12] And further, at para 8 of the affidavit, it reads as follows:

'It therefore appears that the correct forum in which the action is to proceed is the South Gauteng High Court, Johannesburg, and I respectfully submit that the action should accordingly be transferred to that division'.²

[13] The first defendant, in opposing the application to transfer indicated that such application was not competent as the old Supreme Court Act 59 of 1959 did not contain any provision for an action to be transferred to another jurisdiction and that the Superior Courts Act, which allowed such transfer in terms of s 27(1)(a) commenced on 23 August 2013, and did not operate retrospectively.

¹ Para 5, page 29, Index to the rule 30 application.

² Page 29, Index to the rule 30 application.

[14] The first defendant submits that the removal application must be decided before any further steps can be taken in the action and it is prejudiced, as it is required to plead in this division when this court does not have jurisdiction. He alleges that he is fortified in this view as the Registrar refused to grant default judgment against the second defendant on the basis that this court did not have jurisdiction and submits further that he is prejudiced as he is required to continue litigation in a court when the plaintiff has conceded that the court does not have jurisdiction and is incurring costs in two jurisdictions.

[15] The plaintiff submits that the application to transfer the action to the South Gauteng High Court, although instituted, was not pursued. It subsequently amended its particulars of claim on 24 July 2017 to cite the first defendant at his residential address in Westville, Durban. Such amendment was not opposed and the amended page was served on 6 September 2017 and filed on 11 September 2017 and consequently the particulars of claim now refer to the first defendant residing within the court's jurisdiction.

[16] It denies that the court does not have jurisdiction and indicates that the references to the paragraphs in the plaintiff's affidavit referred to above do not constitute concessions and if the court finds they are in fact concessions, it is not bound by such concessions. In addition it submits that the application to transfer has nothing to do with the matter.

[17] The plaintiff avers that it did not concede that the court did not have jurisdiction and that there was nothing in s 27 of the Superior Courts Act which suspends the time period for the filing of pleadings. In addition, the plaintiff submits that the provisions of rule 30 are being improperly utilised to avoid the question of whether or not the court has jurisdiction, pursuant to the amendment. It submits that if the first defendant was bona fide, he would have objected to the amendment, filed a special plea of prescription alternatively, not oppose the application for transfer and/or file a special plea of jurisdiction.

[18] The crux of the issue for determination, in my view, is whether or not the

provisions of rule 27 have suspended the *dies* for the filing of a plea.

Analysis

[19] The provisions of Uniform rule 30 reads as follows:

‘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.’

[20] The rule is intended to deal with matters of form not of substance. It is intended to deal with irregular steps taken by parties during the course of litigation and where the irregularity emanates from the inappropriate use of the rules of court.³ It is not in my view to be used as a dilatory step and serve to prevent the speedy resolution of matters. The words of De Villiers CJ in *Le Roex v Prins*⁴ quoted in *Singh v Vorkel* are still apposite:

‘The tendency of recent rules of procedure in this Court has been to sweep away all unnecessary technicalities and hinderances to the speedy and effectual administration of justice’.⁵

³ D Harms *Civil Procedure in the Superior Courts* S1-69 at B30.3

⁴ *Le Roex v Prins* (1883-1884) 2 SC 405 at 407.

⁵ *Singh v Vorkel* 1947 (3) SA 400 (C) at 406.

[21] It is common cause that the application to transfer the matter to the South Gauteng High Court after it became opposed, was not pursued by the plaintiff. This was in January 2017. Subsequently, the plaintiff then in July 2017 sought to amend its particulars of claim to cite the residential address of the first defendant, which amendment was not opposed. The amendment became effective when the amended pages were filed in September 2017. The first defendant, in my view, was then required to plead to the amended particulars of claim. The plaintiff, quite correctly in my view, served a notice of bar requiring the first defendant to plead when he failed to do so.

[22] In addition, if the first defendant was desirous of having the s 27 application determined, it could have proceeded to enrol the matter for hearing in terms of the Practice Rules in this Division, as a consequence of the plaintiff's failure to file a replying affidavit.

[23] There is nothing to indicate why it did not exercise this option. In addition, I agree with the submission of Mr *Tucker* that there is nothing in the reading of s 27 of the Superior Courts Act which indicates that the dies for the filing of a plea is suspended as a consequence of such application. It must follow that I agree with the submission that the first defendant can still raise the aspect of a special plea in relation to prescription as well as jurisdiction, should it be of the view that this is a defence in any plea it files.

[24] I also do not agree that the contents of the two paragraphs referred to in the plaintiff's affidavit in the s 27 application is a concession that this court does not have jurisdiction and even if I am wrong in coming to that conclusion, there is existing authority that the court is not bound by such concessions if same is wrong in law.⁶

[25] No purpose will be served in having the s 27 application enrolled as the plaintiff has tendered the costs of such application, and in addition one of the grounds filed in

⁶ *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) para 43; *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh & others* 2019 (4) SA 471 (SCA) para10.

opposition namely the apparent lack of jurisdiction has been surpassed by the amendment which the first defendant did not oppose. The other grounds of opposition including that of jurisdiction can rightfully still be raised in the first defendant's plea. Although none is alleged, any prejudice which may be suffered by the first defendant in relation to the s 27 application can be cured by the tender of costs and any defences can still be raised in his plea.

[26] The reliance on rule 30 by the first defendant in my view is inappropriate and does not bring the parties any closer to having the real issues determined. I do not agree that the plaintiff's notice of bar constitutes an irregular step or that the s 27 application stayed the dies for the filing of further pleadings. In this regard I align myself with the sentiments expressed by Rampai J in *Louw v Grobler & another* where he held the following:

'The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.'⁷

Costs

[27] That then brings me to the aspect of costs. Both parties, in my view, have been lax in pursuing the matter to finalisation. The plaintiff now by its tender of costs seeks to withdraw the s 27 application at this late stage, subsequent to the application being enrolled on the opposed motion court roll for hearing and does so in its heads of argument. In my view, an appropriate order in this regard ought to be made.

[28] The first defendant too has persisted with this application rather than deal with

⁷ *Louw v Grobler & another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016) para 18.

the merits of the matter. He is fully aware that the particulars of claim have been amended and he had elected not to object to such amendment. In addition, although the first defendant indicates that he filed an exception, such exception does not appear to have been set down. Presumably, this was as the plaintiff amended its particulars of claim.

Order

[29] In my view, the fairest result is the following:

[29.1] The plaintiff is granted leave to withdraw the application in terms of s 27 of the Superior Courts Act 10 of 2013 and is directed to pay the costs occasioned by such application.

[29.2] The application in terms of rule 30 is dismissed and the first defendant is directed to pay the costs occasioned by such application as well as the application for condonation.

A handwritten signature in black ink, appearing to read 'Henriques', with a stylized, cursive script.

HENRIQUES J

Case Information

Date of Hearing : 23 June 2020
 Date of Judgment : 17 February 2021

Appearances

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 17 February 2021.