

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 28717/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO

(3) REVISED.

DATE: 19.9.22

SIGNATURE:

In the matter between:

Plaintiff

NATIONAL PRIDE (PTY) LTD

and

BOSS FOODS CC

Defendant

JUDGMENT

Todd AJ

Introduction

1. This matter came before me as an interlocutory application brought by the defendant under the provisions of Rule 30 and Rule 30A of the Uniform Rules. I will refer to the parties as in the main action proceedings.

Background and summary of the issues

2. The proceedings were instituted by way of summons in June 2021. The defendant delivered a plea and counterclaim on 26 August 2021.
3. The plaintiff raised certain objections to the plea and counterclaim, contending that they were irregular in respects it described in a notice delivered in terms of Rule 30(2)(b) on 6 September 2021.
4. The defendant regarded the objections as trivial and obstructive, and in a letter dated 7 September 2021 invited the plaintiff to withdraw its Rule 30 notice. The plaintiff responded that it intended to persist with its objections under Rule 30, and the defendant asserted that it would oppose any application brought under the provisions of that rule. This was in September 2021.
5. The plaintiff did not, however, take any further steps consequent upon that Rule 30 notice. The time period for bringing an application contemplated in Rule 30(2) came and went.
6. In November 2021 the plaintiff delivered a notice in terms of Rule 23(1) in which it raised a number of exceptions to the plea and counterclaim, including on grounds that those pleadings were vague and embarrassing. The plaintiff purported to give notice under Rule 23(1)(a), but this was, of course, long after expiry of the 10 day period after receipt of the pleading within which it was entitled to give such notice.
7. This led to the defendant raising objections under Rule 30 and 30A, which it did by way of a notice dated 29 November 2021. In essence, the defendant raised two main objections. First, it contended that the plaintiff's notice had been given out of time. Second, it contended that the notice had been given in circumstances in which the plaintiff's previous objections under Rule 30 were still "pending". The defendant described this conduct by the plaintiff as "dilatory and vexatious".
8. The plaintiff did not agree with the defendant's objections under Rule 30 and 30A and it duly delivered its notice of exception, dated 8 December 2021.
9. This resulted in further notices from the defendant, again under Rule 30 and 30A. In these notices, which were delivered on 15 December 2021, the defendant objected to the delivery of the notice of exception in circumstances in which the

notice on which the exception was founded, in part at least, had been given outside the permissible time period. It also objected to the exception being delivered in circumstances in which its previous objections to the underlying notice had not been resolved.

10. In addition, the defendant persisted with its complaint that the plaintiff had not either pursued or withdrawn its own previous Rule 30 notice, dated 6 September 2021. It contended that the plaintiff was seeking “to protract this matter, on trifling grounds”.
11. The plaintiff again took no heed of these objections under Rules 30 and 30A. It did, however, give notice of its intention to amend its exception with a view to removing its reliance on the allegation that the impugned pleading was vague and embarrassing. In this way the plaintiff sought to remove its reliance on any part of the exception that required prior notice to have been given within the period prescribed by Rule 23(1)(a).
12. The plaintiff delivered its notice of intention to amend its exception on 20 December 2021, and duly gave effect to that amendment on 18 January 2022.
13. This led to the defendant, on 27 January 2022, delivering the application that came before me on 9 September 2022.
14. In pursuing its application the defendant relies on the Rule 30 and 30A notices that it delivered on 29 November 2021 and it seeks to set aside the plaintiff’s notice in terms of Rule 23(1)(a) dated 11 November 2021 – the notice that preceded the exception itself.

The parties’ submissions

15. Mr Alli, who appeared for the defendant, submitted in the first instance that the plaintiff’s objections under Rule 30 communicated in its notice of 6 September 2021 remained an obstacle to the further conduct of the proceedings. He submitted that no further steps could be taken until those objections had been resolved, notwithstanding the expiry of the time period within which the plaintiff was permitted to bring an application under Rule 30(2). Since the plaintiff could have sought an extension of time or condonation under the provisions of Rule 27, he submitted, in the absence of a formal withdrawal of the objections they continued to inhibit further steps in the proceedings.

16. Ms Lombard, who appeared for the plaintiff, submitted that this was not so and that on expiry of the time period for bringing an application in terms of Rule 30(2) those particular objections no longer had any effect and could be ignored.
17. Second, Mr Alli submitted that although in the application before me the defendant attacks the notice that preceded the plaintiff's exception, it had always been the defendant's intention to deal with all of the pending interlocutory matters together, and he submitted that he was entitled to do this, without having brought a further separate application pursuant to the notices of 15 December 2021. If the attack on the notice that preceded the exception was good, then it followed that the exception could and should be set aside as well.
18. Ms Lombard, on the other hand, submitted that since the only application before me was based on the earlier Rule 30 and 30A notices the defendant was not permitted to seek relief that attacked the exception itself, as subsequently amended. The defendant had not brought an application on the strength of its subsequent notices given on 15 December 2021, and the amendment to the exception had rendered the impugned notice in terms of Rule 23(1)(a) irrelevant.
19. Ms Lombard also submitted that the application before me had in any event not been properly brought because it was not supported by affidavit. Since proof of prejudice was a prerequisite for success in an application under the provisions of Rule 30, she submitted, an application under the Rule must necessarily be supported by affidavit. She referred me in this regard to the commentary in Erasmus, Superior Court Practice Volume II D1-354 at footnote 3, and the cases referred to there.
20. Insofar as the defendant relied on the provisions of Rule 30A, Ms Lombard submitted that reliance on that rule was misplaced in the circumstances. She further submitted, in relation to the merits of the interlocutory applications before me, that following the amendment to the exception effected on 18 January 2022 the only subject matter of the exception concerned the defendant's conditional counterclaim. Since what remained of the exception was solely directed at the contention that the counterclaim does not disclose a cause of action, the exception was now a "stand alone" exception in respect of which no prior Rule 23(1) notice was required.

21. As a result, and since the defendant was entitled to take an exception and had not been barred from pleading to the counterclaim, Ms Lombard submitted that it should have been apparent to the defendant, before it launched the present application on 24 January 2022, that the plaintiff no longer relied on the out of time Rule 23(1)(a) notice. Consequently, there was no purpose in bringing the present interlocutory application, the question of the validity or effect of the Rule 23(1)(a) notice having been rendered “moot”. This, Ms Lombard submitted, meant that the present interlocutory application before me was an abuse of process and she submitted that it warranted a punitive costs order.
22. In reply, Mr Alli again pressed me to accept that it was impermissible for the plaintiff to have taken any steps towards amending its exception in circumstances in which the defendant’s objections under Rule 30 were pending and where the plaintiff had itself failed to withdraw or proceed with its own earlier Rule 30 objections, which preceded the exception procedure that it had followed. The Plaintiff, he submitted, had left its own Rule 30 objections “hanging in the air” and was not entitled to ignore the objections taken to its Rule 23(1)(a) notice and to proceed with bringing an exception and subsequently amending it.

Evaluation

23. The parties have become embroiled in a convoluted procedural tangle. Each blames the other, and each submits that the other is abusing this court’s process and should be mulcted with punitive costs.
24. In these circumstances it was somewhat surprising to hear both parties submit that they were anxious to get the proceedings on track and moving in the direction of a trial as expeditiously as possible.
25. It seems to me that both parties must bear some responsibility for the tangle. Both appear to have lost sight of the fact that a litigant has a duty to take the most expeditious course to bring litigation to a conclusion: see Wallis JA in *Moila v City of Tshwane* [2017] ZASCA 15 at paragraph [9]. A sensible case management meeting between them would have been a good way to cut through a number of misperceptions that appear to have contaminated the conduct of the matter.

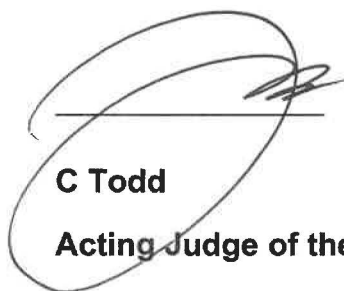
26. Ultimately what the defendant seeks to do is to attack the exception, so that the plaintiff is precluded from taking it.
27. I am satisfied that it the defendant is entitled to pursue the present application on notice and without an affidavit. It seems to me that prejudice in the conduct of a case can be established in a case such as the present one, where the issues are primarily about the procedure adopted, without an affidavit. It would be of little assistance to the court to be presented in an affidavit with what are essentially legal submissions about prejudice in the conduct of the case.
28. Broadening its attack on the exception, the defendant seeks to characterize the exception as dilatory and meritless. In that regard, I agree with Ms Lombard that the merits of the exception are not before me. I also accept that the plaintiff is entitled to bring an exception, good or bad, in relation to the counterclaim in circumstances in which it has not been barred from pleading to the counterclaim.
29. More importantly, I agree with Ms Lombard that the notice that preceded the exception, which is the focal point of the defendant's attack on the exception, has been rendered irrelevant by the subsequent amendment to the exception. By excluding any assertion that the counterclaim is vague and embarrassing, the amendment brings the exception within more limited grounds that do not require any prior notice.
30. For that reason, the defendant's attack on the exception by attacking the validity of the prior notice cannot succeed.
31. It does not follow, however, that the defendant's attack on the exception constitutes an abuse of process. It is true that the defendant has to some extent tripped itself up in multiple interlocutory notices. On the other hand the plaintiff has itself raised various technical objections in different ways, first under Rule 30, not pursued, then by way of a Rule 23(1)(a) notice that was long out of time. It ignored objections to this, and delivered an exception that was in part dependent on the validity of the out of time notice. Although it has now corrected this by amending the exception, whittling it down to something which I am satisfied it is entitled to proceed with, its approach is hardly a model of the effective use of this court's rules. I would, however, stop short of characterizing its conduct as an abuse of process either.

32. Both parties have been clumsy in their efforts to progress the matter, if that is indeed what they have attempted to do.
33. The path ahead is, now, clear. The plaintiff's exception must be determined. Depending on that outcome, the plaintiff must plead to the counterclaim and the matter must proceed to trial. The parties would be well advised, once pleadings have closed, to make good use of Rule 37 whose purpose is to promote the effective disposal of the litigation.

Order

34. In the circumstances I make the following order –

The defendant's application is dismissed with costs.



C Todd
Acting Judge of the High Court of South Africa.

REFERENCES

For the Plaintiff:	Adv. Y Alli
Instructed by:	Wadee Attorneys
For Defendant:	Ms. N Lombard
Instructed by:	Cox Yeats Attorneys
Hearing date:	09 September 2022
Judgment delivered:	19 September 2022