



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 3148/2021

EMMARENTIA COETZEE

First Applicant

KITTY POTGIETER

Second Applicant

and

**MASTER OF THE FREE STATE HIGH COURT,
BLOEMFONTEIN**

First Respondent

WILLIAM FRANCIOS BOUWER N.O.

Second Respondent

RONEL SWART

Third Respondent

MARTHINUS CHRISTIAAN VAN DEN HEEVER

Fourth Respondent

EMMARON BOERDERY CC

Fifth Respondent

BEFORE: **CHESIWE, J**

HEARD ON: **19 MAY 2022**

DELIVERED ON: **15 SEPTEMBER 2022**

[1] This is an interlocutory application instituted by the Fourth and Fifth Respondents, that the main application launched by the Applicants be declared irregular and be set aside in terms of Rule 30 (1). The application is opposed.

[2] The Fourth and Fifth Respondents seek the following relief:

- “1. That the Applicants’ notice of motion and application are declared irregular and set aside in terms of Rule 30 (1);
2. That the Applicants are afforded 10 days in which to substitute their notice of motion and application;
3. That the Applicants pay the costs of this application jointly and severally;
4. Should the Applicants fail to substitute their notice of motion and application timeously and or satisfactorily, the Fourth and Fifth Respondents are granted leave to apply on the same papers suitably amplified if necessary for an application main application be dismissed with costs.”

[3] The Fourth and Fifth Respondents raised amongst others, the following causes of their complaint against the Applicants’ notice of motion and application:

First complaint, the Applicants seeking that the decision of the First Respondent be set aside, is not identified in the notice of motion:

Second complaint, with the Applicants in seeking relief that their objection to the supplementary liquidation and distribution account be sustained, should be limited to the allocation of the shares. Part of the complaint is also that numerous other issues not forming part of the supplementary liquidation and distribution account nor the objection, are raised by the Applicants. The additional aspects raised by the Applicants do not flow from the supplementary liquidation and distribution account and the attempt to lodge objections outside the ambit of the account constitute an irregular proceeding.

Third complaint, the Applicants having failed to object and with this account being implemented and executed, an attempt to impermissibly and belatedly lodge objections against the first liquidation and distribution account which had been finalised in 2018, duly advertised in terms of the **Administration of**

Estate Act ¹, hereafter referred to as (“the Act”), the revisit of the account is truly an irregular proceeding.

- [4] Background on this matter briefly is that, the parties who are the four children of the deceased are in dispute of the estate of their late father, Barend van den Heever, who passed away on 26 April 2017.
- [5] The Executor, that is the Second Respondent, filed an amended first and final liquidation and distribution account on 25 May 2018 in terms of section 35 (5)(a) of the Act. None of the children raised an objection with regard to the amended first and final liquidation and distribution account.
- [6] During 2020, additional assets of the deceased estate were found, that being the shares referred to in the second complaint. The Executor therefore drafted a supplementary first and final liquidation and distribution account, that dealt with the proceeds of these shares.
- [7] This supplementary account was advertised from 19 March 2021 in the Volksblad and Government Gazette, pursuant to that the Applicants lodging an objection to the supplementary account. The Master dismissed the objection of the Applicants. The Applicants then proceeded to launch the main application.
- [8] The Fourth and Fifth Respondents launched the current interlocutory application to have the notice of motion and main application set aside as its irregular in terms of Rule 30.
- [9] The court has to determine whether the proceedings, that is in terms of Rule 30 (1) were irregular and whether the complaints as raised by the Fourth and Fifth Respondents are permissible.
- [10] Counsel on behalf of the Fourth and Fifth Respondents submitted in oral argument that additional assets of the deceased were found and must be added to the supplementary account. Secondly, Counsel submitted that the main application ought to be set aside as irregular proceedings as with the relief sought by the Applicants is vague and undetermined and unidentifiable. Counsel

¹ Act 66 of 1965

submitted that the litigation should be limited to the supplementary account as the first account had no objections from the Applicants. Counsel further submitted that the Applicants failed to join the different trusts and have a real interest in the litigation as an order will be against the sureties.

- [11] Counsel on behalf of the Applicants submitted in oral argument that the main application is dealt with in terms of section 35(10) of the Act. Further that the Applicants are not attempting to deal or change the first account, but to amend it by supplementing it. Counsel submitted that in the founding affidavit, the claim of Emmarentia of R4 million was not dealt with; nor was the vehicles belonging to the deceased dealt with, including the policies that were paid into the estate. Counsel further submitted that certain assets were not dealt with and were neither included in the first account. Thus, the Applicants seek relief for the inclusion of these claims as mentioned. And that the claims are not to be limited to the supplementary account, but to the second account as well.

RULE 30 (1) APPLICATION

- [12] Rule 30 (1) deals with irregular proceedings and provides as follows:

- “(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 sub-rule (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 fifteen days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2).
- (3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set 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 to 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.”

[13] A Court will grant a Rule 30 (1) application if it is satisfied that there is an irregular step. In **Afrisun Mpumalanga (Pty) Ltd v Kunene N.O & Others** ², Southwood J held as follows:

“With regard to the Rule 30 application, Mr. van der Linde pointed out that such an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside.”

[14] The basis of Rule 30 (1) application is that the main application lacks clarity and the Fourth and Fifth Respondents cause of complaints as contained in the notice of Rule 30 (2)(b) has not been removed by the Applicants.

[15] I paused to mention that Rule 30 (2)(b) that was filed by the Fourth and Fifth Respondents was heard on 30 September 2021 and the court ordered as follows:

- “1. Fourth and Fifth Respondents failure to within 10 days of becoming aware of the Applicants’ irregular notice of motion and application serve a notice in terms of Rule 30 (2)(b) on the Applicants, affording them an opportunity of removing the cause of the complaint, be condoned.
2. Notice in terms of Rule 30 (2)(b) is declared effective and operative;
3. The Applicants are afforded 10 days after the granting of this application, to remove the cause of the complaint.”

[16] The principles that govern the approach to an application in terms of Rule 30 are stated in **BSB International Link CC v Readam SA (Pty) Ltd and Another, In Re; Readam SA (Pty) Ltd v The City of Johannesburg Metropolitan Municipality and Another** ³, the Court held as follows:

² 1999 (2) SA 599 (T)

³ (2013/14167) [2014] ZAGPJHC 28 (7 March 2014)

"[2] Before I deal any further with the application it is necessary to briefly restate the principles applicable to an application in terms of rule 30. The rule is designed to provide for the setting aside of irregular steps taken in proceedings. The rule endows the court with a wide discretion (rule 30(3)). Important for present purposes is the well-settled requirement of prejudice: proof of prejudice is a pre-requisite for success in an application in terms of rule 30(1) (cf *Trans-African Insurance Co Ltd v Maluleka* 1966 (2) SA 273 (A); *Erasmus Superior Court Practice* B1-193 and the cases referred to in footnote 9). A party entitled to invoke the rule is not obliged to do so: as much is clear from the wording of rule 30(1): 'a party...may apply to court to set it aside'. The applicant in a rule 30 application accordingly, must allege and prove prejudice, if not substantial prejudice."

[17] The Fourth and Fifth Respondents in this matter contend that they will be severely prejudiced if the relief sought in the main action is granted specifically referring to the supplementary account. Furthermore, that the Applicants failed to file an objection against the first amended liquidation and distribution account in 2018.

[18] The Fourth and Fifth Respondents in the affidavit in support of the Rule 30 (1) application, state that the additional aspects raised by the Applicants have been dealt with in the first liquidation and distribution account to which the Applicants had raised no objection as the account was advertised for objection in terms of section 35 of the Act. The Fourth and Fifth Respondents at para 16 further state as follows:

"The attempts by the applicants to impermissibly and belatedly lodge objections against the first liquidation and distribution account is impermissible and constitute an irregular proceeding."

[19] A Court will grant a Rule 30 (1) application if it is satisfied that there is an irregular step that the party bringing such an application has not taken any further step in the cause of the matter with the knowledge of such irregular step and has given the opponent notice to remove such step within ten (10) days of the former becoming aware of that irregular step. Of importance is whether the Applicants will suffer prejudice unless the irregular step is removed. In **Afrisun**

Mpumalanga (Pty) Ltd v Kunene N.O and others *Supra*, the Court said the following:

“...an application will be granted only where the irregular step would cause prejudice to the applicant seeking to set it aside.”

[20] The Fourth and Fifth Respondents raised five (5) complaints towards the irregular step that they informed the Applicants to remove the cause of the complaints. The Applicants failed to remove the cause of complaints.

[21] The Fourth and Fifth Respondents raised the issue with prayer 1 in the notice of motion that the relief sought by the Applicants to set aside the decision of the First Respondent is not identified. The Applicants in the answering affidavit contend that the First Respondent had dismissed the objection that was raised against the estate. This is reflected in **Annexure “O”** on page 119 as follows:

“Your complaint or objection against the estate is dismissed.

Under the administration of the estate Act, it is duty of the executor to determine the liquidation and distribution of assets, to admit, dispute or reject claims lodged against the estate.

Anyone aggrieved by such duty or decision made, can take the executor for review.”

[22] Prayer 1 of the notice of motion of the main application, the Applicants’ relief is that:

“That the decision of the First Respondent be set aside in terms of section 35(10) of the Administration of Estate act 66 of 1965.”

[23] In my view, the Fourth and Fifth Respondents are correctly objecting to the relief sought in prayer 1 as the First Respondent has made several decisions in respect of the estate, whether it is the first liquidation and distribution account, the first supplementary account or the second supplementary liquidation and distribution account of the estate, that indeed is not clear in prayer 1 of the notice of motion.

[24] Furthermore, the second and third complaints are in respect of the first liquidation and distribution account that the Applicants’ objection should be limited to the additional assets (shares) and its allocation which include vehicles, proceeds of

crops and liabilities of the estate. Indeed, the first account was finalised in 2018 without any objections. The mentioned additional assets may be dealt with by way of amending the existing account or by way of a supplementary account. Furthermore, the First Respondent indicated that: “on the basis the claim was dealt with in the first and final account, but was not objected to (See page 119 of **Annexure “O”**)

- [25] Indeed, as correctly stated by the Fourth and Fifth Respondents, the Applicants cannot revisit the first account at such a late stage with no application for condonation. The First Respondent in **Annuxure “O”** had indicated that any aggrieved party should have taken the matter on review. The Applicants should probably have approached the court with a review application.
- [26] The Fourth and Fifth Respondents raised a further issue with the non-joinder or misjoinder by the Applicants to join Brakkuil Trust and the Wolwekop Trust which are entities that have an interest in the relief sought.
- [27] The question raised is whether or not Uniform Rule 30 is a mechanism that can be utilized to challenge a misjoinder. In **Erasmus Superior Courts Practice** ⁴, the following is stated:
- “An objection of non-joinder or misjoinder may be raised under this rule, but the usual practice is to raise it by way of a special plea.”
- [28] The Respondents contend that the Applicants failed to join Brakkruij Trust and Wolwekop Trust. The Applicants on the other hand, contend that these two (2) trusts have no direct and substantive interest to the proceedings or to the estate of the deceased. I am inclined to agree with the Applicants as the claim of these trusts are still to be investigated by the First Respondent, neither is there any evidence before me that these trusts have a direct and/or substantive interest in the proceedings. In any event, non-joinder should be raised as a special plea and not raised by means of a Rule 30 application.

⁴ Erasmus in relation to non-joinder or misjoinder, at B1-191
<https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>

[29] With regard to the late filing of the Affidavit of the Applicants, the court will condone such late filing as this matter involves siblings in dispute of their deceased father's estate. It is in the interest of justice that both sides be given a fair chance to ventilate their issues.

[30] The Fourth and Fifth Respondents have shown that they will be severely prejudiced if the relief sought is granted as it will affect issues that have already been finalised. Furthermore, the Applicants by not clearly identifying what must be set aside by the First Respondent would prejudice the Fourth and Fifth Respondents in that they would be unable to respond.

[31] It is trite that the Court has a discretion that is to be exercised judicially in determining whether to grant or refuse an application in terms of Rule 30.

[32] Taking into consideration that there has to be a balance by what is fair to all parties, in **Northern Assurance Co Ltd v Somdaka** ⁵, the Court said the following:

"The Court has a discretion to be exercised judicially upon consideration of the circumstances, to do what is fair to both sides."

[33] In the circumstances, where the notice of motion does constitute an irregularity and the irregularity is not of such a nature that it requires the whole action to be set aside, in terms of Rule 30 (3) the Court can make an appropriate order that will enable the Applicants to amend their papers. The Fourth and Fifth Respondents cannot be faulted in seeking clarity on the relief sought by the Applicants. Bearing in mind that the Applicants, the Fourth and Fifth Respondents are siblings opposing each other, in the end, it is their deceased father's estate and there should be fairness on all sides.

[34] Accordingly, the following order is made:

1. The Applicants' notice of motion and application are declared irregular and are set aside in terms of Rule 30(1);

⁵1960 (1) SA 588 (A) at 595

2. The Applicants are afforded 15 days in which to substitute their notice of motion and application;
3. Should the Applicants fail to so substitute their notice of motion and application timeously and/or satisfactory, the Fourth and Fifth Respondents are granted leave to apply on the same papers, suitably amplified if necessary, for an order that the Applicants' main application be dismissed with costs;
4. Costs to be costs in the main action.

A handwritten signature in black ink, appearing to be 'Chesuwe, J.', written over a horizontal line.

CHESIWE, J

On behalf of the Applicant:

Mr JD de Beer

Instructed by:

Kramer Weihmann

On behalf of the Fourth and

Fifth Respondents:

Adv. JJ Pretorius

Instructed by:

Mcintyre & Van Der Post