



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

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

Case number: 5657/2017

In the matter between:

**EVENT AV DIRECT
PROPRIETARY LTD**

PLAINTFF/RESPONDANT

and

**MALUTI-A-PHOFUNG
LOCAL MUNICIPALITY**

DEFENDANT/EXCIPIENT

HEARD ON: 29 November 2019

JUDGMENT BY: CHESIWE, J

DELIVERED ON: 18 APRIL 2019

[1] The Plaintiff instituted action against the Defendant for payment of R8 257 145.32, which arises from the Defendant's acknowledgement of liability towards the Plaintiff (Claim A) and payment in the amount of the amount of R5 815 414.55 for contractual damages (Claim B). The Defendant is defending the claim.

- [2] The Plaintiff is Event AV Direct Proprietary Limited, a private company duly incorporated in terms of the company laws of the Republic of South Africa with registration number 2014/1449635/07 and with its address at 62 Henry Street Bloemfontein Free State.
- [3] The Defendant is Maluti- A-Phofung Municipality, a municipality as contemplated by Section 2 of the Local Government: Municipality Systems Act 32 of 2000 with its address at Cnr Moremoholo and Motlounge Streets Setsing Business Complex Phutaditjhaba, Free State.
- [4] The Plaintiff submitted a proposal in March 2015 pursuant to a request by the Defendant for several projects of management services relating to the organisation and hosting of the annual Dipontsho tsa Maluti-a-Phofung Festival. On 28 April the Defendant's bid adjudication committee awarded a tender to the Plaintiff to render the required services. The Plaintiff received a letter of appointment dated 30 April 2015 which confirmed the following:
- “7.1 The fees payable to the Plaintiff by the Defendant would be the sum of R7 028 000 exclusive of Value Added Tax;
- 7.2 the duration of the project would be twelve months from the date of the signing of the contract;
- 7.3 The Plaintiff and the Defendant would sign a service level agreement Within 7 days of acceptance of the appointment.”
- [5] On 20 July pursuant to the letter of appointment the Plaintiff and Defendant in concluding the service level agreement the Plaintiff was represented by Mr. Romeo Lekoba, a director of the Plaintiff

and the Defendant was represented by TC Taetsane a Municipality Manager of the Defendant. The services contract was such that the Defendant would pay the Plaintiff for services rendered upon presentation of progress reports, a valid tax invoice and any other information the Defendant would deem necessary in order to process payment to the Plaintiff. According to the Plaintiff the Defendant did not allow the Plaintiff to render services for the years 2016 and 2017. And as a result of the Defendant's conduct and repudiation of the contract the Plaintiff's legitimate expectation of profit was in the amount of R5 815 414. 55.

- [6] The Plaintiff on the 7 December 2017 filed an application for summary judgment against the Defendant. The matter was placed on the roll for the 14 December 2017 on which date the parties by agreement removed it from the roll and leave was granted to the Defendant to defend the action and costs were in the cause.
- [7] The Plaintiff delivered a notice of intention to amend the particulars of claim in term of Rule 28(1) of the Uniform Rules of Court. The Defendant did not object to the Plaintiff notice of intention to amend its particulars of claim. The Plaintiff effected the amendment in terms of Rule 28 (5) of the Uniform Rules of Court.
- [8] The Defendant file its exception on 25 June 2018 to which the Plaintiff contends that the exception was not filed within the required 15 days as the date of filing expired on 8 June 2018. On 9 July 2018 the Plaintiff then filed a notice calling upon the Defendant to remove the cause of complaint. According to the Plaintiff the Defendant refused to comply. In the premises the

Plaintiff contends that the Defendant's exception dated 25 June 2016 was not delivered in compliance with the Uniform Rules of Court and therefore should be struck out.

- [9] The issue is whether the Defendant exception constitutes an irregular step as envisaged in Rule 30 and 30A.
- [10] During oral argument Advocate Els on behalf of the Plaintiff submitted that the exception was delivered out of time and the Defendant did not comply with Rule 30(A) and 30(2). He indicated that the Defendant's exception application should have been accompanied with an application for condonation.
- [11] Advocate Botes Counsel on behalf of the Defendant submitted that the Defendant pleaded to the particulars of claim and after the Plaintiff realised its predicament, the Plaintiff filed for an amendment, this amendment had an effect on the date. He indicated that the Defendant did not object to the amendment and nor was the Defendant place under bar. The Defendant still has to plea to the amendment. He submitted that the Defendant be allowed to plea to the amendment in the particulars of claim.
- [12] Rule 23 of the Uniform Rules of court provides that:
 - “(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence as the case may be, the period allowed for filing any subsequent pleadings delivers an exception therefor and may set it down for hearing in terms of paragraph (f) of Sub rule (5) of Rule (6). Provided that where the party intends to take exception that a pleading is vague and embarrassing he shall within the period allowed aforesaid by notice afford his opponent an opportunity

of removing the cause of complaint within 15 days, provided further that the party exception shall within 10 days from the date on which a reply to much notice is reserved or from the date on which such reply is due, deliver his exception.

(2) Where any pleading contain averments which are scandalous vexation or irrelevant, the opposite party may within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may The court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence, it is not to be granted.

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to struck out is made, no plea, replication or other pleading over said be necessary."

[13] The procedure for amendment of pleading is regulated in terms of Uniform Rule 28 provides that:

"(1) any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all parties of his/her intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in sub-rule 1 shall state that unless written objection to the proposed amendment is delivered in 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection if founded.

(4) If objection which complies with sub-rule (3) is delivered within the period

referred to in sub-rule (2), the party wishing to amend may within 10 days lodge an application for leave to amend.

(5)

[14] In this instance the Plaintiff notified the Defendant of its intention to amend its particulars of claim. The Defendant did not object to the amendment of the particulars of claim as stipulated in the uniform rule 28 (2), instead the Defendant filed the purported exception. It is on this basis that the Plaintiff contends that the Defendant did not comply with the rules and thus its exception application constitutes an irregular step and abuse of the court processes. In **Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd**¹ the following was stated at paragraph 8: “....These steps must be taken ‘within 15 day after the amendment has been effected’ meaning 15 days after the amending party has effected the amendment and implying a party other than the amending party taking these steps. The time period is specific and the sub-rule leaves no room to include an unspecified period of time after the failure of the ‘affected ‘party to make consequential amendments. The latter need not but ‘may’ make consequential amendments. Moreover, there is no provision in rule 28 (8) deeming that the existing plea to have been made subsequent to the amendment. As I have said the consequence of a failure to make consequential amendments is that in terms of Rule 22 (3) every allegation of fact.... Which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted.”

[15] Rule 30(1) provides that: “A party to a cause in which an irregular step has been taken by another party may apply to court to set it aside.”²

¹ 2007 (5) SA 90 (W) at 93I – 94 C

² Searle v Searle 1967 (2) 19 (O) at 21 A-C, Erasmus J held that a counterclaim could not be introduced after a Defendant s’ plea had been filed.

[16] In **Cochrane v City of Johannesburg**,³ the court at paragraph [31] said “the irregular step mentioned in the rule related only to an irregular step taken by a party in respect of the Uniform Rules of Court. I am accordingly, of the view that, rule 30 was intended to serve as a notice of objection in respect of proceedings other than Uniform Rules of Court, It wold be casting the net too far and would lead to abuse. In any event, Rule 30 was never intended to serve as a basis for the objection to procedural irregularities in respect of other legislation. Rule 30 was meant to deal with irregular steps taken by parties involved in litigation where the irregularity emanated from the use of the Rules of Court.”

[17] Our courts have pronounced on this issue and held that Rule 30 applies only to irregularities of form and not matters of substance⁴.

[18] Accordingly this court need to consider if the Defendant’s notice in terms of Rule 23 (1) was out of time. The Defendant in terms of Rule 28 (8) had 15 days within which to make any consequential adjustments and to take steps in as set out in Rule 23. The 15 days expired on 8 June 2018. The Defendant delivered its exception on 25 June 2018. It is trite that the plaintiff cannot object to the exception on the grounds that it was delivered outside the prescribed period allowed for the delivery of a plea before the exception of the period in the notice of bar.⁵ The courts have decided on several cases where it was held that an exception is a pleading and as such a notice of bar is necessary before a Plaintiff can object to an exception on the grounds that it was filed out of time⁶. In this instance the Plaintiff has

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⁴ Singh v Vorkel 1947 (3) SA 400 (C) at 406; Odendaal v De Jager (4) SA 307 (O) at 310 F-G

⁵ Erasmus Superior Court Practices – page B1-158A

⁶ Felix and Another v Norther NO and Others 1994 (4) SA 502 (SEC) at 506 E.

not filed a notice of bar against the Defendant, instead the Plaintiff proceeded with an application in terms of Rule 30.

[19] It is trite that the procedures laid down by the rules of court should be complied with. Where there is non-compliance with any rule, the uniform rules provides for the condonation of such non-compliance in terms of Rule 27 of Uniform Rules of Court. Counsel for the Defendant conceded that there is no condonation application before court however the non-compliance will not prejudiced the Plaintiff, but this application would prejudiced the Defendant if granted. In **S v Dzukuda and Others**⁷, Ackerman, J said: “the test is not whether the procedure is ideal, but whether it is fair.”

[20] The Defendant contends that the Plaintiff by adding a new cause of action in the amendment will prejudice the Defendant, and the Defendant still has to plead to that amendment, indeed it will prejudice the Defendant if an opportunity to plead was not afforded. There is no objection in principle to the new cause of action or defence added by way of the amendment, even if it has the effect of changing the character of the action to determine the real issue between the parties, but the amendment must be bona fide.⁸

[21] The rules of court which constitute the procedural machinery of the courts are intended to expedite the business of court.⁹ The rules are not an end in themselves to be observed for their own sake. They are

⁶ (CCT23/00 [2000] ZACC 16 (27 September 2000)

⁸ Trans-Drakensberg Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D) at 643 C.

⁷ SOS Kinderhoff International v Effie Lentin Architects 1991 (3) SA 574.

⁸ Federated Trust Ltd v Botha 1978 (3) SA 645 (A).

⁹ Federated Trust Ltd supra

provided to secure the inexpensive and expeditious completion of litigation before the courts.¹⁰ In **Federated Trust Ltd v Botha**,¹¹ the court went further and said: “where one or either of the parties has failed to comply with the requirements of the rules or order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the courts endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the object for which the rules were designed.”

[22] The Defendant did not make any consequential adjustment to its plea to the Plaintiff’s original claim as envisaged in Rule 28(8). And thus according to the Plaintiff the Defendant is deemed to have admitted to the Plaintiff’s amended particulars of claim. Counsel for the Defendant submitted that where a pleading as contemplated in Rule 28(8), the other party (in this case the Defendant) should deliver an exception thereto.

[23] The Plaintiff relied on the written agreement between the parties only to abandon it and decided to amend its particulars of claim to which the Defendant contends that the amended particulars of claim introduced a new cause of action and to which the Defendant still have to file its plea. Rule 28(8) provides an opportunity to the Defendant to invoke the provisions of Rules 23 and 30 after the Plaintiff has effected an amendment of its particulars of claim.

[24] As correctly stated by the Defendant in the opposing affidavit that the Defendant is a custodian or gatekeeper of public funds as envisaged in the Local Municipality Finance Management Act no 56 of 2003. It is

paramount that when an Organ of State in the National, Provincial or Local sphere of government, or any other institution identified in national legislation, contracts for goods or services, must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Be it that as it may, matters with such substantial amounts need to be correctly ventilated by the courts. An order to dismiss such application must be taken with precautions in order to avoid granting court orders in haste.

- [25] The High court is vested with inherent jurisdiction¹² to condone any procedural irregularity as non-compliance with its rules. No fixed rules can fetter that discretion. The rules of court stout general guidelines within which that discretion is to be exercised. As a result, the court may condone any irregularity or neglect which does not materially prejudice the other party.
- [26] Accordingly, the Plaintiff's objection to the exception on the ground that it was delivered outside the prescribed period allowed for the delivery of a plea but before the expiration of the period provided in the notice of bar cannot stand. Thus the Defendant is allowed to pursue its exception in terms of Rule 23 of the Uniform Rules of Court.
- [27] In my view the Defendant did not take an irregular step and therefore the exception should first be deposed of and the Defendant should be

¹² Jerold Taitz describes it in *The Inherent Jurisdiction of the Supreme Courts* (1985) pp 8-9 "This latter jurisdiction should be seen as those unwritten powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers; e.g. in the exercise of its inherent jurisdiction the court may regulate its own procedures independently of the rules of court."

afforded an opportunity to file its plea in respect of the new allegations and averments introduced by the Plaintiff by virtue of the amendment that was effected on 18 May 2018.

- [28] Accordingly there is no merit in the Plaintiff objection that the notice in terms of Rule 23 (1) was filed out of time.

ORDER

- [29] In the result the Plaintiff's application in terms of Rule 30 is dismissed with costs as between party and party scale.

S. CHESIWE, J

On behalf of Plaintiff: Advocate J ELS
Instructed by: McIntyre Van Der Post Attorneys
Bloemfontein

On behalf of Defendant: Adv. FW Botes SC
Instructed by: Azar & Havenga Incorporated
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