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

Case No: 2321/2014

In the matter between:

NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD	**APPLICANT**

Versus

MANGAUNG LOCAL MUNICIPALITY	**RESPONDENT**

CORAM:	NAIDOO, J
JUDGMENT:	NAIDOO, J
HEARD ON:	27 NOVEMBER 2014
DELIVERED ON:	26 FEBRUARY 2015

JUDGMENT

Naidoo J

[1] The applicant (plaintiff in the main action) applies, in terms of Rule 30(1) of the Uniform Rules of Court, for the striking out of an exception by the respondent (defendant in the main action) to the

applicant's Particulars of Claim, served on the applicant on 19 August 2014. The applicant contends that the exception constitutes an irregular step, as contemplated by Rule 30(1) on the following three grounds:

1.1 The defendant failed to serve the exception within the prescribed time periods as set out in the Uniform Rules of Court;

1.2 The exception is not signed in accordance with Rule 18(1) by either an advocate or an attorney duly admitted and having right of appearance in terms of Section 4(2) of Act 62/1995;

1.3 The defendant's prayer in the exception "*Plaintiff's particulars of claim be dismissed"* is bad in law and not competent relief that may be granted by the court.

The respondent opposes the application, denying that the exception is an irregular step on any of the three grounds I have listed above. Mr G Naude appeared for the applicant in this court and Mr AH Burger SC for the respondent.

[2] By way of background, the applicant and the respondent entered into an agreement in terms of which the applicant, a debt collector, would collect, on behalf of the respondent, certain debts due by third parties to the respondent. In return the applicant would be entitled to be paid collection commission of 16% of all amounts collected by it. There were several terms in the agreement regulating the contractual relationship between the applicant and respondent. In the summons relevant to this matter (ie case number 2321/2014), the applicant claims an amount of R4 162 337.26, together with interest thereon. This amount is ostensibly in respect of collection commission due to the applicant for the

months of June and July 2011. Invoices dated 31 January 2014 in respect of both months were attached to the summons in support of the claim.

[3] It is perhaps useful at this point to briefly sketch a timeline reflecting the history of how the litigation unfolded in this matter.

3.1 The applicant issued summons against the respondent out of this Division on 26 June 2013, under case number 2510/2013 (the 2013 summons), in which it claimed collection commission for May, June and July 2011.

3.2 The respondent filed a notice in terms of Rule 23(1) of the Uniform Rules on 8 November 2013, drawing to the applicant's attention that the summons was vague and embarrassing, and detailing therein which paragraphs of the particulars of claim it was assailing and the grounds for doing so. It is not clear if an exception was filed by the respondent, but it appears that the applicant amended the Particulars of Claim in February 2014. I pause to note at this point that although an undertaking was made in the Founding Affidavit to this application that the file under case number 2510/2013 would be made available at the hearing of this matter, this was not done. I rely therefore on certain averments and common cause facts contained in the Founding and Opposing Affidavits, as well as documents attached thereto, to compile this timeline. The amendment to the 2013 summons entailed a claim only in respect of collection commission for May 2011(excluding the claims in respect of June and July 2011). The applicant alleges that pleadings have closed in that matter and a trial date is being sought.

3.3 Returning to the timeline, the summons in the present matter was issued on 23 May 2014.

3.3 The respondent defended the action on 5 June 2014. Thereafter the respondent filed a notice in terms of Rule 23(1) on 20 June 2014 on the basis that the summons was vague and embarrassing, and detailing the paragraphs it was assailing and the grounds therefor.

3.4 The applicant's response was to file an application for summary judgment on 23 June 2014 (the date of hearing being 14 August 2014).

3.5 On 4 July 2014, the respondent, served a Notice in terms of Rule 30(2) on the applicant, alleging that the applicant's application for summary judgment was an irregular step in that it was brought when the complaint of the respondent (in the Rule 23(1) Notice) had not been removed. The applicant was given ten days to remove the cause of complaint, but did not respond.

3.6 The respondent opposed the summary judgment application on 11 August 2014 and filed (outside the time allowed by the Rules of Court) its opposing affidavit on 12 August 2014. As a result the matter was postponed from the unopposed roll on 14 August to the opposed roll on 9 October 2014.

3.7 On 19 August 2014 the respondent filed its exception to the summons, and it is common cause that this was considerably after the time normally allowed for the filing of such a pleading.

3.8 On 26 August 2014, the applicant filed a Notice in terms of Rule 30(2) alleging that the respondent's exception was an irregular step, on the three grounds that I have listed in paragraphs 1.1 to 1.3 above.

3.9 The application before me was served on the respondent on 23 September 2014, the date of hearing being 9 October.

3.10 0n 9 October 2014, the applicant's summary judgment application was dismissed with costs.

3.11 It appears that the current application was not heard on 9 October 2014 but on 13 October 2014, when it was postponed to 27 November 2014 and dates were set for the filing of the various affidavits in this matter.

[4] Both counsel addressed the court at length in advancing their respective cases. What is apparent (and regrettably so), is that the collegiality and cooperation which are meant to be hallmarks of the legal profession were seriously lacking in this matter. Many of the complaints could have been resolved by proper communication and cooperation between the parties, and costs could have been contained. Examples are the filing of pleadings or the taking of further steps in the matter, without due regard for the complaints raised by the opposing party and simply ignoring correspondence that flowed between the parties, or responding in a manner which made it clear that cooperation was not forthcoming. It is apparent from the record that a number of procedural steps taken by the respondent were in fact not compliant with the time limits provided for in the Rules, and understandably frustrated the applicant. The applicant's conduct is also not above reproach. The first summons it issued in 2013 was amended after the respondent gave notice of its exception thereto, and the matter proceeded to the point where a trial date could be obtained. The second summons, which was issued in May 2014, was couched in very similar terms to the un-amended 2013 summons. The respondent once again gave notice of exception to such summons in terms very similar to its notice of exception in respect of the 2013 summons. The point made by the applicant is that the 2013 summons is practically identical to the

one issued in the present matter and that if the respondent was able to plead to that summons, it could also do so in this matter. It appears that the respondent was able to plead to the 2013 after it was amended. The present summons, which is couched in essentially the same terms as the un-amended 2013 summons, has not been amended

The attitude of the applicant in this matter was simply to ignore the Rule 23(1) notice and three days later file an application for summary judgment, which caused the parties to become embroiled in protracted litigation around the summary judgment application. While that is no excuse for the respondent's late opposition to the summary judgment application and filing of the opposing affidavit, as well as its failure to set down its exception to the summary judgment application, it is clear that its attention was focused on staving off the greater evil of summary judgment and not on fighting the irregular procedural step it complained of. The nett result of all of this was to prevent the speedy closing of pleadings in order to obtain a trial date for the ventilation of the real issues between the parties, and to unduly escalate the costs of this matter. Having said that, I now deal with the application at hand.

[5] It was common cause between the parties that an exception is a pleading and subject to the same time limits for filing as other pleadings. As such an exception would fall within the ambit of Rule 26 of the Uniform Rules, which provides for an automatic bar where a party has failed to file a replication or subsequent pleading within the time provided for in the Rules, but for all other pleadings it requires a notice of bar to be filed before the defaulting party can be precluded from filing such pleading. Mr Burger referred the court to the case of **Tyulu v Southern Insurance Association**

Ltd 1974(3) SA 726 (E), and Mr Naude kindly provided a copy of the case for the court. In that case the defendant filed an exception two days after the due date and the plaintiff objected to it on the ground that it was filed out of time. The court there held that the provision of Rule 26 applied to the exception, in that a notice of bar was required before the defendant could be precluded from filing his exception. I align myself with the reasoning of the court in Tyulu. In my view the Rule applies equally to the present matter. Mr Naude argued that the Rules allow the applicant two options, namely to file a notice of bar or to bring an application in terms of Rule 30, as it did in this matter.

[6] Rule 30 provides for the setting aside of a procedural step where a party has taken such a step irregularly. An irregular step has been held to be a step which advances the proceedings one stage nearer completion. The learned author **Eramsus** in the work **Superior Court Practice at page B1-190** cites a number of instances which have been regarded, by our courts, as an irregular step. Non-compliance with the Rules is not one of them, and with good reason, as this is dealt with by another Rule, which I will refer to shortly. Rule 30 (2) also provides that an application in terms of subrule(1) may only be made if, inter alia, the applicant himself has not taken a further step in the cause. In the notes on **page B1-192**, **Erasmus,** in discussing the notion of taking a “further step in the cause”, asserts that while previously it was held that a notice of exception amounted to a further step contemplated by the Rule, this approach changed and it was held that the excipient was concerned merely with making full use of the remedies provided by the rules to attack a defective pleading, so that the filing of an exception cannot be held to have advanced the proceedings one

step nearer completion. In my view this will apply equally to an exception filed by the opposing party. Rule 30A is the rule that specifically provides a remedy for non-compliance with the Rules, and the applicant ought to have sought his remedy in Rule 30A. In my view it was not correct for the applicant to rely on Rule 30(1) to complain about and seek sanction for the respondent's non-compliance with the time limits for filing of its exception. Therefore the respondent is correct in holding that, in the absence of a notice of bar, it is not subject to sanctions for not complying with the prescribed time limits for the filing of its exception, and that the filing of the exception on 19 August 2014 did not constitute an irregular step.

[7] The second ground upon which the applicant seeks to have the exception set aside, is that it was not signed, in accordance with Rule 18(1), by either an advocate or an attorney duly admitted and having right of appearance in terms of Section 4(2) of the Right of Appearance in Courts Act 62 of 1995 (the Appearance Act).

[8] A perusal of the papers reveals that every pleading, save the opposing affidavit in this application, was signed by attorney TK Gaborone. No reference is made in any of those pleadings, save for the exception which is the subject of this application, to section 4(2) Appearance Act or to Attorney Gaborone's right of appearance in the High Court. The exception, on page 5, contains a line, under which certain words appear and are depicted as follows:

____

"TK Gaborone

Attorney for Defendant

Moroka Attorneys
74-80 Pres Reitz Avenue
Suite 19, Reitz Park
Westdene
Bloemfontein"

Under these words appears another line and under this line appear certain words depicted as follows:

____

" TK Gaborone, duly admitted and
having the right of appearance ito
Section 4(2) of Act 62/1995"

[9] On the first line shown above, appears a signature which is the same or similar to that observed on all the other pleadings purported to be signed by TK Gaborone. The second line depicted above does not bear a signature. It is on this basis that the applicant contends that the respondent has taken an irregular step in that it has filed a pleading which is not signed in accordance with the Rules. I pause to note that no objection was lodged by the applicant to any of the other pleadings bearing this signature and where no mention is made of the right of appearance of the signatory. Save for the lack of a signature on the second line, the exception complies with the provisions of Rule 18(1). It was not the applicant's case that the second line and/or a signature thereon are either prescribed by the Rules or is an established and required practice for the validation of a pleading. The respondent argued that the second line can be ignored as it ought not to have been there, and surmised that it could have been a typing error. It also raised the argument that TK Gaborone signed all other pleadings without challenge. A copy of TK Gaborone's certificate in

terms of section 4(2) of the Appearance Act was attached to the Respondent's Heads of Argument, and much was made of this by the applicant, who alleged that the attachment of the certificate to the Heads was an admission or acknowledgement by the respondent that the lack of a signature on the second line described above was problematic. I do not agree. I regard the attachment of the certificate to the respondents' Heads to be a neutral factor, at best, and this issue need not detain us any further. 'The more probable explanation for the presence of the second line is the one tendered by the respondent and would also explain why Attorney Gaborone's signature does not appear thereon. He/she clearly did not consider it necessary to place a second signature on the document, having already signed it. In this regard, I find the approach of the applicant to be formalistic and its contention regarding the lack of a signature on the second line without substance. I am satisfied that there was compliance with Rule 18(1).

[10] With regard to the last ground raised in the applicant's exception that the relief sought by the respondent is bad in law, I have already alluded to the fact that in its Rule 23(1) notice and in its exception, the respondent referred to the specific paragraphs of the applicant's particulars of claim which it objected to, stating the grounds for such objection. There can be no doubt in the mind of the reader of the exception that the respondent is assailing only specific portions of the particulars of claim. In my view, a common sense approach must be adopted when reading the prayer for relief sought by the respondent, as common sense will dictate that it is not capable of being read as a prayer for the dismissal of the entire particulars of claim, after having regard to the body of the

exception. While the form of the prayer may be argued to be impermissible, it cannot be read in isolation. Again, a formalistic approach to the application of the Rules of Court must be discouraged in the interests of fairness and equity between both parties. It is somewhat opportunistic of the applicant to argue otherwise.

[12] The applicant argued for a punitive costs order against the respondent, in view of what it held were the dilatory tactics of the respondent to delay and drag out this matter in an attempt to avoid paying the appellant what was due to it. I have outlined my view of the conduct of the parties in paragraph [4] of this judgment. The delays in this matter can be attributed to both parties at various stages of the litigation, and in my view the court is entitled to demonstrate its displeasure at the manner in which this matter has been conducted by both parties, by deviating from the norm that costs follow the result. The court hearing this matter on 13 October 2014 reserved costs, which I have considered in my deliberations in this matter.

[13] I am not satisfied that the applicant has made out a case for the relief it seeks and order as follows:

13.1 The application is dismissed;

13.2 Each party is to pay its own costs in respect of this matter, including the costs of the hearing on 13 October 2014

S. NAIDOO, J

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