

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 40135/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>04 August 2024</u> _____	
DATE	SIGNATURE

In the matter between

CHANGING TIDES 74 (PTY) LTD

Plaintiff

And

THE CITY OF JOHANNESBURG

Defendant

JUDGMENT

Mahosi J

Introduction

[1] This is a claim for damages to recover economic loss founded in delict, declaratory order and ancillary relief. The issue for determination concerns the

proper interpretation of the Commercial Court Directive and, in particular, the documents that constitute pleadings for the purpose of the impending trial.

Parties

[2] The plaintiff is Changing Tides 74 (Pty) Ltd (“Changing Tides”), a private company with a share capital duly incorporated with limited liability and registered with registration number 2001/011908/07 in accordance with the Company Laws of the Republic of South Africa.

[3] The defendant is the City of Johannesburg (“the City of Johannesburg”), a metropolitan municipality duly established by virtue of Notice 6766 of 01 October 2000, issued in terms of section 12(1) read with section 14(2) of the Local Government Municipal Structures Act¹.

Background and litigation history

[4] Changing Tides is the owner of Erf 1[...], Johannesburg Township, Registration Division I.R. Gauteng, which is situated at no. 1[...] J[...] Street, Johannesburg, and on which is fixed an eleven (11) story building known as C[...] H[...] Mansions (“the property”), which falls within the area of the City of Johannesburg. When Changing Tides transferred the property into its name, the building was unlawfully occupied and colloquially referred to as a “hijacked building”.

[5] On 23 March 2010, the owner of the Lister Medical Centre, a hospital and emergency medical services next to the property, successfully obtained an interdict against the Changing Tides and the City of Johannesburg in terms of the provisions of the National Building Regulation and Building Standards Act² and the National Health Act³ to prevent and abate the unhygienic and offensive conditions of the property.

¹ Act 177 of 1998, as amended.

² Act 103 of 1977, as amended.

³ Act 63 of 1977, as amended.

[6] In April 2010, the City of Johannesburg brought an application against Changing Tides to ensure the building was evacuated, fully renovated, upgraded and controlled. In turn, Changing Tides launched an application in May 2011 for the eviction of the unlawful occupiers in accordance with the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act⁴. The City of Johannesburg opposed the application on the basis that it did not recognise any direct constitutional obligation on it and respect of the occupiers. On 14 June 2012, Classen J issued the following order:

- “1. The application for postponement is dismissed.
2. The 250th Respondent ("the city") is directed to provide all those whose names appear in the document entitled "List of Residents of Chung Hua Mansions dated 6 June 2012", annexed hereto and marked "A" with temporary shelter where they may live secure against eviction, in a location as near as possible to the area where the property is situated, by no later than 30 January 2013, provided that they are still resident at the property and have not voluntarily vacate it.
3. The City is directed to file a report by no later than 31 October 2012, setting out the nature and location of the temporary shelter to be provided to the occupiers.
4. The First to 249th Respondents, and all those holding occupation through them ("the occupiers") are to vacate C[...] H[...] Mansions, 1[...] J[...] Street, Johannesburg, more fully described as Erf 1[...], Johannesburg ("the property") by not later than 15 February 2013, failing which the sheriff is authorised to evict the occupiers.
5. The City is directed to pay the Applicant's and occupiers' costs, including the wasted costs..."

[7] It is apparent from the above order that the Court ordered the eviction of the occupiers by not later than 15 February 2013 but ordered the City of Johannesburg to find them temporary accommodation not later than 30 January 2013. Following non-compliance with the above order, the occupiers

⁴ Act 19 of 1988, as amended.

launched an enforcement application against the City of Johannesburg, its Mayor, the City Manager and the Head of the Housing Department on 19 December 2012. Lamont J heard the matter on 06 February 2013 and issued, by agreement between the parties, the following order:

- “1. This case is consolidated with case number 2011/20127.
2. The consolidated case is postponed to the 9th [of] April 2013 for a further hearing on whether it is just and equitable to implement the suspended eviction order dealt with in paragraph 3 below.
3. The implementation of paragraph 4 of the order granted by Claassen J in case number 2011/20127, ordering the First to 249th Respondents and all those holding occupation through them to vacate C[...] H[...] Mansions, 1[...] J[...] Street, Johannesburg, more fully described as Erf 1[...], Johannesburg ("the property"), failing which the Sheriff is authorised to evict the occupiers ("the eviction order"), is suspended pending the outcome of the hearing on 9th April 2013.
4. The first respondent ("the City") is directed to provide all those whose names up here in the document entitled "List of Residents of Chung Hua Mansions dated 6 June 2012", annexed to the order granted by Claassen J ("the residents"), to the order granted by provided they are still resident at the property and have not voluntarily vacate it, with temporary shelter where they may live secure against eviction, in a location as near as possible to the area where the property is situated.
5. This City is directed by not later than the 20th March 2013 to deliver a report to this Court, confirmed on affidavit by an appropriate official of the City, setting out the nature and location after temporary shelter to be provided to the occupiers. That report must identify the building or buildings where the occupiers will be accommodated and the particular terms as to rent and occupation on which the occupiers will be accommodated, including any house rules or other tenant responsibilities sought to be imposed. The report must specifically deal with the building known as Ekuthuleni and Linatex. The report must also contain an undertaking to make the accommodation available by a specified date, giving fully detailed and rational reasons while such date cannot be any earlier. The report must deal specifically with the

issue of proximity and explain why the particular location and form of accommodation have been selected. The report must also set out the steps taken between the date of this order and the filing of the report to engage with the occupiers through their legal representatives, or by any other appropriate means.

6. The first to 182nd applicants are entitled by no later than 27 March 2013 to deliver affidavits dealing with the contents of the City's report and specifying any objections thereto, and this City is entitled by 3rd April 2013 to deliver such further affidavits as it deems appropriate. The fifth respondent may deliver such affidavits as it deems appropriate by the 3rd [of] April 2013.

7. The second, third and fourth respondents add to be served with a copy of this order by Sheriff of Court.

8. The costs are reserved."

[8] The City of Johannesburg failed to comply with the above order, and Changing Tides continued to accommodate the occupiers. On 03 April 2013, Satchwell J issued an enforcement order against the City of Johannesburg and its three officials. The City of Johannesburg unsuccessfully appealed to the Supreme Court of Appeal against parts of the abovementioned order. In June 2015, its application for leave to appeal the Supreme Court judgment to the Constitutional Court was dismissed.

[9] In November 2015, Changing Tides applied to re-enroll the combined applications for:

9.1 This Court to determine a date by which the City of Johannesburg must provide temporary emergency accommodation and a date on which the occupiers must locate in compliance with the eviction order of Claasen J, alternatively such further relief as may be just and equitable in the circumstances, and

9.2 The City of Johannesburg's named officials to each answer and explain under oath precisely what the head each done to comply with the order of Claasen J and the first and second orders of Satchwell J,

and what today would each do to ensure compliance with any further court orders granted.

[10] The occupiers filed supporting papers seeking a finding of contempt of Court and ancillary relief. This prompted the City of Johannesburg to provide the occupiers with temporary emergency accommodation on 10 January 2016. It was the City of Johannesburg's delay in complying with the above orders that resulted in Changing Tides initiating this action on 14 November 2016 against the City of Johannesburg for the loss of profit resulting from its failure to secure emergency accommodation for the occupiers and charges related to water and electricity incurred from 30 January 2013 to 10 January 2016 while it could not enjoy possession and ownership of its property. On 14 March 2019, Changing Tides filed amended particulars of claim. The City of Johannesburg filed its plea to the amended particulars of claim dated 13 May 2019.

[11] The Commercial Court Directive ("the Directive") was published and became effective on 03 October 2018. Pursuant thereto, Changing Tides applied for the designation of this matter as commercial in accordance with the Directive. On 16 November 2020, this matter was designated as a commercial matter, and Kathree-Setiloane J was appointed to manage the matter.

[12] Kathree-Setiloane J issued two case management directives outlining the parties' timelines for exchanging documents. Accordingly, the parties delivered discovery affidavits on 12 and 15 December 2021, respectively. On 25 February 2022, Changing Tides filed notices in terms of Rules 36(9)(a) and (b), and the City of Johannesburg failed to file its expert summary. On 10 November 2022, Changing Tides delivered its statement of case, and the City of Johannesburg filed its responsive statement on 25 November 2022. The parties filed the Joint Status Quo report on 25 August 2023. On 12 September, the Court enrolled the matter as a long-duration trial of 10 days.

[13] On 22 February 2014, the City of Johannesburg proposed an amended timetable and Changing Tides accepted it on 26 February 2024. Several correspondences regarding the filing of documents were exchanged between the parties. On 15 July 2024, the City of Johannesburg commented on the draft joint practice note and raised an issue regarding the pleadings to be considered by the Court in adjudicating the dispute. The parties then held a further pre-trial meeting on 22 July 2024.

[14] On 31 July 2024, the City of Johannesburg requested a case management meeting with this Court, which was held 07 August 2024. In that meeting, the parties were directed to file heads of argument regarding the set of pleadings that would form the basis of the matter. The issue was to be argued on 16 August 2024, but the council became unavailable. As a result, the parties argued the issue on the first day of the trial.'

Legal framework

[15] The Uniform Rules of Court ("the Uniform Rules") were promulgated in terms of the Supreme Court Act 59 of 1959 and remain in force in terms of the Superior Courts Act 10 of 2012. Rule 17 regulates how the action proceedings are initiated, and it reads:

“(1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant *inter alia* that, if he disputes the claim, and wishes to defend he shall-

(a) within the time stated therein, give notice of his intention to defend;

(b) thereafter, if the summons is a combined summons, within twenty days after giving such notice, deliver a plea (with or without a claim in reconvention), an exception or an application to strike out.

(2)(a) In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of

his claim, which statement shall *inter alia* comply with rule 18.”

[16] Rule 22 sets the requirements that the parties must meet in pleading their respective cases, and it reads:

“(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.

(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.”

[17] In *Minister of Agriculture and Land Affairs v De Klerk and others*⁵, the SCA stated:

“It is trite that parties are bound by their pleadings – the object thereof being to delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and to then seek to pursue another at the trial.”

Submissions

[18] Changing Tides submits that the matter stands to be adjudicated in terms of the pleadings filed by the parties, namely the summons and particulars of claim, the amended particulars of claim and the plea. The City of

⁵ (747/2012) [2013] ZASCA 142 (30 September 2013) at para 39.

Johannesburg contends that the matter must be adjudicated in terms of the statement of case and the responsive statement filed after the matter was designated as a commercial court matter to the exclusion of the pleadings filed in terms of the Uniform Rules.

Analysis

[19] In submitting that the trial stands to be adjudicated in terms of the pleadings, Changing Tides relies on Rules 17 and 22 of the Uniform Rules. It is, therefore, necessary to compare the provisions of the Practice Directive with the relevant provisions of the Uniform Rules to assess any inconsistencies between the two.

[20] Rule 17(2) of the Uniform Rules provides for a plaintiff, where the claim is not for a debt or liquidated demand, to commence an action proceedings by issuing a summons to which must be attached the particulars of material facts relied upon by the plaintiff in support of its claim. Rule 22(2) requires to deliver a plea in which it either admits, denies or confesses and avoids all the material facts alleged in the combined summons and to clearly and concisely state all material facts upon which he relies.

[21] As mentioned above, the Directive records that the Commercial Court's aim is to "*promote efficient conduct of litigation in the High court and resolve disputes, quickly, cheaply, fairly and with legal acuity.*" Chapter 2 provides for instances where a trial action is brought to the Commercial Court, and paragraph 13 reads:

"At any time after a summons has been issued out of the High Court, any party to the suit may apply to have the case allocated as Commercial Court case."

[22] The words "*Bringing the trial action to the Commercial Court*" and "*At any time after a summons has been issued...*" anticipate that actions summons of which were issued in terms of the Uniform Rules may be

allocated as Commercial Court cases upon application by any party to the proceedings who wished to have the dispute resolved expeditiously.

[23] Chapter 4 of the Directives outlines the steps to be taken to get the matter ready for trial, and it reads:

“18. Matters heard in the Commercial Court will be dealt with in line with the broad principles of fairness, efficiency and cost-effectiveness.

19. The following steps will usually be of application, subject to the requirements of the particular case.

20. The plaintiff, within the period specified by the judge at the first case management conference, must file a statement of the case containing the following:

20.1 The plaintiff’s cause(s) of action and relief claimed;

20.2 The essential documents the plaintiff intends to rely on, and

20.3 A summary of the evidence the plaintiff intends to rely on.

21. The defendant and third parties, if any, within the period specified by the judge at the first case management conference must file a responsive statement of the case containing the following:

21.1 The defendant or third party’s defence(s) and any counterclaim relied upon;

21.2 The essential documents the defendant or third party intend(s) to rely on,

21.3 A summary of the evidence the defendant or third-party intend(s) to rely on.”

[24] The words “*the steps to be taken to get the matter ready for trial*” imply that the statement of case and the responsive statements are documents to advance the matter expeditiously. Both documents are not intended to replace the pleadings but are required to outline the cause of action and defence or counterclaim, relief claimed, the essential documents the parties intend to rely on, and a summary of the evidence they intend to rely on.

[25] The above proposition was acknowledged by both parties in the Joint Status Quo report, which records in paragraph 2 that "Subject to the pleadings, it is common cause that...". Further, Changing Tides recorded in paragraph 3 of the Joint Status Quo report that it "notes that some of the issues which the defendant raises do not arise in the pleadings and will be objected to..." When asked about the abovementioned objection in Court, the counsel for the City of Johannesburg submitted that it was not considered at the time.

[26] Notwithstanding, the City of Johannesburg relied on the judgment it regards to be the only decision on the proper application of the Directive to matters designated "commercial". The said judgment is *Lombard Insurance Company Limited v McCrae* ("Lombard"), in which Pullinger A.J. noted the following regarding the Directive:

"[27] It appears that practice directives enjoy the same status as the Uniform Rules of Court. But, even if this is not the case, it is entirely irrational and wasteful that litigants would apply, in terms of the Directive, for the certification of a matter as "commercial", and then ignore the mechanism provided in the Directive for the prosecution of the matter. Further, the procedural steps stipulated in the Directive are couched in peremptory terms. I can see little scope for litigants, who chose to have their dispute resolved by application of the Directive, avoiding or sidestepping the carefully considered and well-designed process therein.

[28] There is, then, an obligation on litigants, their legal practitioners and judges, ordinarily, to adhere to the procedure stipulated in the Directive. I say "ordinarily" because of the power retained by courts to regulate their own process and because the mechanism I shall now discuss being more appropriate for proceedings by way of action than by way of application." [Footnotes omitted]

[27] However, Changing Tides brought to this Court's attention the criticism by the authors of Erasmus, Superior Court Practice, of the comment made by the Court in *Lombard* at paragraph 27, with reference to section 173 of the

Constitution, that “*It appears that practice directives enjoy the same status as the Uniform Rules of Court.*” They said the comment “*would appear to fly in the face of the clear principle laid down by the Supreme Court of Appeal*” in the following three unanimous decisions, which Pullinger A.J overlooked.

[28] In *The National Director of Public Prosecution (Ex Parte Application)*⁶ (2018), the SCA held that:

“[31] The practice directive is subordinate to any relevant statute, the common law and the Uniform rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and, their purpose is to supplement the rules of Court.”

[29] In *The National Director of Public Prosecutions (Ex Parte Application)*⁷ (2022), the SCA reaffirmed the above principle as follows:

“[14] This Court in Ramadhani explained how a practice directive stands in relation to a statute, the Uniform Rules and the common law. Seriti JA held in this respect, that:

‘The practice directive is subordinate to any relevant statute, the common law and the Uniform Rules, and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and, their purpose is to supplement the rules of Court. In this case, the Court a quo afforded the practice directive statutory force overriding both s 38 of POCA and rule 6(4)(a) of the Uniform Rules which is impermissible. The practice directive should not negate the provisions of s 38 and rule 6(4)(a) of the Uniform Rules. In my view the portion of the practice directive dealing with ex parte applications is not applicable to ex parte applications brought in terms of s 38.’”

⁶ (905/2017) [2018] ZASCA (86) (31 May 2018)

⁷ (Case no 669/2020) [2021] ZASCA 142 (7 October 2021)

[30] And also stated that:

“[19] Practice directives provide essential guidance for the daily functioning of the courts. Practice directives may not derogate from legislation, the common law or rules of Court that have obligatory force. A statute that permits the use of a procedure so as to make its enforcement effective must be adhered to. The competence of the courts to give practice directives is an important means by which the work of the courts may be carried out. However, practice directives must facilitate what a statute requires. Practice directives should not place obstacles in the way of achieving the objects of a statute.”

[31] In considering whether it is competent for a Judge President of a high court to remove certain areas of the Court's jurisdiction through a practice directive, the SCA in *Frank Mhlongo and Others v Tryphinah Mokoena N O and Others*⁸ stated that:

“As mentioned before, the appellants rely on the provisions of s 21(1) and 21(2) of the Superior Courts Act as a basis for their contention that the High Court had the necessary jurisdiction to adjudicate their application. It is therefore necessary to juxtapose the provisions of the Practice Directive with the relevant provisions of the Superior Courts Act in order to assess whether there are any inconsistencies between the two. This exercise is necessary because, as explained by this Court in *The National Director of Public Prosecutions (Ex Parte Application)*, ‘[p]ractice directives may not derogate from legislation, the common law or rules of court that have binding force . . .’”

[32] It is apparent from the above authorities that while the Practice Directive deals with the daily functioning of the courts and supplements the Rules of Court, it is subordinate to any relevant statute, the common law and the Uniform Rules. The learned authors of Erasmus were correct in criticising

⁸ (723/20) [2022] ZASCA 78 (May 2022) at para 8

the comments in *Lombard*. Moreso, as the learned Acting Judge overlooked the authorities of the SCA, which are binding on the High Court.

[33] Changing Tides further referred this Court to the judgment in *Transnet Soc Ltd and Another v CRRC E-LoCo Supply (Pty) Ltd (formerly CSR E-LoCo Supply (Pty) Ltd) and Others*⁹, where the applicant launched a self-review application seven years after the transaction under the principle of legality. Instead of filing an answer or a rule 6(5)(d) notice, one of the respondents brought a substantive application to dismiss the review on the sole ground of delay. The applicant then brought a Rule 30 application to dismiss the respondent's dismissal application and the following arguments were noted as follows:

"It is acknowledged on behalf of CCRC that the Delay application is a novel proceeding but is nevertheless, so it is argued, justified by its practical utility. From that premise, an argument was advanced about the peculiar opportunities for pragmatism which can or ought to flow from the special features of the Commercial Court system which operates within the Gauteng Division of the High Court, which apply to this case. This consideration, so runs the argument, can be linked to section 173 of the Constitution and the High Court's inherent jurisdiction to regulate its own processes. The Delay application, so it is argued, is an appropriate expression of what the Commercial Court system envisages can be accomplished in the interests of efficient litigation."¹⁰

[34] However, Sutherland DJP rejected the above argument as follows:

"The argument that the dynamics of the Gauteng Commercial Court litigation model opens a door to unfettered pragmatism by the case-manager-judge is probably an exaggerated proposition. But even assuming that the Commercial Court model envisages quite novel *ad hoc* designer procedural techniques, this line of argument cannot

⁹ (11645/2021) [2022] ZAGPJHC 15 (12 April 2022)

¹⁰ *Ibid* at para 10.

overcome the fact that the Delay defence is not a discrete issue. No degree of pragmatism can surmount that fact. The full extent of the space to vary the rules of Court by agreement among the parties need not be further explored for the purposes of this judgment."¹¹

[35] In light of the above authorities, it is apparent that the Directive remains subordinate to the Uniform Rules and cannot supplant them. There is, therefore, no basis for this Court to ignore the pleadings issued in terms of the Uniform Rules and adjudicate the trial based on the statement of case and the responsive statement issued under the Directive to advance the pragmatic and expeditious approach to commercial litigation. Changing Tides correctly submitted that a contrary finding would enable the City of Johannesburg to turn its responsive statement into a 'Trojan horse' to introduce its new defences not raised in its plea. This is impermissible.

Costs

[36] Although Changing Tides submitted that the City of Johannesburg's decision to persist with this preliminary point, in the face of three SCA judgments drawn to its attention, is causing delay, frivolous and amounts to a continuation of its serial abuse of the process practised consistently for more than 10 years, it prayed for the costs to be reserved.

Order

[37] Accordingly, the following order is made:

1. The preliminary point that the matter must be adjudicated in terms of the statement of case and the statement of response filed after the matter was designated as a commercial court matter to the exclusion of the pleadings filed in terms of the Uniform Rules is dismissed.
2. The costs are reserved.

¹¹ *Ibid* at para 22.

D. Mahosi J
Acting Judge of the High Court

Date of hearing: 02 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 04 September 2024.

Appearances

For the plaintiff: Advocates CHJ Badenhorst SC and P Bosman
Instructed by: Esthé Muller Incorporated Attorneys
c/o Couzyns Incorporated Attorneys

For the defendant: Advocate A.W. Pullinger
Instructed by: Kunene Ramapala Incorporated Attorneys