



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

Case No: 117558/2023

In the application between:

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
23 May 2025	
DATE	SIGNATURE

**PASSENGER RAIL AGENCY OF
SOUTH AFRICA**

APPLICANT

And

RAUBEX CONSTRUCTION(PTY)LTD

RESPONDENT

JUDGMENT

NHARMURAVATE AJ

INTRODUCTION

- [1] The Applicant is Passenger Rail Agency of South Africa (“PRASA”) a legal entity which has brought an opposed interlocutory application where it seeks to struck out certain paragraphs in the Respondent’s answering affidavit as per the notice of motion filed.
- [2] This application is opposed by Raubex Construction (PTY) LTD, a company duly registered and incorporated in terms of the company Laws of the Republic of South Africa. They are the Respondents in this interlocutory application whereas they are the applicants in the review application.
- [3] The issue for this court to decide is whether the challenged paragraphs within the Respondent’s answer should be struck out, alternatively, whether the Respondent’s answer should be dismissed in its entirety based on the notice served pursuant to rule 30/30A (the notice).

BACKGROUND FACTS

- [4] PRASA issued an application where it seeks a separation of issues in relation to the review application that was instituted by the Respondent. The separation is brought in terms of rule 33(4) of the uniform rules of court. In line with the papers filed the separation sought by the Applicant is opposed by the Respondents here in.
- [5] As per the norm, the Applicant filed the founding papers which in turn the Respondent had to respond to by filling an answer. The answering affidavit raised complaints from the Applicant’s side. This complaint was raised in terms of a rule 30/30A notice which was served on the Respondents herein on the 5th of March 2024.
- [6] The notice was worded in the following manner:

***“TAKE NOTICE THAT** the Applicant hereby gives notice that the following portions of the Respondents answering affidavit dated 19 February 2024 delivered in respect of the separation application issues application in terms of rule 33 (4) of the uniform rules of court alternatively the common law comprises an irregular step and or a failure to comply with the uniform rules of court.*

The purported importation, and the manner in which the Respondent purports to incorporate affidavits in respect of the urgent interim interdict application under case number 117558/2023, and affidavits in respect of the urgent application to compel under case number 117558/2023, into its answering affidavit dated 19 February 2024 is regular and impermissible.

The impugned paragraphs per 1 above in the Respondent's answering affidavit dated 19 February 2024 are as follows:

.....”

- [7] This notice of irregularity was responded to in terms of a correspondence dated the 11th of March 2024 in this correspondence the Respondent denied the existence of any irregularity complained of in the papers filed. They further denied transgressing any court rule and/or common law by referring to paragraphs and pleadings which are already before the court. The Respondent further denied the existence of any irregularity, or any prejudice caused to the Applicants by including the other affidavits in the matter. The Respondents further reiterated that they would not be removing the cause of complaint and that they expressed their intention to oppose any application which will be filed thereafter.
- [8] It was due to this refusal that the Applicant then issued this interlocutory application. Considering the above correspondence, the application was then issued by the Applicant which is what is before this court for consideration.

ARGUMENTS PRESENTED

- [9] Ms Ndlovu Counsel for the Applicant argued that a struck out was sort in terms of Rule 30/30A of the notice served. That is the setting aside of namely paragraph 2.1,2.2,5.1,15.1,19.1,21.1,28.1,29.1,32.1,33.1,35.1,36.1,37.1,38.1,40.1 and 41.1. Alternatively, a setting aside of the entire answering filed by the Respondent.
- [10] Ms Ndlovu for the Applicant argued that the answering filed referred to 5(five) affidavits which were not directly relevant to the matter. She argued that these affidavits were totaling 500 pages which made it impossible for the Applicants to file a replying affidavit where it must deal with the allegations made therein. She argued that the impugned

paragraphs constitute irrelevant matters as they do not in any manner contribute to a decision in a separation application. Additionally, she pointed that the conduct of the Respondent in filling such an answer was vexatious in nature and that such evidence was inadmissible which amounts to prejudice and obstructive conduct. It was also on this basis that a punitive costs order was sought.

- [11] In opposition Mr Buys for the Respondent argued that this application was unmeritorious simply because it was solely relying on rule 23(2) whereas the Respondents were only notified of certain paragraphs within their answer being irregular in terms of rule 30 and 30 (A). In addition to that, he further added that the attached affidavits are important part of evidence which should be included in their answer and cannot be separated as they are already before the court. He further argued that the Respondents were never notified of their answer alternatively the impugned paragraphs beings scandalous, vexatious or irrelevant. It is on this basis that he sought a dismissal with costs on scale B.

ANALYSIS OF THE MATTER

- [12] It is crucial for this court to examine the notice served in accordance with rule 30/30A that was presented to the Respondent. Firstly, the specific rule or rules upon which the Applicant's application relies are not explicitly clear from the notice, as it presents alternatives. An inquiry was made to Ms Ndlovu, Counsel the Applicant, who directed the court to rule 30A. However, this clarification was neither communicated to the Respondents in writing before the hearing nor specified in the notice itself. This court is restricted to the documentation submitted and presented before it and does not consider statements made by Counsel from the bar that are not included in the filed papers.
- [13] Secondly, the notice served on the Respondent lacked clarity on the irregularity committed. The Applicant was required to address the irregularity according to rule 30 but did not do so. The irregularity should be addressed to ensure that the responding party is informed and able to decide how to handle the complaint. The notice communicated that the Respondent attached affidavits regarding the urgent interim interdict and the urgent application to compel into the answering affidavit, which was considered irregular and impermissible.
- [14] As per the notice: *"The purported importation, and the manner in which the Respondent purports to incorporate affidavits in respect of the urgent interim interdict application under case number 117558/2023, and affidavits in respect of the urgent application to*

compel under case number 117558/2023, into its answering affidavit dated 19 February 2024 is irregular and impermissible.”

[15] The Applicant’s notice did not specify the details of the irregularities, or the irregularity being complained about. Incorporating affidavits in an application is not considered an irregularity, and there is no rule preventing parties from doing so. The alleged irregularity of not complying with the uniform rules of court (rule 30A) should have been clearly addressed in the notice. When the court inquired about the specific rule that the Respondent did not comply with, Ms Ndlovu for the Applicant referred to rule 6(5) without specifying the sub-provisions. This left the court to speculate, as these details were not evident on the notice served on the Respondent nor on the application. Additionally, Ms Ndlovu appeared aggravated by the court’s inquiry, which was aimed at clarifying the confusion regarding the filed documents.

[16] Paragraph (2) of the notice did not specify which rule the Respondent failed to comply with, nor did it detail the irregularities within the listed paragraphs. The notice was inadequately drafted, as it did not clearly communicate the infractions committed by the Respondent in line with the uniform rules of court, preventing rectification or any other necessary actions. Furthermore, the notice read together with the founding papers lacked clarity on the specific rule that the Respondents failed to adhere to.

[17] The founding papers exacerbate the situation by lacking clarity, thereby contributing to the confusion. The application claims to be filed under rule 30/30(A), while reliance is placed on rule 23(2) and rule 6(11) read together. Each of these rules, according to the uniform rules of court, follows distinct procedures.

[18] Rule 6(11) regard being had to the striking out, requires a notice of such an application to struck out to be served.¹ Subrule 6(11) in this regard is read together with rule 6(15) which reads as follows:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including

¹ Jeebhai v Minister of Home Affairs 2007 (4) SA 294 306E -307H

costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted².

Wherefore subrule 6(15) regulates struck outs, of matters from any affidavit. The rule directs that an application to strike out which is brought in terms of a rule 6(11) is set down for hearing at the same time as the hearing of the main application. Further the party in the position of the Applicant is expected to deal with the impugned paragraphs in their reply not to move it as a separate application.

[19] The commentary under this subrule reads: *“Since an application to strike out objectionable matter in affidavits is dealt with only at the hearing of the main application a party must in his opposing affidavit deal with the allegations sought to be struck out by doing so he or she does not waive his right to object to the offending allegations in the affidavit he or she must direct the courts attention to these statements of which he or she complained and specify the grounds on which he or she objects to each paragraph.* This is not the case in this application³.

[20] The commentary under rule 30A clearly states that: *“To the extent that the provisions of this rule may be in conflict with a provision in another rule which provides a specific remedy for non-compliance with that rule, a party need only follow the provisions of the other rule, without first having to give notice in terms of this rule⁴.”*

[21] None of the mandatory requirements were followed by the Applicant regard being had to the rules specially the rules the Applicant seeks to rely on. Wherefore reliance on 30A whereas there is a specific remedy for non- compliance with rule 6 is flawed. Further, reliance on rule 6(11) is misplaced because no reply has been filed wherein these allegations have been dealt with and this court is not dealing with the main application (the application in terms of rule 33(4).

[22] Mr Buys for the Respondent was correct in arguing that the application by the Applicant was relying on rule 23(2) as supported by the Applicants’ heads of argument. He was also correct in arguing that they were not notified in accordance with the provisions of rule 23(2). On a proper analysis, the Applicant’s application (*just after paragraph 31*) has

² Superior Court Practice Rule 6

³ Supra Commentary Rule 6(15)

⁴ Supra Commentary Rule 30A

a subheading the “*APPLICATION TO STRIKE*” under that subheading the Applicant discusses rule 23(2). There was no explanation made how the 3 rules if not the 4 rules appearing on the Applicant's papers were linked.

[23] Briefly, Rule 23(2) provides that a party intending to make an application to struck out must first deliver a notice within ten days of receipt of the pleading. This is to afford the party delivering the pleading an opportunity to remove the cause of complaint within fifteen days of delivery of the notice of intention to strike out (the notice to cure). There was no notice brought let alone any attention brought by the Applicant to the Respondents of their intention to strike out the impugned paragraphs based on the grounds that these paragraphs were vexatious, scandalous and irrelevant.

[24] A party who intends to deliver an application to strike out in terms of rule 23(2) is not entitled to do so before bringing a notice and before the period of fifteen days provided for has expired. In total twenty-five days must elapse before the application could be delivered. This was not demonstrated by the Applicant.

[25] The objection raised by filing an exception or noting an irregularity follows distinct rules and procedures that must be adhered to. The application was puzzling which prompted inquiries from the court. Counsel for the Applicant acknowledged that no notice was served in accordance with rule 23(2). She also acknowledged that these rules differ from rule 30/30(A) and proposed that the court proceed based on rule 30A, which the court cannot accept as it would result in litigation by surprise.

[26] The court makes its decisions based on the papers filed, rather than on counsel's afterthoughts in motion applications.⁵ There is a concerning trend among certain legal practitioners in motion court who draft and move notices or applications based on various alternative rules without providing explanations or clarifications on paper. This is in expectation of the court to determine which rule is relevant to that specific application. Such an approach essentially lumps everything together in the hope that something positive will emerge. However, this is not the court's function, as it would mean the court is assuming the duties of counsel, thereby compromising the judiciary's impartiality. Such practices should be strongly discouraged.

⁵ Director of hospital Services v Mistry 1979(1) SA 626 (A) at 645H

[27] Ms Ndlovu counsel for the Applicant also argued that the Respondent and its legal representatives were dishonest and unethical which was refuted by the Mr Buys for the Respondent. In my view, I found no basis for such an argument on the papers filed by the Applicant. These terms should not be used indiscriminately or without adequate evidence and substantiation.

[28] Ms. Ndlovu displayed a lack of courtesy towards the court's inquiry and Respondent's Counsel, which is conduct unbecoming of an officer of this court. In *Grundler N.O v Zulu*, the court made the following observation:

[29] *'There is a rising trend in the legal profession of practitioners demonstrating disrespect (if not outright contempt) for courts and the judiciary. One does not need to look far to find examples of this sort of behaviour, from the ranks of senior counsel to the most junior of candidate attorneys. It manifests not only in how practitioners interact with opponents and judges in and out of court but also in the launching of prima facie spurious applications, lacking in factual or legal foundation, that are designed to "snatch bargains", achieve ulterior objectives, delay and/or obstruct. It is a "win at all costs" attitude that does a disservice to the profession and to the country and sets an appalling example to the public at large. It ignores not only the oath that all lawyers take upon their admission but also the distinction between the duty that practitioners owe to their clients and the separate duty that they owe to the Court⁶.'*

[30] Practitioners engaged in litigation are reminded of their sworn oath, adherence to the code of conduct, and their duty as officers of this court above all else, ensuring the maintenance of court decorum.

Conclusion

[31] The application presented by the Applicant lacked a probable basis for the irregularity claimed in accordance with the notice served. Additionally, the application was inadequately designed and did not demonstrate a comprehensive understanding of this court's rules. Consequently, the Applicant's application was unsuccessful.

⁶ *Grundler N.O and another v Zulu and others* [2023] ZAKZDHC 7 para 37.

[32] The determination of costs is at the discretion of the court. Since this is an interlocutory application, the costs will be assessed during the main application of this matter.

[33] In conclusion, the following order is made:

1. The Application is dismissed with costs reserved.



**NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

For the Applicant: Adv M N Ndlovu
Instructed by : Macroberts Attorneys

For the Respondent: Adv JJ Buys
Instructed by: York Attorneys Inc

Date of Hearing: 04 March 2025
Date of Judgment: 23 May 2025