

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: B39602/2022

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 14 May 2025

SIGNATURE OF JUDGE:

In the matter between:

DITIRO WORKS (PTY) LTD
BOGANALA SUPPLIES (PTY) LTD

First Plaintiff
Second Plaintiff

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY
AIGAN WILLIAMS (OFFICE OF THE CITY MANAGER)
PHEKO LENTLONKANE
(ROAD TRANSPORT DEPARTMENT)
THEMBEKA MPHEFU (SUPPLY CHAIN MANAGEMENT)

First Defendant
Second Defendant
Third Defendant
Fourth Defendant

JUDGMENT

HF OOSTHUIZEN AJ

- [1.] The plaintiffs initially claimed payment from the defendants of an amount in excess of R25 million for certain construction work in terms of a service level agreement ("the agreement").
- [2.] On or about 21 February 2023, the first defendant delivered a notice in terms of rules 30 and 30A ("the first rule 30 notice") in which it alleged that the combined summons comprised an irregular step and/or a failure to comply with the Uniform Rules of Court ("the rules") in that it:
- [2.1.] was not signed by an attorney who, under section 4(2) of the *Right of Appearances in Courts Act*, 1995¹ has the right of appearances in the High Court;
- [2.2.] did not comply with rule 18(6) in that it did not state whether the agreement was written or oral, where it was concluded and, if it was written, a true copy thereof or the part relied on was not annexed; and
- [2.3.] did not comply with rule 18(10) in that the damages were not set out in such manner as would enable the defendants reasonably to assess the quantum thereof.
- [3.] The first defendant accordingly afforded the plaintiffs an opportunity of removing the cause of complaint, failing which the first defendant intended to apply in terms of rule 30 and/or 30A to set aside the combined summons.
- [4.] The first plaintiff delivered a reply to the the first rule 30 notice in which it essentially disputed the grounds in the first rule 30 notice.
- [5.] The first defendant subsequently launched an application to set aside the combined summons.

¹ Act 62 of 1995

[6.] On 6 December 2023, Vorster AJ granted the following order ("the Court Order") on an unopposed basis:

- "1. *The summons and particulars of claim be declared to be non-compliant with the rules Governing Proceedings in the High Court ("the Rules").*
2. *The summons and particulars of claim are struck in their entirety.*
3. *The plaintiffs to pay the costs of this application on attorney and client scale."*

[7.] On 30 May 2024, the plaintiffs served a new combined summons on the defendants in which they claim damages of approximately R11,5 million from the first and second defendants, on the basis of an alleged breach of contract of the agreement. The second defendant is cited in the new combined summons as the City Manager: City of Tshwane Metropolitan Municipality. No reference is made to the third and fourth defendants in the new combined summons.

[8.] On or about 3 June 2024, the defendants delivered a notice in terms of rules 30 and/or 30A ("the second rule 30 notice") in which they contended that the new combined summons comprised an irregular step and/or a failure to comply with the rules in that it was issued under the same case number relating to the combined summons which had been struck in terms of the Court Order.

[9.] The defendants afforded the plaintiffs an opportunity of removing the cause of complaint, failing which the defendants intended to apply in terms of rule 30 and/or 30A to set aside the new combined summons.

[10.] On or about 23 July 2024, the defendants applied for an order setting aside and/or striking the new combined summons, which application is opposed and served before me.

[11.] The defendants' essential contention is that "*the effect of the Court Order was to render the combined summons void ab initio and/or de facto non-existent.*

Invariably, the Court Order brought to an end any proceeding instituted under the above-mentioned case number”.

- [12.] The defendants moreover contend that if the new combined summons were to be issued under a new case number, this “*would have rendered the plaintiffs’ claim prescribed*”. This argument is apparently premised on section 15(2) of the *Prescription Act, 1969*² which provides in relevant parts that “*the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgement*”.
- [13.] The defendants moreover sought condonation for their failure to comply with the prescribed time periods in terms of rule 30(2)(c). In support of condonation, the defendants contend that the first defendant and “*the public purse*” would suffer prejudice “*should the prescribed claim be allowed to be ventilated*” and that it is therefore in the public interest that condonation be granted.
- [14.] Rule 30(3) affords the Court the power to set aside an irregular step, including (pursuant to rule 18(12)) the failure to comply with the provisions of rule 18, which relates to pleading generally.
- [15.] The subrule gives the Court very wide powers once it is satisfied that the step was in fact irregular.³ The Court is not obliged to set aside the irregular step and is entitled to overlook any irregularity which does not substantially prejudice the other party.⁴
- [16.] Rule 30A(1)(b) affords the Court the power to strike out a claim or defence where a party fails to comply with the rules. There is thus an overlap between rules 30 and 30A.

² Act 68 of 1969

³ *Afrocentric Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd* 2023 (4) BCRL 361 (CC) para [26]

⁴ *Van den Heever NO v Potgieter NO* 2022 (6) SA 315 (FB) para [23] and [24]

- [17.] Striking out a claim or defence is a drastic remedy. In granting such an order, a Court should consider all relevant factors such as the reasons for non-compliance; whether the defaulting party was in reckless disregard of his obligations; whether his case or defence appears to be hopeless; and the issue of prejudice.⁵
- [18.] The fatal flaw in the defendants' argument is the failure to distinguish between the striking out of a pleading and the striking out of a claim or defence.
- [19.] An order dismissing or striking out an action or a claim puts an end to the proceedings and means that if the plaintiff wishes to pursue his claim on a different pleading he must start *de novo*, which may have drastic consequences for the plaintiff, particularly where it results in the prescription of the claim. A finding that the combined summons is fatally defective by reason of its failure to properly plead a cause of action does not however have such drastic consequences.⁶
- [20.] In the event that an exception against a combined summons is upheld, the combined summons is destroyed but "*the remainder of the edifice does not crumble*" and "*the husk of the combined summons*" is left.⁷
- [21.] The upholding of an exception to a combined summons does not, therefore, carry with it the dismissal of the action. The unsuccessful party may apply for leave to amend the particulars of claim.
- [22.] In *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Ltd*⁸ Ponnar JA overruled the order of the court *a quo* upholding an exception to a plea and granting judgement in favour of the plaintiff on the following basis:

⁵ *Nkholovu v Phoshoko* (11908/2020) [2023] ZAGPPHC 1298 (2 March 2023)

⁶ *Group Five Buildings Ltd v Government of the Republic of South Africa (Minister of Public and Land Affairs)* 1993 (2) SA 593 (A) at 602I-603B

⁷ *Group Five Buildings Ltd v Government of the Republic of South Africa (Minister of Public and Land Affairs)* 1991 (3) SA 787 (T) at 791G-I

⁸ 2018 (3) SA 405 (SCA) para [7]

"Preliminary, it is necessary to observe that it is unclear upon what basis Le Grange J dealt with the case in the manner he did. Having upheld the exception and struck out the plea he proceeded to enter judgement for Old Mutual, instead of granting leave to the appellants, if so advised, to amend their plea. The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence. The rationale for this seems to be that, although the defence contained in the pleading may be bad, the pleading as such continues to exist. Ordinarily therefore the court should grant leave to defend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is good reason that the pleading cannot be amended. No 'good reason' was evident or asserted in this case. In those circumstances, counsel for Old Mutual conceded that, irrespective of the merits of the exception, Le Grange J ought not to have proceeded to enter judgement against the appellants. It follows that para 3 of his order cannot stand and accordingly falls to be set aside."

- [23.] The striking out of a combined summons on the basis that it does not comply with rule 18 similarly does not carry with it the dismissal of the action.
- [24.] The fact that Vorster AJ only granted a costs in respect of the application and not the costs of the action indicates that it was not the intention of the Court to bring an end to the action, as argued by the defendants.
- [25.] The defendants have failed to refer me to any case law which supports their contention that the striking out of a combined summons due to the failure to comply with rule 18 brings an end to the action. The decisions of *Capitec Bank Ltd v Mangena*⁹ and *Millu v City of Johannesburg Metropolitan Municipality*¹⁰ deal with the striking out of a defence and not with the striking out of a plea and are thus not of any assistance.
- [26.] The defendants argued in the alternative that the plaintiffs should have sought leave to amend the combined summons and not simply deliver the new combined summons. Mr Lukhele's answer to this argument was that this was not the defendants' cause of complaint and, if it was, the plaintiffs would have applied for leave to amend, which submissions are convincing.

⁹ (2021/28660) [2023] ZAGPJHC 225 (16 March 2023)

¹⁰ (25039/2021) [2024] ZAGPJHC 1622 (18 March 2024)

[27.] The defendants also argued that the new combined summons introduced a new second defendant, namely the City Manager: City of Tshwane Metropolitan Municipality, in contrast to Aigan Williams (Office of the City Manager), the cited second defendant in the original combined summons. It is not clear whether the plaintiffs did in fact introduce a new defendant but even if they did, this was not the plaintiffs' cause of complaint and, if it was, the plaintiffs could have applied to join the new second defendant.

[28.] I am accordingly of the view that the delivery of the new combined summons did not amount to an irregular step on the grounds pleaded by the defendants.

[29.] I am in the alternative of the view that I should, in the exercise of my discretion, refuse to dismiss the plaintiffs' claim. The dismissal of the action on the basis that the combined summons was not signed by an attorney with the right of appearance in the High Court with the implication that the claim has been extinguished by prescription would amount to an unreasonable and unjustifiable limitation of the plaintiff's right of access to courts in terms of section 34 of the Constitution.¹¹

ORDER

[30.] I accordingly grant the following order:

The application to set aside and/or struck the plaintiffs' combined summons, dated 23 July 2024, is dismissed with costs including the costs of counsel on scale B.



HF OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

¹¹ *Myathaza v Johannesburg Metropolitan Bus Services SOC Ltd t/a Metrobus* 2018 (1) SA 38 (CC) para [22]

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 14 May 2025.

Appearances

Adv B Lukhele, instructed by Feke Myeko Attorneys appeared on behalf of the plaintiffs.

Adv N Mahlangu, instructed by Motsoeneng Bill Attorneys Inc appeared on behalf of the defendants.

Date of Hearing: 6 May 2025

Date of Judgment: 14 May 2025