IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **11210/23**

In the matter between:

KURT ANTON PAULSEN	First Applicant
PRO FINTECH (PTY) LTD	Second Applicant
and	
JP MARKETS SA (PTY) LTD	First Respondent
JUSTINE GEORGE PAULSEN	Second Respondent
In re	
JP MARKETS SA (PTY) LTD	First Plaintiff
JUSTINE GEORGE PAULSEN	Second Plaintiff
And	
KURT ANTON PAULSEN	First Defendant
PRO FINTECH (PTY) LTD	Second Defendant

Coram: SARKAS AJ

Heard: 6 June 2025

Delivered electronically: 15 September 2025

JUDGMENT

SARKAS AJ:

Introduction

[1] The applicants asked this court to set aside the respondents' notice of amendment, and the amended pages delivered pursuant thereto, on the grounds that they constitute an irregular step under rule 30 of the Uniform Rules of Court.

[2] At issue is whether it is permissible for a litigant to introduce a counterclaim by way of an amendment to the pleadings.

Background

[3] The underlying action concerns disputes between two brothers (the first applicant and the second respondent) and involves two companies that fall under their respective control (the second applicant and the first respondent).

[4] For convenience, the applicants are collectively referred to as Pro Fintech, and the respondents are collectively referred to as JP Markets. The background to this application is as follows:

a) In July 2023, JP Markets instituted proceedings against Pro Fintech (‘***the original claim***’).
b) In September 2023, Pro Fintech filed a plea and counterclaim to the original claim.
c) It would seem that the brothers agreed to withdraw their claims against each other, save for a dispute between the brothers that was subject to arbitration proceedings.
d) On or about 28 September 2023, JP Markets withdrew the original claim against Pro Fintech.
e) Pro Fintech did not withdraw its counterclaim against JP Markets, ostensibly because there was no response to the request that the withdrawal of claims be subject to a written and signed settlement agreement.
f) On 7 February 2024, Pro Fintech served a notice of bar in respect of its counterclaim in the action proceedings.
g) On 14 February 2024, JP Markets delivered their plea to Pro Fintech’s counterclaim. In the accompanying correspondence JP Markets proposed that the parties agree to the reinstatement of the original claim, failing which JP Markets would introduce the original claim as a counterclaim.
h) No agreement could be reached, and on 4 April 2024, JP Markets delivered a notice stating that they intended to apply to reinstate the original claim, and that ‘in the event that the Plaintiffs’ claim is not to be reinstated’ they intend to amend their pleadings by introducing their counterclaim.
i) This notice was met with an irregular step notice under rule 30 dated 17 April 2024.
j) On 25 April 2024, JP Markets nevertheless proceeded to deliver the amended pages setting forth their counterclaim.
k) On 6 May 2024, Pro Fintech served a further irregular step notice under rule 30, affording JP Markets ten days to remove the amendment.
l) When they failed to do so, Pro Fintech launched the present rule 30 application.
m) Some months later, JP Markets launched a conditional counterapplication, seeking condonation for the delay in instituting the

counterapplication and delivering their counterclaim, and leave to deliver their counterclaim, in the event that the rule 30 application was upheld.

n) Both these applications are opposed.

[5] It warrants emphasis that JP Markets' counterclaim and the original claim are virtually identical, and Pro Fintech had already pleaded to the original claim. Furthermore, the amendment to introduce the counterclaim was delivered not long after JP Markets had delivered its plea.

Analysis

[6] In support of the rule 30 application, Pro Fintech argued that:

a) There is no provision in the Uniform Rules of Court that affords a plaintiff a right to reinstate a withdrawn claim, nor one that permits a counterclaim to a counterclaim.
b) Even if a counterclaim is permissible, a plaintiff is nevertheless required to deliver a counterclaim with their plea, failing which the procedure set out in rule 24 must be followed.
c) The delivery of amended pages in circumstances where the proposed amendment is the subject matter of an interlocutory application is premature.

[7] The rule 30 application was opposed on the basis that:

a) The introduction of a counterclaim by way of an amendment is not irregular because rule 28 contemplates amendments to pleadings and documents that have been filed, including JP Markets' plea.
b) Even if it were irregular to effect the amendment to JP Markets' plea to introduce the counterclaim, there is no prejudice necessitating the setting aside of the amendment.

A counterclaim to a counterclaim

[8] In the matter of *Levy v Levy*, the plaintiff had withdrawn her original claim and simultaneously sought to introduce a counterclaim to the defendant's original counterclaim by way of an amendment.

[9] The Appellate Division held that:

'…it is convenient to consider in the first place whether the court was correct in deciding that the envisaged counterclaim was to be disallowed in principle and regardless of its contents. The learned judge did so, as I have said, for the reason that our rules do not provide for a counterclaim to a counterclaim. This is so. But the conclusion, with respect, overlooks the fact that the plaintiff simultaneously sought the withdrawal of her claim in its entirety. <u>If withdrawn, the defendant's counterclaim would become in reality the main claim with her envisaged counterclaim (assuming it to be otherwise in order) a permissible response</u>. One would be left, despite nomenclature, with a conventional set and sequence of pleadings: a claim, plea and counterclaim.' [1] (own emphasis added)

[10] The Appellate Division therefore permitted a counterclaim to be raised to a counterclaim where the plaintiff sought to withdraw her original claim.

[11] On the facts in the present matter, consequent upon the withdrawal of the original claim and the delivery of the amended pages, Pro Fintech's counterclaim became the main claim. Consonant with the approach of the Supreme Court of Appeal in *Levy*, JP Markets' envisaged counterclaim was therefore a permissible response to Pro Fintech's counterclaim.

[12] However, there remains the question of the procedural steps provided for in the Rules of Court to give effect to such a response.

Irregularity

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[1] *Levy v Levy* 1991 (3) SA 614 (A) at 619D-E.

[13] The core of Pro Fintech's complaint is that JP Markets seeks to deliver its counterclaim outside of the prescribed time periods, and so ought to have sought agreement to do so, and failing such agreement, the leave of the court under sub-rule 24(1).

[14] Sub-rule 24(1) provides that:

'A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.'

[15] This court was referred to two decisions dealing with the question of whether a counterclaim could be introduced by way of an amendment under Rule 28(1), as contended for by JP Markets:

a) First, *Shell SA Marketing (Edms) Bpk v JG Wasserman h/a Wasserman Transport* 2009 (5) SA 212 (O) ('***Shell***'), where the plaintiff brought an application in terms of rule 30(1), in response to the defendant's proposed amendment of its plea and the introduction of a counterclaim. In holding that the rules do not provide for the introduction of a counterclaim by means of an amendment, the court had regard to the history of sub-rule 24(1), and held that:

   i. '…rule 28(1) was designed to provide for the amending of a pleading that already exists and already filed in connection with any pending civil proceedings. It was not designed to serve as an avenue for the creation and introduction of new pleadings'. [2]

[2] *Shell SA Marketing (Edms) Bpk v JG Wasserman h/a Wasserman Transport* 2009 (5) SA 212 (O) at para 19. [1] The authors of *Harms: Civil Procedure in the Supreme Court* on p. **172** at para. B24.3 submit that a defendant cannot circumvent Rule 24(1) by amending the plea by inserting a counterclaim, with reference to *Shell*.

ii. *'To allow the subsequent filing of a belated counterclaim via such an obscure route would not only infringe the plaintiff's right and undermine the authority of the court, but would defeat the purpose for which rule 24(1) was enacted. To allow the creation and filing of new pleadings years after the pleadings have been closed would render the principle of litis contestatio virtually meaningless'.*[3]

b) Second, *Natela Importers (Pty) Ltd v Aldor Africa (Pty) Ltd* (ZAGPJHC Case No. A5007/17, unreported) ('***Natela***'), where the court agreed with the line of reasoning in *Shell*.

[16] This court was also referred to the decision in *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ), where the court was called upon to determine an application in terms of Rule 24(1). The court, with reference to *Shell*, stated that the introduction of a counterclaim subsequent to the delivery of a plea, where the plaintiff has refused to consent thereto, requires the leave of the court.

[17] In response, JP Markets pointed to various decisions in which new claims and defences were introduced by way of amendments in terms of rule 28(1). However, none of these decisions dealt with a counterclaim.

[18] For the reasons traversed in *Shell*, the Rules of Court require that a counterclaim be introduced by way of rule 24. It follows that JP Markets' amendment of their plea so as to introduce a counterclaim is an irregular step.

Discretion

[19] The court nevertheless has a wide discretion to condone or set aside an irregular step, on a consideration of all the circumstances and what is fair to all the parties.[4]

[3] *Ibid* at para 25.
[4] Rule 30(3), discussed in *Rabie v De Wit* 2013 (5) SA 219 (WCC). See also *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 958.

[20] The Constitutional Court has explained that:

a) Rules should not be observed for their own sake and where the interests of justice so dictate, courts may depart from a strict observance of the rules, even where one of the litigants is insistent that there be adherence to the rules.
b) *'Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and …to further the administration of justice".'*[5]

[21] More recently, the Supreme Court of Appeal has endorsed the view that the rules of court must be understood in a practical way to advance the process of litigation and not to have the rules become an obstacle course without purpose.[6]

Prejudice

[22] In the rule 30 application, Pro Fintech has alleged no prejudice as a consequence of the step taken by JP Markets.

[23] Instead, in argument Pro Fintech relied on *Natela*, where the full court held that non-compliance with the rules is prima facie prejudicial, and in such cases the onus would be on the respondent in the rule 30 application to 'establish facts excluding the non-compliance. <u>There is no duty on the plaintiff to allege prejudice</u>.'[7]

[5] *Eke v Parsons* 2016 (3) SA 37 (CC) at paras 39 and 40.
[6] *Alexia Kobusch and Others v Wendy Whitehead* (515/2023) [2025] ZASCA 24 (27 March 2025) at paragraph 18.
[7] 'In terms of the doctrine of precedent, the order of the full court binds all the judges in the Gauteng Division, and has persuasive force in other divisions of the high court' (*Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse & Another* (182/2021) [2023] ZASCA 162 (30 November 2023) at para 13).

[24] I am not persuaded that the applicant in a rule 30 application need not show prejudice relating to the continuation of the litigation in order to succeed. The weight of authority is to the contrary:

a) As a point of departure, in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) ('***Maluleka***') it was held that *'the Court is entitled to overlook in proper cases any irregularity in procedure which does not work any substantial prejudice to the other party.'*[8] The Appellate Division went on to explain that *'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'*[9]

b) The court in *Afrisun Mpumalanga (Pty) Ltd v Kunene No and Others* 1999 (2) SA 599 (T) held that:

'… [the] prejudice that is referred to is prejudice that will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the conduct of the case is not affected by the irregular step and the irregular step can simply be ignored'.[10]

c) In this division, the full bench in *Rabie v De Wit* 2013 (5) SA 219 (WCC) reaffirmed the requirement of prejudice with reference to *Maluleka*.[11] The court held further that the submission that

'… the Rules must somehow be regarded as being an end in themselves, flies in the face of the dictum by Van Winsen AJA in Federated Trust Ltd v Botha: "The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.".'[12]

d) More recently, in *BMW Financial Services South Africa (Pty) Ltd v Doola* [2025] 2 All SA 107 (GP), the court considered what is meant by the term

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[8] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 276H.
[9] *Ibid* at 278F-H.
[10] *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and others* 1999 (2) SA 599 (T) at 611C-F.
[11] *Rabie v De Wit* 2013 (5) SA 219 (WCC) at para 17.
[12] *Ibid* at para 18.

'*irregular step*' as provided for in rule 30(1). [13] The court held that *'the step must have an ultimate effect on litigation but, considering the purpose of rule 30 within the rules, this effect must further be prejudicial to the innocent party's rights in the future conduct of their litigation, failing which rule 30 should not be invoke[d] as it will amount to an abuse of the rule with the only effect to cause unnecessary applications and delays.'.* [14]

[25] Prejudice is therefore key to the determination of an application in terms of Rule 30(1). It is furthermore apposite to reference the decision in *Motloung and Another v Sheriff, Pretoria East and Others* 2020 (5) SA 123 (SCA), where the Supreme Court of Appeal recently referred to *Maluleka* with approval, and held that:

'Overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged. The need for condonation to show good cause allows for a consideration of prejudice. If courts are to err at all they should do so in finding that irregularities are susceptible of condonation rather than being necessarily visited with nullity.' [15]

[26] As noted above, Pro Fintech relies solely on the contention that non-compliance with the rules is prima facie prejudicial. On the other hand, JP Markets has stated that to the extent that the amendment is irregular, there is no prejudice as Pro Fintech need only plead to the amendment, as Pro Fintech had done when the amendment had stood as the original claim. This is not disputed by Pro Fintech.

[27] This court is enjoined to place substance ahead of form. I am satisfied that there is no substantial prejudice to Pro Fintech, whereas condoning the irregularity will enable the litigants to resolve their disputes in as speedy and

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[13] *BMW Financial Services South Africa (Pty) Ltd v Doola* [2025] 2 All SA 107 (GP) at para [10]-[18].
[14] *Ibid* at para 16.
[15] *Motloung and Another v Sheriff, Pretoria East and Others* 2020 (5) SA 123 (SCA) at paras 27 and 28.

inexpensive manner as possible. In the circumstances, the rule 30 application must fail.

Costs

[28] On the issue of costs, the principle set forth in *Whittaker v Roos and Bateman* 1911 TPD 1092 has been applied consistently ever since:

'The object of the Court is to do justice between the parties. It is not a game we are playing in which, if some mistake is made, the forfeit is claimed...[W]e all know...that mistakes are made in pleadings, and it would be a grave injustice, if for a slip of the pen, or error of judgment...litigants are to be mulcted in heavy costs...Therefore the Court will not look to technicalities, but will see what the real position is between the parties.' [16]

[29] In the present matter, the rule 30 application was not directed at removing any hindrance to the prosecution of the action. It would therefore be appropriate for the applicants to bear the costs of the rule 30 application.

[30] In view of the above findings, it is not necessary to deal with JP Markets' conditional counterapplication, and there shall be no costs order granted in that application.

Order

[31] **I accordingly make the following order:**

1. The application in terms of Rule 30(1) is dismissed with costs.

[16] *Whitaker v Roos and Bateman* 1911 TPD 1092 at 1102-3, quoted with approval in *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust* (364/2019) [2020] ZASCA 22 (25 March 2020) at para 33.

ACTING JUDGE T SARKAS

<u>Appearances</u>

<u>For applicants</u>:	Adv DL **Williams**
<u>Instructed by</u>:	Malherbe Rigg & Ranwell Inc. (Boksburg)
<u>For respondent</u>:	Adv B **Prinsloo**
<u>Instructed by</u>:	Hanekom Attorneys Inc.