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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 4125/23P

In the matter between:

THE VALSPAR (SOUTH AFRICA) CORPORATION (PTY) LTD PLAINTIFF
(REGISTRATION NUMBER: 1959/001105/07)

and

AUTOCITY PAINT AND PANEL (PTY) LTD	FIRST DEFENDANT
(REGISTRATION NUMBER: 2017/332802/07)	
ROBERT DONALD SIMPSON	SECOND DEFENDANT
(IDENTITY NUMBER: 561[...])	
WILFRED CECIL ROY STONEFIELD	THIRD DEFENDANT
(IDENTITY NUMBER: 461[...])	

This judgment was handed down electronically by circulation of the parties' representatives by email and released to SAFLII.
The date for hand down is deemed to be on 15th September 2025 at 10:00.

ORDER

The following order is granted:

1. The plaintiff's two applications in terms of the provisions of Uniform Rule 30 are dismissed.
 2. The defendants' application in terms of the provisions of Uniform Rule 24(1) is hereby granted.
 3. The defendants are granted leave to deliver their counterclaim within ten days of the date of this order.
 4. The costs of this application are to be costs in the action.
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JUDGMENT

Sibisi AJ

Introduction

[1] On 17 March 2023, the plaintiff instituted an action against the first, second and third defendants for payment of R6 108 893.89 and R320 490.15, interest and costs of suit. The plaintiff alleges that the second and third defendants bound themselves in favour of the plaintiff as sureties and co-principal debtors with the first defendant for amounts of money, any claims and the general performance of the obligations of the first defendant. Furthermore, the plaintiff alleges that it sues on the strength of a settlement agreement and an amended settlement agreement.

[2] The defendants filed their plea on 2 February 2024 and their plea was not accompanied by a claim in reconvention. The defendants filed their notice of intention to amend in terms of the provisions of Uniform rule 28 on 27 March 2024. The proposed amendment incorporated their claim in reconvention. The plaintiff delivered a notice in terms of rule 30(2)(b) on 8 April 2024, notifying the defendants that their notice of intention to amend was an irregular step and giving the defendants until 22 April 2024 to remove the cause of the complaint. The plaintiff did not object in terms of rule 28(3) to the defendants' proposed amendment and the amended pages were delivered on 16 April 2024. The defendants, on 16 April 2024, by written notice, requested the plaintiff's consent to the introduction of the claim in reconvention. On 18 April 2024, the plaintiff caused a second notice in terms of rule 30(2)(b) to be served on the defendants, calling for the withdrawal of the filed amended pages.

[3] On 3 May 2024, the plaintiff served its first rule 30A application to set aside the notice of intention to amend as an irregular step. On 13 May 2024, the plaintiff served its second rule 30A application to set aside the filing of the defendants' amended pages as an irregular step. In response to these applications, the defendants delivered their answering affidavit on 12 June 2024.

[4] The defendants then brought an application in terms of rule 24(1) and the plaintiff opposes this application. On 2 September 2024, the plaintiff's two rule 30 applications and the defendants' rule 24(1) application were consolidated.

[5] The parties are in agreement that the principles that are applicable in dealing with the late filing of a counterclaim that is not delivered simultaneously with the plea are set out in *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd*.¹ It held that a party seeking to introduce a counterclaim belatedly, must provide a reasonable and acceptable explanation for the delay and demonstrate an entitlement to pursue the counterclaim by, *inter alia*, setting out the cause of action relied upon. The parties agree that in establishing such an entitlement, it is not necessary for the defendants to show a *prima facie* prospect of success in respect of the proposed counterclaim.

The plaintiff's case

[6] The plaintiff argues that the irregularity is as a consequence of the defendants seeking to introduce a claim in reconvention by way of an amendment to its plea. The plaintiff points out that despite serving a notice in terms of rule 30(2)(b) on the defendants to remove the cause of the complaint, the defendants proceeded to give effect to the notice of intention to amend and on these grounds, the plaintiff seeks to set aside the filing of the amended pages.

[7] The plaintiff argues that the defendants' answering affidavit should be disregarded because it was served 21 days after the delivery of the first application, which is beyond the 15 days ordinarily provided for in rule 6(5)(d)(ii).

¹ *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) para 8.

[8] The plaintiff points out that a claim in reconvention ought to accompany the defendants' plea and if that is not done, there are two options open to the defendants:

(a) the defendants should have approached the plaintiff for it to consent to the late filing of the claim in reconvention; alternatively

(b) if the plaintiff's consent is withheld (as in the present case), the defendants ought to have applied to court for leave to file its claim in reconvention.

[9] It is pointed out that the defendants did not use the options that were available to them but chose to introduce their claim in reconvention by way of an amendment to their plea. The plaintiff highlights that leave is required and mentions that this is an irregularity of form and not substance, which makes rule 30 applicable.

[10] The plaintiff argues that the late introduction of a claim in reconvention is not there for the taking and there should be a reasonable and acceptable explanation for its lateness. The plaintiff further argues that a defendant must show an entitlement to institute the claim in reconvention and that the court retains a discretion whether to allow the introduction of the proposed claim in reconvention.

[11] It is the plaintiff's case that by introducing the claim in reconvention in the manner done by the defendants, the plaintiff is effectively denied an opportunity to oppose the introduction thereof on any of the recognised grounds.

[12] It was argued on behalf of the plaintiff that the objection that rule 28(3), alternatively rule 23, ought to have been followed, is misguided because these are rules that are aimed at dealing with matters of substance and not procedure. The basis for objecting to a proposed amendment, alternatively excepting to a pleading, is not the same as the test for an application for leave in terms of rule 24(1) and it is well established that a party may avail itself of any remedy available to it under the rules.

[13] The plaintiff also points out that the defendants should not be allowed to rely on a claim in reconvention that may not meet the requirements of an application for leave in terms of rule 24(1) in order to oppose the application for summary judgment.

The defendants' case

[14] The defendants seek that the plaintiff's rule 30 applications dated 29 April and 10 May 2024 be dismissed, and that the defendants' amendment dated 15 April 2024 be authorised and admitted as part of the pleadings in the main action.

[15] The defendants point out that the plaintiff did not formally object to the notice of intention to amend and take the view that the procedure that they followed in accordance with rule 28 is correct. They argue that there is no prejudice to be suffered by the plaintiff since it failed to object in terms of rule 28(3).

[16] The defendants argue that rule 30 does not apply. The defendants take the view that since there was no objection to its proposed amendment, the defendants were entitled to give effect to that amendment by delivering the amended pages as they did. The defendants argue that proof of prejudice is a prerequisite to succeed in an application in terms of rule 30(1).

[17] The defendants argued that the authority used by the plaintiff can be distinguishable,² in that the delay in that case had been some three and a half years and it was after *litis contestatio* had been reached, whereas in this matter, the delay was approximately a month and a half and before *litis contestatio* had been reached. Furthermore, it is the defendants' case that the consent was sought from the plaintiff in terms of the notice of intention to amend and in the circumstances, the plaintiff cannot complain that its rights were infringed. It is the view of the defendants that the plaintiff cannot complain of prejudice when the defendants had an automatic right to deliver a counterclaim a month and a half before and that the prejudice is not present. The defendants also mentioned that the manner of obtaining consent in terms of rule 24(1) is not defined and that the consent was sought from the plaintiff in their notice of intention to amend and in terms of rule 28(5), which states that the absence of an objection means that a party is deemed to have consented thereto. It is the view of the defendants that the consent referred to in rule 24(1) was correctly sought in the notice of intention to amend. The defendants criticised the plaintiff for not taking a pragmatic approach to ventilate the true disputes between the parties.

² *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O) (*Shell*).

Legal principles

[18] Rule 24, which deals with claim in reconvention, provides as follows:

- '(1) 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.
- (2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.
- (3) A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to sub-rule (2) of rule 18.
- (4) A defendant may counterclaim conditionally upon the claim or defence in convention failing.
- (5) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.'

[19] The procedure for dealing with irregular proceedings is set out in rule 30:

- '(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 - (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties

or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.’

[20] There are various passages to be noted in *Shell*:

‘[22] I have earlier observed that the defendant had an automatic procedural right to deliver its counterclaim together with its plea. That right availed the defendant until the moment its plea was filed. The moment the plea was delivered the defendant's automatic procedural right ceased to exist. Since the defendant did not simultaneously exercise such right, it was extinguished through effluxion of time.

[23] After the extinction of the defendant's automatic procedural right, he was not remediless. By law the defendant acquired a relative procedural right to deliver its belated counterclaim, provided the plaintiff agreed, failing which, provided the court sanctioned the late delivery thereof on application by the defaulting defendant. Upon the demise of the defendant's automatic right to deliver its counterclaim simultaneously with its plea, the plaintiff acquired an absolute procedural right to be first consulted and its consent sought before the defendant could approach the court to allow the late delivery of its counterclaim.

[24] The procedure adopted by the defendant is a radical departure from the recognised procedure outlined in rule 24(1). Moreover, it bypasses the plaintiff and thereby negates the plaintiff's absolute procedural right and creates another new method whereby a belated counterclaim may be introduced...

[25] ...

[26] Although a defendant may amend its pleadings, including its plea and, of course, its counterclaim, where one has been duly and previously delivered, in order to perfect the elegance thereof, that is not what we really have here. It is not the defendant's case that the plea does not properly reflect the real dispute between the parties on account of certain incomplete or ambiguous or incorrect wording. The amendment was certainly not necessitated by any such technical defects and the defendant's attendant intention to remove them.

[27] In the instant case the amendment of the plea was informed by the defendant's plain scheme to launch its belated counterclaim by using its plea as a springboard.’³

³ See also *Tahilram v Kayser and Others In re: Kayser and Others v Tahilram* [2021] ZAGPJHC 751 and *Orange Flamingo (Pty) Ltd v Member of the Executive Council Responsible for Public Works in the Eastern Cape and Another* [2022] ZAECHC 24.

[21] In *Shell*, the defendant's notice of intention to amend its plea was declared irregular and set aside.

[22] Turning now to deal with rule 6. It has to be noted that in terms of rule 6(5)(d)(ii), the period afforded to a person to deliver a notice of intention to oppose the application is 15 days.

Issues in dispute as identified and agreed by the parties

[23] The following issues are in dispute:

- (a) Does the introduction of a claim in reconvention by way of an amendment to a plea constitute an irregular step?
- (b) Is the plaintiff prejudiced by the introduction of the claim in reconvention in a manner inconsistent with the procedure set out in rule 24?
- (c) Should the defendants' answering affidavit be disregarded because of the late filing thereof?

[24] It is agreed that the dispute relates to procedure and that there are no material disputes of fact.

The defendants' rule 24(1) application

[25] The defendants had an automatic right to file a counterclaim when they filed their plea. The right to file the counterclaim ceases to exist once the plea has been submitted. Permission has to be obtained from the court, alternatively, the plaintiff has to consent to the late filing of the counterclaim. The reason advanced by the plaintiff to withhold consent is because the defendants' proposed counterclaim fails to disclose a cause of action. The defendants' counterclaim is for damages arising from the failure to meet a suspensive condition.⁴

[26] According to the defendants, they followed rule 28(1) to amend the pleadings because they believed that it was the correct procedure to follow. They point out that in an effort not to prejudice the parties and to saddle them with further unnecessary

⁴ The plaintiff relies on *Mia v Verimark Holdings (Pty) Ltd* [2009] ZASCA 99; [2010] 1 All SA 280 (SCA) para 1 where the following was stated: 'No action lies to compel a party to fulfil a suspensive condition. If it is not fulfilled the contract falls away and no claim for damages flows from its failure'.

costs, they requested the plaintiff's consent in order to amend the plea by introducing the claim in reconvention and that since there was no objection to the proposed amendment, they caused the amended pages to be delivered, which they believed was the correct procedure. As soon as they became aware that the plaintiff disagreed with their approach, they then sought the consent of the plaintiff on 16 April 2024.

[27] The defendants point out that after the exception was heard and dismissed on 28 November 202. Furthermore, that the plaintiff, on 26 January 2024, issued a notice of bar, giving the defendants five days to file their plea, and that the December period was usually a difficult period to obtain instructions from parties. The defendants' attorney explains that he planned to consult with the second defendant on 18 December 2023 but was not able to do so.

[28] Another factor said to be contributing to the delay over the December holiday period is the fact that the attorney was on leave and attended a pre-booked family vacation, which resulted in his inability to work on this matter until the middle of January 2024 when he returned to the office. Consultations took place during the week of 22 January 2024. The senior counsel who had been involved in the matter was not available and then a junior counsel was briefed. A plea was then drafted. At this point, the defendants' attorney believed that the plea could be amended in the future to introduce a counterclaim.

[29] According to the defendants, at the time of drafting the plea, the claim in reconvention was envisaged but all the financial information required was not available. The missing information required by counsel related to historic financial losses sustained by the defendants in pursuit of performing in terms of the agreements concluded with the plaintiff. It is under these circumstances that the defendants' plea was delivered on 2 February 2024. The outstanding documents were received on 19 February 2024, and a brief to counsel was prepared, with the instruction to draft the amendment to the plea. On 20 February 2024, the plaintiff delivered its application for summary judgment, which meant that the envisaged amendment fell within the same period required to respond to the plaintiff's application for summary judgment.

[30] The defendants argue that the delay in instituting their claim in reconvention was not due to tardiness or disrespect to the plaintiff or to the court but was caused by circumstances beyond the defendants' control.

[31] The defendants' representatives addressed a letter to the plaintiff's representatives on 4 April 2024, wherein they expressed the view that the defendants' intended amendment does not prejudice the plaintiff's summary judgment application and that they intended to amend the plea. The defendants further tendered the plaintiff's wasted costs in order to cure any potential prejudice to the plaintiff. The defendants argued that the intention was to move the matter forward in the interests of justice and the parties. The letter dated 16 April 2024 was intended to remedy the difference of opinion on the correct procedure to be used in the circumstances of this matter but the plaintiff maintained its stance and as a result, the rule 30 application was subsequently lodged.

[32] On 1 August 2024, the defendants' attorneys sent a letter asking the plaintiff's attorneys to condone its non-compliance with rule 24(1). Furthermore, they asked that the counterclaim be accepted as forming part of the pleadings; that the plaintiff attend to delivering a supplementary affidavit to its summary judgment application occasioned by the introduction of the counterclaim and that the defendants file their affidavit resisting summary judgment. They tendered the costs of the rule 30 application to be paid by the defendants on an unopposed basis on the party and party scale. This was an attempt, according to the defendants, to find a solution to the *lacuna* created between rules 24 and 28. This proposal was rejected by the plaintiff on 5 August 2024. Again, on 13 August 2024, the defendants' representative sent a letter to the plaintiff's attorney pointing out that its approach to the claim in reconvention was overly technical in circumstances where the plaintiff suffered no prejudice and that the proposed amendment was accompanied by a tender for costs. Due to the stance adopted by the plaintiff, the defendants resorted to bringing an application in terms of rule 24(1).

[33] The defendants categorised the plaintiff's stance as formalistic without a consideration of the costs and time implications. They argued that the plaintiff would not suffer prejudice from receiving the claim in reconvention after the plea. The

defendants point out that the refusal of leave to introduce the counterclaim by way of an amendment to the plea means that the defendants will have to institute their own action against the plaintiff and that rule 11 will have to apply to consolidate the two actions. This, the defendants argued, will increase costs and waste time.

[34] The parties further agreed that the issues to be considered to determine the application in terms of rule 24(1) are the following:

- (a) Whether the defendants have provided a reasonable and acceptable explanation for the late introduction of the counterclaim.
- (b) Whether the proposed counterclaim discloses a cause of action.
- (c) Whether the grounds relied upon by the plaintiff warrant the dismissal of the defendants' application.
- (d) Whether the plaintiff has raised any substantive opposition to the defendants' proposed plea *in limine*.
- (e) Whether this court is appropriately poised to adjudicate on the issues in this matter without *viva voce* evidence being adduced before it. If not, whether the trial court should be better positioned to do so.
- (f) Whether *Shell* and *Zungu*⁵ are relevant to this case.
- (g) Whether *litis contestatio* has been reached.
- (h) Whether the plaintiff stands to suffer any prejudice if the substantive relief sought by the defendants is granted, given that the right to counterclaim simultaneously with the plea is an automatic right.
- (i) Whether the opposition advanced by the plaintiff is sufficient to justify a limitation of the defendants' rights in terms of ss 34 and 35(3)(c)(i) of the Constitution by virtue of the test for limitation of those rights in terms of s 36 of the Constitution.
- (j) Whether it would be desirable for the defendants' counterclaim to be heard by another court (should the relief sought by the defendants not be granted), the said court not being the court which will hear the plaintiff's trial in its action.

Analysis

[35] Not all issues identified by the parties have been dealt with herein. The issues are interrelated and it is unnecessary to deal with them individually.

[36] The defendants attribute the delay in filing their counterclaim to time constraints, lack of necessary documents and the hope that the counterclaim would be introduced via an amendment.

[37] The plaintiff contends that the explanation and the conduct of the defendants in relying on rule 28 are insufficient because it does not provide particularity of facts in support thereof.

[38] It is incumbent upon an applicant in such applications to demonstrate that a valid and justifiable reason exists for non-compliance with the rules and has the burden to prove good cause for the relief sought.

[39] The court has a wide discretion and should consider all the facts to satisfy itself that there is a reasonable and acceptable explanation for non-compliance with the rules.⁶ There must also be a satisfactory explanation furnished for the delay and the party requesting the condonation must have a *bona fide* case.⁷

[40] The defendants should have followed the provisions of rule 24(1) when seeking to introduce their late counterclaim. The wording of the rule is not ambiguous. Rule 28 should not have been followed. It is unfortunate that the defendants sought to justify their reliance on rule 28.

[41] Whilst there might be merit in the plaintiff's argument to the effect that the defendants' counterclaim is on shaky grounds, this has to be determined at the trial - I am not in a position to make any conclusions about the strength of the averments in the counterclaim. In *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others*,⁸ the court was seized with an application in terms of rule 24(2) and it found that:

⁶ See *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC).

⁷ See D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 26, 2025) at D1 Rule 27-4.

⁸ *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others* 1990 (1) SA 393 (W) at 395H-I.

'The need to establish a *prima facie* case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) at 737G – 738A. I do not think that the condition in Rule 24(2) must be construed in this way.'

[42] The substance of the counterclaim will best be dealt with at the trial. It is difficult at this stage to determine whether the counterclaim is valid in law.

[43] It is apparent from the papers that the defendants' attorneys were under the impression that utilising the provisions of rule 28 to introduce the counterclaim would suffice. Had it not been for the conduct of the defendants' attorneys, it seems the counterclaim would have been brought earlier with the plea. Generally, courts do not penalise a litigant on account of his attorneys' negligence and/or error.⁹ In the event the application in terms of rule 24(1) is not granted, an action will inevitably result, which will cause further delays and costs, which can be avoided if all disputes between the parties are ventilated in the trial.

[44] It is appropriate that the defendants be granted leave to file their counterclaim and any prejudice the plaintiff may suffer can be cured by an appropriate costs order at the end of the trial.

[45] The court hearing the trial should be in a position to have regard to all the facts before it to come to a conclusion and the disputes will then be dealt with in a single trial. In the circumstances and in terms of rule 24(1), I exercise my discretion in favour of the defendants for the reasons stated, together with considerations of justice, equity and convenience. The application in terms of rule 24(1) succeeds.

Costs

[46] Ordinarily, the successful party should, as a general rule, be awarded costs. Furthermore, it is also generally accepted that a party seeking an indulgence from the

⁹ *Huysamen and Another v Absa Bank Limited and Others* [2020] ZASCA 127 para 14; *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F.

court is to be seized with the costs of that indulgence. I am of the view that costs should be costs in the action.

Order

[47] I accordingly grant the following order:

1. The plaintiff's two applications in terms of rule 30 are dismissed.
2. The defendants' application in terms of rule 24(1) is hereby granted.
3. The defendants are granted leave to deliver their counterclaim within ten days of the date of this order.
4. The costs of this application are to be costs in the action.

SIBISI AJ

Date of hearing: 16 April 2025
 Date of judgment: 15 September 2025

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