

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: 2180/2023

In the matter between:

SOL PLAATJE UNIVERSITY

Applicant / Defendant

and

T&M MOYO PROJECTS (PTY) LTD

Respondent / Plaintiff

AND

In the matter between:

T&M MOYO PROJECTS (PTY) LTD

Applicant / Plaintiff

and

SOL PLAATJE UNIVERSITY

Respondent / Defendant

In re:

T&M MOYO PROJECTS (PTY) LTD

Plaintiff

and

SOL PLAATJE UNIVERSITY

Defendant

Heard on : 9 May 2025

Delivered on : 19 September 2025
Coram : Olivier AJ
Summary : *Civil procedure – application for condonation for late filing of notice in terms of rule 23 as well as for late filing of exception – application for leave to amend and for filing of amended papers – application to have exception declared an irregular step.
Condonation granted for late filing of notice of intention to except – condonation for late filing of exception not necessary – Leave to amend granted – application to have exception declared an irregular step dismissed.
Defendant to pay costs of both applications.*

ORDER

In the result, the following order is made:

1. That the plaintiff's application in terms of Rule 30 of the Uniform Rules of Court is dismissed;
 2. That the late filing of the defendant's notice in terms of Rule 23 of the Uniform Rules of Court dated 11 December 2023 is condoned;
 3. That the defendant is afforded leave to amend its exception dated 18 January 2024 in accordance with its notice of intention to amend dated 21 February 2024;
 4. That the defendant is to deliver its amended exception, alternatively the amended pages of its exception within 5 (five) days from date of this order; and
 5. That the defendant is to pay the costs in both the main application as well as in the Rule 30 application on scale "C" as set out in Rule 67A read with Rule 69 of the Uniform Rules of Court.
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JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. I was required to determine two applications which will hereafter be referred to as "*the main application*" and "*the Rule 30 application*" respectively.

2. The Sol Plaatje University (herein after referred to as "*the defendant*") approached the Court by way of the main application for an order in the following terms:
 - 2.1 That the late filing of the defendant's notice in terms of Rule 23 of the Uniform Rules of Court ("*the Rules*") dated 11 December 2023 as well as the late filing of the defendant's exception in terms of Rule 23(1)(b) of the Rules dated 18 January 2024 be condoned;
 - 2.2 That the defendant be afforded leave to amend its aforesaid exception in accordance with its notice of intention to amend dated 21 February 2024;
 - 2.3 That the defendant be authorised to deliver its amended exception in terms of Rule 23(1)(b) within 5 (five) days from date of the granting of the order sought; and
 - 2.4 That T&M Moyo Projects (Pty) Ltd (herein after referred to as "*the plaintiff*") be ordered to pay the costs of the main application on an opposed basis should the plaintiff elect to oppose the main application.
3. The plaintiff in turn, approached the Court by way of the Rule 30 application for an order in the following terms:
 - 3.1 That the defendant's exception filed on 19 January 2024 be declared to be an irregular step as envisaged in Rule 30 of the Rules;
 - 3.2 That the said exception be set aside as an irregular step; and
 - 3.3 That the defendant be ordered to pay the costs of the Rule 30 application on a scale as between Attorney and client.
4. Both applications were opposed.

5. The plaintiff issued summons against the defendant on 10 November 2023 and it is common cause that the summons with the accompanying particulars of claim came to the attention of the Senior Manager, Legal Services of the defendant, Ms. M.C.C. Botha (“Botha”), on 17 November 2023 after it was duly served on a different employee of the defendant earlier on the same day.
6. The defendant served and filed a notice of intention to defend on 29 November 2023 which meant that, in terms of the relevant provisions of the Rules, its plea was due on 3 January 2024.¹

The defendant, however, opted not to file a plea, but served a notice in terms of Rule 23 of the Rules on the attorneys for the plaintiff on 12 December 2023 (herein after referred to as “*the notice of intention to except*”) wherein notice was given of the defendant’s intention to except to the plaintiff’s particulars of claim (“*the particulars of claim*”) on the ground that the particulars of claim lacked the necessary averments to sustain an action as well as on the ground that the particulars of claim was vague and embarrassing.

Suffice it to say that in the notice of intention to except, the defendant set out grounds as to why it is alleged that the particulars of claim lacked averments necessary to sustain an action, as well as grounds as to why it is alleged that the particulars of claim were vague and embarrassing.

7. Rule 23(1) of the Rules² states as follows:

“Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may

¹ **Rule 22(1)** of the Uniform Rules of Court.

² Subsequent to its amendment which was effected on 22 November 2019.

apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that –

- (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and*
- (b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.”*

8. The provisions of Rule 23(1) are, in my view, unambiguous and clearly provides for two distinctly separate main grounds upon which an exception against a pleading of another party may possibly be raised, namely:

8.1 That the pleading is vague and embarrassing; or

8.2 That the pleading lacks averments which are necessary to sustain an action or defence.

9. If regards are to be had to the contents of the defendant’s notice of intention to except, it is clear that the defendant had the intention, at the time, to except to the particulars of claim on both the two main grounds provided for in Rule 23 of the Rules.

10. In the last paragraph of the notice of intention to except, the defendant stated as follows:

“TAKE FURTHER NOTICE that the plaintiff is hereby afforded an opportunity to remove the cause(s) of complaint within 15 (fifteen) days from date of the delivery of this notice, failing which, the defendant will except to the plaintiff’s particulars of claim.”

11. It is apparent from the above, in my view, that the defendant intended affording the plaintiff an opportunity to remove all of the defendant's causes of complaint against the particulars of claim within 15 days from date of service of the notice of intention to except.

The plaintiff was therefore allowed the opportunity to remove the causes for the defendant's complaint that the particulars of claim lacked averments necessary to sustain an action and the complaint that it was vague and embarrassing by, on my calculations, 9 January 2024 if it is considered that 15 December 2023 was declared a public holiday.

12. It is common cause that the plaintiff did not react to the aforesaid notice of intention to except and on 18 January 2024 the defendant served the plaintiff with an exception in terms of Rule 23(1)(b) of the Rules (herein after referred to simply as "*the exception*").

I will return to the details of the exception herein later.

13. The filing of the exception sparked reaction from the plaintiff in that it served the defendant with a notice in terms of Rule 30(2)(b) of the Rules on 31 January 2024 in terms whereof the defendant was notified that the exception, according to the plaintiff, constituted an irregular step.

In this notice of 31 January 2024, the plaintiff alleged as follows:

“BE PLEASED TO TAKE NOTICE FURTHER that the basis for the above contention of irregularity is based on the following:

[1] *Although purporting to be an exception in terms of Uniform Rule 23(1)(b), which rule deals exclusively with an exception on the basis that the impugned pleading*

is vague and embarrassing, the basis of the exception is expressly stated to be 'that it lacks averments which are necessary to sustain a cause of action'.

[2] *The proviso to Uniform Rule 23(1) therefore does not find application and the defendant was in the result obliged to deliver its exception 'within the period allowed for filing any subsequent pleading'.*

[3] *In view of the fact that the defendant's notice of intention to defend the action was delivered on 29 November 2023, the defendant's plea, being the subsequent pleading, had to be filed on or before 3 January 2024, in accordance with the provisions of Uniform Rule 22 and therefore that was also the due date of any exception on the basis as contained in the defendant's exception.*

[4] *The said exception was therefore delivered outside the time allowed in terms of the Uniform Rules of Court and therefore constitutes an irregular step."*

14. It is clear that the plaintiff took umbrage with the fact that the exception was filed on 18 January 2024 instead of on 3 January 2024 and from the argument presented to me by Mr. Van Niekerk SC who appeared on behalf of the plaintiff, it became evident that the cause of the plaintiff's complaint, is to be found in the opening paragraph of the exception where it was stated as follows:

***"BE PLEASED TO TAKE NOTICE THAT** the defendant, having afforded the plaintiff an opportunity to remove the cause of complaint rendering its particulars of claim dated 6 October 2023 vague and embarrassing and lacking the necessary averments to sustain a cause of action by notice dated 11 December 2023, hereby excepts to the plaintiff's particulars of claim on the basis that it lacks averments which are necessary to sustain a cause of action, for the following reasons ..." (My underlining).*

15. The wording of the exception creates an ambiguity in the sense that, although it is formally termed **"EXCEPTION IN TERMS OF RULE 23(1)(b)"** which gives the immediate impression that one is dealing with an exception against the particulars

of claim on the basis that it is vague and embarrassing, the impression created by the opening paragraph of the exception however is that the defendant excepts to the particulars of claim only on the basis that it lacks averments necessary to sustain an action.

16. Mr. Van Niekerk argued that, although the exception purported to be an exception taken in terms of Rule 23(1)(b), the wording of the opening paragraph expressly states the contrary which meant that the provisions of Rule 23(1)(a) and Rule 23(1)(b) did not find application with the resultant effect that the exception had to be filed within the period allowed for the defendant to file its plea, in other words by 3 January 2024.

Mr. Van Niekerk argued that the exception was therefore filed out of the prescribed time period and consequently constituted an irregular step.

17. I agree with Mr. Van Niekerk in the sense that, based only on the wording of the opening paragraph to the exception, it indeed seems as if the defendant excepts to the particulars of claim only on the ground that it does not contain the necessary averments to sustain an action, but I hold the view that, if regards are to be had to the remainder of the content of the exception, it becomes clear that, despite the ambiguous wording of the opening paragraph, the exception is in fact raised against both the main grounds for an exception as contemplated in Rule 23.

I say this based thereon that in paragraphs 1 to 3 of the exception, the defendant raises certain issues that it allegedly experiences with the contents of the particulars of claim and then in paragraph 4 of the exception, the defendant states as follows:

“As a result of the abovementioned, plaintiff’s particulars of claim are ambiguous, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness and consequently, defendant is prejudiced in its ability to plead thereto.”

In paragraph 5 of the exception the defendant raises certain further complaints against the particulars of claim and in paragraph 6 of the exception it is stated as follows:

“The plaintiff’s particulars of claim therefore lacks averments which are necessary to sustain a cause of action against the defendant...”

18. I am fortified in my above view by the fact that, on 8 February 2024 and in reaction to the plaintiff’s above notice in terms of Rule 30(2)(b) dated 31 January 2024, the defendant served a notice of intention to amend the exception (herein after “*the first notice to amend*”) with the clear intent of rectifying the apparent deficit in the opening paragraph of the exception and the ambiguity created thereby.

The defendant *inter alia* intended amending the opening paragraph of the exception to include the words “*vague and embarrassing*” so that the opening paragraph post amendment would have read as follows:

“BE PLEASED TO TAKE NOTICE THAT *the defendant, having afforded the plaintiff an opportunity to remove the cause of complaint rendering its particulars of claim dated 6 October 2023 vague and embarrassing and lacking the necessary averments to sustain a cause of action by notice dated 11 December 2023, hereby excepts to the plaintiff’s particulars of claim on the basis that it is vague and embarrassing and/or lacks averments which are necessary to sustain a cause of action, for the following reasons ...”* (My underlining).

19. The intended amendments as set out in the first notice to amend, if it were allowed and effected, would therefore have brought the exception in line with the notice of intention to except and I hold the view that at the time, the defendant still had the clear intention of excepting to the particulars of claim on both the main grounds for exception.

20. The first notice to amend attracted a formal objection from the plaintiff which was filed on 13 February 2024 and wherein the plaintiff takes issue with the intended amendments stating, quite correctly so, that if the intended amendments to the exception were to be allowed, the exception will rest on both the main grounds for exception namely that the particulars of claim is vague and embarrassing and that it does not contain the necessary averments to sustain an action.
21. The gist of the plaintiff's notice of objection of 13 February 2024 may be summarised as follows:
 - 21.1 That if the intended amendment were to be allowed to provide for an exception on the basis that the particulars of claim is vague and embarrassing, the exception would constitute an irregular step in the sense that notice in terms of Rule 23(1)(a) was not given within 10 days from receipt of the particulars of claim as well as in the sense that an exception was not filed within the time period required in terms of Rule 23(1)(b); and
 - 21.2 That the exception based on the allegation that the particulars of claim did not contain averments necessary to sustain an action, constitutes an irregular step in the sense that the exception was not filed within the time period allowed for the filing of the defendant's plea, in other words by 3 January 2024.
22. The plaintiff clearly held the view that the exception constitutes an irregular step for failure to adhere to the stipulated time periods, regardless of whether the defendant excepts to the particulars of claim on the basis that it fails to sustain a cause of action or on the basis that it is vague and embarrassing.
23. Suffice it to say that the above objection by the plaintiff lead to the filing of a further notice of intention to amend by the defendant on 21 February 2024 (herein after "*the second notice to amend*") wherein the defendant completely aborts its

intention to except to the particulars of claim on the basis that it lacks averments necessary to sustain an action.

The final stance of the defendant is therefore that it still intends to except against the particulars of claim, but only on the basis that the particulars of claim is vague and embarrassing and also only on the grounds as set out in the exception post amendment.

This was confirmed during argument by Ms. Sieberhagen who appeared on behalf of the defendant.

24. The plaintiff filed a further objection to the second notice to amend on 28 February 2024 wherein the plaintiff essentially persists with its objection based thereon that the exception, even after its intended amendment as aforesaid, would still constitute an irregular step based thereon that notice in terms of Rule 23(1)(a) was not given within 10 days from receipt of the particulars of claim as well as in the sense that the exception was not filed within the time period required in terms of Rule 23(1)(b).

Was the notice of intention to except filed out of time?

25. I am of the view that the first question that needs to be answered for a proper determination of this matter, is whether the notice of intention to except was in fact filed out of time since this will have a bearing on whether the exception was filed out of time and eventually whether the late filing of the notice of intention to except and/or the exception constitutes an irregular step.
26. Mr. Van Niekerk, at the beginning of his argument, cautioned that this matter should be considered against the backdrop of the basic principles applicable to exceptions and that matters should not be over-complicated.

Although I agree with Mr. Van Niekerk and certainly attempted to adhere to his cautionary remark, it soon became evident, for the reasons set out below, that it was much easier said than done.

27. It is clear from the provisions of Rule 23, cited herein above, that in as far as the filing of the papers in exception proceedings is concerned, different time periods find application depending on whether an exception is taken on the ground that a pleading lacks the necessary averments to sustain an action or defence or on the ground that a pleading is vague and embarrassing.
28. In the first instance an excipient is to file his/her exception within the time frame allowed for the filing of a subsequent pleading.³

Where an excipient is therefore of the opinion that his opponent's pleading lacks averments necessary to sustain an action or a defence, it is not necessary for such excipient to first notify his/her opponent of the intention to except and to afford such opponent the opportunity to remove the cause(s) of complaint.

In such instance the excipient may file his/her exception immediately on or before the date that the excipient was to file his/her subsequent pleading.

29. In the second instance, in other words where an exception is taken to a pleading on the ground that said pleading is vague and embarrassing, the excipient has to take his/her first step in the exception process within 10 days of receiving the pleading and notify his/her opponent that he/she intends excepting to the alleged vague and embarrassing pleading and to afford said opponent 15 days to remove the cause of complaint.⁴

The second phase of the exception process where a party intends to except to a pleading on the basis that it is vague and embarrassing, is for the excipient to file

³ **Rule 23(1)** of the Rules.

⁴ **Rule 23(1)(a)** of the Rules.

his/her exception, either within 10 days from receiving a reply to the aforesaid notice of intention to except or within 15 days from the date when such reply is due.⁵

30. Under normal circumstances and considering that in the present matter the defendant gave notice of intention to defend on 29 November 2023, the defendant would have had to, if it took umbrage with the particulars of claim only on the basis that it lacked averments necessary to sustain an action, file its exception on 3 January 2024, in other words on the date that the defendant's plea was originally due.
31. On the other hand and in the event of the defendant intending to except to the particulars of claim only on the basis that it was vague and embarrassing and taking into consideration that the summons and particulars of claim was duly served on 17 November 2023, the defendant would have had to, under normal circumstances, file its notice of intention to except in terms of Rule 23(1) on 1 December 2023, in other words 10 days after receipt of the summons and particulars of claim and in said notice afford the defendant up and until 27 December 2023 to remove the cause(s) of complaint.
32. Further to the above and again under normal circumstances, the defendant would have had to file its exception in terms of Rule 23(1)(b) by 19 January 2024 in the event of the plaintiff failing to remove the cause(s) of complaint by 27 December 2023.
33. The circumstances in the present matter are however neither normal nor straightforward since the defendant, as was already pointed out herein above, initially intended to except to the particulars of claim on both the main grounds for exception as provided for in Rule 23 of the Rules⁶ and it needs to be determined

⁵ **Rule 23(1)(b)** of the Rules.

⁶ Reference is made to the contents of the University's Notice of Intention to Amend.

whether it is permissible to raise both grounds for exception simultaneously and by way of one exception.

From the authorities perused by myself, it appears that the Courts have in the past consistently accepted and dealt with exceptions which were raised on both the main grounds referred to in Rule 23 simultaneously and in one exception and I do not see the need to deviate from this practice.⁷

34. The conundrum however is that Rule 23 does not set out specific time periods that have to be abided by should a party raise an exception on both the main grounds and do so by using only one exception/document and I could unfortunately not find specific authorities that give specific clarity to the above or give some sort of direction as to the process that should be followed in as far as time periods are concerned.
35. However, in ***Kobusch and Others v Whitehead***⁸ (herein after referred to as “***Kobusch (1)***”) the defendant, after having been served with a notice of bar in terms of Rule 26, delivered a notice to except in terms of Rule 23(1) as well as a notice to strike in terms of Rule 23(2), calling upon the plaintiff to remove the causes for complaint within 15 (fifteen) days.

The intended exception was based on both the main grounds for an exception as set out in Rule 23 of the Rules.

The plaintiff thereafter served a notice in terms of Rule 30 stating that the defendant’s notice in terms of Rule 23 was not delivered within 10 (ten) days of receipt of the summons as contemplated in terms of Rule 23(1) and Rule 23(2) and that it therefore constituted an irregular step.

⁷ See in general *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ingelyf en Andere* [2001] 2 All SA 319 (T); *Ray v Ray and Others* [2022] 4 All SA 457 (WCC); *Steenkamp N.O. and Others v De Waal and Another* [2025] ZAFSHC 58 (17 February 2025).

⁸ *Kobusch and Others v Whitehead* [2022] ZAKZPHC 83 (15 December 2022).

The further causes for complaint raised by the plaintiff in the notice in terms of Rule 30 are of no consequence for purposes hereof.

36. The Court in **Kobusch (1)** was tasked with, *inter alia*, determining whether the defendant's exception brought in terms of Rule 23(1) and Rule 23(2) was a valid response to the notice of bar and also whether the notice of exception and the exception were served out of time and although the circumstances and facts in **Kobusch (1)** differ from the circumstances and facts in the present matter in the sense that the notice in terms of Rule 23(1)(a) was delivered subsequent to the delivery of a notice of bar, it is apposite to refer to the following remark made by Madondo AJP:

*“An exception should be dealt with sensibly and not in an over-technical manner. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is designed to weed out cases without legal merit.”*⁹

The learned Madondo AJP thereafter correctly stated that in the event of a party intending to except to a pleading on the basis that same is vague and embarrassing, such party must, on notice and within 10 (ten) days from receipt of the pleading complained about, afford the opposing party an opportunity of 15 (fifteen) days to remove the cause(s) of complaint and that a failure to do so, should constitute an irregular step.¹⁰

It was held that the defendant's failure to serve her notice in terms of Rule 23(1)(a) and Rule 23(2) within the stipulated period of 10 (ten) days *sans* an application for condonation, constitutes an irregular step which would justify the setting aside thereof.¹¹

⁹ See **Kobusch (1)**, *supra*, par 22 as well as the authorities referred to in that paragraph.

¹⁰ **Kobusch (1)**, *supra*, paras 41 and 42.

¹¹ **Kobusch (1)**, *supra*, para 43.

37. The above judgment in **Kobusch (1)** was appealed and the primary ground for the said appeal was that the delivery of the notice in terms of Rule 23(1) constituted an irregular step which should have been set aside on that basis.

The Supreme Court of Appeal in **Kobusch and Others v Whitehead**¹² (herein after referred to as “**Kobusch (2)**”) upheld the decision by Madondo AJP in **Kobusch (1)** namely that the notice of exception should have been served within the required 10 (ten) days from receipt of the particulars of claim and that the failure to do so constituted an irregular step.¹³

38. I am of the view that, if regards are to be had to the decisions in both **Kobusch (1)** as well as **Kobusch (2)**, it is possible to raise an exception on both the two main grounds for exception as contemplated in Rule 23 simultaneously and that the party raising the exception is not prohibited from affording his/her opponent the 15 (fifteen) days to remove the cause(s) of complaint, provided that the notice so given, is given within 10 (ten) days from date of receipt of the pleading complained about.
39. In the event however that I interpret the above incorrectly, I hold the view that the fact that the “offending party” is afforded 15 (fifteen) days within which to remove a complaint that his/her pleading lacks averments necessary to sustain an action or defence, cannot be to such party’s prejudice.

I am fortified in my view by the following remark made by Corbett CJ in **Group Five Building Limited v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)**¹⁴:

“As far as I am aware, in cases where an exception has successfully been taken to a plaintiff’s initial pleading ... on the grounds that it discloses no cause of action, the

¹² **Kobusch and Others v Whitehead** 2025 (3) SA 403 (SCA).

¹³ **Kobusch (2)**, *supra*, par 12.

¹⁴ **Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)** [1993] 2 All SA 127 (A).

invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave, is so advised, to file an amended pleading within a certain period of time.”¹⁵(My omissions)

The above simply means that, even if the defendant’s exception was to be upheld on the basis that the particulars of claim did not contain the necessary averments to sustain an action, the plaintiff would, in all probability, have been allowed to amend the particulars of claim.

40. I can therefore not find any prejudice to the plaintiff in the fact that the defendant initially elected to give notice of intention to except to the particulars of claim on both the main grounds for exceptions as set out in Rule 23 and that the defendant allowed the plaintiff 15 (fifteen) days within which to remove the causes of complaint, including the causes of complaint that the particulars of claim did not sustain an action.
41. I am further of the view that the defendant’s actions in doing so, should not be considered too strictly since it has been held on various occasions in the past that the Rules are there for the Courts and not the Courts for the Rules and that the Courts should not become slaves to the Rules but should ensure that justice is served and observed.¹⁶

The Constitutional Court specifically held as follows:

“It is important that the rules of Court are used as tools to facilitate access to the Courts rather than hindering it. Hence, rules are made for Courts and not that the Courts are

¹⁵ **Group Five Building Ltd**, *supra* at 134.

¹⁶ See *inter alia* **Mukaddam v Pioneer Foods (Pty) Ltd and Others (Legal Resources Centre as amicus curiae)** 2013 (10) BCLR 1135 (CC), par 32; **Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk** 1972 (1) SA 773 (A) at 783; **Mynhardt v Mynhardt** [1986] 3 All SA 197 (T) at 205 and **Ex TRTC United Workers Front & Others v Premier, Eastern Cape NO** [2010] JOL 25351 (ECB), par 4;

established for rules. Therefore, the primary function of the rules of Court is the attainment of justice.”¹⁷

42. If regards are therefore to be had to all of the above, I hold the view that the defendant should have filed the notice of intention to except by 1 December 2023 and that the notice of intention to except, seeing that it was filed out of time, might therefore be deemed to be an irregular step in the event of condonation for such late filing not being granted.

Should condonation be granted for the late-filing of the notice of intention to except?

43. Rule 27 of the Rules deals with extension of time, removal of bar and condonation and Rule 27(3) specifically provides for the possibility of a party's non-compliance with the Rules to be condoned by a Court, upon good cause shown.
44. It is trite that in considering whether or not to grant condonation for non-compliance with the Rules, a Court has a wide discretion which has to be exercised judicially and upon consideration of the relevant facts of each matter.¹⁸
45. It is necessary for the party seeking condonation, to give a full explanation of the default to enable the Court to properly assess the explanation and the party's conduct and motives.¹⁹
46. The party seeking condonation is further expected to show good cause by way of affidavit in which such party deals with the merits in such a way that the Court can determine the soundness of the party's case.²⁰

¹⁷ *Mukaddam, supra.*

¹⁸ See *inter alia S v Yusuf* 1968 (2) SA 52 (A) at 53.

¹⁹ *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] 3 All SA 316 (SCA), par 21; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 355; *Uitenhage Transitional Local Council, supra*; *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) at 93.

²⁰ *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 572. Also see *Du Plooy v Anwes Motors (Edms) Bpk*

47. In the present matter, the defendant filed the notice of intention to except a total of 7 (seven) days out of time and in the defendant's founding affidavit in the main application, Botha tenders the following explanation for the delay in filing the notice of intention to except:
- 47.1 That she is not allowed to take any decisions on behalf of the defendant in respect of the defending of actions against the defendant and that, in terms of the defendant's internal procedures, authorisation for the defence of the action was to be obtained from the Vice Chancellor ("*the VC*");
- 47.2 That, subsequent to the receipt of the summons during the afternoon of Friday, 17 November 2023, she referred the matter to the VC on Monday, 20 November 2023 and that she, after not receiving any immediate feedback from the VC, made a follow-up enquiry on Thursday, 23 November 2023;
- 47.3 That she received the required instructions from the VC to defend the action on Friday, 24 November 2023 where after she contacted the defendant's attorneys on Monday, 27 November 2023 to arrange for a consultation, which was scheduled for Wednesday, 29 November 2023;
- 47.4 That the notice of intention to defend was filed on 29 November 2023;
- 47.5 That, during the consultation of 29 November 2023, she indicated to the legal representatives of the defendant that the defendant was unable to respond to the allegations as set out in the particulars of claim as it was pleaded at the time;

- 47.6 That she was then advised that a notice of exception should be filed and that a decision to do so was taken during the consultation;
- 47.7 That, as a result of the fact that the particulars of claim consisted of 340 (three hundred and forty) pages, it took some time to consider same and to prepare the notice of intention to except;
- 47.8 That the notice of intention to except was finalised on 7 December 2023, and was forwarded to her on Friday 8 December 2023; and
- 47.9 That she thereafter instructed the attorneys for the defendant to file the notice of intention to except on Monday 11 November 2023 and that the notice of intention to except was served on 12 December 2023.
48. Ms. Sieberhagen contended on behalf of the defendant that the whole of the above process, from receipt of the summons and particulars of claim to the serving of the notice of intention to except, took a mere 17 (seventeen) days and she submitted that it should be clear that the defendant did not drag its feet in serving the notice of intention to except.
- Ms. Sieberhagen further argued that the period of 7 (seven) days that the notice of intention to except was filed late was not excessive, especially given the voluminous nature of the particulars of claim and that the defendant did not act recklessly or with an intentional disregard for the Rules.
49. In its answering affidavit in the main application, the plaintiff denied that the defendant had provided a proper explanation for the late filing of the notice of intention to except and stated that the explanation that was provided, fell short of what is expected of an applicant in applications for condonation based, *inter alia*, thereon:

- 49.1 That no explanation was provided for why it took a week for the VC to take a decision to defend the action;
 - 49.2 That Botha did not explain why she only made arrangements for a consultation on 27 November 2023 and not on 24 November 2023 already;
 - 49.3 That Botha did not explain why the consultation was scheduled for 29 November 2023 and not for an earlier date; and
 - 49.4 That Botha failed to explain why it ultimately took 5 (five) days to finalize the notice of intention to except.
50. Generally, when Courts have to decide upon the issue of “*good cause*”, the following would be considered:
- 50.1 Whether a reasonable explanation was afforded for the delay in filing the pleading in question;
 - 50.2 Whether the request was made *bona fide* and not with the intention to delay the proceedings;
 - 50.3 Whether or not the party in question recklessly and intentionally disregarded the Rules;
 - 50.4 Whether the applicant’s action or defence is not ill-founded with *prima facie* some prospects of success; and
 - 50.5 Whether or not any prejudice suffered by the opposing party can be compensated by way of an appropriate costs order.²¹

²¹ See *Ingosstrakh, supra*. Also see *Smith, NO v Brummer, NO and Another; Smith, NO v Brummer*

51. I have to agree with Mr. Van Niekerk in the sense that an explanation by the defendant for why it took the VC a whole working week to give a simple authorisation for the appointment of attorneys to defend the action, especially if the Senior Manager, Legal Service advised that it should be done, is lacking in the defendant's founding affidavit and the same goes for the question why arrangements for a consultation was not made on Friday 24 November 2023 already.
52. In the defendant's replying affidavit in the main application, Botha explains that the VC could not provide earlier authorisation since he was involved in preparing for a quarterly council meeting that took place on 22 November 2023 and that she (Botha) could not attend to making earlier arrangements for a consultation with the attorneys for the University as she was attending an event on 24 November 2023 that lasted the whole day.
53. It is common cause that a party is in general expected to make out a case for the relief that such party seeks in his/her founding papers²², but it appears that Courts are prepared to take a more lenient stance towards the rule against new matter in replying affidavits and have held that this rule is not absolute and should be applied with a fair measure of common sense especially in the absence of prejudice to the opposing party.²³

I am of the view that such a more lenient stance is warranted in this matter and I am satisfied that the defendant managed to provide a proper explanation for its failure to file the notice of intention to except timeously.

1954 (3) SA 352 (O) at 358; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA), par 11

²² See in general *Director of Hospital Services v Mistry* [1979] 1 All SA 292 (A). See also *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 739 (WLD) at 742; *Riddle v Riddle* 956 (2) SA 739 (C) at 747-748.

²³ *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T) at 511; *Smith v Kwanonqubela Town Council* [1999] 4 All SA 331 (A), par 15.

54. Even if it is to be found that I am wrong in my above view, it should be confirmed that it has been held that even if the explanation provided for the delay is weak, the Courts may come to assistance of the offending party if such party shows good prospects for success²⁴ and that, in the end, a Court needs to exercise its discretion, upon a consideration of all of the relevant facts and that, in essence, it is a question of fairness towards both parties.²⁵
55. I pause here to state that, if the defendant's intended amendment to the exception is allowed, the defendant's exception to the particulars of claim will only be on the basis that same is vague and embarrassing and I will therefore, in considering whether the defendant has good prospects for success in their intended exception, focus solely on the defendant's contentions on why the particulars of claim is, in their opinion, vague and embarrassing.
56. The plaintiff's claim against the defendant is based on a written agreement between the parties and the relevant parts of the particulars of claim read as follows:

“[4] *The agreement between the parties consisted of the following documents:*

- 4.1 *A document titled 'Request for Proposal' ...a copy of which is attached hereto as Annexure 'TMM 1';*
- 4.2 *A document titled 'Catering Services Contract' referred to in Annexure 'TMM 1' and a copy of which is attached hereto, together with its annexures, as Annexure 'TMM 2';*
- 4.3 *The plaintiff's written proposal in response to Annexure 'TMM 1' and a copy of which is attached hereto as Annexure 'TMM 3';*

²⁴ *Colyn, supra*, par 12; *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.

²⁵ *Melane, supra*.

4.4 *The defendant's letter to the plaintiff dated 21 January 2021 and a copy of which is attached hereto as Annexure 'TMM 4'.*

[5] *The following were inter alia the express, alternatively tacit, alternatively implied terms of the agreement between the parties:*

5.1 *The plaintiff will render catering services at three of the defendant's dining halls being Tauana-, Mhudi- and Rathaga dining halls;*

5.2 *The said catering services would entail the provision of three daily meals for consumption by an agreed number of students of the defendant;*

5.3 *The said service would be rendered and the agreement would be in force for the period January 2021 to December 2022;*

5.4 *The plaintiff would render invoices for the services so rendered, in accordance with the procedure prescribed in the catering services contract and which invoices would be rendered on a monthly basis;*

5.5 *The monetary rates at which the plaintiff would be remunerated by the defendant, should be in accordance with its proposal as accepted by the defendant;*

5.6 *All invoices submitted by the 10th day of a month would be payable by the defendant on or before the 30th day of that month;*

5.7 *...*

[6] *The plaintiff has duly and properly complied with all its contractual obligations in terms of the agreement between the parties and in particular has provided*

catering services for the full contractual period at the dining halls of the defendant.

[7] *Although the plaintiff rendered invoices to the defendant on a monthly basis for the period February to December 2022 for only the amounts due and payable according to the unilateral prescripts of the defendant and in respect of the actual uptake of meals, and not in terms of the agreement between the parties, it is averred that this was the result of the plaintiff being instructed by the defendant to issue invoices on that basis causing the plaintiff to harbour the reasonable apprehension that the plaintiff will not receive payment of any amount should the said instruction be disregarded and on this basis it is averred that the said conduct of the defendant made it impossible for the plaintiff to render contractually compliant invoices in accordance with the terms of the said agreement.*

[8] ...

[9] *The defendant has failed and/or refused to effect payment, or full payment, of the amounts due and payable in terms of the agreement and to date still remains indebted to the plaintiff in the total amount of R 13,389,506.78 and the calculation and compilation of which amount appears from the monthly reconciliations for the period of February to December 2022, copies of which are attached hereto in a bundle as Annexure ‘TMM 5’.*”

57. Rule 18 of the Rules which deals with pleadings in general, states as follows:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

58. In **Jowell v Bramwell-Jones and Others**²⁶ the Court held as follows:

*“The plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.”*²⁷

59. In the often-quoted judgment of **Trope v South African Reserve Bank and Another and Two Others Cases**²⁸, the Court has held as follows:

*“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important, test.”*²⁹

60. The grounds for the defendant’s allegations that the particulars of claim is vague and embarrassing, as set out in the exception are as follows:

“1.1 In paragraph 7 of the plaintiff’s particulars of claim the plaintiff alleges that the plaintiff rendered invoices to the defendant on a monthly basis for the period February to December 2022 for only the amounts due and payable according to the unilateral prescripts of the defendant and in respect of the actual uptake of meals and not in accordance with the terms of the agreement between the parties. The plaintiff also avers that this was the result of the plaintiff being instructed by the defendant to issue invoices on that basis causing the plaintiff to harbour

²⁶ 1998 (1) SA 836 (W).

²⁷ **Bramwell-Jones**, *supra* at 913.

²⁸ 1992 (3) SA 208 (T).

²⁹ **Trope**, *supra* at 211.

the reasonable apprehension that the plaintiff will not receive payment of any amounts should the said instruction be disregarded and on that basis, the plaintiff avers that the conduct of the defendant made it impossible for the plaintiff to render contractually compliant invoices in accordance with the terms of the said agreement.

1.2 The plaintiff however fails to provide sufficient particularity to enable the defendant to plea to this paragraph and more specifically in respect of the following:

1.2.1 The plaintiff fails to disclose and/or identify the terms and conditions of the unilateral prescripts of the defendant as alleged in this paragraph;

1.2.2 The plaintiff fails to disclose and/or identify who the representative/s of the defendant was who made the unilateral prescripts as alleged in this paragraph;

1.2.3 The plaintiff fails to disclose and/or identify when the unilateral prescripts of the defendant were made as alleged in this paragraph, taking into consideration that the plaintiff's claim is based on the period from February 2022 to December 2022 and not in respect of the entire contract period as alleged in paragraph 3 of the plaintiff's particulars of claim.

1.2.4 The plaintiff fails to disclose and/or identify what the actual uptake of meals was as alleged in this paragraph.

1.2.5 The plaintiff fails to disclose and/or identify which specific terms of the agreement and which agreement, Annexure TMM1, TMM2, TMM3 or TMM4, the plaintiff refers when alleging that the invoices were not rendered in terms of the agreement.

1.2.6 The plaintiff fails to disclose and/or identify when the plaintiff was allegedly instructed by the plaintiff to issue the invoices on that basis.

2.

2.1 In paragraph 4.2 of the plaintiff's particulars of claim, the plaintiff is relying on a "Catering Services Contract" which is attached as Annexure "TMM2" to the particulars of claim in support of the plaintiff's claim against the defendant.

- 2.2 *Annexure “1”, which is attached to Annexure “TMM2” refers to the scope of services and paragraph 1.1 of the said document reads as follows:*

*“.....The total student complement is approximately 2300 of which **1 367 are catering residence** students eligible to eat breakfast, lunch and supper (7 days a week) in the dining halls. There are +_ **350-day students** that are eligible to eat lunch only (Monday to Friday).*

- 2.3 *In paragraph 5.2 of the plaintiff’s particulars of claim, the plaintiff pleads that the catering services would entail the provision of three daily meals for consumption by an agreed number of students of the defendant. The plaintiff fails to disclose and/or identify the **agreed number of students** in paragraph 5.2 of its particulars of claim.*

- 2.4 *In paragraph 9 of the plaintiff’s particulars of claim, the plaintiff pleads that the defendant has failed and/or refused to effect payment, or full payment, of the amounts due and payable in terms of the agreement and to date still remains indebted to the plaintiff in the total amount of R13 389 506.78. The calculation and compilation of which amount appears from the monthly reconciliation for the period of February to December 2022 which is attached as Annexure “TMM5” to the plaintiff’s particulars of claim.*

- 2.5 *According to Annexure “TMM5” the plaintiff’s claim is based on 3 294 “number of students” for each of the relevant periods (having breakfast, lunch and supper) which constitutes 1 098 number of students (3 294 divided by 3) per day.*

- 2.6 *As a result of the abovementioned, Annexure “TMM1”, paragraph 5.2 of the plaintiff’s particulars of claim and Annexure “TMM5” in so far as it refers to the agreed number of students is ambiguous, contradictory and capable of more than one meaning.*

3.

- 3.1 *In paragraph 5.5 of the plaintiff's particulars of claim, the plaintiff is alleging that the monetary rates at which the plaintiff would be remunerated by the defendant would be in accordance with its proposal as accepted by the defendant.*
- 3.2 *The plaintiff's written proposals which are attached as Annexure "TMM3" to the plaintiff's particulars of claim and more specifically item nr 10 (7.1.3.5 and 7.1.3.8) consist of Pricing Proposal 1 and Pricing Proposal 2. Consequently, it is unclear to which proposal the plaintiff is referring in paragraph 5.5 of its particulars of claim.*

4.

As a result of the abovementioned, plaintiff's particulars of claim are ambiguous, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness and consequently, defendant is prejudiced in its ability to plead thereto."

61. Ms. Sieberhagen argued that if the particulars of claim in its current form, be allowed to stand, the defendant will be severely prejudiced in the sense that the defendant would not be able to properly plead to the particulars of claim, leaving the defendant at a disadvantage.

Ms. Sieberhagen referred me to the decision of the apex Court in ***F v Minister of Safety and Security and Another***³⁰ where the Court held, in paragraph 34, as follows:

"It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible"

³⁰ [2011] ZACC 37 (15 December 2011).

62. I align myself completely with the above *dictum*, but it should also immediately be said that the South African civil process makes ample provision for parties to fully ventilate issues even before the actual trial commences by, for example, discovery, requesting and providing further particulars, and engaging in pre-trial conferences.
63. The question however is whether the defendant is prejudiced in its ability to properly plead to the particulars of claim as it currently stands and it would appear that the Courts, in recent times, have placed more emphasis on the requirement in Rule 18(4) that facts should be pleaded with sufficient particularity to enable the opposition to answer thereto resulting therein that the line between *facta probanda* and *facta probantia* has become somewhat blurred.³¹

I am not required to decide upon the merits of the defendant's complaints against the particulars of claim but only on whether the defendant might have some prospects for success should the exception be argued and given the above, I hold the view that the defendant might have such prospects especially with regards to:

- 63.1 The plaintiff's failure to provide particularity in respect of the unilateral prescripts as alleged in the particulars of claim;
- 63.2 The plaintiff's failure to provide particularity in respect of the actual amount of uptake of meals; and
- 63.3 The plaintiff's failure to provide particularity as to the actual agreed number of students whom meals had to be provided to.

³¹ See *inter alia* **HAL obo MML v MEC for Health, Free State** [2022] 1 All SA 28 (SCA); **Deltamune (Pty) Ltd and Others v Tiger Brands Limited and Others** [2022] 2 All SA 26 (A); **Disipi v Member of the Executive Council for Health, Northern Cape Province** [2024] ZANCHC 117 (13 December 2024).

64. I am consequently of the view that, based on all of the above, condonation for the late filing of the notice of intention to except on 12 December 2023 should be granted to the defendant.

I am specifically of the view that it would be in the interests of justice to do so.

Was the exception filed out of time?

65. The defendant's exception was filed on 18 January 2024 after no reaction to the notice of intention to except was received from the Plaintiff.

66. In terms of the notice of intention to except which was filed on 12 December 2023, the plaintiff was afforded 15 (fifteen) days within which to remove the defendant's causes of complaint, in other words by 10 January 2024 whereafter and in view of the fact that the plaintiff did not react as aforesaid, the defendant had to file its exception within 10 (ten) days, in other words by 24 January 2024.

67. It is therefore evident that the exception was filed within the allotted time period and that it was therefore not filed out of time.

68. In view of the above, I am therefore of the view that an application for condonation for the late filing of the exception was unnecessary and I do not intend spending any further time on the issue.

The resultant effect of the above is therefore that the Rule 30 application must necessarily fail.

Should the defendant be allowed to amend its exception?

69. The defendant, as was already mentioned herein above, gave notice of its intention to amend the exception, the result of which would be that an exception

is raised against the particulars of claim on the basis only that it is vague and embarrassing.

70. The plaintiff objected to the intended amendment, as was also already pointed out above, on the basis that the amendment, if allowed, would render the exception an irregular step on the basis that the notice of intention to except and/or the exception itself was filed outside the prescribed time periods.
71. Since I have already set out my views on these aspects, I do not deem it necessary to regurgitate what has already been set out above, bar to state that, in view of what has been stated above, the grounds for objection to the intended amendment to the exception has fallen away.
72. It is trite that a Court, in deciding on whether or not to allow an amendment to a pleading, exercises a discretion and that, in doing so, would lean towards granting the amendment to ensure that justice is done between the parties.³²
73. I am satisfied that the interests of justice between the parties dictate that the intended amendments to the exception are allowed and I am also satisfied that the plaintiff will not be prejudiced if the said amendments are allowed.

I intend to cure any prejudice that might possibly exist, by way of an appropriate costs order.

Costs:

74. The conduct of the defendant during the course of the proceedings leading up to the arguing of the matter, did not impress me and can be likened to a cat on a hot tin roof.

³² See *inter alia* **SA Droëvrugtekoöperasie Bpk v SA Raisins (Edms) Bpk** [1999] 3 All SA 245 (NC) at 252.

I have to also agree with Mr. Van Niekerk's argument that, if it was so easy for the defendant to eventually abort its plans to except against the particulars of claim on the basis that it lacked the averments necessary to sustain an action, the question might very well be asked why the defendant gave notice of its intention to except to the particulars of claim on this basis in the first place.

75. The impression that is created is that the defendant's initial actions were not well thought through and that the hand of the plaintiff was forced to a certain extent.
76. I am consequently of the view that this matter is an excellent example of a case where the successful party should not be awarded its costs and also, given the fact that the defendant approached this Court effectively asking for an indulgence, I hold that the defendant should pay the costs of the proceedings.

ORDER:

77. In view of all of the above, the following order is made:
 1. **THAT THE PLAINTIFF'S APPLICATION IN TERMS OF RULE 30 OF THE UNIFORM RULES OF COURT IS DISMISSED;**
 2. **THAT THE LATE FILING OF THE DEFENDANT'S NOTICE IN TERMS OF RULE 23 OF THE UNIFORM RULES OF COURT DATED 11 DECEMBER 2023 IS CONDONED;**
 3. **THAT THE DEFENDANT IS AFFORDED LEAVE TO AMEND ITS EXCEPTION DATED 18 JANUARY 2024 IN ACCORDANCE WITH ITS NOTICE OF INTENTION TO AMEND DATED 21 FEBRUARY 2024;**
 4. **THAT THE DEFENDANT IS TO DELIVER ITS AMENDED EXCEPTION, ALTERNATIVELY THE AMENDED PAGES OF ITS EXCEPTION WITHIN 5 (FIVE) DAYS FROM DATE OF THIS ORDER; AND**

5. THAT THE DEFENDANT IS TO PAY THE COSTS IN BOTH THE MAIN APPLICATION AS WELL AS IN THE RULE 30 APPLICATION ON SCALE "C" AS SET OUT IN RULE 67A READ WITH RULE 69 OF THE UNIFORM RULES OF COURT.



A.D. OLIVIER
ACTING JUDGE
NORTHERN CAPE DIVISION

REPRESENTATIVES OF PARTIES:

For Plaintiff: **ADV JG VAN NIEKERK SC**
 oio Engelsman Magabane Inc.
 Kimberley

For Defendant: **ADV AS SIEBERHAGEN**
 oio Van De Wall Inc.
 Kimberley