

REPUBLIC OF SOUTH AFRICA



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

Case No: 2024/112906

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>2/3/2026</u> DATE:	
 SIGNATURE	

In the matter between:

FIRSTMILE PROPERTIES

IKHAYALETHU (PTY) LTD

First Applicant

FIRSTMILE PROPERTIES

ONALERONA (PTY) LTD

Second Applicant

And

SA RETAIL PROPERTIES (PTY) LTD

First Respondent

AFHCO HOLDINGS (PTY) LTD

Second Respondent

In Re:

SA RETAIL PROPERTIES

**(PTY) LTD
AFHCO
HOLDINGS (PTY) LTD**

First Applicant

Second Applicant

and

FIRSTMILE PROPERTIES

IKHAYALETHU PTY LTD

First Respondent

FIRSTMILE PROPERTIES

ONALERONA PTY LTD

Second Respondent

JUDGMENT

MIA J:

[1] This is an interlocutory application in terms of Rule 30 of the Uniform Rules of Court (the Rules). The applicants seek an order setting aside a supplementary affidavit delivered by the respondents in the main application on the basis that it constitutes an irregular step.

[2] The interlocutory application arises within the main application instituted by the respondent on 4 October 2024. In that application the present respondents sought payment of R9 269 401.63 together with an order declaring certain immovable properties especially executable. The main claim is based upon a Vendor Loan Agreement concluded pursuant to a sale of immovable property and secured by a surety mortgage bond. The respondents allege that the applicants breached the loan agreement and are indebted for the amount claimed.

[3] The respondents referred to annexures in the founding affidavit and omitted to attach the relevant annexures referred to. The applicants in the present application did not deliver an answering affidavit on the merits in the main application. They delivered a notice in terms of Rule 6(5)(d)(iii) raising points of law. One of the points raised relates to paragraph 16.1 of the respondents founding affidavit, referring to annexures which were not attached.

The applicant in the present matter held the view that without the annexures there was no evidence of performance on the papers.

[4] In response, the respondents delivered a supplementary affidavit on 6 November 2024. The deponent thereto explains that the three annexures referred to had been erroneously omitted and attached them to the papers. The respondents stated that no new facts were introduced by the supplementary affidavit. It merely cured an omission. No further explanation was proffered regarding the omission.

[5] The present applicants contend that the delivery of the supplementary affidavit was without leave of the court and thus constitutes an irregular step and should be set aside. They instituted the present application in terms of Rule 30 on 6 December 2024.

[6] The question for determination is whether the delivery of the supplementary affidavit without leave of the Court constitutes an irregular step liable to be set aside under Rule 30. More specifically, the issues are:

1. Whether the delivery of the supplementary affidavit was procedurally irregular?
2. Whether the applicants have established prejudice? and
3. Whether, in the exercise of its discretion, the Court ought to set the affidavit aside?

[7] Rule 30 provides a mechanism by which a party may apply to set aside an irregular or improper step of its opponent. The application of the rule was not intended to encourage technical obstruction of litigation. It seeks to prevent procedural prejudice. An applicant must show prejudice to succeed with a Rule 30 application. In *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH*,¹ the Court emphasised that prejudice is a prerequisite for relief. That principle has been consistently affirmed.

¹ 1991 (1) SA 823 (T) at 824G–H

[8] In motion proceedings, parties are generally confined to three sets of affidavits: founding, answering and replying. Any further affidavits may be delivered only with the leave of the Court. However, the Court retains a discretion to admit further affidavits where the interests of justice so require. This discretion is broad. The guiding consideration is fairness between the parties and the proper ventilation of the issues.

Was the Supplementary Affidavit Irregular?

[9] The respondent delivered the supplementary affidavit after the applicants had filed a Rule 6(5)(d)(iii) notice raising points of law. The affidavit was not accompanied by an application for leave nor by a formal application for condonation. Strictly speaking, that constitutes a procedural irregularity. Nevertheless, not every irregularity justifies the setting aside of a step under Rule 30. However, the nature and effect of the affidavit are critical. This is determined having regard to the prejudice upon the applicant by the supplementary affidavit.

[10] The supplementary affidavit explains that annexures referred to in the founding affidavit were omitted in error and attaches those documents. The respondents confirm in their heads of argument and during submissions that no new facts were introduced and that the purpose was solely to place the omitted annexures before the Court.

[11] The supplementary affidavit does not introduce a new cause of action or fresh factual allegations. It attaches annexures expressly referred to in the founding affidavit but omitted when the papers were filed. The omission was an oversight rather than one of substance. The respondents' case remains unchanged.

Prejudice

[12] The determining factor is then whether the applicants suffered prejudice. The applicants contend that the respondents have strengthened their case and were not entitled to do so after the delivery of the Rule 6(5)(d)(iii) notice. After the applicant filed the Rule 6(5)(d)(iii) notice the matter was ready to be set

down for hearing. The respondent was not permitted to file a further affidavit without leave of the Court. In the absence of an answering affidavit the Court may determine the matter on the points of law.

[13] The applicants placed reliance on the dictum of the Supreme Court of Appeal in *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another*², where the Supreme Court of Appeal said:

"Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent in application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets. It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. It is therefore not surprising that rule 6(5)(e) D provides that further affidavits may only be allowed at the discretion of the court."

[14] I do not accept that depiction that the respondents have "strengthened" their case with filing of the supplementary affidavit. The annexures were incorporated by reference in the founding affidavit. Their attachment does not alter the pleaded case but completes the record.

[15] I am mindful of the applicants' position that they are not afforded an opportunity to address the material in the annexures and that without the annexures the respondents have not made out a proper case. They maintain that to permit the affidavit prejudices the applicants who are not afforded an opportunity to address the material in the supplementary affidavit. The affidavit can thus only be permitted with leave of the court they contend. It is helpful for the proper deliberation of the matter that all relevant facts are placed before the

² 2013 (1) SA 161 (SCA)

court. In this matter, I agree with the Court's observation in *Louw v Grobler and another* at paragraph [18] that :

The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.³

[16] The view expressed in *Louw* above is applicable to the present facts before me.

[17] In my view, the appropriate remedy is not to strike out the supplementary affidavit but to regulate the further conduct of the proceedings to eliminate any possible prejudice. This will address the uncertainty that the applicants complain about and afford them an opportunity to file an affidavit in response to the respondents' case on the papers. It cannot be ignored that the annexures were referred to in the founding affidavit. The respondents' case is formulated based on those annexures. The omission was one of attachment, not substance.

[18] The applicants elected not to deliver an answering affidavit on the merits but to raise legal points only. They are not precluded from seeking leave to deliver further affidavits if necessary to address the annexures. The disadvantage complained of by the applicants is technical in nature and the disadvantage relating to uncertainty can be addressed if they are permitted to

³ *Louw v Grobler and another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016), para [18].

file an affidavit. The annexures do not introduce new facts that are unknown to them. There is no assertion that they are unable to respond to them if required. In these circumstances, the prejudice alleged is technical rather than real.

The Court's Discretion

[19] Even if the delivery of the supplementary affidavit was irregular in a formal sense, the Court retains a discretion to admit it or to set it aside. The Court's discretion is accepted by the applicant. Courts are not keen to strike out an affidavit which would impede the proper determination of the real issues between the parties, where no material prejudice has been shown. It is in the interests of justice that the dispute is fully ventilated on the merits rather than on procedural technicalities.

[20] In this matter, setting aside the supplementary affidavit would serve no substantive purpose. It would merely increase the costs if the respondents had to apply formally for leave to introduce the same documents. The purpose of the rules is not to cause a delay finalisation and to incur additional costs. It is proper to permit the supplementary affidavit to stand, to grant the applicants leave to file an answering affidavit in response and a reply thereto which places the application back on track allowing the Court determining the matter to consider the complete record and the merits.

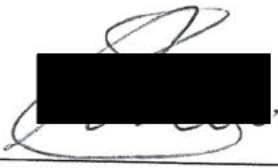
[21] Where there is no substantial prejudice and the supplementary affidavit merely cures an omission, the interests of justice are best served by allowing the supplementary affidavit to stand and granting the applicants leave to file a further answering affidavit in the main application.

[22] Both counsel sought costs permitting the costs of senior counsel. I disagree with the respondent that punitive costs are appropriate. It is appropriate that these costs shall stand over and be costs in the main application.

[23] Consequently I make the following order:

Order

1. The Rule 30 application is dismissed.
2. The supplementary affidavit delivered on 6 November 2024 is accepted as part of the record in the main application.
3. The applicants in the Rule 30 application are granted leave to deliver a further answering affidavit in the main application, limited to addressing the annexures attached to the supplementary affidavit.
4. Such further answering affidavit shall be delivered within 15 days of the date of this order.
5. The respondents in the main application shall be entitled to deliver a replying affidavit, if so instructed, within 10 days thereafter, limited strictly to matters raised in the further answering affidavit.
6. The costs of the Rule 30 application shall be costs in the main application.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	: Adv JPV McNally SC
Instructed by	: Brian Kahn Inc
On behalf of the respondent	: Adv. P Daniels SC and A Kohler
Instructed by	: Cliff Dekker Hofmeyer Inc
Date of hearing	: 26 February 2026
Date of judgment	: 2 March 2026