REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

07/03/19
Date

ML TWALA

CASE NO: 28818/2014

In the matter between:

FUEL RETAILERS ASSOCIATION — **APPLICANT**

AND

THE MINISTER OF ENERGY — **FIRST RESPONDENT**

CONTROLLER OF PETROLEUM PRODUCTS — **SECOND RESPONDENT**

SOUTH AFRICANT PETROLEUM INDUSTRY ASSOCIATION (SAPIA) — **THIRD RESPONDENT**

PETROSA — **FOURTH RESPONDENT**

THE RETAIL MOTOR INDUSTRY ORGANISATION (RMI) — **FIFTH RESPONDENT**

AMISTEC (PTY) LTD t/a LIQUID FUELS WHOLESATERS ASSOCIATION — **SIXTH RESPONDENT**

PETROLEUM RETAILERS ALIGNMENT FORUM (PRAF) **SEVENTH RESPONDENT**

ROYALE ENERGY **EIGHT RESPONDENT**

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA (NERSA) **NINTH RESPONDENT**

JUDGMENT

TWALA J

[1] Before this Court, there are three applications, two brought under rule 30A of the Rules of Courts by both the applicant and the respondents to set aside steps taken by either of them as irregular and the third being an application to amend the notice of motion brought by the applicant.

[2] It is to be noted that in this judgment when I refer to the respondents I am referring to the first and second respondent only. The third to ninth respondents were joined later in these proceedings. There was no opposition to the filing of the application for condonation for the late filing of the rule 28 and 30 applications by the parties. There being no prejudice to be suffered by either of the parties and it being in the interest of justice, the applications were granted.

[3] The genesis of these applications is the applicant's filing of an amended notice of motion and supplementary affidavit in the main application without following the prescripts of rule 28 of the Rules of Court.

[4] The historical background of this case is that, on the 9th of August 2014 the applicant launched an application seeking the following orders:

1. Directing the first respondent, within 15 day of the granting of this order, to clarify the proper allocation of the Entrepreneurial Compensation portion of the retail margin of the Regulatory Accounting System ("RAS"), and in particular whether the oil companies are entitled to recover from it.

2. In addition and/or in the alternative to prayer 1 above:
   2.1 directing the first respondent to commence such consultation or engagement process that she may require properly to regulate the Entrepreneurial Compensation portion of the retail margin and/or to take the decisions referred to in paragraph 1 above; and
   2.2 directing the first respondent, within 45 days of the granting of this order, to notify the applicant of the outcome of such consultation or engagement process or, if such process is not yet complete, to inform the applicant of the further steps that must be taken before, and the time by which, the process will be completed;

3. Reviewing and setting aside the first respondent's failure to decide whether to prohibit any business practice, method of trading agreement, arrangement, scheme or understanding which has the effect of allowing oil companies to recover from the Entrepreneurial Compensation allocation of the fuel retail margin;

4. Directing the first respondent to take the decision referred to in paragraph 3 above within 3 months of the granting of this order;

5. Directing such respondents who shall oppose this application to pay the costs thereof.

[5] The respondents filed its opposition to the application and its answering affidavit on the 2nd of October 2014. Annexed to its answering affidavit were documents which evinced that a decision has already been taken by the respondents.

[6] On the 29th April 2015, the respondents initiated settlement negotiations and further consultation with all stakeholders and the parties agreed to hold the litigation in abeyance. On the 23rd of November 2015 the respondents informed the applicant that the settlement negotiations have collapsed and that it should proceed with the litigation. The applicant responded by filing an amended notice of motion with a supplementary affidavit on the 19th of September 2016.

[7] Counsel for the applicant submitted that the main application is an application for review of the decision of the respondents' failure to make a decision. The applicant is therefore entitled, after receiving the record of the decision, to amend its prayers and file its supplementary affidavit. It was not necessary for the applicant to comply with the provisions of rule 28. Further, counsel contended that it took the respondents eight months to object to the filing of the amended notice of motion and have never requested the applicant to comply with the provisions of rule 28 during that period of eight months. The respondents have acquiesced to the step taken by the applicant.

[8] It is contended further by counsel for the applicant that the applicant endures substantial prejudice as a result of the irregular step taken by the respondent and the concomitant delay in advancing and finalising the main application. However, the applicant has, ex abudante cautela, brought an application in terms of rule 28 to amend its notice of motion. The respondents have not, so it is contended, shown that they will suffer any prejudice if the amendment is allowed and effected. The respondents still has a chance to file its answering affidavit to the applicant's amended founding papers. The amendment does not bring a new cause of action but sought that the respondents furnish the record of the decisions of December 2013 and November 2015 respectively.

[9] It is further contended by counsel for the applicant that the record which was annexed to the respondents answering affidavit is incomplete. The applicant filed a rule 35(12) and the response thereto produced other documents which were not part of the record of the decision that was attached to the answering affidavit.

[10] Counsel for the respondents contended that all litigants are equal before the law and that the rules of Court are applicable equally to litigants including Organs of the State. The applicant instituted proceedings against the respondents in terms of PAJA and should follow the prescripts of rule 28 when it intends to amend its pleadings. The applicant cannot simply invoke the provisions of Rule 53 and conflate the two applications into a Rule 53 application.

[11] It is contended further by counsel for the respondents that the respondents filed their answering affidavit on the 2nd October 2014 and only three years later the applicant, instead of filing its replying affidavit, decided to bring an application for amendment of its notice of motion and to supplement its

founding affidavit. The respondents are prejudiced by the delay as they have already filed their answering affidavit and are now unnecessarily put through to defend the belated and contrived case of the applicant.

[12] It is submitted by counsel for the respondents that only one decision was made by the respondents and that is the decision of December 2013. The decision of November 2015 that settlement negotiations should not be proceeded with and that the litigation should resume is, so the argument goes, without prejudice and cannot be disclosed for that reason. The applicant has been furnished with the complete record of the decision that was taken in December 2013 as part of the annexures to the answering affidavit and as a reply to the rule 35 (12) notice.

[13] It is trite that Rule 30(3) gives court very wide powers, powers which enable a court to grant a litigant an opportunity to amend a pleading which is so defective as to constitute a nullity. However, the discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work to substantial prejudice to the other party.

[14] I am in respectful agreement with counsel for the respondents that the main application in this case was brought in terms of sections 6 and 7 of PAJA and not in terms of rule 53 of the Rules of Court. At the time the application was instituted, the applicant did not know that a decision had been taken by the respondents - hence the application sought to compel the respondents to make a decision. I am therefore of the view that the filing of the amended notice of motion and supplementary affidavit by the applicant without following the prescripts of rule 28 was an irregular step since it is not competent to conflate

the review application in terms of PAJA with the review application in terms of rule 53 of the Rules of Court.

[15] In *Khunou & Others v Fihrer & Son 1982 (3) SA (WLD)* the Court stated the following:

"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner."

[16] In *Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)* which was quoted with approval in the case of *Life Healthcare Group (Pty) Ltd v Mdladla & Another (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014)* the court stated the following:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[17] In my view, there is no merit in the argument that the respondents acquiesced to the filing of the irregular pleading by its delay in lodging its objection

thereto. Although the respondents delayed for some time in noting their objection to the irregular step taken by the applicant, they did not take any further step after such irregular step by filing further pleadings in the matter. The applicant failed to demonstrate any prejudice it suffered because of the delay of the respondents in objecting to the irregular step being taken by the applicant except to contend that the delay has impacted in the finalisation of the main application.

[18] It has long been established that settlement negotiations are by their nature without prejudice and cannot be disclosed in litigation that follows even if it was not expressly stated by the parties that they are undertaken on a without prejudice basis. Therefore, I hold the view that there is only one decision that was made by the respondents and that is the decision of December 2013. The decision to abandon the settlement negotiations taken on the 16th of November 2015 was without prejudice and the applicant is therefore not entitled to be furnished with the record and reasons therefore.

[19] Rule 28(1) provides that any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. Rule 28(10) empowers the Court with the discretion that at any stage before judgment, it may grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[20] It is my respectful view that the Court must exercise its discretion judicially when considering an application for an amendment. Substantial prejudice to be suffered by any of the parties if leave to amend were to be granted becomes an important factor. In the present case, save for prayer 5 in the proposed amendment to the notice of motion which relates to the decision on settlement

negotiations which are without prejudice by their nature, I am of the respectful view that the proposed amendment to the applicant's notice of motion does not bring a new course of action. The amendment to the notice of motion is brought about by the record of the decision as amplified by the documents which were annexed to the respondents' answering affidavit and those that were filed in response to the rule 35(12) notice. Therefore, there is no prejudice to be suffered by the respondents if the applicant were to be granted leave to amend its notice of motion. The respondents have the right to supplement its answering affidavit in response to the further affidavit filed by the applicant.

[21] I am persuaded by the argument that there are other documents which did not form part of the record of the decision of December 2013 as annexed to the answering affidavit and to the reply in terms of rule 35(12). It is undesirable for the respondents to furnish the applicant with such a record in a piece meal fashion. The respondents' reply to the rule 35(12) notice was inadequate since it contended that the applicant has some of the documents in its possession. The rule 35(12) notice calls for a party to produce such documents for inspection by the other party and the respondents have failed to do so in this case as it referred the applicant to documents which are its possession. The applicant has in my view established a case for the respondents to furnish it with the full record of the decision it took in December 2013.

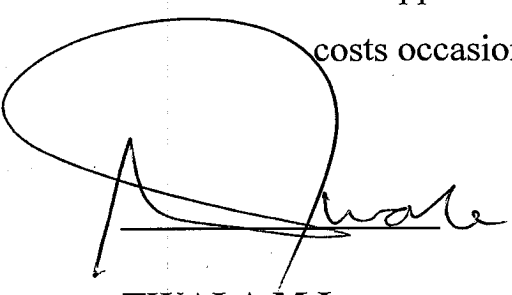
[22] I find myself in disagreement with counsel for the respondents that the respondents are now unnecessarily put through a process of answering a delayed and contrived case of the applicant. The respondents will be responding to the case that arose from its own decision and the reasons therefore as evidenced in its answering affidavit. I am mindful of the fact that, although there is no prejudiced to be suffered by the respondents if leave to

amend the notice of motion is granted except for costs, the main issues to be determined in this case are of such importance that it will impact the whole fuel industry and the economy of the whole Republic. The ineluctable conclusion is therefore that the interest of justice would not be served if leave to amend is not granted.

[23] It is accepted that costs follow the result. However in this case, the applicant did not respond positively when it was informed of its irregular step and of the procedure it should have followed to bring to amend its pleadings. It is my considered view therefore that the applicant should bear the costs of these interlocutory applications.

[24] In the circumstances, I make the following order:

I. The application in terms of rule 30 by the applicant is dismissed;
II. The respondents' application in terms of rule 30 is granted and the irregular pleading filed by the applicant is set aside;
III. The applicant's notice of motion is amended in accordance with the rule 28 notice filed on the 9th of October 2017 and annexure A thereto excluding prayer 5 thereof.
IV. The applicant is liable to pay the costs of these applications including costs occasioned with the employment of two counsel.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:	**11th February 2019**
Date of Judgment:	**07th March 2019**
For the Applicant:	**Adv. A Rafik Bhana SC** **Adv. Frances Hobden**
Instructed by:	**Seton Smth & Associates** **TEL: 021 556 2322**
For the Respondents:	**Adv. Leah Gcabashe SC** **Adv. B Morris** **Adv. I Mokoena**
Instructed by:	**State Attorney** **Tel: 011 330 7691**