IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 9244/2014

In the matter between:

CHARIOTEER INVESTOR 2 CC t/a
BALLID PROTECTION SERVICES CC **PLAINTIFF**

and

ELECTRICAL POWER SYSTEMS CC **DEFENDANT**

ORDER

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1. The plaintiff's application in terms of rule 30 to declare the defendant's notice of exception an irregular step is upheld with costs.

2. The defendant's exception is dismissed with costs.

3. The defendant is directed to pay the party/party costs occasioned by both the application to declare the notice of exception an irregular step as well as the exception on the tariff applicable to the Regional Court.

JUDGMENT

HENRIQUES J

Introduction

[1] Two interlocutory applications served before me on the opposed motion roll on 22 February 2016, having been enrolled by consent for simultaneous determination. One is the defendant's exception to the plaintiff's particulars of claim; the other is the plaintiff's application to declare the defendant's notice of exception to be an irregular step.

Issues for determination

[2] The following are the issues for determination in these applications, namely:-

[2.1] Is paragraph 3 of the particulars of claim excipiable?

[2.2] Is the notice of exception out of time, and consequently an irregular step?

The Pleadings

[3] Relevant to a determination of the applications is a consideration of the

pleadings and a timeline which preceded the enrolment of these applications.

[4] On 3 July 2014, the plaintiff issued summons in which it sought payment of the sum of One Hundred and Seventeen Thousand Six Hundred and Seventy Seven Rand and Thirty Cents (R 117 677.30) together with interest and costs of suit. The cause of action pleaded was in respect of security services rendered to the defendant at various times in terms of an oral agreement. Annexed to the particulars of claim were invoices submitted monthly to the defendant for the various services rendered at the Umgababa site. It is worth mentioning that at the time, the plaintiff was cited as Ballid Protection Services CC, a close corporation trading as Ballid Protection Services.

[5] An appearance to defend prompted an application for summary judgment which became opposed. The deponent to the founding affidavit was Riaan Claasens, who describes himself as a director of the plaintiff. In the answering affidavit, the deponent Rory Van Lingen, the sole member of the defendant, in seeking condonation for the late filing of the answering affidavit, indicated that he had been engaged in settlement discussions with Riaan Claasens, with whom he was a co-director in a separate company Octegon (Pty) Ltd.

[6] In addition two points *in limine* were raised. The first point challenged Claasen's authority to depose to the founding affidavit as the plaintiff was a close corporation and a member is authorised to depose to the affidavit on its behalf. As Claasen did so as a "director" of the plaintiff, he did not have *locus standi* to depose to the affidavit in support of summary judgment.

[7] The second point was to aver that the particulars of claim were excipiable for want of compliance with the rules of court relating to the pleading of agreements and thus vague and embarrassing. The defendant elected not to file an exception calling upon the plaintiff to cure the pleadings at this stage.

[8] Presumably, in answer to the first point *in limine,* on 21 January 2015, the plaintiff served a notice in terms of rule 28(1) of its intention to amend the citation of the plaintiff in the pleadings from "Ballid Protection Services" to "Charioteer Investor 2 CC t/a Ballid Protection Services". In essence, the nature of the amendment was to correct a misnomer.

[9] Such application was opposed by way of notice in terms of rule 28(3) on 30 January 2015. The defendant objected to the proposed amendment on the basis that the amendment was not competent and constituted an abuse of the court processes as the plaintiff was attempting 'to withdraw from proceedings and to introduce a new party to the proceedings and/or substitute a Plaintiff by simple amendment. . . .'[1]

[10] A formal application was instituted in terms of rule 28(4) on 9 February 2015 and was enrolled for hearing on 18 March 2015, on which date the application to amend the particulars of claim was granted with costs against the defendant, in *absentia*.[2] On 20 March 2015, the plaintiff filed the amended pages to its particulars of claim. On 7 May 2015, a period of approximately eight (8) months from the date of service of the summons and particulars of claim, the defendant served and filed a

[1] Notice of objection to plaintiff's notice in terms of rule 28, pages 3 and 4 of Bundle titled Index to Applications: Amendment, Exception, Irregular Step.
[2] Court order 18 March 2015, page 17 of Bundle titled Index to Applications: Amendment, Exception, Irregular Step.

notice in terms of rule 23(1), calling upon the plaintiff to remove the cause of complaint within fifteen (15) days.

[11] The notice of exception recorded the defendant's complaint to the particulars of claim as being vague and embarrassing as follows:

> 'The content thereof is vague and embarrassing, as the Plaintiff fails to plead in accordance to Rule 18(6) of the Honourable Court as to names and capacity of the representatives in terms of the Agreement between Plaintiff and Defendant.
>
> In addition these omissions render the paragraph insufficient of particularity to enable the Defendant to plea or to consider Plaintiff's claim at all.
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> In light of the Defendant's complaints, Plaintiff's claim is confusing and therefore vague and embarrassing and Defendant cannot be expected to nor is it able to plead to same.'[3]

[12] On 14 May 2015, the plaintiff filed a notice of irregular step in terms of rule 30(2)(b), on the basis that the defendant was required to file its plea by no later than 14 April 2015 in terms of rule 28(8), which was within fifteen (15) court days of the amended pages being filed. The notice called upon the defendant to withdraw its notice in terms of rule 23(1) as it was out of time, not accompanied by an application for condonation, and called on the defendant to remove the cause of complaint within ten days, failing which it would proceed in terms of rule 30(1).

[13] The defendant filed the exception on 11 June 2015, without any application for condonation, enrolling the exception for hearing on 15 July 2015. On 18 June

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[3] Notice in terms of rule 23, page 24 of Bundle titled Index to Applications: Amendment, Exception, Irregular Step.

2015, the plaintiff filed its application in terms of rule 30(1) enrolling the application to be heard simultaneously with the exception.

[14] As both applications were opposed, the matters were enrolled for hearing on 22 February 2016 by consent. At the hearing of the matters the parties were *ad idem* that:

[14.1] the notice of exception was served and delivered outside the 20 day period envisaged in terms of the rule for the filing of further pleadings;

[14.2] the defendant's cause of complaint related to paragraph 3 of the particulars of claim in that the plaintiff did not comply with rule 18(6) and indicate who represented the parties at the time of conclusion of the agreement.

[15] At this juncture, it is perhaps useful to set out the submissions of the parties in respect of the applications. Mr *Bernhard* who appeared for the defendant submitted that the exception was not an irregular step and was not out of time. He indicated that an exception is a pleading and that the defendant had 20 days within which to serve and file the notice of exception. Whilst he conceded the exception was filed in excess of the 20 day period, he submitted that the exception was not out of time as being a pleading. The plaintiff was therefore required to serve a notice of Bar, which it had failed to do and consequently, the defendant was thus free to raise an exception at any time, in the absence of a notice of Bar.

[16] In addition, Mr *Bernhard* submitted that the plaintiff had failed to comply with rule 18(6) and had not identified the representatives or the capacities of the representatives to the alleged agreement. He submitted that the defendant would have no alternative but to file a bare denial and would then have to amend its plea once such information came to hand. He indicated that a request for further particulars requesting such information could only be filed once pleadings had closed and this would then necessitate an amendment to the plea once the information came to hand, if in fact, it was supplied in answer to a request for further particulars.

[17] He further submitted that the pleadings are vague and embarrassing because of this and that such went to the root of the cause of action and the defendant would be embarrassed and prejudiced should it have to plead to such particulars. A further concession made by Mr *Bernhard* was that the proper course of action, should the exception be upheld, would be to afford the plaintiff an opportunity to remove the cause of complaint within a stipulated time period rather than dismissing the action.

[18] Mr *Ender* who appeared for the plaintiff submitted firstly, that the defendant's exception was out of time and that same was an irregular step. He obviously disagreed with certain of Mr *Bernhard's* submissions and indicated that the exception had been filed out of time and that the plaintiff was not required to place the defendant under Bar. In addition, he submitted that the particulars of claim, specifically paragraph 3 thereof, was not vague and embarrassing and complied with the provisions of rule 18(6) and therefore disagreed that the defendant was prejudiced as a consequence thereof.

[19] Mr *Ender* also submitted that the pleadings comply with the requirements of the rules of court and that the plaintiff has pleaded each *facta probanda* for the cause of action. Furthermore, the manner in which it has been pleaded does not render the particulars of claim meaningless or capable of more than one meaning. In addition, he submitted that the contracting parties are juristic persons and consequently all that a plaintiff was required to state in compliance with rule 18(6) was that the juristic entities were duly represented.

[20] The purpose of the exception was to see if there was a point of law which would dispose of the case in whole or in part, and if there was any embarrassment, that such embarrassment was real and the prejudice to the defendant was of such a nature that it could not plead. The defendant was neither embarrassed nor prejudiced by the pleadings and the exception did not dispose of the matter in whole or in part.

Analysis

[21] I now turn to the exception. Rule 23(1) of the Uniform Rules of Court provides that:

> 'Where any pleading is vague and embarrassing. . .the opposing party may, **within the period allowed for filing any subsequent pleading**, deliver an exception thereto. . .Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days. . . . '
> (My emphasis)

[22] In considering an exception, a court commences from the premise that the allegations contained in the particulars of claim are correct and considers the pleadings as a whole. No facts outside those contained in the pleadings can be brought into issue. An excipient will have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it.[4]

[23] The purpose of an exception is to dispose of the case in whole or in part. An exception on the grounds that the pleadings are vague and embarrassing is not directed at a particular paragraph in the particulars of claim but goes to the whole cause of action which must be shown to be vague and embarrassing.[5]

[24] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity.[6]

[25] In dealing with exceptions that pleadings are vague and embarrassing, courts have held that such an exception can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded,[7] and such exception will not be allowed unless an excipient will be seriously prejudiced if the offending allegations are not expunged.[8]

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[4] *Theunissen & andere v Transvaalse Lewendehawe Koöp BPK* 1988 (2) SA 493 (A) at 500E-F; *First National Bank of Southern Africa Limited v Perry N.O. & others* 2001 (3) SA 960 (SCA) at 965C-D.
[5] *Jowell v Bramwell-Jones & others* 1998 (1) SA 836 (W) at 899F-G.
[6] *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I-J.
[7] See *Jowell supra* at 902F-G; *Factory Investments (Pty) Ltd v Record Industries Ltd* 1957 (2) SA 306 (T).
[8] *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A-B;
Gallagher Group Ltd & another v IO Tech Manufacturing (Pty) Ltd & others 2014 (2) SA 157 (GNP) at 166G-H.

[26] In deciding on exceptions based on vagueness and embarrassment, our courts have over the years ultimately held the following are the considerations, namely:

[26.1] the onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice;[9]

[26.2] whether or not the exception should be upheld is whether the excipient is prejudiced;[10]

[26.3] the excipient must make out a case for embarrassment by reference to the pleadings alone.[11]

[27] It is these considerations which must be considered by this court in deciding this application. The defendant alleges that paragraph 3 of the particulars of claim is vague and embarrassing as it does not comply with rule 18(6). Rule 18 of the Uniform Rules of Court are the rules relating to pleadings. Rule 18(4) reads as follows:

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

[28] Rule 18(6) relates to pleadings based on contract and reads as follows:

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[9] *Theunissen supra* at 500E-F.
[10] *Trope v South African Reserve Bank & another and Two Other Cases* 1992 (3) SA 208 (T) at 211B-C.
[11] *Deane v Deane* 1955 (3) SA 86 (N) at 87(F)-G.

> ‘A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.’

[29] It is the defendant’s complaint that the plaintiff did not comply with rule 18(6) as it did not mention the names or the capacities of the persons that duly represented the parties in concluding the agreement. It is for this reason that the defendant alleges that the particulars of claim lacks sufficient clarity to enable it to plead and that it is prejudiced thereby.

[30] If one reads the provisions of rule 18(6), the sub-rule does not say that a pleader must provide the name and capacity of the parties who concluded the contract. All that is required to be pleaded is whether or not the contract is written or oral, when, where and **by whom**[12] it was concluded.

[31] In my view, the plaintiff has pleaded each of the facts required to sustain a cause of action based on an agreement - facts not evidence must be pleaded. One must draw a distinction between the *facta probanda* (the facts that have to be proved) and the *facta probantia* (the evidence needed to prove those facts).

[32] If one has regard to the pleadings as a whole, the plaintiff sues the defendant, a close corporation, for security services rendered pursuant to an oral agreement. It has pleaded the express, alternatively implied, alternatively tacit terms of the agreement and has also, in addition attached to the particulars of claim, individual

[12] My emphasis.

invoices evidencing the amount claimed, the date the services were rendered, the nature of these services rendered, as well as the specific site at which such services were rendered. Essentially, paragraph 3 refers to the fact that the parties were duly represented. The contracting parties to the agreement are identified and being juristic persons, it is alleged they were duly represented when the agreement was concluded in or about July 2013 but no later than 23 July 2014 at Howick, KwaZulu-Natal.

[33] The defendant bears the onus to prove that the lack of clarity amounts to vagueness and embarrassment and consequently prejudice.[13] In my view, the defendant has failed to make out a case that the omission of the names and capacity of the persons, who represented the parties when the agreement was concluded, amounts to vagueness and embarrassment and that it is prejudiced.[14]

[34] The exception does not, in my view, go to the root of the cause of action and consequently, does not dispose of the matter in whole or in part.[15] The omission of the names and capacity of the representatives does not render the particulars of claim meaningless or capable of more than one meaning, and in addition, discloses a cause of action to which the defendant is able to plead without embarrassment. I am fortified in this view having regard to the opposing affidavit in the summary judgment application and the decision in *Absa Bank Ltd v Boksburg Transitional Local Council* (*Government of the Republic of South Africa, Third Party*)[16] where the court held the following:

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[13] *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) para 6.
[14] *Nxumalo supra* para 6.
[15] *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I.
[16] 1997 (2) SA 415 (W) at 421I-422D.

> '. . .if a plaintiff's pleading is seriously vague, it is wrong to blatantly say that a defendant is able to plead, even if it is then only a general denial. Once it is not such a flagrant fundamentally defective situation, the omission of detail will still either create vagueness to the extent that the other party does not adequately know what the plaintiff's case is or, alternatively, the case will fall outside that deficient category. But how a specific pleading is to be classified is then an *ad hoc* decision involving a matter of degree. The decision must necessarily be influenced, *inter alia*, by the nature of the allegations, their content, the nature of the claim, the relationship between the parties. It is essentially a factual question. It is on that level that I conclude that despite the probable right to request further particulars (under Rule 21) (not necessarily a right to obtain the information as asked because the defendant may be entitled to answer that it will have to establish the fact by way of inference from proclomations, press reports, silence, and other considerations), it seems to me that the third party can fairly be expected to plead to the third party notice as it stands at the moment. It can respond adequately even if a hypothetical outsider happens to be relatively disadvantaged. It may be that, as the exception claims, the third party is unable to establish `precisely' what case it is called upon to meet. But it knows `adequately' what the plaintiff's case is. It can understand the defendant's case and is able to take instructions from the client and to record a meaningful response to it.'

[35] In opposition to the application for summary judgment, the defendant, through its sole member Rory van Lingen, deposed to an affidavit in opposition to summary judgment. A point *in limine* was raised in respect of Claasen, the deponent to the founding affidavit, and the defendant further pleaded that the particulars of claim were excipiable for reasons already alluded to in this judgment. A fairly detailed affidavit was filed in respect of the security services rendered at the Umgababa site. These extend to some 28 paragraphs. What is noteworthy are paragraphs 5, 6 and 7 of the opposing affidavit as it would appear that the names and capacities of the

representatives who concluded the agreement, may be known to the defendant and further, paragraph 48 of such affidavit which reads as follows:

> '. . .and that costs be awarded on a punitive scale against the Plaintiff as it has been well aware of these defences which have been raised with it from the initiation of its invoicing and immediately following the abandonment of site.'

[36] It would appear from the opposing affidavit that the defendant has been able to deal with its defence to the action in much detail and importantly, it has essentially placed the terms of the agreement in dispute but it does not dispute that services were rendered. The defendant appears to have had no difficulty understanding the cause of action pleaded and formulating a response to same, at least for summary judgment purposes. This is indicative in my mind that the defendant is not only able to file a plea not constituting a bare denial, but also deal with what it says the terms of the agreement were,[17] its defences thereto and its counterclaim.

[37] In my view, the defendant has failed to make out any case that it will be severely prejudiced if the exception is not allowed,[18] and consequently, the exception is without merit and falls to be dismissed with costs.

[38] I turn now to the next application namely, whether or not the exception is an irregular step and in doing so bear the following in mind. As early as October 2014, the defendant was of the view the particulars were excipiable. The amendment in terms of rule 28 did not in any way affect the cause of action or the content of the

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[17] Opposing Affidavit, page 12 para 23 of Bundle Index: Notices.
[18] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 337; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298.

particulars of claim. It was confined to the citation of the plaintiff. The amended pages were served in terms of rule 28(7) on 20 March 2015. The notice of exception was served in May 2015.[19]

[39] The plaintiff sets out in detail why the exception is an irregular step.[20]

[40] Rule 30(1) of the Uniform Rules of Court reads as follows:

> '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.'

[41] Rule 30(2) of the Uniform Rules of Court deals with the procedure to be followed and provides that:

> '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;
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> *(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).'

[42] It is apparent that the plaintiff has complied with rule 30(2). The defendant's

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[19] I must also make mention that it would appear that having regard to the court file, several notices of Bar were served in an attempt to get the defendant to file its plea, which notices were subsequently withdrawn after service of notices in terms of rule 30. I make no ruling as to whether they were correctly withdrawn or were irregular steps in terms of rule 30.

[20] See founding affidavit of Terence Talbot, pages 6 to 11 of Index to Applications: Amendment, Exception, Irregular Step and plaintiff's Heads of Argument, pages 6 to 11.

stance has been dealt with earlier on in this judgment and it has submitted the authorities it relies on in its heads of argument.

[43] Rule 30(3) of the Uniform Rules of Court provides that:

> '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.'

[44] The premise on which the defendant relies on for its submission is rule 23, the relevant portion for purposes of its argument reads:

> '. . .the opposing party may, **within the period allowed for filing any subsequent pleading**, deliver an exception thereto. . . .'
> (My emphasis)

[45] I agree with the submission that an exception is a pleading. I have also had regard to the authorities relied on by both counsel in support of their respective submissions.[21] Having considered them, they are distinguishable from the present matter on the facts.

[46] In my view, the starting point in this matter is rule 28(8). Rule 28(8) of the Uniform Rules of Court provides that:

> 'Any party affected by an amendment may, **within 15 days after the amendment has been effected** or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and **may also take the steps contemplated in rules 23 and 30**.'

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[21] *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O); *Felix & another v Nortier NO & others (2)* 1994 (4) SA 502 (SE); *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality & others: In Re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd & others* 2010 (3) SA 81 (ECM); *Tyulu & others v Southern Assurance Associated Ltd* 1974 (3) SA 726 (E).

(My emphasis)

[47] The steps referred to in rule 28(8) is to file a notice of exception in terms of rule 23 or proceed in terms of rule 30. These steps must however be taken within 15 days of the amendment, in this instance, within 15 days of the amended pages being filed.

[48] Should such steps not be taken within that time, the exception will be out of time, unless the court has on application granted leave for it to be filed outside of the time period stipulated in the rule. This is what must be meant by the words in the sub-rule '…or within such other period as the court may determine'.[22]

[49] Rule 28 makes specific provision for the taking of an exception once an amendment has been effected and it is the procedure and the time frames in this sub-rule that the respondent must comply with if it wants to proceed in terms of rule 23. To give another interpretation to rule 28(8) would in my view, not be correct. The sub-rule uses the word "may" which implies that a party has a choice. In the event of a party electing not to invoke rules 23 or 30, then a plea would have to be filed within the 15 day period, failing which, the party would have to be placed under bar. Failure to file a notice in terms of rules 23 or 30 which is referred to as "any other pleading", results in a party being automatically barred and a notice of bar being unnecessary. This is consistent with rule 26.This would be consistent with the provisions of rule 23 as well. It could never have been the intention that once the amended pages were filed a party was at liberty to invoke rule 23 until such time as it had been placed

[22] Rule 27 of the Uniform Rules of Court provides for the court in the absence of an agreement between the parties, to condone the non-compliance with the rules of court on good cause shown. Subrule (3) empowers the court to condone 'any non-compliance' with the rules, and the use of the word 'any' emphasizes the absence of any restriction on the powers of the court to do so.

under bar. This would mean at any time of its choosing, even outside of the time period of 15 days.

[50] Consequently, the defendant's notice of exception is out of time and has not been accompanied by an application for condonation. In the premises, the plaintiff is entitled to the relief it seeks in the notice of motion.

Costs

[51] Both parties seek punitive costs orders against each other in the respective applications. In my view, the amount of the claim falls within the jurisdiction of the Regional Court and I see no reason to mulct the defendant with costs on the tariff applicable to the High Court.

[52] I have considered the submissions of the plaintiff regarding a punitive costs order. The court in the rule 28 application expressed its displeasure and awarded a costs order in favour of the plaintiff. I could find no authority in this division dealing with the issue raised by the defendant in the rule 30 application, namely that a notice of Bar would have to be served before the exception was out of time. In light of that, it was reasonable for the defendant to take this point and have a court in this division decide that issue.

[53] In addition, there does not appear to be anything in the conduct of the defendant warranting a punitive costs order in the exception application either. Consequently, there appears to be no reason to grant a punitive costs order on the

attorney client scale.

[54] In the result the following orders will issue:

[54.1] The plaintiff's application in terms of rule 30 to declare the defendant's notice of exception an irregular step is upheld with costs.

[54.2] The defendant's exception is dismissed with costs.

[54.3] The defendant is directed to pay the party/party costs occasioned by both the application to declare the notice of exception an irregular step as well as the exception on the tariff applicable to Regional Court.

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HENRIQUES J

Case Information

Date of argument	:	22 February 2016
Date of judgment	:	31 August 2016

Appearances

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