



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 13801/2020

In the matter between:

**FRITZ CHRISTIAAN WIRTH (JNR)**

**Plaintiff**

And

**JOHAN CHRISTIAAN WIRTH**

**1<sup>st</sup> Defendant**

**FRITZ HERMAN WERNER WIRTH (SNR)**

**2<sup>nd</sup> Defendant**

**MIGAL LANDMAN WIRTH**

**3<sup>rd</sup> Defendant**

**NOOITGEDACHT BEHEREND (PTY) LTD**

**4<sup>th</sup> Defendant**

**KOELPARK DEVELOPMENT (PTY) LTD**

**5<sup>th</sup> Defendant**

**NOOITGEDACHT INVESTMENT HOLDINGS (PTY) LTD**

**6<sup>th</sup> Defendant**

**NOOITGEDACHT WYNMAKERY (PTY) LTD**

**7<sup>th</sup> Defendant**

**BRONZ EDITIONS (PTY) LTD**

**8<sup>th</sup> Defendant**

**KOELLENHOF KONSTRUKSIE (PTY) LTD**

**9<sup>th</sup> Defendant**

**NOOITGEDACHT REAL ESTATE (PTY) LTD**

**10<sup>th</sup> Defendant**

**THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION**

**11<sup>th</sup> Defendant**

**THE COMMISSIONER FOR THE SARS**

**12<sup>th</sup> Defendant**

**THE SOUTH AFRICAN RESERVE BANK**

**13<sup>th</sup> Defendant**

**NEDBANK LIMITED**

**14<sup>th</sup> Defendant**

**JD KIRSTEN (PTY) LTD t/a KIRSTEN BOERDERY**

**15<sup>th</sup> Defendant**

**NOOITGEDACHT FLOWER COMPANY (PTY) LTD**

**16<sup>th</sup> Defendant**

**JUNE WIRTH**

**17<sup>th</sup> Defendant**

**LIESL THEODORA COLDMAN (born WIRTH)**

**18<sup>th</sup> Defendant**

*Date of hearing* : 19 August 2021

*Date of Judgment* : Electronically delivered on 23 August 2021

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**JUDGMENT**

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**NUKU, J**

[1] Do the Uniform Rules of Court preclude a defendant from taking an exception to the plaintiff's amended particulars of claim where such defendant has not objected to the plaintiff's notice of intention to amend his or her or its particulars of claim? That is the principal question that must be answered in this application.

[2] The applicant, who is the plaintiff in the main action, brings this application in terms of Rule 30, to set aside a notice in terms of Rule 23 (1) filed on 17 February 2021 by the first to tenth and sixteenth to eighteenth defendants. I shall henceforth refer to the applicant as the plaintiff, and the first to tenth and sixteenth to eighteenth defendants as the defendants.

[3] The plaintiff instituted an action against the eighteen defendants seeking the following orders:

- (a) declaring his removal as a director of the fourth to tenth defendants to be unlawful and of no legal effect;

- (b) directing the eleventh defendant to rectify its register by reinstating the plaintiff as a director of the fourth to tenth defendants;
- (c) declaring the first to third defendants to be delinquent directors in terms of section 162 (2) and 162 (5) of the Companies Act 71 of 2008; and
- (d) costs of suit.

**[4]** The defendants and the fifteenth defendant filed a notice of intention to defend. Shortly thereafter the plaintiff withdrew the action against the fifteenth defendant. The defendants failed to deliver their plea within the time period prescribed by the Rules. This caused the plaintiff to deliver its first notice of bar on 12 November 2020.

**[5]** The defendants responded by delivering their first notice in terms of Rule 23 (1), indicating their intention to take an exception to the plaintiff's particulars of claim on the basis that, in certain instances, the plaintiff's particulars of claim lack averments necessary to sustain the plaintiff's claim, and that they are also vague and embarrassing in various respects. The plaintiff, in turn, responded by delivering a notice of intention to amend his particulars of claim in terms of Rule 28.

**[6]** The defendants did not object to the plaintiff's proposed amendment. The plaintiff thereafter effected the amendment by delivering the amended particulars of claim. Once again, the defendants failed to deliver their plea within the prescribed time limits and the plaintiff delivered a second notice of bar on 16 February 2021.

[7] On 17 February 2021, the defendants delivered their second notice in terms of Rule 23 (1), indicating their intention to take an exception to the plaintiff's amended particulars of claim on the basis that, in certain instances, the plaintiff's amended particulars of claim lack averments necessary to sustain the plaintiff's claim, and that they are also vague and embarrassing in various respects.

[8] The plaintiff, considering the defendants' second notice in terms of Rule 23 (1) an irregular step, delivered a notice in terms of Rule 30 (2) (b) on 24 February 2021, giving the defendants a period of ten days within which to withdraw their second notice in terms of Rule 23 (1). On 26 February 2021, the defendants advised of their refusal to withdraw their second notice in terms of Rule 23 (1). A stalemate having been reached, the plaintiff launched the present application in terms of Rule 30 (1), seeking an order setting aside the defendants' second notice in terms of Rule 23 (1) as an irregular step, with costs.

[9] The application was set down for hearing in the Third Division on 3 May 2021, on which date it was postponed for hearing on the semi-urgent roll in the Fourth Division on 17 June 2021. On 17 June 2021 the matter was crowded out, and was postponed to 19 August 2021.

[10] The plaintiff contends that the defendants' second notice in terms of Rule 23 (1) is an irregular step in that the defendants, having failed to object to the plaintiff's notice of intention to amend his particulars of claim, are deemed to have consented to the

amendment. Having consented to the amendment, so the argument goes, the defendants are not entitled to take an exception to the plaintiff's amended particulars of claim.

[11] The plaintiff's contention that the defendants are not entitled to take an exception to the amended particulars of claim is based on the plaintiff's argument that the defendants had an opportunity to object to the proposed amendment. The argument goes further that, by their failure to object to the proposed amendment, the defendants waived their right to take an exception to the plaintiff's amended particulars of claim.

[12] The plaintiff decries the defendants' conduct as an abuse of process and that if countenanced, the plaintiff will be subjected to endless notices of intention to except by the defendants.

[13] The defendants, for their part, submitted that the applicant's failure to file an affidavit in support of the application is fatal in that the plaintiff, without an affidavit, has failed to provide proof of prejudice and the facts supporting his claim that the defendants have waived their procedural right to take an exception to the amended particulars of claim.

[14] The defendants, with reference to the provisions of Rule 28 (8), submitted that they are entitled to file a notice in terms of Rule 23 (1) after receipt of the plaintiff's amended particulars of claim in that it provides specifically 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 adjustments to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.”*

Thus, the defendants' argument is that their second notice in terms of Rule 23 (1) is what Rule 28 (8) contemplates.

[15] The point raised by the defendants in respect of Rule 28 (8) appeared to me to be dispositive of the application in that Rule 28 (8), far from preventing a party (who has not objected to a proposed amendment) from filing a notice in terms of Rule 23, provides, in specific terms, that it may file a notice in terms of Rule 23. I invited plaintiff's counsel to address me on what he contends to be the proper interpretation of Rule 28 (8) having regard to the decision of the Witwatersrand Local Division in *Wendy Machanik Property Holdings*<sup>1</sup>, where it was held that:

*“... the Rule contemplates that the other party, a party 'affected' by the amendment would react to the amendment made by the other party”*

and that:

*“It also allows the 'affected' party to take the steps contemplated by Rules 23 and 30.”*

[16] He submitted that *Wendy Machanik Property Holdings* was wrongly decided, that the proper interpretation of Rule 28 (8) is that the defendants are only entitled to make

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<sup>1</sup> *Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd* 2007 (5) SA 90 (W) at 94 A-B

consequential adjustments, and that it is the plaintiff who is entitled to take the steps contemplated in Rules 23 and 30. As support for this proposition, he referred to a passage in *Erasmus*<sup>2</sup> which reads:

*"It is submitted that where a pleading is excipiable as a result of a failure to make consequential adjustments to such pleading as contemplated in this subrule, the party who has effected the amendment should, . . . deliver an exception thereto."*

[17] He submitted further that to interpret Rule 28 (8) as in the manner contended for by the defendants would not be in the interest of justice and would be open to abuse as has been demonstrated by the defendants' conduct in this matter.

[18] There are various difficulties with the interpretation contended for by plaintiff's counsel. The first difficulty is that the reading of Rule 28 (8) makes no distinction between a party who may make consequential adjustments and a party who may take steps contemplated in Rule 23. To the contrary, the use of the words "*and may also take...*" suggest that the party entitled to make consequential adjustments is also entitled to take steps contemplated in Rule 23. Had the intention been to make a distinction between a party entitled to make only consequential adjustments to its documents and a party who may take steps contemplated in Rule 23, the Rule would have stipulated so expressly.

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<sup>2</sup> *Erasmus: Superior Court Practice* RS 9, 2019, D1-344.

[19] The second difficulty is that the passage relied upon by plaintiff's counsel does not support his contention. This is so because a footnote to the same passage makes it clear that Rule 28 (8), as it stands, does not make provision for the party effecting an amendment to raise an exception and that the writer is advocating for the amendment of Rule 28 (8) so that it may make provision for the party effecting an amendment to raise an exception.

[20] Interpretation is the process of attributing meaning to the words used in a document<sup>3</sup>. The words of the section provide the starting point and are considered in light of their context, the apparent purpose of the provision, and any relevant background material<sup>4</sup>. There may be rare cases where the words used in a statute or contract are only capable of bearing a single meaning.<sup>5</sup>

[21] Having regard to the words used in Rule 28 (8) I am of the view that this is one of those rare cases where the words are only capable of bearing one meaning. A party affected by an amendment can only mean the party receiving the amended pages and not the party making the amendment. In this regard, I cannot agree with plaintiff's counsel that *Wendy Machanik Property Holdings* was wrongly decided.

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<sup>3</sup> Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]

<sup>4</sup> Ibid

<sup>5</sup> Commissioner For The South African Service v Bosch and Another 2015 (2) SA 174 (SCA) at para 8



[22] One would have to strain the language used in Rule 28 (8) to hold that a party effecting an amendment is also affected by such an amendment and so entitled to take steps contemplated in Rule 23. But this still would not justify the distinction contended for by plaintiff's counsel, namely, that the defendants are only entitled to make consequential adjustments but not to take steps contemplated in Rule 23, and that it is only the party effecting the amendment that is entitled to take steps contemplated in Rule 23.

[23] There is also an anomaly which is self-evident in the interpretation contended for by plaintiff's counsel. How the plaintiff, after having effected an amendment, can take an exception to the defendants' pleadings is difficult to understand. This is so because the plaintiff, by effecting the amendment is the last party to take a step in the matter. The plaintiff cannot therefore take exception to pleading filed before the amendment.

[24] Counsel for the plaintiff could not point to any Rule which precludes a party (who has not objected to a proposed amendment) from taking any exception to the amendment. To the contrary, Rule 28 (8) expressly provide for the party affected by an amendment to raise an exception to the amendment.

[25] The defendants, having done what Rule 28 (8) contemplates, the issue of prejudice to the plaintiff and the issue of defendants' waiver of procedural rights cannot arise. Whilst the defendants had a procedural right to object to the plaintiff's proposed amendment on the basis of it being excipiable, their failure to do so does not deprive them of their

procedural right to take an exception to the amended particulars of claim if they consider them to be excipiable.

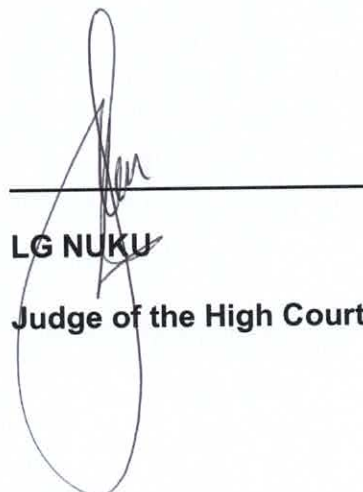
**[26]** A party receiving a notice in terms of Rule 23 (1) has procedural options. It can either amend its pleading to address the issue raised by the opponent, or it can persist with its pleadings in which event the Court would have to determine the merits of the exception.

**[27]** The interest of justice argument is also difficult to follow. As I understand, the contention is that the plaintiff will be subjected to countless notices in terms of Rule 23 (1) even if he were to amend his amended particulars of claim. The answer to this lies in the procedural remedies available to the plaintiff. If plaintiff is content that his amended particulars of claim, there would be no need to amend them. All that would have to happen is the determination of the exception. In the event that the plaintiff considers his amended particulars of claim excipiable, then he could simply file another notice of amendment. Thus, it is not necessary to speculate about what the defendants would do if the plaintiff were to seek to amend his amended particulars of claim.

**[28]** Counsel were in agreement that the costs should follow the result, including the costs occasioned by the postponements of 3 May 2021, and 17 June 2021. This agreement is in line with the generally accepted principle that the costs should follow the result and I cannot find any reason for departing from the said principle.

**[29]** In the result I make the following order:

The application is dismissed with costs, including the costs occasioned by the postponement of the application on 3 May 2021 and 17 June 2021.



**LG NUKU**  
**Judge of the High Court**

**APPEARANCES**

For the Applicant	:	Advocate J C Marais
Instructed by:		Falck Attorneys (Ref: Mr G Falck)
For the Respondent	:	Advocate P Nel
Instructed by:		Kellerman Joubert Heyns (Ref: Ms A Joubert)