

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: <u>5/3/2016</u>
	DATE
	SIGNATURE <u>[Signature]</u>

CASE NO: 2013/17508

In the matter between:

**ABOVE AND BEYOND TRADING 164 CC t/a
GROVE EXPORT**

Applicant

and

PRO ROOF STEEL MERCHANTS (VRN) (PTY) LIMITED

Respondent

In re:

PRO ROOF STEEL MERCHANTS (VRN) (PTY) LIMITED

Plaintiff

**ABOVE AND BEYOND TRADING 164 CC t/a
GROVE EXPORT**

First Defendant

CONRADIE, CHRISTOPHER PAUL

Second Defendant

JUDGMENT

SOUTHWOOD, AJ:

A. INTRODUCTION

1. This is an interlocutory application in terms of Rule 30 of the Uniform Rules of Court to set aside a notice of bar served on the applicant, the first defendant in the action, by the respondent, the plaintiff in the action, as an irregular step.
2. The notice of bar was directed at compelling the applicant to deliver a plea in the action.
3. The applicant contends that the notice of bar is irregular for three reasons:
 - 3.1 the combined summons was never served on the applicant;
 - 3.2 the notice of bar was served prematurely since the applicant had not given notice of intention to defend;
 - 3.3 the notice of bar was served on attorneys Nolte Inc, prior to their coming on record as attorneys for the applicant.

B. BACKGROUND

4. The combined summons was issued in 2013 against the applicant and one Christopher Paul Conradie, cited as the second defendant. Mr Conradie, the deponent to the applicant's founding affidavit, is the sole member of the applicant.
5. The particulars of claim¹ indicate that the basis of the claim against the applicant is for outstanding moneys for goods sold and delivered. The basis of the claim against Mr Conradie is a suretyship agreement in terms of which he bound himself as surety and co-principal debtor *in solidum* for the due and proper performance of the applicant's obligations to the respondent.
6. The sheriff served the combined summons on Mr Conradie on 5 June 2013 at 113 Boeing Road East, Bedfordview, Germiston North being his chosen *domicilium citandi et executandi*, by affixing the combined summons to the main entrance in terms of Rule 4(1)(a)(iv). The return of service indicated that the premises were vacant.
7. There is no return of service in respect of the applicant.

¹ The court file contains a pleadings bundle which I have had regard to despite it not being uploaded onto Caselines, as with the application papers

8. There is a dispute as to whether service was effected on the applicant. As will become clear, there is no reason to determine this dispute.
9. It has not been properly disputed that the applicant ceased trading around about December 2012 and gave up its leased premises at 113 Boeing Road East, Bedfordview around about January 2013. Thereafter, the applicant became dormant and did not trade; and no longer had any assets. This was before service of the summons on Mr Conradie.
10. On or around 8 July 2013, the respondent applied for default judgment against Mr Conradie only. Default judgment was granted against Mr Conradie on 20 August 2013.
11. On 25 September 2014, this order was rescinded.
12. On 14 January 2015, attorneys, Nolte Inc, gave notice of intention to defend (**'the notice'**).
13. The applicant contends that such notice was given on behalf of Mr Conradie. The respondent contends that the notice was given on behalf of both defendants.
14. Thereafter, Mr Conradie filed a plea. The trial was first set down for hearing on 17 August 2016 and then, again, on 27 February 2018. In the latter instance, the trial was postponed by agreement.

15. On or about 26 February 2018, Mr Conradie gave notice of a proposed amendment of his plea which contemplated raising a special plea of prescription on the basis that the principal debt had prescribed (presumably, on the basis that the combined summons had not been served on the applicant with the result that the running of prescription in relation to the applicant had not been interrupted), and, consequently, that Mr Conradie had been discharged from his obligations as surety for such debt.
16. On 28 February 2018, the respondent served a notice of bar on Nolte Inc., ostensibly as attorneys for the applicant.
17. On 1 March 2018, the applicant, then represented by Nolte Inc, entered appearance to defend with reservation of its rights in relation to the alleged non-service of the summons on the applicant. On the same day, it gave notice in terms of Rule 30 that the notice of bar was an irregular step.
18. On 12 March 2018, the respondent's attorneys advised that the respondent did not agree that delivery of the notice of bar constituted an irregular step and invited the applicant to proceed with an application in terms of Rule 30.
19. The applicant launched the Rule 30 application on or about 5 April 2018.

C. **IS THE NOTICE OF BAR IRREGULAR?**

20. As indicated above, the applicant contends that the notice of bar is irregular for the following reasons:

18.1 the summons has not been served on the applicant;

18.2 the notice of bar was served prematurely because the applicant has not given notice of intention to defend;

18.3 the notice of bar was served at the address of Nolte Inc, prior to it coming on record as attorneys for the applicant.

21. In terms of Rule 26, if any party fails to deliver a pleading (other than a replication or subsequent pleading) within the time laid down in the rules or within any extended time allowed in terms thereof, then any other party may by notice served upon the defaulting party require that party to deliver such pleading within five days after the day upon which the notice is delivered.

22. The notice of bar was directed at delivery of the applicant's plea.

23. In terms of rule 22(1), the applicant is required to file its plea within 20 days of delivery of its notice of intention to defend.

24. It is clear that the time period within which a defendant must deliver a plea commences from the date of delivery of its notice of intention to defend.
25. Accordingly, it is irrelevant whether the combined summons has been served on the applicant. The determination which must be made is whether the applicant has delivered a notice of intention to defend and, if so, when such notice was delivered.
26. In the premises, I find that the first ground of irregularity is without merit.
27. Insofar as the second ground of irregularity is concerned, what must be determined is whether the applicant has delivered a notice of intention to defend and, if so, whether more than 20 days had elapsed from the date of the delivery of the notice, prior to the service of the notice of bar.
28. Insofar as the third ground of irregularity is concerned, in order to find that service on Nolte Inc. was irregular, I would have to find that Nolte Inc. had not entered appearance to defend on behalf of the applicant at the time when the notice of bar was served.
29. The second and third grounds of irregularity are, therefore, inextricably linked.

30. The applicant alleges that, prior to the service of the notice of bar, it had not delivered a notice of intention to defend. This is disputed by the respondent. It is the determination of this issue which lies at the heart of this application.
31. The notice was delivered on 14 January 2015. The notice is ambiguous and could be understood as a notice on behalf of both defendants or as a notice on behalf of Mr Conradie. This is clear from the following terms which appear in the notice: '*Defendants hereby give notice*', '*of **his** intention to defend*', '*appoint Nolte Inc. as **his** attorneys of record*', '*at which address the **Defendant** will accept service*', '*the **Defendant** hereby consents*'. The notice is signed by the '*ATTORNEY FOR DEFENDANTS*'. (Emphasis added).
32. *Mr Strydom*, for the applicant, contended that I should interpret the notice by applying the well-known rules of interpretation. *Mr Wannenburg*, respondent's counsel, approached the matter on the basis that the applicant's intention must be gleaned from the notice and other surrounding circumstances. I agree with the latter approach.
33. In the founding affidavit, Mr Conradie alleges that he only gave instructions to attorney, HS Nolte, to enter appearance to defend on behalf of himself. It is further alleged that Mr Nolte asked his secretary to prepare a notice of intention to defend on behalf the second defendant i.e. Mr Conradie. The references to '*Defendants*' are alleged to be typographical errors which Mr

Nolte failed to notice. Both Mr Nolte, an officer of the court, and his secretary confirm these allegations.

34. Mr Conradie's allegations are baldly denied. The respondent does not address the affidavits deposed to by Mr Nolte and his secretary at all.
35. In argument, *Mr Wannenburg* sought to persuade me to reject this evidence simply on the basis that Mr Conradie was aware of the action against the applicant and that the notice refers to '*Defendants*'. He also referred me to other formal notices where reference had been made to the '*Defendants*'.
36. As in the notice, the other references to '*Defendants*' is inconsistent.
37. There is nothing inherently improbable about Mr Conradie's contentions. At the stage when he gave Mr Nolte instructions to give notice of intention to defend, the respondent had indicated an intention to pursue Mr Conradie only. The respondent had sought and had been granted default judgment against Mr Conradie only. This may have been because the respondent was also of the view that the combined summons had not been served on the applicant and/or because the applicant was a dormant company with no assets.
38. There is no basis to reject the evidence of Mr Conradie², his attorney, Mr Nolte, or his attorney's secretary.

² Applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635B

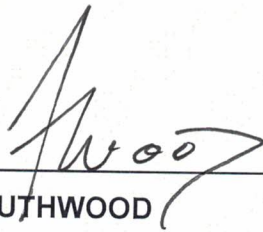
39. Accordingly, the notice delivered on 14 January 2015, is the second defendant's notice of intention to defend.

40. As a consequence, the notice of bar is irregular, both because it is premature since, at the time when it was delivered, the applicant had not delivered a notice of intention to defend; and, because it was served on Nolte Inc. who had not yet come on record as attorneys for the applicant.

ORDER

Accordingly, I make the following order:

1. The respondent's notice of bar, dated 28 February 2018, is set aside as an irregular step.
2. The respondent is directed to pay the applicant's costs of the application.



F SOUTHWOOD 5/03/20
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Date of Hearing: 28 January 2020

Date of Judgment: 06/03/ 2020

For the Applicant: F Strydom
Instructed by: Nolte Inc Attorneys

For the Respondent: W Wannenburg
Instructed by: Esthé Muller Inc. Attorneys