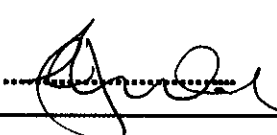


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 22826/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
...4/8/2016	
	

4/8/2016

In the matter between:

TUFFSAN INVESTMENTS 1088 (PTY) LTD

Plaintiff

and

BUSISIWE AGNES SETHOLE

First Defendant

TOBIPROX (PTY) LTD

Second Defendant

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This is an opposed application for condonation of the late filing of an exception taken to the plaintiff's particulars of claim.
2. The first and second applicants are the first and second defendants in the main action and the respondent is the plaintiff therein. I shall refer to the parties in this judgment as plaintiff and defendants respectively.
3. When the matter was called, there was no appearance on behalf of the plaintiff, despite heads of argument and a practice note having been filed on the plaintiff's behalf.

4. I was advised by Mr de Beer who appeared on half of the defendants that the plaintiff's attorneys of record had withdrawn as attorneys for the plaintiff. A copy of the notice of withdrawal dated 12 April 2016 was handed in. The notice of set down of this application was served on 16 March 2016 on the plaintiff's erstwhile attorneys, whilst they were still recorded as attorneys of record for the plaintiff. There has been proper notice of the set down of the hearing of this application.
5. It would be prudent to set out the background to the launching of this application for condonation.
6. The plaintiff caused a summons to be served on 18 and 19 May 2015 upon the respective defendants. Both the defendants entered an appearance to defend the said action on 28 May 2015.
7. On receiving the notice of intention to defend, plaintiff responded by serving an application for summary judgment and set it down for 31 July 2015 on which date leave was granted to the defendants to defend the action. The plaintiff was mulct with a cost order.
8. It appears that the plaintiff thereafter filed a declaration. The explanation provided in the answering affidavit for the filling of the declaration was that the summons was a simple summons, which the defendants deny. However nothing turns on this issue.
9. On 22 September 2015 the plaintiff caused a notice of bar to be served upon the defendants in which the defendants were afforded a period of 5 days to file their plea.
10. The defendants did not serve a plea within the stipulated 5-day period, but served a notice in terms of the provisions of Rule 23(1) of the Uniform Rules of Court on the plaintiff calling upon it to remove several causes of complaint contained in its particulars of claim within the prescribed period of 15 days from service of the said notice. The

said notice was served on the plaintiff's attorneys on 23 September 2015. The 15-day period allowed expired on 15 October 2015.

11. The plaintiff failed to remove the causes of complaint within the allotted 15-day period. Consequently, the defendants were obliged in terms of the provisions of Rule 23 of the Uniform Rules of Court to file their exception, if so intended, by 29 October 2015.
12. Although the defendants filed their exception at the Registrar of this Court on 22 October 2015, i.e. well within the prescribed period for delivering such, it was not served upon the plaintiff's attorneys due to an administrative error which I shall deal with below. The defendants' exception was eventually served upon the plaintiff's attorneys on 6 November 2015, effectively 6 days late.
13. Despite being advised of the administrative error in the serving of the exception, the plaintiff refused to accept the exception. The plaintiff's refusal to accept the late service of the exception prompted the defendants to launch this application, which they did on 17 November 2015 and served it on the plaintiff's attorneys on 19 November 2015.
14. The defendants state that their attorneys of record make use, as many other firms of attorneys do, of a service rendered by a messenger service known as @Law Legal Messenger Services for serving and filing of legal process. In the present instance @Law Legal Messenger Services filed the exception at court, but failed to serve it on the plaintiff's attorneys. This is the basis upon which the defendants apply for the condonation of the late filing of the exception. The aforesaid error was only realised when on 3 November 2015 the plaintiff caused a notice of intention to apply for default judgment to be served upon the defendants. That document only came to the attention of the defendants' attorney dealing with this matter after hours on 5 November 2015. The defendants' attorneys immediately rectified the error on 6 November 2016.

15. The dispute between the parties relates to the interpretation of the provisions of Rule 23 of the Uniform Rules of Court and in particular with reference to the provisions of Rule 22 and 26 of the Uniform Rules of Court.
16. Rule 22(1) of the Uniform Rules of Court provides:

“(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.”

17. It is clear from this sub-rule that a defendant has a choice in the manner in which to respond to a plaintiff's summons, i.e. either by filing a plea thereto with or without a claim in reconvention, or taking an exception thereto with or without an application to strike out.
18. In the event that a defendant opts to take an exception to a plaintiff's particulars of claim, the defendant is obliged to adhere to the provisions of Rule 23 of the Uniform Rules of Court. That rule provides:

“(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): 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: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary."

19. It is clear from the first proviso to sub-rule (1) of Rule 23 that where the complaint is that the particulars of claim are vague and embarrassing, the defendant is obliged to first afford the plaintiff the opportunity of removing the causes of complaint. The first proviso is peremptory.¹

20. Rule 26 of the Uniform Rules of Court provides

"Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso

¹ *Viljoen v Federated Trust Ltd* 1971(1) SA 750(O) at 753F; see also *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms)Bpk* 1973(2) SA 680 (T) at 688D

facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading."

21. The plaintiff in its answering affidavit and in its heads of argument, raised the point that Rule 26 is clear in that it stipulates that a *pleading* is to be filed within the 5-day period allotted by the notice of bar in terms of Rule 26. In this respect, the plaintiff relies on the specific wording of Rule 26 and the judgment in *McNally NO v Codron* 2012 JDR 0385 (WCC).
22. Yekiso, J, in *McNally*,² *supra*, held that it is trite that an exception is a pleading and that an exception may be filed within the 5-day period of the notice of bar, but differed from Griffiths, AJ, in *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality et al: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha(Pty) Ltd et al*³ whether the notice in terms of the first *proviso* in Rule 23(1) satisfied that requirement.⁴
23. It was held in *McNally*, *supra*, that a party may only file a notice in terms of Rule 23(1) within the initial 20-day period allowed for the filing of a plea and that it was not open to a party to follow that

² 2012 JDR 0385 (WCC) at [9]

³ 2010(3) SA 81 (ECM)

⁴ *McNally*, *supra*, at [16] –[26]; *Landmark Mthatha*, *supra*, at [7] and [20] - [21]

procedure when a notice of bar is served.⁵ In this regard the court in *McNally* relied upon the specific wording of Rule 23.

24. The contrary was held in *Felix et al v Notier NO et al (2)*.⁶
25. I am in respectful agreement with the findings in this regard of *Felix, supra*, and *Landmark Mbhatha, supra*. To hold the contrary, as in *McNally, supra*, would disentitle a party after the initial period of 20 days within which to file an exception where the pleading is vague and embarrassing to thereafter take such an exception.⁷ Such party would have difficulty in pleading to the vague and embarrassing allegations. It is trite that the very purpose of pleadings is to crystallize the issues in dispute.
26. It follows that the defendants were entitled to serve a notice in terms of Rule 23(1) within the period allotted in the notice of bar.
27. Accordingly, the defendants' notice of intention to except served on 23 September 2015 complied with the notice of bar.
28. The issue whether the defendants are entitled to condonation for the late serving of the exception requires consideration.
29. In this regard, the exception was filed at court, but not served upon the plaintiff as dealt with above. The exception thus had not been "delivered" as required in terms of the rules.
30. The defendants have explained why the exception was not "delivered" as required. I have dealt therewith earlier in this judgment. It is clear that there had been no wilful delay in serving the exception and that the defendants have shown good cause for the delay. I am satisfied

⁵ at [25] - [27]

⁶ 1994(4) SA 502 (SE) at 506D-I; see also *Landmark Mthatha, supra*, at [7] and [20] - [21]

⁷ *Viljoen v Federated Trust Ltd* 1971(1) SA 750 (O) at 753E-F

that the defendants have sufficiently explained their omission to serve the exception timeously.

31. It follows that the defendants are entitled that the late serving of their exception be condoned.
32. Mr de Beer requested that in the event that the defendants are successful in obtaining condonation for the late serving of their exception, an order is to be granted directing the manner in which the exception is to be prosecuted. In this regard, the rules of court and the practice directive applicable in this Division, sufficiently provides therefor.

I grant the following order:

- (a) The defendants' late filing of the exception is condoned;
- (b) Costs of the application are costs in the main action.


G.J. VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicants:
Instructed by:

J de Beer
Philip Coetzer Inc.

On behalf of Respondents:
Instructed by:

No appearance