




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO <input type="radio"/>
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO <input type="radio"/>
(3)	REVISED.
21/01/2022	
DATE	SIGNATURE

Case No: 27427/19

In the matter between:

LEROY CURTIS BARNES

First Plaintiff / Respondent

THABO MILTON NCALO

Second Plaintiff / Respondent

and

KUSHITE INVESTMENT HOLDINGS (PTY) LTD

First Defendant / Applicant

KUSHITE LIFESTYLE (PTY) LTD

Second Defendant / Applicant

ANDILE CALEB MAKHUNGA

Third Defendant / Applicant

BUYISIWE MAKHUNGA

Fourth Defendant / Applicant

MOTLATSI MTHIMUNYE

Fifth Defendant / Applicant

MMATU MBULELO MZAIDUME

Sixth Defendant / Applicant

Date of Hearing: 23 November 2021

Date of Judgment: 12 July 2022

JUDGMENT

BARNES AJ

Introduction

1. This is an application launched by the first to fifth defendants¹ to have the plaintiffs' application for default judgment, delivered on 25 March 2020, set aside as an irregular step in terms of Rule 30.
2. For convenience, I shall refer to the parties as they are referred to in the main action.
3. The facts giving rise to this application are the following:
 - 3.1 On 6 May 2019, the plaintiffs instituted the main action against the

¹ As they are referred to in the main action proceedings under the same case number. The plaintiffs sought no relief against the sixth defendant and cited it merely as an interested party.

defendants.

- 3.2 On 20 May 2019, the first to fifth defendants (hereinafter “the defendants”) delivered a notice of intention to defend.
- 3.3 On 24 June 2019, the defendants delivered a notice of intention to except in terms of Rule 23(1).
- 3.4 On 17 July 2019, the plaintiffs delivered a notice of intention to amend.
- 3.5 The plaintiffs failed to deliver their amended pages timeously. The defendants accordingly required the plaintiffs to “re-deliver” their notice of intention to amend. The plaintiffs did so on 2 October 2019.
- 3.6 On 1 November 2019, the plaintiffs delivered their amended pages.
- 3.7 On 2 December 2019 the defendants delivered a further notice of intention to except in terms of Rule 23(1). I shall refer to this as “the December notice.”
- 3.8 On 14 February 2020 the plaintiffs delivered a notice of bar.
- 3.9 On 18 February 2020 the defendants “re-delivered” the December notice. I shall refer to this as “the February notice.”

- 3.10 On 25 March 2020 the plaintiffs delivered an application for default judgment.
- 3.11 On 26 March 2020 the defendants delivered their exception.
- 3.12 The application for default judgment was enrolled for hearing on 17 June 2020. It was postponed *sine die* in order to allow this application to be heard.
4. The plaintiffs contend that the February notice delivered by the defendants on 18 February 2020 did not constitute a valid response to the notice of bar and that they were accordingly entitled to apply for default judgment.
5. The plaintiffs contend that, faced with the notice of bar in the present case, there were two options open to the defendants: they could have filed an exception on the back of the December notice (together with an application for condonation since the exception would have been out of time) or they could have filed a plea. In the plaintiffs' submission, the February notice, not being an exception or a plea, did not constitute a valid response to the notice of bar.
6. The defendants, for their part, contend that it was not open to them to deliver an exception on the back of the December notice. This was because the exception was out of time and "an exception delivered out of time is

defective and a nullity and stands to be dismissed for that reason alone.”

7. More fundamentally however, the defendants contend that the February notice, as a matter of principle, constituted a valid response to the notice of bar and precluded an application for default judgment by the plaintiffs.
8. The defendants contend, in the alternative, in the event that it is found that they were not correct in filing the February notice, that the plaintiffs were not entitled simply to ignore the February notice and proceed with an application for default judgment. The defendants contend that if the plaintiffs were of the view that the February notice was irregular then they were obliged to serve a notice in terms of Rule 30 to set aside the February notice as an irregular step.
9. The crisp question in the application before me is accordingly whether the February notice constituted a valid response to the plaintiffs’ notice of bar.

Was the February notice a valid response to the notice of bar?

10. The weight of authority is to effect that a notice of intention to except, as contemplated in Rule 23(1), constitutes a pleading for purposes of Rule 26 or at least “the next procedural step in the proceedings” and therefore constitutes a valid response to a notice of bar.

11. In *Steve's Wrought Iron Works and Others v Nelson Mandela Metro*,² a judgment handed down in the Eastern Cape High Court, Goosen J, faced with the same crisp legal question which arises in this case, reasoned as follows:

"Rule 23(1) provides that an exception may be filed 'within the time period allowed for filing any subsequent pleading.' It requires, however, the peremptory filing of a notice if it is contended that the pleading is vague and embarrassing. A party is only barred from filing an exception (which is a pleading) if that party is time barred in accordance with rule 26.

...

In this instance the notice of exception was delivered within the five day period provided in the notice of bar. That is permitted in accordance with the authorities referred to and the plain wording of the rules.

Plaintiff's counsel relied upon the judgment in *McNally NO and Others v Codron and Others*³ where Yekiso J held that the notice of an exception constitutes a procedural step which would not preclude a bar being imposed by a notice of bar ...

The finding of Yekiso J runs counter to the authority of this division. It bears emphasis that it was specifically held in *Felix*⁴ that a party is entitled to proceed to except in response to a notice of bar. Thus, the filing of a notice of exception, which is a peremptory requirement where it is alleged that a pleading is vague and embarrassing, is permitted. This was followed in *Landmark Mthatha (Pty) Ltd v King Sabata Dalinyebo Municipality and Others: In re African Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others*.⁵

I am bound by the decisions of this division unless I am persuaded that they are wrong. I am not so persuaded. To the contrary, they are in my view correctly decided. The decision in *McNally* in effect precludes a party who intends to object to a pleading on the basis that it is vague and embarrassing from taking such exception upon receipt of a notice of bar unless that party has filed such notice of intention to

² 2020 (3) SA 535 (ECP)

³ [2012] ZAWCHC 17 (19 March 2012)

⁴ *Felix and Another v Nortier NO and Others* (2) 1994 (4) 502 (SE) at 506E, where Leach J specifically held that a defendant is entitled to file a notice of exception upon receipt of a notice of bar.

⁵ 2010 (3) SA 81 (ECM) at para 13.

except within the initial period allowed for the filing of a plea. Such construction of rule 23(1), in my view, would defeat the purpose to be served by the process of excepting to a pleading.”⁶

12. This division has followed the same approach as that followed by Goosen J and has criticised the judgment in *McNally* for the same reasons. In *Tuffsan Investments 1088 (Pty) Ltd v Sethole and Another*,⁷ Van der Westhuizen AJ held as follows:

“I am in respectful agreement with the findings in this regard of *Felix* supra and *Landmark Mthatha* 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. Such party would have difficulty in pleading to vague and embarrassing allegations. It is trite that the very purpose of pleadings is to crystallise the issues in dispute.

It follows that the defendants were entitled to serve the notice in terms of rule 23(1) within the period allotted in the notice of bar.”

13. The judgment of *Kramer Weihmann and Joubert Inc v South African Commercial Catering and Allied Workers Union*⁸ handed down in the Free State High Court is the most closely related to the present case from a factual point of view. The plaintiffs served a notice of bar on the defendants and the defendants responded by serving a notice in terms of Rule 23(1) within the allotted five-day period. The plaintiffs ignored the Rule 23(1) notice and proceeded to apply for default judgment. The Court held that a party faced with a notice of bar may file any relevant pleading in response

⁶ At paras 14 to 18

⁷ 2016 JDR 1425 (GP); [2016] SAGPPHC 653 (4 August 2016)

⁸ [2012] SAFSHC 152 (16 August 2012)

thereto. The Court held that the defendants had filed the rule 23(1) notice within the period stipulated in the notice of bar and that the defendant had therefore filed a relevant pleading before the expiration of the period stipulated in the notice of bar. It follows logically said the Court *“that where the respondent in response to a notice of bar delivers a rule 23(1) notice he has taken the next procedural step in the matter and has thus complied with the court rules.”*⁹

14. As Adv McKenzie, counsel for the defendants, correctly pointed out in argument before me, *McNally* was for a long time the lone judgment which held that a notice of intention to except in terms of Rule 23(1) did not constitute a valid response to a notice of bar.
15. This was until *Tracey Hill N. O. and another v Mark Brown*,¹⁰ a judgment handed down by the Western Cape High Court on 6 July 2020 after the launch of the present application. Relying on *McNally*, the Court in *Tracey Hill*, held that if a defendant is to avoid being barred pursuant to a notice in terms of Rule 26, he or she must file a pleading, that is, a plea or an exception. The Court held that a Rule 23(1) notice which is merely a precursor to an exception does not constitute a proper response to a notice of bar.¹¹

⁹ At para 9.

¹⁰ [2020] ZAWCHC 61 (3 July 2020)

¹¹ A para 8.

16. Curiously, the Court in *Tracey Hill* made no reference to the judgments in *Landmark Mthatha*; *Steve's Wrought Iron Works*; *Tuffsan Investments* or *Kramer Weihmann*, all of which ruled that a notice in terms of Rule 23(1) constitutes a valid response to a notice of bar. Moreover, as set out above, the judgments in *Steve's Wrought Iron Works* and *Tuffsan Investments*, were highly critical of the reasoning in *McNally*.
17. In addition to *McNally* and *Tracey Hill*, the plaintiffs sought to rely on the judgment of *De Bruyn v Mile Inv 307 (Pty) Ltd and Others*¹² in support of their contention that the February notice filed by the defendants did not constitute a valid response to the notice of bar. The judgment of *De Bruyn*, did not, however, consider the question of whether the delivery of a Rule 23(1) notice had the effect of interrupting a notice of bar. The Court in *De Bruyn* was called upon to determine the validity of an exception in circumstances in which the exception had been delivered out of time following the delivery of the Rule 23(1) notice.
18. Ultimately, I am bound by the judgment in *Tuffsan Investments* which is a judgment of this division unless I am satisfied that it is wrong. I am not. On the contrary, the judgment in *Tuffsan* accords with the weight of authority on this point which is that a notice in terms of Rule 23(1) constitutes a pleading or at least the next procedural step in the proceedings and is therefore a valid response to a notice of bar. I agree with Goosen J in

¹² [2017] SAGPPHC 286 (5 May 2017)

Steve's Wrought Iron Works that the alternative construction of Rule 23(1) endorsed by *McNally* would defeat the purpose to be served by the process of excepting to a pleading. As such it is a construction which favours form over substance. It bears emphasis that the rules of court exist to facilitate the ventilation of disputes and not to make substantive law. As was held in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd*¹³

"The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters Pty Ltd v Levine* **1988 (4) SA 460** (W) at 463B -E and authority there cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts not the courts for the rules (see *Standard bank of South Africa v Dawood* **2012 (6) SA 151 (WCC)** para 12)." ¹⁴


19. For all of the above reasons, I find that the February notice delivered by the defendants on 18 February 2020 constituted a valid response to the plaintiffs' notice of bar.
20. It follows that the plaintiffs were not entitled to apply for default judgment in the circumstances and their application for default judgment accordingly falls to be set aside as an irregular step.
21. In the circumstances I make the following order:

¹³ 2014 (2) SA 119 (WCC).

¹⁴ At para 11.

Order

1. The application succeeds with costs.
2. The plaintiffs' application for default judgment delivered on 25 March 2020 is declared an irregular step and set aside.
3. The plaintiffs shall pay the costs of the application.

A handwritten signature in black ink, consisting of a stylized 'B' followed by a wavy line, positioned above a horizontal line.

BARNES AJ

Appearances:

For the Defendants: Adv A C McKenzie instructed by Webber Wentzel

For the Plaintiffs: Attorney J Dorning of Millers Attorneys