

# REPORTABLE

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

Case No: 20406/11

Before the Hon Mr Justice NJ Yekiso

In the matter between:

**SPENCER LEONARD JAMES McNALLY N.O.**  
**PETRO HEYDENRYCH N.O.**

(in their capacities as trustees of the Belulu Trust,  
Registration number IT4078/97)

1<sup>st</sup> Plaintiff/Applicant  
2<sup>nd</sup> Plaintiff/Applicant

**LERIX INVESTMENTS (PTY) LTD**

3<sup>rd</sup> Plaintiff/Applicant

**SPENCER LEONARD JAMES McNALLY N.O.**  
**KARIN JENNIFER McNALLY N.O.**  
**ANTHONY GEORGE CROOKES N.O.**

(in their capacities as trustees for the time being  
of the Shanklin Trust, Registration number IT1833/2007)

4<sup>th</sup> Plaintiff/Applicant  
5<sup>th</sup> Plaintiff/Applicant  
6<sup>th</sup> Plaintiff/Applicant

and

**SALVATORE CODRON**

1<sup>st</sup> Defendant/Respondent

**SALVATORE CODRON N.O.**  
**CLAUDIA CODRON N.O.**  
**RONEN MAZOR N.O.**

(in their capacities as the remaining trustees of the  
Belulu Trust, Registration number IT4078/97)

2<sup>nd</sup> Defendant/Respondent  
3<sup>rd</sup> Defendant/Respondent  
4<sup>th</sup> Defendant

**SALVATORE CODRON N.O.**  
**RONEN MAZOR N.O.**  
**BRIAN NEVILLE GAMSU N.O.**

(in their capacities as trustees of the Party Trust,  
Registration number IT3574/2007)

5<sup>th</sup> Defendant/Respondent  
6<sup>th</sup> Defendant  
7<sup>th</sup> Defendant

**INVESTEC BANK LIMITED**

8<sup>th</sup> Defendant

**THE MASTER OF THE HIGH COURT**

9<sup>th</sup> Defendant

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Coram: **NJ Yekiso, J**

Judgment by: **NJ Yekiso, J**

Counsel for Applicants: **Adv D M Davis**

Attorneys for Applicants: **Korbers Inc**

Counsel for Respondents:  
Attorneys for Respondent:

**Adv R Patrick**  
Maurice Phillips Wisenberg

Date of Hearing:

**20 February 2012**

Date of Judgment:

**9 March 2012**

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Coram: **N J Yekiso, J**

Heard: **20 February 2012**

Delivered: **9 March 2012**

Summary:

Notice of Bar : Taking “a further step in the proceedings’ after delivery of a notice of bar – the filing of a notice of intention to except to plaintiffs’ particulars of claim not a proper response to delivery of a notice of bar.

- The ‘taking of a further step’ after delivery of a notice of bar ought to be ‘some act which advances the proceedings one stage nearer completion’.
- Notice of intention to except not a pleading to constitute a proper response to delivery of notice of bar.
- The filing of a ‘notice of intention to except to plaintiffs’ particulars of claim is merely to make full use of the remedies which the Rules provide for an attack on a defective pleading – does not constitute the taking of a further step within the meaning of Rule 30(2).
- Proposition that an ‘exception’ is a pleading re-affirmed.



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**JUDGMENT DELIVERED ON 9 MARCH 2012**

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**YEKISO, J**

[1] This is an application to set aside as an irregular step the service of a notice of intention to except to plaintiff's particulars of claim after delivery of a notice of bar in terms of rule 26 of the Uniform Rules of Court. Instead of responding to the notice of bar by way of a plea (with or without a counterclaim), an exception or an application to strike out, the defendants, in response to the notice of bar served, delivered a notice of intention to except. The notice of intention to except was served during the bar period.

[2] The plaintiffs object to the service of the defendants' notice of intention to except during the bar period. The plaintiffs, whilst conceding that an exception may be delivered during the bar period, contend that the filing and service of a notice of intention to except during the bar period is an irregular step susceptible to be set aside as an irregular step in terms of rule 30 of the Uniform Rules. It is contended on behalf of plaintiffs that such a notice ought to have been filed and served within a period of twenty days required to file a plea (with or without a counterclaim), an exception or an application to strike out after the giving notice of an entry of appearance to defend.

[3] The chronology of service of subsequent processes after service of a combined summons on the defendants is as follows:

[3.1.] The plaintiff's summons and particulars of claim were served on the defendants on 2 October 2011. The defendants delivered their notice of intention to defend on 19 October 2011.

[3.2.] Service of the defendant's notice of intention to defend was followed by an application for summary judgment against first defendant only, which was served on 25 October 2011.

[3.3.] On 4 November 2011, and after service of an application for summary judgment, the defendants served a notice in terms of rules 35(12) and (14) requesting the production of certain documents. Plaintiffs responded to the notice so served on 7 November 2011.

[3.4.] On 9 November 2011 security was furnished for plaintiffs' claims in terms of rule 32(3)(a) of the Uniform Rules. On 10 November 2011 the application for summary judgment against the first defendant was withdrawn by agreement between the parties.

[3.5.] The 20 day period for the delivery of the defendants' plea expired on 8 December 2011. On 9 December 2011 plaintiffs served a notice of bar on the defendants in terms of rule 26 of the Uniform Rules.

[4] On 13 December 2011 the defendant served a notice of intention to except to plaintiffs' particulars of claim. In that notice the defendants advised of their notice of intention to file an exception to the plaintiffs' particulars of claim on the basis that the particulars failed to disclose a cause of action, alternatively, that the particulars were vague and embarrassing. The plaintiffs were called upon to remove the cause of complaint within a period of 15 days as contemplated in rule 23(1) of the Uniform Rules.

[5] In response to the notice referred to in the preceding paragraph, plaintiffs delivered a notice in terms of rule 30(2)(b) of the Uniform Rules, complaining that the notice of intention to except was an irregular step and required the defendants to remove the cause of complaint within the prescribed time. The defendants did not respond to plaintiffs' notice whereupon plaintiff served a notice of the present application on the defendants on 12 January 2012. The application was enrolled for hearing in the Motion Court on 2 February 2012. On 2 February 2012 the application served before Blignault J in Third Division. By agreement between the parties, and with the leave of court, the matter was postponed for hearing on the semi-urgent roll on 20 February 2012. The matter was argued before me on Monday, 20 February 2012. After hearing argument by the parties I reserved judgment and indicated to the parties that judgment in the matter will be delivered in due course. In the paragraphs which follow, is my judgment in the matter.

#### **THE PLAINTIFFS' COMPLAINT**

[6] As has already been pointed out, the plaintiffs' complaint is that the defendants' notice of intention to except was out of time in that the notice was delivered after expiry of a period of twenty days within which the defendants were required to file a plea (with or without a counterclaim), an exception or application to strike out as provided in rules 17(1) and 22(1) of the Uniform Rules. Over and above that, the plaintiffs complain that the defendants' complaints in the notice are not valid or proper subjects to be dealt with by way of an exception and that the defendants have adopted a wrong procedure by raising their complaints by way of an exception.



**THE PARTIES' CONTENTION**

[7] Whilst it is contended on behalf of plaintiffs that it is impermissible to file a notice of intention to except during the bar period after delivery of a notice of bar, it is contended on behalf of the defendants that there is nothing irregular in the step taken by the defendants. It is contended on behalf of the defendants that all that is required of a defendant after delivery of a notice of bar is to take the next procedural step in the proceedings and that the filing of a notice of intention to except is such a next procedural step in the proceedings, relying on *Landmark Mthatha v King Sabata Dalindyebo Municipality* 2010 (3) SA 81 ECM among other authorities relied on.

[8] The issue in *Landmark Mthatha*, supra, was whether it is competent of plaintiffs to apply for judgment in default of plea in circumstances where the defendants, in response to a delivery of a notice of bar, filed a notice of intention to except to plaintiffs' particulars of claim during the bar period and, subsequent to that notice, an exception. Thus a notice of intention to except was filed during the bar period but an exception, subsequent to such notice, was filed outside the bar period. The delivery of a notice to except during the bar period was not an issue for determination. The issue for determination in *Landmark Mthatha* was whether it was competent of a plaintiff to apply for judgment in default of plea in circumstances where an exception, filed outside the bar period, was argued and, after hearing argument, the exception was dismissed. It was thus contended on behalf of plaintiffs that when a defendant has excepted unsuccessfully in circumstances where the exception was delivered in response to a notice of bar, it is not required of a plaintiff to deliver a fresh notice of bar as there is no

provision for such a procedure in the Uniform Rules. Under these circumstances, so it was contended on behalf of plaintiffs, the plaintiffs were entitled to apply for judgment in default of plea as the defendants remained barred as a consequence of the notice of bar initially served on them. Put differently, the plaintiff's contention was that the filing of an exception, which was subsequently dismissed after argument, did not render the notice of bar inoperative. Thus, the plaintiffs' contention boils down thereto that the filing of an exception after delivery of a notice of bar, in circumstances where the exception was argued and dismissed, did not render the initial notice of bar inoperative.

[9] In dismissing the application, Griffiths AJ observed that where a defendant, in response to a notice of bar, delivers an exception, such a defendant has taken the next procedural step in the matter and has thus complied with the demand made in the notice of bar. Griffiths AJ held the view that once the defendant had complied with a notice of bar by delivering an exception, the notice of bar was no longer of any force or value and such a notice of bar had an historical value only. Griffiths AJ went further to observe that it has been held that an exception is in fact a pleading and thus falls squarely within the wording of rule 26 of the Uniform Rules. I am perfectly in agreement with these observations provided, of course, the exception is filed during the bar period.

[10] As I have already pointed out, the issue in *Landmark Mthatha*, supra, did not involve a pertinent consideration of whether a notice of intention to except, as opposed to an exception, can be delivered during the bar period. Thus, the issue turned on the question whether a notice of bar remained operative, after an exception filed in response to such notice of bar, is dismissed.

**PROCEDURE IN DELIVERY OF AN EXCEPTION**

[11] In terms of rule 17(1) of the Uniform Rules, a combined summons must call upon the defendant to deliver a plea (with or without a counterclaim), an exception or an application to strike out within twenty (20) days after filing a notice of intention to defend. In terms of rule 19(1) the defendant, in every civil action, shall be allowed ten (10) days after service of summons on him or her within which to deliver a notice of intention to defend.

[12] On the other hand, rule 22(1) of the Uniform Rules requires a defendant to deliver a plea (with or without counterclaim), or an exception with or without an application to strike out, within twenty (20) days after delivery of a notice of intention to defend in respect of a combined summons.

[13] Further, rule 23(1) provides that where a pleading is vague and embarrassing or fails to disclose a cause of action, the opposing party may, within the time period allowed to deliver any subsequent pleading, deliver an exception, with the proviso that in an instance where a party intends to take an exception on the grounds that a pleading is vague and embarrassing, such a party shall, with the time allowed to file any subsequent pleading, afford the opposing party an opportunity to remove the cause of complaint within fifteen (15) days.

[14] After giving notice of intention to defend, a subsequent pleading is a plea (with or without a counterclaim), an exception or an application to strike out.

**OPTIONS OPEN TO THE DEFENDANT AFTER SERVICE OF SUMMONS**

[15] As has already been pointed out, a combined summons must call upon a defendant to deliver a plea (with or without a counterclaim), an exception or an application to strike out within twenty (20) days after giving notice of intention to defend. The defendant is thus apprised of these options on service of summons. The defendant is apprised of these options before giving notice of intention to defend which he must deliver within ten (10) days of service of summons.

[16] Once the defendant has delivered its entry of appearance to defend, such a defendant will already be aware that it has a period of twenty (20) days within which to either deliver its plea (with or without a counterclaim), an exception or an application to strike out. If the defendant elects to except to the plaintiff's particulars of claim on the basis that the particulars are vague and embarrassing, it has a period of twenty (20) days within which to serve its notice of intention to except to plaintiffs' particulars. In that notice, the plaintiffs have to be afforded a period of fifteen (15) days within which to remove the cause of complaint.

**RULE 26: NOTICE OF BAR**

[17] Because of the discussion which follows, it is necessary to cite in full the provisions of rule 26. Rule 26 of the Uniform Rules provides:

"Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso 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 which 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 delivery of any pleading.” The emphasis is mine.

[18] It will be noted that a failure to deliver a replication or subsequent pleading, as required in terms of rule 25 of the Uniform Rules, will result in an automatic barring of a party failing to deliver a replication or subsequent pleading. But in an instance of any other pleading, such other pleading will have to be delivered within the time stated in the notice or within such further period as may be agreed between the parties. The rule, as it were, calls on the party on whom the notice is served, to deliver a pleading. In the instance of this matter, a process which was delivered, in response to service of a notice of bar, is a notice of intention to except to the plaintiff’s particulars of claim. This then begs the question whether a notice of intention to except is a pleading as contemplated in rule 26 of the Uniform Rules.

#### **NOTICE OF INTENTION TO EXCEPT**

[19] It has been held in authorities such as *Barclays National Bank Ltd v Thompson* 1989 (1) SA 546 (A) at 556-557; *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) and several other authorities that an exception is a pleading and cannot be objected as having been filed out of time unless a notice of bar has been given. Although it has become practice to call on the defendant to deliver a plea in a notice of

bar, what in effect is required of the defendant is to deliver a plea (with or without a counterclaim), an exception or a notice to strike out. The question then is whether a notice of exception falls into the category of the pleadings just referred to or, put differently, whether delivery of a notice of exception is a proper response to delivery of a notice of bar in terms of rule 26 of the Uniform Rules.

[20] During argument I raised a pertinent question with *Mr Patrick*, for the defendants, as to whether a notice of intention to except is a plea or a proper process which may constitute a proper response to the plaintiffs' notice of bar. The best that *Mr Patrick* could say is that 'a notice of intention to except' constitutes the taking of the next procedural step after service of a notice of bar, and being the next procedural step taken, it is competent of a defendant to serve a notice of exception during bar period relying on the observations of Griffiths AJ in *Landmark Mthatha*, supra, at p86E-F. The taking of the next procedural step in my view, would be a step which advances the proceedings one stage nearer to completion. The question that calls for determination, therefore, is whether the delivery of a notice of exception is a further step that advances the proceedings one stage nearer completion.

[21] The criterion of 'a further step in the proceedings' was laid down in *Pettersen v Burnside* 1940 NPD 403 at 406 where it was held that a further step in the proceedings is 'some act which advances the proceedings one stage nearer completion', and this criterion has been applied and followed in several other decisions. [See, amongst others, *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) (SA) 150 (O) at 152E; *Killamey of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D) at 96]

[22] In *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (W) at F-G, Heher J, as he then was, made the following observation:

"A further step in the proceedings is one which advances the proceedings one stage nearer completion and which, objectively viewed, manifests an intention to pursue the cause despite the irregularity. Seen in that light, the filing of a notice of exception, which contains as an alternative an application to set pleadings aside under the provision of Rule 18(2) read with Rule 30, does not constitute the taking of a further step within the meaning of Rule 30(2). Such an excipient is concerned merely to make full use of the remedies which the Rules provide for an attack on a defective pleading." My emphasis

[23] The issue before Heher J, in *Jowell v Bramwell-Jones & Others*, supra, concerned exceptions and procedural objections taken to plaintiff's particulars of claim in an action for damages. What is clear from Heher J's observations is that a further step in the proceedings is the one which advances the proceeding one stage nearer completion; an application to set the pleading aside does not constitute the taking of a further step in the proceedings; and an excipient who intends to except on the basis that the particulars are vague and embarrassing is concerned merely to make full use of remedies which the rules provide for an attack on a defective pleading. Such an exception does not advance the proceeding one stage nearer completion. Those observations are compelling. I say the observations are compelling because they seek to differentiate between further procedural steps that tend to advance the proceedings towards completion and those that do not constitute the taking of further steps but merely provide for an attack on a defective pleading.

[24] In its notice of exception, the defendant gives notice of its intention to except to plaintiffs' particulars of claim on the grounds that the particulars fail to disclose a cause of action, alternatively, that the particulars are vague and embarrassing. The defendants could well have excepted to the plaintiffs' particulars on the grounds that the particulars do not disclose a cause of action and that exception would have been a valid response to the notice of bar delivered on the defendants, but the defendants elected not to do so. The delivery of an exception on the basis that the particulars of claim lack the averments which are necessary to sustain a claim, would have been a regular step because the notice of bar calls for delivery of a pleading. As has already been pointed out in paragraph [19] above, there is authoritative support to the proposition that an exception is a pleading the delivery of which would have constituted a valid response to plaintiffs' notice of bar.

[25] As has already been pointed out, the defendants' notice of intention to except, on the basis of the authorities referred to in paragraph [21] to [22] of this judgment cannot be said to advance these proceedings a stage nearer completion. What the defendants, in effect, want to do is to utilise one of those remedies in the rules that provide an attack on a defective pleading. The notice of intention to except is intended to achieve that objective. It is not an objective that can be achieved by way of a response to a notice of bar. It is a remedy that would have had to be utilised and resorted to within a period of twenty (20) days as provided in rules 17(1) and 22(1) of the Uniform Rules. The notice of intention to except, as taken in the instance of these proceedings, is an irregular step that falls to be set aside.



[26] If the defendants had elected to except to the plaintiffs' particulars of claim on the grounds that the particulars are vague and embarrassing, they would have had to file their notice of exception within a period of twenty (20) days of delivery of a notice of intention to defend as provided in rules 17(1) and 22(1) of the Uniform Rules. It is not competent of a defendant to file a notice of exception contemplated in rule 23(1) during bar period and as a response to a notice of bar. The remarks of Griffiths AJ, which, in my view, were obiter, and which remarks were relied on by *Mr Patrick*, should be understood in the context of the analysis in paragraphs [19] to [23] of this judgment.

[27] The remarks in authorities such as *Felix v Nortier N.O.* 1994 (4) SA 502 (SE) at 506E and *Landmark Mthatha*, supra, that what rule 26 requires is that the party served with a notice of bar take the next procedural step in the matter, dealt with the delivery of an exception, which is a pleading. They are definitely no authority for what is contended for on behalf of the defendants. Those authorities did not deal with a notice of intention to except as is a case in the matter before me.


[28] In the light of the conclusion I arrived at as regards the defendants' notice of intention to except, it is not necessary for me to deal with those grounds of objection relating to the defendants' proposed complaints not being proper subjects of exception proceedings.

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

[29.1.] The first, second, third and the fifth defendants' notice of intention to except to the plaintiffs' particulars of claim, served on the plaintiffs' attorneys of record on 13 December 2011, is set aside as an irregular step as contemplated in rule 30(3) of the Uniform Rules of Court.

[29.2.] The first, second, third and the fifth defendants are ordered to pay plaintiffs' costs, duly taxed or as agreed, jointly and severally, the one paying the other to be absolved.

[29.3.] The plaintiffs' notice of bar served on the defendants on the 9<sup>th</sup> December 2011 shall be deemed to have been served on the date of delivery of this judgment.



Nd Yekiso, J