REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3274/2022

In the matter between:

THE SPAR GROUP LTD	**Applicant**
And	
HARD AS NAILS (PTY) LTD	**First Respondent**
CHRISTOPHER GEORGE MORAGEMOS	**Second Respondent**
GLENN GERICKE	**Third Respondent**

AND	**CASE NO: 3752/2022**
GOOD TO GREAT HARDWARE (PTY) LTD	**First Respondent**
DONWIN CHARLES VAN LOGGERENBERG	**Second Respondent**
GLENN GERICKE	**Third Respondent**

Heard: 23 May 2023

Delivered: 10 August 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 10 August 2023 at 10h00

JUDGMENT – RULE 30(1) APPLICATION

LEKHULENI J

[1] The applicant has issued summons under the above two different case numbers against three distinct defendants in each case. Those defendants are the respondents ("the respondents") in this matter. In both matters, the applicant brought an application in terms of Rule 30(1) of the Uniform Rules to set aside certain alleged irregular steps taken by the respondents against the applicant's particulars of claim.

[2] In both matters, the applicant delivered a notice of bar in terms of rule 26, giving the respondents five days to deliver their pleas. Instead of responding to the notice of bar by way of a plea, an exception, or an application to strike out, the respondents delivered a notice entitled 'Notice of Exception' together with a 'Special Plea and a Plea Over' a day before the expiry of the *dies* of the notice of bar. The applicant objected to the service of the respondent's notices of exception and stated that the delivery of the respondents' notices of exception in terms of Rule 23(1)(a) during the bar period is an irregular step that is susceptible to be set aside in terms of Rule 30(1) of the Uniform Rules.

Background Facts

[3] The applicant sued the respondents under the above case numbers for goods supplied at the respondents' special instance and request. In both actions, the first and the third respondents entered an appearance to defend the applicant's claims. These two actions are identical in substance save for the parties.

[4] Both actions have a similar history or chronology of events. For convenience, I will refer to case 3274/2022 as the first case and to 3752/2022 as the second case. In both cases, the applicant seeks an order in terms of Rule 30(1) of the Uniform Rules of Court to set aside a notice of exception delivered by the first and the third respondents against the applicant's summons.

[5] Regarding the first case (Case no: 3274/2022), the summons was served upon the third respondent on April 2022. On 5 May 2022, the third respondent entered an appearance to defend. On 17 August 2022, the applicant delivered a notice of bar on the third respondent giving the latter five days to deliver his plea. The third respondent had to deliver his plea by 25 August 2022 in terms of the rules of court. On 25 August 2022, the third respondent delivered a notice headed 'Notice of Exception' and a document headed 'First Defendant's Special Plea and Plea Over.'

[6] The basis of the third respondent’s exception was that the applicant’s summons does not set out a cause of action, is vague, embarrassing, and unintelligible because the summons does not set out when and in which year the applicant supplied the third respondent with goods. The third respondent also averred in his notice of exception that it was unclear whether the applicant's claim had prescribed. On 6 September 2022, the applicant delivered a notice in terms of Rule 30(2)(b) of the Uniform Rules advising the third respondent to remove a cause of complaint.

[7] In the said notice, the applicant advised the third respondent that the notice of exception served upon the applicant constitutes an irregular step in that it purported to raise an exception on behalf of the First respondent, who has not entered an appearance to defend. The applicant also drew the third respondent's attention to the fact that the said notice of exception claimed that the applicant's particulars of claim were vague and embarrassing, yet, the notice was accompanied by and delivered with a document purporting to be a plea. The applicant afforded the third respondent an opportunity to remove the cause of complaint within ten (10) days, failing which the applicant advised the third respondent that it would apply to the court to have the notice of exception set aside.

[8] On 19 September 2022, the third respondent delivered a notice to amend its special plea in response to the applicant's notice in terms of Rule 30(2)(b). The third respondent's notice to amend did not make any reference whatsoever to the notice of exception nor addressed the applicant's concerns raised in the Rule 30(2)(b) notice.

[9] Belatedly, the first respondent delivered a notice of intention to defend on the same day, 19 September 2022.

[10] On 13 October 2022, the applicant delivered its notice to set aside the irregular step in terms of Rule 30(1) against the third respondent's notice of exception. The third respondent opposed the application.

[12] The applicant subsequently sent a notice of bar to the first respondent on 1 December 2022. On 13 December 2022, the first respondent as well delivered a 'Notice of Exception and a Plea', the contents of which were in similar terms to that filed by the third respondent. On 22 February 2023, the applicant delivered a notice to set aside the first respondent's notice of exception and plea. The first respondent opposed the application. On 23 April 2023, the two applications, namely, the applicant's Rule 30 application instituted against the first and the third respondent, were by agreement consolidated by order of this court.

[13] It is these two applications, that is, the Rule 30(1) application launched against the first and third respondents' notice of exception that this court is enjoined to consider in the first action.

[14] Concerning the second action, (case No: 3752/2022), the chronology of events is similar to the first action discussed above, albeit, with different dates. To avoid being repetitious and long-winded, I will not repeat the chronology of the second case. I must, however, mention that in both cases, the applicant seeks an order in terms of Rule 30(1) setting aside the notice of exceptions delivered by the first and the third respondents.

[15] The applicant contends that the notice of exception in both actions is irregular in several respects. Firstly, the applicant avers that the notice of exception purported

to be a notice in terms of Rule 23(1)(a) of the Uniform Rules, which is not a pleading and therefore does not qualify as a pleading delivered in the timeframe afforded by the notice of bar in terms of Rule 26 of the rules of court. Secondly, the applicant asserts that the said document concluded with the phrase *'Please take notice further that the plaintiff excepts to the plaintiff's particulars of claim on the basis that they lack averments necessary to sustain a cause of action (my underling)*.' Thirdly, in so far as the said document purported to record an actual exception, based on the particulars of claim being vague and embarrassing, the applicant asseverated that it amounts to an exception that was not preceded by a notice in terms of Rule 23(1)(a) as required by the rules. Fourthly, the applicant asserts that the document was served simultaneously with a document purporting to be a plea by the respondents, when an exception is, by definition, a document served when a defendant is unable to plead.

[16] The applicant averred that the simultaneous delivery of a plea rendered the purported exception meaningless and irregular on that basis. The applicant further averred that the document is woefully irregular and requires to be struck out.

[17] At the hearing of this application, Mr Acton informed the court that the two applications against the first and third respondents in both actions had been consolidated by agreement on 20 April 2023. Counsel argued that the current complaint by the applicant pertains to the notice of exception to which the respondents had not amended. This document, Counsel argued, was delivered five days after the notice of bar was delivered to the respondents. The notice of exception refers to the respondent; however, it does not explicitly indicate which respondent affords the applicant time to remove the cause of complaint. When the notice of exception was filed, it was the third respondent only who had entered an appearance to defend. Counsel further submitted that, on the face of it, this notice is a precursor to an exception based on the allegations that the applicant's summons is vague and embarrassing.

[18] Mr Acton submitted that what was delivered on the last day after a notice of bar was served was a precursor to an exception. Counsel further contended that a notice of bar in terms of rule 26 allows only one thing, the delivery of a pleading in the five days set out in the Rule 26 notice. In Counsel’s view, a Rule 23(1)(a) notice is not such

a pleading. What is contemplated in Rule 26 is a plea or an exception, not a notice predicting an exception in the future. Thus, Counsel submitted that the respondents have not complied with the notice of bar because they have not delivered a pleading within the stipulated timeframe.

[19] In expanding his argument, Mr Acton submitted that the applicant would be prejudiced if the respondents' notice of exception in terms of Rule 23(1)(a) is not struck out because the applicant must respond to it and cannot simply ignore notices. He implored the court to grant an order setting the said notices aside.

[20] Mr Petersen, who appeared on behalf of the first and third respondents, confirmed the chronology of events for both actions as set out above. He also conceded that the respondents' Rule 23(1)(a) notice delivered to the applicant is a precursor to an exception. Counsel also argued that a Rule 23(1)(a) notice affording the applicant an opportunity to remove an alleged cause of complaint is simply that, a notice. It claims no relief.

[21] Relying on the judgment of this court in *Tracy Hill N.O. & Another v Mark Brown* ZAWCHC/2020 (26 June 2020), Counsel argued that the Rule 23(1)(a) notice that the respondents submitted did not call for adjudication. If the applicant had removed the cause of complaint, the notice would have served its purpose and received no further attention. Counsel further argued that if the applicant does not remove the alleged cause of complaint, but the respondents decide not to follow up their notice with an exception, the notice likewise receives no further attention. It is the exception and not the preceding notice in terms of Rule 23(1)(a) that the court adjudicates.

[22] To the extent that the respondents did not pursue the exception, Mr Petersen argued that should be the end and the court should not adjudicate on this notice. More so, the contention proceeded; the notice did not ask for relief or a court's intervention. It fell away when the respondents failed to file their exceptions. Mr Petersen submitted that Rule 30(1) applies to irregularities of form only and not to matters of substance. Counsel further submitted that there is no allegation of prejudice that the applicant pleaded in this matter. To this end, he implored the court to dismiss the applicant's application and find in favour of the respondents.

Relevant Legal Principles and Discussion

[23] An exception is a legal objection to the opponents' pleading. What defines an exception is a prayer in which the court is asked to set aside the document to which the exception is taken. Like a plea, a properly drawn exception concludes with a prayer for relief. *Marais v Steyn & Ander* 1975 (3) SA 479 (T). An exception provides a helpful mechanism for weeding out cases without legal merit. *Telematrix (Pty) Ltd t/a Matrix Vehicle tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465H. A defendant who responds to a notice of bar by delivering an exception is regarded to have complied with the demand for plea made in the notice of bar in terms of Rule 26. *Felix v Nortier NO* (2) 1994 (4) SA 502 (SE) at 506E. In other words, an exception is a proper response to a notice of bar.

[24] However, it is notable that the law is not that settled concerning a notice of exception (notice to remove the cause of complaint), in terms of Rule 23(1)(a) notice. There are differing views on whether such a notice can be regarded as a proper response to a notice of bar. Two schools of thought hold different opinions on whether a Rule 23(1)(a) notice of exception which is a precursor to an exception, is a proper response to a notice of bar in Rule 26 of the Uniform Rules.

[25] The first school of thought believes that a notice of exception in terms of Rule 23(1)(a) is not a pleading and that if a defendant is to avoid being barred pursuant to a notice of bar in terms of Rule 26, he must file a pleading, that is, a plea (with or without a counterclaim) or an exception. This school of thought also believes that a Rule 23(1)(a) notice which is merely a precursor to an exception, is not a proper response to a notice of bar. See *Tracy Hill & Another v Mark Brown, para 8; McNelly NO Coldron* (Unreported, Case No: 20406/11 (9 March 2012); *Van den Heever N.O. v Potgieter* 2022 (6) SA 315 (FB) para 20.

[26] While the second school of thought believes that a notice of exception in terms of Rule 23(1)(a) is a proper response to a notice of bar. For instance, in *Steve's Wrought Iron Works and Others v Nelson Mandela Metro* 2020 (3) SA 535 (ECP), the plaintiffs instituted an action against the defendant. Summons was issued on 25 February 2019. On 3 May 2019, the plaintiffs delivered a notice of bar under Rule 26

of the Uniform Rules requiring the defendant to file its plea within five days. On 6 May 2019, the defendant filed a Rule 23(1)(a) notice asserting that the plaintiffs' particulars were vague and embarrassing, giving them the stipulated 15 days to remove the cause of complaint. When the plaintiffs failed to respond to this notice, the defendant, on 30 May 2019, filed its exception to the plaintiffs' particulars. The plaintiffs objected to the exception on the ground that it was late and therefore fell to be struck out.

[27] The court rejected the plaintiffs' objection and reasoned as follows:

> 'In the case of all pleadings except a replication or subsequent pleading, the bar occurs only upon lapse of the notice of bar, ie within five days of its receipt. If within the five-day period a pleading which the party is entitled to file, is filed, there is no bar. A notice of exception is a proper response to a notice of bar. The contrary view, viz that the notice of exception [Rule 23(1)(a) notice] is not a pleading and that only the exception itself is a proper response to the notice of bar, would defeat the purpose served by the process of excepting to a pleading. Therefore, the plaintiffs' objection to the defendant's exception had to be rejected.' (My underlining)

[28] Notably, Rule 26 requires a party to file a pleading in response to a notice of bar. Pleadings are written statements of the parties served by each party in turn upon the other, which must set out, in summary form, the material facts each party relies on in support of his claim or defence, as the case may be. In *Security v Slabbert* 2010 2 AII SA 474 (SCA) at para 11, Mhlantla JA, stated that the purpose of pleadings is to define the issues for the other party and the court. A party must allege in the pleadings the material facts upon which it relies.

[29] A notice in terms of Rule 23(1)(a) does not define the case of the parties in terms of the legal principle set out above. In my opinion, the views expressed by the first school of thought that Rule 23(1)(a) is not a pleading is preferable and spot on. It is preferable because a notice of exception in terms of Rule 23(1)(a), does not have a prayer or call for adjudication. It does not inform one's opponent of what case he has to meet. Rule 23(1)(a) notice does not define the issues to position the other side to determine what evidence it requires to pursue its case at the trial.

[30] Simply put, Rule 23(1)(a) notice is only intended to draw the opposing party's attention to the defect or incompleteness in the manner in which the pleading is set out, which results in embarrassment to the defendant or the plaintiff as the case may be. As a result of that defect, the notice demands that the defect be removed within a specified time. Furthermore, if such a notice is considered a proper response to a notice of bar in rule 26, it would vitiate the time period set out in the notice of bar in that the party serving the notice of bar would have to comply with the time period (15 days) set out in the Rule 23(1)(a) notice as opposed to enforcing the notice of bar.

[31] Therefore, I am satisfied that a notice in Rule 23(1)(a) is not a pleading and cannot serve as an answer to a notice of bar in terms of rule 26 of the Uniform Rules. I share the views expressed by the first school of thought in this division that if a defendant is to avoid being barred pursuant to a notice of bar in terms of Rule 26, he must file a pleading, that is, a plea (with or without a counterclaim) or an exception. A notice in terms of Rule 23(1)(a), which is merely a precursor to an exception, is not a proper response to a notice to plead.

What then should be made of the respondents' notice in terms of Rule 23(1)(a)?

[32] Mr Petersen argued that to the extent that the respondent did not pursue the exception, the applicant should have ignored it. In expanding his argument, he relied on the *Tracy Hill N.O. v Brown (supra)* case*,* where the court observed that the notice does not call for adjudication. I do not agree with Counsel's proposition. More so, the facts in this case, are different and distinguishable from the *Tracy Hill N.O. v Brown (supra)* matter. In this case, the respondents delivered the notice of intention to except in terms of Rule 23(1)(a) simultaneously with their Special pleas and Plea over. The notice of exception, the Special Plea and Plea Over, were delivered in response to a notice of bar in terms of Rule 26.

[33] Significantly, the respondents have clearly been able to plead to the applicant's particulars of claim and have done so. It must be stressed that a notice of exception cannot co-exist simultaneously with a plea, as the delivery of a plea defeats the purpose of the exception.

[34] Undoubtedly, the respondent's delivery of the Rule 23(1)(a) notice was an irregular step. In my view, until such time that the respondents' notices in terms of Rule 23(1)(a) are either found to be valid or found to be irregular and set aside, as the applicant is asking the court to do in this application, the applicant is prejudiced. This conclusion is fortified by the fact that the respondents' documents allege that the applicant's cause of action is not apparent from the summon and that the applicant's summons is vague and unintelligible as it does not set out when and in which year the applicant supplied the respondents with goods.

[35] Furthermore, what is concerning is that the respondents' notice of exception is vague and embarrassing in that it purports to be an exception proper that the applicant's summons does not disclose a cause of action. The document also purports to be a Rule 23(1)(a) notice. The document was delivered simultaneously with a document purporting to be a plea. It must be emphasised that an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strike at the root of the cause of action as pleaded and a defendant is embarrassed such that he is unable to plead. In the present matter, the respondents have pleaded to the very summons they alleged are vague and embarrassing.

[36] To this end, I agree with the views expressed by Mr Acton, that in so far as the respondents' notice purported to record an actual exception, on the basis that the applicant's particulars of claim was vague and embarrassing, it amounts to an exception that was not preceded by a notice in terms of Rule 23(1)(a) as required by the rules. In my view, the notice of exception filed was an irregular step and there are no sufficient reasons provided why it should not be strike out.

[37] The argument proffered by Mr Petersen that the applicant should have just ignored this notice is erroneous and unsustainable. The respondents cannot be allowed to file notices and expect the applicant to ignore them. It is for the court to determine if a step taken by the parties is irregular or not. The applicant, as it is with other litigants, has a responsibility to respect and honour the court rules. In these circumstances, the filing of Rule 23(1)(a) was irregular. For certainty, the irregularity of the respondents' Rule 23(1)(a) notice is confirmed by this court and must be set aside in both cases.

[38] In the circumstances, I make the following order:

38.1 The documents headed Notice of Exception delivered in both case 3274/2022, and case 3752/2022, are set aside in their entirety as an irregular step.
38.2 The first and the third respondents are ordered to pay applicant's costs of this application jointly and severally.

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LEKHULENI JD
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Acton
Instructed by Bosse and Associates

For the Respondent: Adv. Petersen
Brink and Thomas Inc