REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***11 November 2021*** Signature: _____

CASE NO: 25119/2019

In the matter between:

EOH MTHOMBO (PTY) LIMITED Applicant/Defendant

And

BUZZ TRADING 236 (PTY) LIMITED t/a BUZZ MOBILE Respondent/Plaintiff

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JUDGMENT

Nichols AJ

Introduction

[1] This is an application in terms of rule 30 in which the applicant, EOH Mthombo (Pty) Limited, seeks an order setting aside in its entirety, as an irregular step, a notice of bar which was served upon it by the respondent, Buzz Trading 236 (Pty) Limited t/a Buzz Mobile. The respondent is the plaintiff in the main action instituted against the applicant as the defendant. For ease of reference I shall refer to the parties as the plaintiff and the defendant respectively.

[2] The defendant also seeks an order that the costs of this application be paid by the plaintiff's attorneys *de bonis propriis* on the scale as between attorney and own client, alternatively, on the party and party scale, further alternatively, that the plaintiff pay the costs of this application on the scale as between attorney and own client, alternatively, on the party and party scale.

[3] The notice of bar that is the subject of this application is dated 2 September 2020 and was delivered the same day. It calls upon the defendant to deliver a plea within five days of receipt, notwithstanding the defendant having delivered an exception to the plaintiff's particulars claim on 12 September 2019, and such exception remaining pending between the parties.

The common cause and factual background

[4] The history of the litigation between the parties in the main action forms the factual background to this application and is as follows:

(a) The plaintiff instituted action against the defendant during July 2019 by causing a combined summons to be served upon it. The defendant entered an appearance to defend on 7 August 2019.

(b) On 6 September 2019, the plaintiff delivered a notice of bar (the first notice of bar) to the defendant. This notice required the defendant '*to deliver its plea, within 5 (five) days*' of receipt of the notice.

(c) Within five days and on 12 September 2019, the defendant delivered a notice of exception to the plaintiff. The notice of exception was to the effect that the plaintiff's particulars of claim lacked averments necessary to sustain a cause of action, alternatively was bad in law.

(d) The plaintiff's attorneys then enrolled the opposed exception for hearing upon the unopposed motion court roll for 2 September 2020. Following on from correspondence exchanged between the parties' representatives regarding the incorrect enrolment of the opposed exception, it was eventually removed from the unopposed motion court roll on 1 September 2020. The defendant's attorneys had pointed out, inter alia, that it is the practice

in this high court division for exceptions to be enrolled and argued on the opposed motion court roll not the unopposed motion court roll.

(e) To date, the exception has not been enrolled on the opposed roll and it remains pending between the parties.

(f) It is against this factual background that the plaintiff delivered the notice of bar dated 2 September 2020 (the second notice of bar) to the defendant.

The issue for determination

[5] The issue which requires determination in this application is the regularity of the second notice of bar.

The applicable law and argument

[6] The defendant contends that the delivery of the second notice of bar constitutes an irregular step in circumstances where the defendant has already filed a pleading in the form of an exception to the particulars of claim and which exception has not been finalized and was extant at the time of the delivery of the second notice of bar.

[7] It is trite that an exception constitutes a pleading which may be delivered in response to a particulars of claim and more importantly when called upon to deliver a pleading in terms of rule 26[1]. The first notice of bar is inarguably a notice in terms of rule 26, requiring the defendant to deliver a pleading or take the next procedural step in the proceedings, within five days of the receipt of the notice, regardless of the fact that the first notice of bar only calls upon the defendant to deliver a plea.

[8] Rule 22 of the Uniform Rules of Court provides as follows:

'Where a defendant has delivered a notice of intention to defend, he shall …. 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 an application to strike out'

[1] *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and Others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others* 2010 (3) SA 81 (ECM) para 12 and 13; *Hill N.O. v Brown* (3069/20) [2020] ZAWCHC 61 (3 July 2020) para 5; *Tyulu & others v Southern Insurance Association Ltd* 1974 (3) SA 727 (E) at 729B-D; *Icebreakers No.83 (Pty) Ltd v Medi Cross Health Care Group (Pty) Ltd* [2011] ZAKZDHC 15; 2011 (5) SA 130 (KZD) para 2.

[9] Rule 26 of the Uniform Rules of Court provides as follows:
'*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.'*

[10] Prior to instituting this application, the defendant delivered a notice in terms of rule 30 to the plaintiff on 7 September 2020. This notice informed the plaintiff that the second notice of bar constituted an irregular step and it called upon it to remove the irregular step within ten days. This notice was followed up by correspondence to the plaintiff's attorneys prevailing upon it to withdraw the second of notice of bar in order to avoid the unnecessary costs and delay which an application in terms of rule 30, this application, would of necessity incur.

[11] Further correspondence was exchanged between the parties' representatives in which the plaintiff's attorneys adopted the stance that it could not withdraw the second notice of bar once the five day period specified in the notice has passed; that since the defendant had failed to deliver a plea as required by the second notice of bar, the plaintiff was entitled to seek default judgment. The plaintiff's attorneys indicated that they would stay the lodgment of an application for default judgment provided the defendant instituted and enrolled this application within ten days.

[12] The plaintiff's contentions, as evidenced by the pleadings, are that the defendant's response to the first notice of bar constituted the delivery of a notice of intention to except in terms of rule 23(1) (a), a precursor to the exception. This notice, it argued, afforded the plaintiff the opportunity to, within ten days, either amend the particulars of claim or stand by it and run the risk of an exception. Once the time period for the plaintiff's response had expired, the defendant could except to the amended particulars of claim (if the plaintiff had taken the opportunity to amend the particulars of claim to remove the cause of complaint) or it could except to the particulars of claim (if the plaintiff elected to stand by its pleading). It contended that it was apparent that the plaintiff had elected to stand by it particulars of claim; that the defendant had failed to then deliver an exception as required by rule 23; and that such exception remained outstanding. It is perhaps apposite to note at this point that I could find no objective or factual justification for these contentions and none were advanced on the papers. A plain textual reading of the defendant's notice in terms of rule 23 does not support this argument. I deal more with the wording of this notice later in this judgment.

[13] The plaintiff averred that it was entitled to enroll the opposed exception for argument when the defendant failed to do so. It's representatives concede that such enrolment should have been upon the opposed motion court roll and hence its removal from the unopposed motion court roll for 2 September 2020, albeit that such removal occurred rather belatedly on 1 September 2020. It then argues that it is not obliged to re-enroll the opposed exception and that it was entitled to instead elect to deliver the second notice of bar requiring the defendant to deliver either a plea or an exception. I pause to mention that no explanation was provided for the reason the plaintiff considered it necessary to enroll what it considered a 'notice of intention to except' for argument as an opposed exception.

[14] Nevertheless, the nub of the plaintiff's argument on the pleadings is that the exception filed by the defendant on 12 September 2019 constituted a notice of intention to except in terms of rule 23(1)(a). Failing the delivery of an actual exception, the plaintiff was entitled to place the defendant on notice to deliver its exception by delivery of the second notice of bar. At the hearing of this matter, Mr. du Plooy, who appeared for the plaintiff, presented a volte-face on this position. He conceded that the notice delivered by the defendant was in fact a notice of exception and not a notice to remove a cause of complaint. He then argued that as the dominus litus in the exception, the onus rested upon the defendant to take steps to enroll the exception for argument. The plaintiff was not obliged to enroll the exception for hearing and if the defendant was dilatory in enrolling the exception for hearing then the plaintiff was perfectly entitled to deliver a notice of bar to the excipient to force it to proceed with the exception to finality.

[15] Apart from the fact that this extraordinary new argument does not appear from the pleadings or the plaintiff's heads of argument, it contradicts the plaintiff's correct averment in the pleadings that it was it entitled to enroll the opposed exception for argument. It ignores the fact that the second notice of bar is at extreme odds with this argument because it makes no mention of the defendant being placed on terms to enroll the exception for hearing. Rather it reads as one would expect of a notice of bar that '*plaintiff herewith requests the defendant to file his plea within 5 (five) days after receipt hereof, failing which the defendant will be ipso facto barred*.' It provides no support for this new argument.

[16] Mr. du Plooy agreed that an exception is a pleading and that the delivery of an exception is a valid response to a notice of bar. In *Hill N.O. v Brown*[2] Rogers J observed that:

'*like a plea, a properly drawn exception concludes with a prayer for relief… typically – in the case of an exception to particulars of claim – a prayer that the exception be upheld with costs and that the particulars of claim be set aside.*'[3]

[17] The plaintiff's opposition to the application on the pleadings commences from the flawed premise that the rule 23 notice delivered by the defendant was a notice in terms of rule 23(1) (a), which is a precursor to an exception, affording the plaintiff an opportunity to remove the alleged cause of complaint. Although it has been conceded that the notice filed by the defendant is in fact a notice to except, I am of the view that it is still necessary to quickly dispose of this argument because there is no reasonable basis upon which the plaintiff could have formed this view. The wording of this notice is quite clear and unambiguous.

[18] For ease of reference, the relevant portions of this notice are reproduced below. Firstly and in the tramlines, the notice is headed '*NOTICE OF EXCEPTION.'* The first paragraph reads:

'KINDLY TAKE NOTICE THAT the excipient hereby excepts to the respondent's particulars of claim dated 15 July 2019 as lacking averments necessary to sustain a cause of action, alternatively, as being bad in law.'

The succeeding paragraphs set out the grounds of the exceptions contended for by the defendant. The notice concludes with a prayer that reads:

'WHEREFORE the defendant prays that:

1. the exception be upheld with costs;

2. the particulars of claim dated 15 July 2019 be struck out;

3. further and/or alternative relief.'

It is therefore apparent that the notice complies with the requirements of rule 23 as referred to by Rogers J in *Hill N.O.* and the authorities referred to therein.

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[2] *Hill N.O. v Brown* (3069/20) [2020] ZAWCHC 61 (3 July 2020).

[3] *Hill N.O* at para 4; *Marais v Steyn & 'n ander* 1975 (3) SA 479 (T) at 483A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 552H

[19] Once an exception has been delivered, rule 23(4) contains the express injunction that '*no plea, replication or other pleading over shall be necessary.'* The exchange of further pleadings is not envisaged until the exception has been finalized.[4]

[20] In the absence of the defendant enrolling the exception on the opposed motion court roll, the plaintiff was entitled to do so. The plaintiff acknowledges as much in the pleadings and appears to have adopted this practical approach initially when the exception was enrolled at the plaintiff's instance on the unopposed motion court roll for 2 September 2020. The matter was only removed by notice on 1 September 2020 when the plaintiff's representatives belatedly acknowledged that the exception had been enrolled incorrectly.

[21] At this stage, the parties had filed heads of argument in relation to the opposed exception and were for all intents and purposes in a position to argue the exception once it was enrolled on the opposed motion court roll. The plaintiff inexplicably elected at this stage to deliver the second notice of bar instead of affording the defendant the opportunity to enroll the exception for hearing or doing so itself. The plaintiff further refused to uplift the second notice bar after it was pointed out to the plaintiff's attorneys that the exception had been filed; that the exception was a pleading; and that whilst the exception was extant the defendant was not required to deliver a plea. These were the only relevant and pertinent points that addressed the basis of the plaintiff's refusal to uplift the second notice bar.

[22] The new argument that was raised on behalf of the plaintiff at the hearing of the application was, however, also addressed. In September 2020, the defendant's attorney informed the plaintiff's attorneys that he could secured a date on the opposed roll for the hearing of the exception for November 2020. In order to expedite proceedings, the plaintiff was required to withdraw the second notice of bar, that had been irregularly delivered, and the defendant could then proceed to secure an opposed date for the hearing of the exception.

[23] The plaintiff's attorneys' reasons for declining to agree on this course of action because they believed they could not withdraw the notice of bar once the five days had elapsed is, in my view, unreasonable. The new argument that the second notice of bar was

[4] *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) para 12.

intended to spur the defendant into the action of enrolling the exception for hearing is belied by the plaintiff's refusal to uplift the second notice of bar so that this could be done and I could therefore reject this new argument on this ground alone.

[24] The second notice of bar is also inarguably a notice in terms of rule 26. This rule may only be utilised to compel a party to proceedings to deliver a pleading which that party has failed to deliver within the time laid down in the rules or any extended time allowed.[5] The notice of set down which would be *a fortiori* proof that the exception had been enrolled on the opposed motion court roll cannot by any parity of reasoning be classified as a pleading. Therefore the plaintiff could not invoke rule 26 in the form of the second notice of bar to force the defendant to enroll the exception for hearing as contended by Mr. du Plooy.

Conclusion

[25] In the premises, I am of the view that the second notice of bar was delivered irregularly in circumstances where the exception delivered by the defendant was extant. It is trite that a court has a discretion whether or not to set aside an irregular step.[6] Usually the presence or absence of prejudice is a consideration that decisively determines how the court exercises its discretion in deciding to set aside an irregular step.[7] In the circumstances of this matter, the unnecessary delay to the finalization of the main action and the concomitant costs incurred by the defendant in this application are alone sufficient indications of the prejudice suffered by the defendant such that I should exercise my discretion and set aside the second notice of bar as an irregular step.

Costs of the Application

[26] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.[8]

[27] Mr Roeloffze argued quite strongly for a punitive costs order against the plaintiff's attorneys, *de bonis propriis* on the attorney and own client scale, alternatively, that the

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[5] *Standard Bank of SA Ltd v Van Dyk* (21915/2013) [2016] ZAGPPHC 261; 2016 (5) SA 510 (GP) (29 April 2016) para 5 and 6.

[6] *Hill N.O.* at para 12.

[7] *Hill N.O.* at para 12.

[8] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

plaintiff be ordered to pay costs on an attorney and own client scale. The thrust of his contentions for such an order related to the plaintiff's attorneys intractable stance regarding their views of the merits of the argument that was set out in the pleadings (these were subsequently abandoned at the hearing of the matter); their persistence with the second notice of bar; the unreasonable and unlawful threats of default judgement; the unreasonable and unlawful attempt to impose unilateral conditions on the defendant that were contrary to the uniform rules of court and the incursion of unnecessary costs by the defendant because of the attorneys dogged persistence in the abuse of the rules and procedures of this court.

[28] Mr. du Plooy argued that it was in fact the defendant who was needlessly delaying the finalisation of the main application and causing the parties to waste time and incur costs. The request for costs *de bonis propriis* were considered a bullying tactic when in fact this application could have been avoided if the defendant's attorneys had taken steps to enrol the exception timeously.

[29] In considering the question of whether a punitive costs order was warranted, in *Tjiroze v Appeal Board of the Financial Services Board,*[9] Madlanga J noted the following:

'In Public Protector v South African Reserve Bank Mogoeng CJ noted that "[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process". (Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 8). Although that was in the minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J further noted that "a punitive costs order is justified where the conduct concerned is 'extraordinary' and worthy of a court's rebuke" (para 226). Both judgments referred to Plastic Converters Association of SA, in which the Labour Appeal Court stated:

> *"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium." (Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46."*[10]

[30] Our courts have ordered punitive costs against a party whose conduct is considered an abuse of the process of court.[11] Costs have also been awarded *de bonis propriis* in

[9] [2020] ZACC 18.

[10] *Tjiroze* at para 23.

[11] *Santam Ltd and Others v Bamber* 2005 (5) SA 209 (W) at 212B-C.

circumstances where an attorney's lack of experience or familiarity with the rules is not considered an acceptable excuse for the unnecessary incursion of costs and waste of time.[12]

[31] The plaintiff's unreasonable refusal to uplift the second notice of bar necessitated this application. This is compounded by the fact that the second notice of bar constituted an irregular step. No satisfactory explanation has been provided for the decision to deliver the second notice of bar the day after the exception had been removed from the unopposed roll or why the plaintiff thereafter refused to uplift it. In the circumstances of this matter, I consider cumulative effect of the actions and responses by the plaintiff, through its attorneys to constitute an abuse of the process of court which warrants the courts opprobrium with a punitive costs order.

Order

[32] In the circumstances I make the following order:

(a) The plaintiff's notice of bar, purportedly in terms of rule 26, dated 2 September 2020 is declared to be an irregular step and is set aside in its entirety.
(b) The plaintiff must pay the defendant's costs in the rule 30 application on an attorney and client scale.

T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 11 November 2021.

[12] *South African Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) para 37; *Huysamen and Another v Absa Bank Ltd and Others* (660/2019) [2020] ZASCA 127 (12 October 2020) para 12 and 21.

HEARD ON:	11 May 2021 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams*.
JUDGMENT DATE:	11 November 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate A L Roeloffze
INSTRUCTED BY:	Edward Nathan Sonnenbergs Inc, Sandton
FOR THE RESPONDENT:	Advocate A du Plooy
INSTRUCTED BY:	Richards Attorneys, Roodepoort