Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: M03/2021

In the matter between

KGOTLA JACOB KETSE 1st Applicant

K.J KETSE ATTORNEYS 2nd Applicant

AND

NATHANIEL KARABO MOTLHABEDI Respondent

JUDGMENT

REDDY AJ

[1] Two applications served before this Court simultaneously, both emanating from the same cause of action, originally under case number **463/2019**. Within case number **M03/2021**, the applicants (defendants under case number **463/2019**, sought a declarator in the following:

(i) Declaring that the applicants were and are not under bar in Case Number 463/2019.

(ii) That the respondents be ordered to pay the costs of this application in the event that he opposes this application.

(iii) Further and/ or alternative relief.

[2] In respect of the second application under case number **463/2019** the plaintiff in the main (the respondent in case number **M03/2021**) prays for default judgment in the following terms:

(i) The first and second respondents/ defendants are jointly and severally ordered to pay 100% of the plaintiff's proven damages

(ii) The first and second respondents/ defendants are ordered to jointly and severally, pay the plaintiff an amount of R 5 210 346 .95.

(iii) Interest will accrue on the amount in paragraph (ii) from the date of summons to date of final payment.

(iv) The first and second respondents/defendants are ordered to, jointly and severally pay the applicant's costs of suit on a party and party High Court scale including the costs of experts and counsel employed by the applicant/plaintiff

(v) The first and second respondents/defendants are ordered to, jointly and severally, pay the applicant's costs for the default judgment application on a party to party High Court scale.

(vi) Further and alternative relief.

[3] A pragmatic approach was adopted to the hearing of these combined applications. As per the *consensus* of the parties, the

application for the declarator that the defendants were not under bar would be the sole issue for adjudication. Therefore, the application for default judgment was not entertained.

[4] The plaintiff requested reasons for an order of 5 October 2023, which was amended on 25 October 2023, in terms of which the plaintiff was ordered to deliver a Notice of Bar on the defendant within five (5) days of this order. The Notice requesting reasons in terms of Rule 49 (1)(c) of the Uniform Rules of Court ("the Rules") reads as follows:

"**PLEASE NOTE THAT** the Respondent hereby request reasons for an Order in the above matter granted by the Honorable Justice Reddy AJ on 5th of October 2023 and corrected on 25th October 2023. In terms of that order the Respondent is ordered to deliver the notice of bar on the applicant within 5 days of the order.

PLEASE NOTE FURTHER THAT the applicants were served with a notice of bar by the Respondent's Correspondent Attorney on the 18th April 2021

(my own emphasis)

The parties

[5] The first applicant is Mr Kgotla Jacob Ketse an adult male attorney duly admitted and practicing attorney under the name and style of K.J KETSE ATTORNEYS, with his principal place of business situated at 693 Corner Robert Sobukwe and Molamu Street, Montshioa, Mafikeng, North West Province. The first applicant is a present or past director of the second applicant when the cause of action arose and is jointly and severally liable with each other, along with the second applicant, for any wrongful act or omission.

[6] The second applicant is K.J KETSE ATTORNEYS, a private company presumably with share capital, duly incorporated and registered in terms of the laws of the Republic of South African and having its registered place of business at 693 Corner Robert Sobukwe and Molamu Street, Monshioa, Mahikeng, North West Province. The second applicant through its members and/or shareholders, were in compliance with section 23 of the Attorneys Act 53 of 1979, (now repealed) and conduct a legal practice at the aforesaid address.

[7] The respondent is Nathaniel Karabo Motlhabedi, an adult male residing at Stand number […], Monsthioa Stadt, North West Province.

[8] For purposes of brevity, I propose to refer to the parties as citied in the main action as plaintiff, with the first and second defendants' collectively as defendants.

Overview

[9] The plaintiff served summons on the defendants on 25 February 2019 wherein, the plaintiff claims an amount of R 5 210 346.25, predicated on an action for professional negligence. On 18 March 2019, the defendants filed their notice of intention to defend, which was out of time. On 18 April 2019, the plaintiff delivered a Notice of Bar. In *lieu* of delivering a plea, the defendants filed an exception on 29 April 2019. On 10 May 2019, the defendants delivered a Notice of Intention to Amend the exception in terms of Rule 28 of the

Uniform Rules of Court. The amended Notice of Exception was delivered on 28 May 2019. The essence of the defendants' exception was that the plaintiff's particulars of claim lacked averments necessary to sustain a cause of action and were bad in law.

[10] The exception was set down for hearing on 27 June 2019. On the date of hearing, unbeknown to the plaintiff, counsel for the defendants disclosed correspondence in which the Legal Practitioners Indemnity Insurance Fund advised that the case of the plaintiff was subject to investigation and, an assessment would ventilate whether the action should be defended or settled. As a result, the exception hearing was postponed to 12 December 2019 with costs reserved.

[11] In the absence of any further correspondence, both plaintiff and defendants delivered their respective heads of argument. The matter was before this Court on 12 December 2019. Afore the hearing of the exception, plaintiff's counsel produced additional correspondence emanating from the Legal Practitioners Indemnity Insurance Fund, which resulted in the withdrawal of the defendants' exception as agreed between the parties, with costs reserved. In essence, the withdrawal of the exception was founded primarily to allow for the Legal Practitioners Indemnity Insurance Fund to intervene with the sole aim to resolve the dispute.

[12] On 29 January 2020, a Notice of Withdrawal of Attorneys of Record was delivered by the defendants. The primary reason for

the withdrawal was as a result of the outcome of the hearing held on 12 December 2019, wherein it was agreed that the Legal Practitioners Indemnity Insurance Fund will take over the action. To this end, on 13 March 2020, all the relevant documents were forwarded to the Legal Practitioners Indemnity Insurance Fund.

[13] Nothing further occurred until 24 August 2020, when a Notice of Allocation of Trial Date(s) (Default Judgement) from the Office of the Registrar was served on the defendants. The allocated date for the default judgment was to be 5 October 2020. The fact that the plaintiff was to forge ahead with a default judgment was surprising as there had been no communication from the plaintiff or the Legal Practitioners' Fidelity Fund. On 5 October 2020, the application for the default judgment was removed from the court roll.

[14] On 7 October 2020, the plaintiff delivered a Notice of Application for the hearing of the default judgment. The defendants delivered a Notice of Intention to oppose. The plaintiff reacted by delivering a Notice of Objection, which relevantly drew attention to the Notice of Intention to oppose being out of time.

[15] In final correspondence with the plaintiff on 2 November 2020, the defendants sought clarity as to the date on which the Notice of Bar of 18 April 2019 became operable, in terms of determining when the defendants were *ipso facto* barred. In replying correspondence, the plaintiff retorted that after the withdrawal of the exception the defendants had one (1) day to file a plea. Put differently, on the withdrawal of the exception, the plea had to be

filed the following day. In terms of a specified timeline, the defendants had until 13 December 2019 to deliver its plea. Notably, this was a day after the exception application had been withdrawn.

The plaintiff's version

[16] According to the plaintiff the exception application was withdrawn on 12 December 2019. The plaintiff asserts that there can, in law and in fact, be no rational basis for the defendants not being *ipso facto* barred. Significantly, the defendants do not deal with the reasons for submitting that they were not *ipso facto* barred. Therefore, it could not have been expected of the plaintiff to embark on speculation to determine what is the relief sought by the defendants.

[17] The plaintiff contends that the exception raised by the defendants were stillborn. Hence, it was destined for failure. The only extrapolation to be drawn from the unconditional withdrawal of the exception, was that it was devoid of any merit since its inception. When the exception was withdrawn, the next logical step was to file a plea after applying that the bar be uplifted.

The defendants' submissions

[18] Advocate Masike contended that an exception is a pleading and in the case of an exception to a declaration or combined summons, a

Notice of Bar in terms of Rule 26 of the Uniform Rules of Court is required, before the plaintiff can object to the exception on the grounds that it was delivered out of time. The contention of Advocate Masike further ran that a plaintiff can accordingly not object to the exception on the grounds that it was delivered outside the prescribed period allowed for the delivery of a plea, but before the expiration of the period provided in the Notice of Bar. To reinforce this submission, Advocate Masike referred to *Johnny Mokgokong v The University of North West* (Unreported Judgment North West High Court, Case Number :314/16 at paragraphs [12] and [13].

[19] Advocate Masike further asserted that upon the dismissal of an exception against a declaration or a combined summons, it was unnecessary for a defendant to seek an order granting leave to deliver a plea. The withdrawal of an exception, Advocate Masike contended is akin to an order of absolution from the instance. Therefore, where a plaintiff wanting to seek default judgment under such circumstances, the plaintiff will have to deliver a further Notice of Bar on the defendants requiring the latter to plead. To this end, Advocate Masike relied on *Landmark Mthata (Pty) Ltd v King Sabata Dalindyebo Municipality*: *In re African Bulk Earthworks (Pty) Ltd v Landmark Mthata (Pty) Ltd* 2010 (3) SA (ECM) at 88H-I.

[20] Advocate Masike concludes that the fifth day for the filing of the plea was 29 April 2019. On 29 April 2019, the defendants delivered an exception. Owing to the withdrawal of the exception on 12 December 2019, the plaintiff was to deliver a second Notice of Bar on the defendants. As the plaintiff had not delivered the second

Notice of Bar, it was peremptory for the defendants to approach this Court for a declarator that the defendants were not under bar.

[21] With regard to costs, Advocate Masike contended that there is justification for not ordering that the plaintiff be mulcted with the costs.

The plaintiff's submissions

[22] Advocate Gxogxa for the plaintiff, affirmed that the defendants are employing what has proverbially come to known as the Stalingrad tactic. It is obvious, so the contention ran, that the defendants are doing all in their power to avoid their day in court. The application for a declaratory order is an abuse of process and speaks to same. The defendants could have and should have employed Rule 6(d) (iii) of the Uniform Rules of Court, within the realm of the default judgment to address the bar, and not bring an independent substantive application on a single point as a stand-alone application under case number **M03/2021**.Piecemeal litigation allows for an abuse of the system. Fragmented applications delay the conclusion of an action, so the argument ran. See: *Dichabe obo GN v Road Accident Fund* (18770/16) [2020] ZAGPPHC 250 (15 June 2020) at paragraph [10].

[23] In dealing with the competency of filing an exception after a Notice of Bar, Advocate Gxogxa relied on *Frans Roelof Petrus De Bruyn v*

Mile Inv 307 (Pty) Ltd and Others (72427/2013) [2017] ZAGPHCP where the following was held:

> "It is clear from the reading of 23(1) of the Rules that the timeframe for the delivery of the exception is peremptory. An exception in this regard had to be delivered within 10 days from the expiry of the 15 day period referred to in the rule. It, thus, follows that failure to comply with the prescribed time frame set out in the rule is not a mere technical formality. The consequences thereof are fatal to the exception."

[24] The contention expressed by Advocate Gxogxa was that the defendants must afford the plaintiff an opportunity to remove the cause of complaint within 15 days, provided and the party taking the exception must within 10 days after the expiry of the 10 days deliver, its exception. The defendants did not comply with Rule 23. Consequently, there was never a valid exception and no compliance with Rule 23. Moreover, even if there was, the exception lapsed because the exception was never delivered after the expiry of the 15 days which were never afforded to the plaintiff to begin with.

[25] Advocate Gxogxa declared that the exception taken by the defendant was procedurally flawed, and that it did not follow the prescripts of Rule 23. The taking of the exception did not advance the action. Due to the exception being withdrawn, it ineluctably followed that the exception was not pronounced on by a court. Therefore, the *status quo* is reinstituted following the immediate withdrawal of the exception, so Advocate Gxogxa reasoned. See: *CF Stemela v MEC for Health, Eastern Cape* (3962/17) ZAECMHC

4 (12 February 2019) paragraph [13], *Webster N.O v Mohr N.O.* (1345/15) 2016 ZAWCHC 41 (15 March 2016) at paragraph [5]-[7].

[26] Advocate Gxogxa disavows the contention of the defendants, that the withdrawal of the exception is akin to an absolution order, and it follows that afresh bar is necessary. In the view of Advocate Gxogxa, the defendants conflate the withdrawal of a case, action, or matter with the withdrawal of a Notice of exception. The withdrawal of an exception is not and cannot be like an order of absolution from the instance.

[27] Turning to costs, Advocate Gxogxa opined that should this Court find for the plaintiff, there then is no reason to deviate from the usual cost order. In the event the court is with the defendants, the exigencies of the present application justify a deviation from the normal cost order. Central to this submission, Advocate Gxogxa contended that the plaintiff's opposition was not unreasonable. Therefore, the defendants should be liable for the costs. It was incumbent on the plaintiff to correct misdirected facts, asserting that the defendants being economical and crisp with the facts which have circumvented the attaining of a just and equitable order. In fact, a punitive cost order is appropriate. Advocate Gxogxa asseverated as the plaintiff is out of pocket due the defendants launching a superfluous application, which should have been included within the main default judgment application as an interlocutory application.

The law on exceptions

[28] An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action, or the specific defence relied upon. See: *Herbstein and Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed, 2009 Chapter 22 – p630.

[29] "An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands…" *Erasmus supra* D1-295.

[30] An exception provides a useful mechanism for weeding out cases without legal merit. Be that as it may, an exception should still be dealt with in a sensible and not over-technical manner. See: *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465H.

[31] Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. If it does not have that effect, the exception should not be entertained. See: *Erasmus* supra D1-296.

[32] It is irrefutable that an exception is a pleading. It is common cause that the defendants delivered an exception on the fifth day for the filing of a plea namely, 29 April 2019. Much ado was made by the plaintiff of the failure of the defendants to deliver a notice as prescribed by Rule 23. The fulcrum of this contention was that the defendants ought to have afforded the plaintiff an opportunity to remove the cause of complaint within fifteen (15) days, provided that the party making the exception must do so within ten (10) days after the expiry of the ten (10) days, deliver, its exception. The unequivocal transgression of Rule 23 was fatal to the exception in that there was never a competent exception that adhered to the prescripts of Rule 23. Moreover, even if there was, the exception lapsed because the exception was never delivered after the expiry of the fifteen (15) days, which was never afforded to the plaintiff to begin with.

[33] Advocate Gxogxa committed an elementary error by misinterpreting the law in conflating an exception and a Notice of Exception as evinced in Rule 23. An exception is a pleading, not a notice. The Notice of Exception is merely a precursor.

[34] In *Hill NO and Another v Brown* (3069/20) [2020] ZAWCHC 61 (3 July 2020), the court in the above case had to adjudicate whether a notice to except as envisaged in Rule 23(1)(a) is a valid response to a notice bar and the court came to the following conclusion:

[4] An exception is a 'pleading' (*Haarhoff v Wakefield* 1955 (2) SA 425 (E); *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). Like a plea, a properly drawn exception concludes with a prayer for relief (*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), 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.

[5] Accordingly, the 'pleading' contemplated in rule 26 covers – in the case of a defendant who has failed to plead to particulars of claim – a plea as contemplated in rule 22(1) or an exception as contemplated in rule 22(1) read with 23(1). Either of these is a valid response to the rule 26 notice, and the defendant will not be barred.

[6] A defendant's notice in terms of rule 23(1)(*a*) affording the plaintiff an opportunity to remove an alleged cause of complaint is simply that, a notice. It claims no relief. It does not call for adjudication. If the plaintiff removes the alleged cause of complaint, the notice has served its purpose and receives no further attention in the case. If the plaintiff does not remove the alleged cause of complaint but the defendant decides not to follow up his notice with an exception, the notice likewise receives no further attention. If the plaintiff fails to remove the alleged cause of complaint and the defendant files an exception, it is the exception, not the preceding notice, that the court adjudicates.

[7] Accordingly, I agree with Yekiso J's judgment in *McNally NO & others v Codron & others* [2012] ZAWCHC 17 that a notice in terms of rule 23(1)(*a*) is not a pleading (and see also *De Bruyn v Mile Investment 307 (Pty) Ltd & others* [2017] ZAGPPHC 286 paras 25-26). The contrary is scarcely arguable.

[8] **If a defendant is to avoid being barred pursuant to a notice in terms of rule 26, he must file a 'pleading', i.e., a plea or an exception. A rule 23(1)(*a*)[12] notice, which is merely a precursor to an exception (which**

may or may not be delivered), is not a proper response. (Emphasis added)

[35] Having concluded that the filing of an exception to the Notice of Bar, was a proper legal consequence, what then follows is a determination of precisely when was the defendants' *ipso facto* barred, if such, a legal occurrence had come to fruition. This requires a retrofitting of the chronological common cause timeline. Cutting aside the verbiage, it is common cause that the defendants withdrew the exception on 12 December 2019. What next procedurally occurs fell for adjudication. This Court found that the plaintiff in terms of the amended order dated 25 October 2023, that the plaintiff serve the defendants with a second Notice of Bar within five (5) days of this order.

[36] The reason for this is twofold. Firstly, the filing of the exception in reaction to the Notice of Bar, completely interrupted the *dies induciae* as set out in the bar, of which is five (5), court days. To my mind, the filing of the exception signalled the end of the procedural existence of the bar. This much is clear from the litigating conduct of both parties as the nucleus of the action proceedings shifted focus until the hearing of the exception, which was eventually withdrawn on 12 December 2029. That being so, the Notice of Bar of 19 April 2019, could not at any point be revived. Put differently, generically a Notice of bar has a legal life span of five (5) court days. In terms of the Rules of Court, a specified legal process follows the failure to react to the delivery of a competent Notice of Bar, an application for a default order.

[37] Secondly, the Notice of Bar and the exception are not civil litigation instruments, that find application simultaneously. The rationale for same is palpable.

[38] The Notice of Bar of 19 April 2019 was overtaken by events. With the withdrawal of the exception, the status of the action proceedings would have been that the defendant would not have pleaded. For the default application to have proceeded to its natural conclusion, a second Notice of Bar would have to be served on the defendants, to compel a plea, given the delivery of the Notice of Intention to defend by the defendants, coupled with the absence of a plea.

[39] Costs are at the discretion of the court. There was no basis to deviate from the usual order that costs follow the result.

Order:

[40] In the premises, the following order was made:

> "The respondent is to deliver a Notice of Bar on the applicants within five (5) days of this order"

_____

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

Date Of Judgment:	**5 October 2023, duly amended 25 October 2023**
Counsel For Plaintiff	**Advocate A. Gxogxa**
Attorneys For Plaintiff	**Mduzulwana Attorneys** **C/O Mothusi Marumo Attorneys** **Office No. 5, Gryphon** **Cnr Martin &Warren Streets**

	Mahikeng
Counsel For Defendants	**Advocate T. Masike**
Attorneys for Defendants	**J.M. Mokoto Attorneys**
	693 Cnr Robert Sobukwe & Molamu Streets
	Montshioa
	Mahikeng
Date of request for reasons:	**6 November 2023**
Date reasons handed down:	**18 January 2024**