



THE REPUBLIC OF SOUTH AFRICA

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

Case No: 13645/15

In the matter between:

NEIL WEBSTER N.O.

Plaintiff

In his capacity as trustee of

THE CYNTHIA DOREEN MOHR WILL TRUST

And

GARY MOHR N.O.

Defendant

In his capacity as executor in the

ESTATE LATE JACOB GERHARDUS MOHR

JUDGMENT DELIVERED ON 15 MARCH 2016

BOQWANA J

[1] The plaintiff brought an application for default judgment on the basis that the defendant is barred from pleading. The defendant contends that the particulars of claim are excipiable. It instituted a counter application to have the notice of bar declared an irregular step, alternatively, to have the late delivery of an exception condoned.

[2] On 21 June 2015, the plaintiff launched an action against the defendant in the amount of R 847 000.00. The defendant served its notice of intention to defend on 07 August 2015. A notice of bar was delivered by the plaintiff on 10 September 2015, calling upon the defendant to deliver its plea within five days of the delivery of the notice, failing which it would be *ipso facto* barred. On 15 September 2015, the defendant served the plaintiff with a notice in terms of rule 23 (1) that it intended raising an exception to the plaintiff's particulars of claim on the basis that they are vague and embarrassing and/or that they do not disclose a cause of action. The plaintiff was afforded fifteen days to remove the said causes of complainant failing which the defendant reserved its right to raise an exception to the particulars of claim. The plaintiff did not remove the cause for complaint nor did the defendant bring the exception upon the expiry of the stated period.

[3] The defendant lodged an application for default judgment and set it down for 19 November 2015. The defendant brought a counter application for the setting aside of the application for default judgment on the basis that it was an irregular step in terms of Rule 30, alternatively to have late delivery of the exception be condoned, the bar be lifted and the defendant be granted consequential extension in terms of Rule 27. The exception was simultaneously filed with the Notice in terms of Rule 30. The parties agreed that all issues brought before the Court should be heard including the exception.

[4] The crux of the plaintiff's case is that upon the expiry of its notice of intention to raise an exception, the chain or sequence was broken, in that the defendant failed to file a pleading or the exception. It further failed to comply with a notice of bar brought in terms of Rule 26. It could no longer bring the exception. It is further submitted on behalf of the plaintiff that no condonation has been asked by the defendant for bringing the exception late.

[5] An exception is a pleading and cannot be objected to as having been filed

out of time unless a notice of bar has been given.¹ While it has become practise to call for delivery of a plea in the notice of bar, and what the defendant is effectively called upon to do in terms of a notice of bar is to deliver a pleading which may be a plea with or without a counterclaim, an exception or a notice to strike out.² The point raised by Langenhoven on behalf of the plaintiff is that the notice of intention to except itself is not a pleading and this seems to be common cause between the parties. The plaintiff's contention however is that the delivery of the notice of intention to except simply suspends the period of bar pending further steps to remove complaint by the plaintiff or bringing of the exception by the defendant which did not happen in this case. Mr Steenkamp on the other hand, submits on behalf of the defendant that the bar was interrupted by the delivery of the notice to except to the plaintiff's particulars of claim. Therefore upon its expiry, the plaintiff should have delivered a fresh notice of bar before applying for default judgment. Mr Steenkamp submits that the court, in any event, does not need to decide that issue because the particulars of claim are excipiable *ex facie* and the court cannot grant default judgment under those circumstances.

[6] The question to determine therefore is whether the notice of exception is a proper response to delivery in terms of the notice of bar. This is the issue that the Court in a judgment of this division, *McNally NO and Others v Codron and Others* supra also had to decide. It had been raised on behalf of the defendants in that case that the notice of exception constitutes the taking of the next procedural step after service of a notice of bar. Counsel for the defendants argued that being a procedural step, it was competent for a defendant to serve a notice of exception during the bar period. He relied on the remarks of Griffiths AJ in the decision of *Landmark Mthatha v King Sabata Dalindyebo Municipality* 2010 (3) SA 81 ECM at 86E-F to advance this proposition.

[7] Yekiso J was of the view that a further step in the proceedings was one which advances the proceedings one stage nearer to completion. He referred to the

¹ *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E)

² *McNally NO and Others v Codron and Others* 2012 JDR 0385 (WCC) at para 19

decision of *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (W) at F-G, where Heher J observed:

‘A further step in the proceedings is one which advances the proceedings one stage nearer to 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.’

[8] Yekiso J in *McNally NO* supra, at para 23 concluded that Heher J’s observations above, sought 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 of a defective pleading. From these decisions it can be surmised that the conclusive point is whether the notice to except is intended to advance the proceedings a stage nearer to completion. In both the *Jowell* and *McNally NO* decisions, it was found that the objective sought by the notice of intention to except in those cases could not be achieved by way of a response to the notice of bar as Yekiso J put it at para 25 of *McNally NO* supra, ‘*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.*’ The court suggested in that instance, that if the defendant had elected to except to the plaintiff’s particulars of claim on the basis that the particulars are vague and embarrassing they would have had to file an exception within the twenty day period of the notice of intention to defend stipulated in Rule 17 (1) and 22(1) of the Uniform Rules. It was found not to be competent in that case for the notice of exception as contemplated in rule 23 (1) to have been delivered during the bar period in response to a notice of bar.

[9] The court seemed to suggest that if the defendant’s exception was taken on

the grounds that the particulars of claim did not disclose a cause of action (which is one of the grounds in this case) that exception would have been a valid response to the notice of bar. The court stated that defendants in that case could have raised an exception on that point, but it elected not to do so. On that issue the court held further that ‘*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 the delivery of a pleading.*’ (Own underlining). (See para 24 of *Mc Nally NO* supra).

[10] If one follows the reasoning adopted in *McNally NO*, therefore a notice of intention to except that the particulars of claim do not disclose cause of action such as the one in the present matter could well be seen to advance proceedings a stage nearer to completion. It would follow therefore that the notice would be a procedural step calling for the removal of a complaint, and in these circumstances that is a valid response to a notice of bar. Therefore, upon the expiry of the period stipulated in the notice for the taking of further steps by either the plaintiff or the defendant, it is my view that a fresh notice of bar should have been delivered. The delivery of the exception is therefore, not incompetent in these circumstances. It, in any event, seems to have been accepted by Mr Langenhoven that the notice to except was a competent procedural step in response to the notice of bar. The point he makes is that the notice to except suspended the period of bar pending compliance with the time periods stipulated in the notice. Therefore, according to him, at the end of those time periods the defendant became *ipso facto* barred. This reasoning does not make sense in my view, in that if it is accepted (as the plaintiff has) that the notice to except was an appropriate step or response to the notice of bar, it cannot be argued at the same time that it did not interrupt the notice of bar when it was delivered.

[11] Even if I am wrong on this issue, I am of the view that good cause has been shown for the lifting of the bar and for condonation of the filing of the exception outside the stipulated time to be granted. The defendant’s attorney deposed to an

affidavit alleging that, the particulars of claim are *ex facie* excipiable. She also alleges that given the patently deficient particulars of claim, she assumed that the plaintiff would rather elect to amend its particulars of claim. While the plaintiff's attorneys were under no duty to communicate with her on what their intentions were, no communication preceded the filing of the default judgment. She contends that she did not want to run unnecessary costs if the exception was due to become academic following amendments to the particulars of claim which she presumed would follow. She thought it would be un-collegial to put due pressure on the plaintiff to respond and she realises that she made a mistake by making all these assumptions.

[12] The defendant's attorney indeed had a responsibility to contact the plaintiff to seek clarity on their position and to confirm whether her assumptions were correct but she did not do so. Whilst the explanation she gives is not very satisfactory, it is clear that her actions were not intended to deliberately disregard compliance with the rules of court. I am however persuaded by the allegations that the exception raised constitutes a defence which is good in law. It is on that basis that I find that a good case has been made for condonation and extension of the time for the delivery of the exception and for the bar to be lifted.

[13] Turning to the exception. As stated before, parties agreed that the exception should also be argued and determined along with the other applications that were placed before Court.

[14] The exception raised by the defendant is that the particulars of claim are vague and embarrassing and/or that they do not disclose a cause of action.

[15] The first ground is that the plaintiff is not the executor of the estate of the late Cynthia D Mohr and consequently does not have *locus standi* to institute a claim which is *ex facie* in favour of the estate later Cynthia D Mohr. The third point is that it is not clear whether the cause of action is based on fraud or enrichment and if it is enrichment, what type of enrichment. Secondly, it is unclear how the amount claimed was arrived at. The further points are that the particulars

of claim are vague and embarrassing on the basis that: it is unclear what the term '*the testator in the Plaintiff Will Trust*' in paragraph 5 of the particulars of claim means; the plaintiff has failed to plead the identity of the '*acquaintance*' referred to in paragraph 9 of the particulars of claim and/or what relevance the reference to the *acquaintance* has to the claim; it is unclear what relevance paragraphs 9.1 to 9.3 of the particulars of claim have to the claim, furthermore the said paragraphs also constitute evidence; lastly it is unclear what is meant by the term '*separable*' at paragraph 10 of the particulars of claim.

[16] Mr Steenkamp argued that the default judgment cannot be granted on a claim that is *ex facie* excipiable even if one were to assume hypothetically that the claim was unopposed. I agree with this proposition. The question however is whether that is the case in this present matter.

[17] The claim is based on the alleged 'fraudulent conduct' of the late Mr Mohr which caused his estate to be enriched in that he wilfully and unlawfully altered an investment policy (where the late Cynthia D Mohr had invested her life savings) to include himself as the sole beneficiary thereof.

[18] A question of whether a plaintiff has *locus standi* is normally taken by way of special plea but if the fact appears in the summons, the defendant is entitled to except to the summons on the basis that no cause of action is disclosed.³

[19] On its own the ground that the plaintiff lacks *locus standi* to institute action is quite compelling. It is trite that '*an executor is the only person who is looked upon by the Court to represent the estate of a deceased person and conversely an heir is not placed in a position of being able to deal with the assets without the executor's consent.*' (See *Nyathi v Minister of Bantu Administration and Others* 1978 (3) SA 224 at page 227)

[20] There is also no attempt to draw the connection between the trust and the

³ See *Erasmus Superior Court Practise*, Second Edition, Van Loggernberg at D1-305; *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651 D-E; *AAIL (SA) v Muslim Judicial Council* 1983 (4) 855 (C) at 860 B – H; *Anirudh v Samdei and Others* 1975 (2) SA 706 (N).

plaintiff on the particulars of claim. If the alleged fraud did indeed take place the claim would vest with the deceased estate and not the trust.

[21] The plaintiff sought to explain this relationship in its opposing affidavit to the rule 30 application. Particulars of claim cannot be supplemented by documents outside the pleading. For the purposes of determining the exception, the pleading is looked at as it stands, no facts outside it can be brought in issue. Mr Langenhoven also attempted to provide an explanation from the bar to explain the issue of the plaintiff's *locus standi* which is obviously impermissible.

[22] Even if the additional allegations were to be read into the pleading, it seems to me, they would still not disclose the cause of action, as the claim would still lie with the executor of the estate of Ms Mohr and not with the purported heir (i.e, the trust).

[23] I am therefore persuaded that the particulars of claim are *ex facie* excipiable and on this ground alone the Court would be entitled to refuse to grant default judgment even if the action was unopposed.

[24] Although, the lack of *locus standi* point on its own is good in law, the other grounds contended by the defendant that the particulars of claim are vague and embarrassing also have merit. The plaintiff does not explain how it arrived at the amount claimed. The other averments lack the particularity needed to enable the defendant to plead. These points are, in my view, not just matters for evidence but averments that are necessary for the purposes of pleading.

[25] For those reasons, the exception must succeed and the plaintiff be afforded an opportunity to amend its particulars of claim. A number of interlocutory applications were argued before me. I do not intend to distinguish between them for the purposes of costs. In my discretion I simply allow costs against the plaintiff.

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

1. The application for default judgment is refused.
2. The exception succeeds and the plaintiff's particulars of claim are set

aside. The plaintiff is afforded an opportunity to amend its particulars of claim, if so advised, within 15 (fifteen) days of this order.

3. The plaintiff is to pay the defendant's costs.

N P BOQWANA

Judge of the High Court

APPEARANCES

For the Plaintiff:	Mr G Langenhoven of Langenhoven Attorneys
For the Defendant:	Mr J P Steenkamp
Instructed by:	Heidi Van der Meulen Attorneys