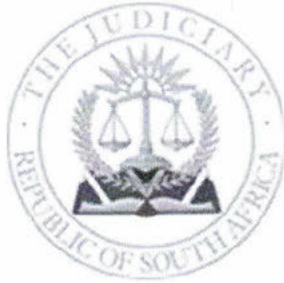


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 23841/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
25 August 2023	
DATE	

In the matter between:

SINGULAR SYSTEMS (PROPRIETARY) LIMITED

First Applicant

NICHOLAS KRUISKAMP

Second Applicant

and

MULTICHOICE SOUTH AFRICA HOLDINGS (PTY) LTD

First Applicant

PHUTHUMA NATHI INVESTMENTS (RF) LIMITED

Second Applicant

PHUTHUMA NATHI INVESTMENTS 2 (RF) LIMITED

Third Applicant

MAWELA, CALVO PHEDI

Fourth Applicant

and

ISMAIL MAHOMED AYOB N.O AND

ZAYD ISMAIL AYOB N.O

(In the Estate of the Late Zamila Khatoon Ayob)

First Respondent

ZAYD ISMAIL AYOB

Second Respondent

SINGULAR SYSTEMS (PTY) LTD

Third Respondent

KRUISKAMP, NICHOLAS

Fourth Respondent

In Re:

The matter between:

**ISMAIL MAHOMED AYOB N.O AND
ZAYD ISMAIL AYOB N.O
(In the Estate of the Late Zamila Khatoon Ayob)**

First Plaintiff

ZAYD ISMAIL AYOB

Second Plaintiff

and

SINGULAR SYSTEMS (PTY) LTD

First Defendant

MULTICHOICE SOUTH AFRICA HOLDINGS (PTY) LTD

Second Defendant

PHUTHUMA NATHI INVESTMENTS (RF) LIMITED

Third Defendant

PHUTHUMA NATHI INVESTMENTS 2 (RF) LIMITED

Fourth Defendant

KRUISKAMP, NICHOLAS

Fifth Defendant

MAWELA, CALVO PHEDI

Sixth Defendant

JUDGMENT

MUDAU J:

- [1] These are two separate applications in terms of Rule 30 of the Uniform Rules of Court to have the respondents' notices of bar, dated 14 October 2022 respectively, set aside on the basis that they constitute irregular steps. The respondents are Ismail Mahomed Ayob and Zayd Ismail Ayob, in their capacity as the executors of the estate of the late Zamila Khatoon Ayob, and Mr Zayd Ayob in his personal capacity. The respondents are the plaintiffs in the main action.

- [2] The first defendant, Singular Systems (Pty) Ltd (“Singular”), and the fifth defendant, Nicholas Kruiskamp have brought a separate Rule 30 application. The remaining applicants are the second to fourth and sixth defendants in the main action. These are MultiChoice South Africa Holdings Proprietary Limited (“MultiChoice SA”), Phuthuma Nathi Investments (RF) Limited (“PN”) and Phuthuma Nathi Investments 2 (RF) Limited (“PN2”) (together, “Phuthuma Nathi”), and Mr Calvo Mawela, the Chief Executive Officer of MultiChoice SA. They, too, brought a separate Rule 30 application in essentially the same circumstances that give rise to these applications.
- [3] The notices of bar, the subject of these applications were delivered after the applicants had delivered exceptions against the respondents’ declaration, on the basis that the exceptions had not been timeously set down for hearing. The notices of bar, however, did not seek to compel the exceptions be set down, but sought to compel the delivery of a plea by the applicants within five days of the notices of bar under threat of applications for default judgments.

Background facts

- [4] On 5 July 2022, the respondents issued a simple summons against the applicants. On 16 August 2022, the respondents delivered a declaration. The respondents essentially claimed the transfer or delivery of certain shares in Phuthuma Nathi, which they allege belonged to Ms Zamila Ayob and Mr Zayd Ayob, as well as the payment of dividends declared in relation to those shares.
- [5] On 13 September 2022, Mr Mawela delivered an exception against the respondents’ declaration in terms of Rule 23(1) on the basis that it lacked the allegations necessary to sustain a cause of action against him. The respondents delivered a notice of bar on 14 September 2022 (“the first notice of bar”), in terms of which the respondents required MultiChoice SA and Phuthuma Nathi to deliver their plea within 5 days of the notice, failing which they would be barred from doing so. MultiChoice SA and Phuthuma Nathi had not yet pleaded or excepted to the main claim by this date.

- [6] Singular and Mr Kruiskamp delivered notices of intention to except on 8 September 2022, on the basis that it lacked the allegations necessary to sustain the various causes of action against them. With their exception, the applicants also delivered an application for condonation which was not seriously challenged. Similarly, On 19 September 2022, MultiChoice SA and Phuthuma Nathi delivered an exception against the respondents' declaration in terms of Rule 23(1) together with Mr Mawela's exception on 5 October 2022 on the same basis.
- [7] On 29 September 2022, the respondents delivered a response to Mr Mawela's exception titled "First and Second Plaintiffs Response to Sixth Defendant's Notice of Exception". The respondents stated therein that the "[p]laintiffs do not regard it as necessary to amend any part of their Declaration and any Exception raised will be challenged accordingly".
- [8] The respondents subsequently delivered additional notices of bar respectively on 14 October 2022, citing all the applicants ("the second notice of bar"). The respondents alleged that the applicants had failed to make application by way of "Motion proceedings to Except" and had failed to apply for condonation for non-compliance. The applicants were called upon to "file their Plea within 5 (five) days of receipt of this notice, failing which said Defendants will be *ipso facto* barred from doing so and judgment will be entered against said Defendants by default".
- [9] On 20 October 2022, the applicants' attorneys, Webber Wentzel, delivered a letter to the respondents stating that the second notice of bar constituted an irregular step and afforded the respondents the opportunity to withdraw the second notice of bar before 21 October 2022, failing which the applicants would file a Rule 30 application. There was no response to the 20 October 2022 letter.
- [10] Consequently, on 21 October 2022, the applicants delivered a Rule 30 notice to the respondents, calling on the respondents to withdraw the second notice of bar on the basis that it constitutes an irregular step. The respondents delivered an answering affidavit in response to the Rule 30 application on 4 January 2023, denying the irregularity of the second notice of bar and the alleged prejudice

suffered by the applicants but failed to speak to the facts set out in the applicants' Rule 30 founding affidavit. Significantly, the respondents reiterated that they will "resist the Applicants purported Exceptions".

- [11] In terms of Rule 22(1), a party may deliver either a plea or exception within 20 days of receipt of a declaration. Rule 26 however (Failure to deliver pleadings – barring) states:

"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 . . . any other party may by notice served upon him required him to deliver such pleading within five days . . ."

(Own emphasis.)

- [12] The applicants delivered exceptions in response to the declaration within the period allowed by the Rules. Each exception includes a prayer for relief, as required for a properly drawn exception.¹ In our law, it is trite that an exception is a pleading.²

- [13] The high watermark in the respondents' answering affidavit in defence of these applications is that the notices of bar were delivered because the applicants had not yet brought "an Application on Motion to Except". However, in argument before this Court the defence was not seriously persisted with. Rule 23(4) provides that when an exception is taken to a pleading, no plea or pleading over is required.³ It follows, accordingly, that a defendant has two choices to respond to a plaintiff's particulars of claim: (i) the defendant can either choose to deliver a plea; or (ii) to except as the applicants have done. The applicants are not required to make application by way of motion proceedings to except for the simple reason that an exception is not brought by way of motion proceedings.⁴

- [14] Rule 23(1) provides that after delivering an exception, an excipient *may* apply to the registrar within 15 days of delivery to have the exception set down for hearing.

¹ Rogers J in *Hill NO. and Another v Brown* [2020] ZAWCHC 61 at para 4; see also *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A).

² See for example *Haarhoff v Wakefield* 1955 (2) SA 425 (E); *Tyulu & Others v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) at 729B-D.

³ See *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] ZASCA 114; [2021] 4 All SA 346 (SCA) at para 12.

⁴ See *Steve's Wrought Iron Works and Others v Nelson Mandela Metro* 2020 (3) SA 535 (ECP) at para 21.

If the excipient fails to apply to have the exception set down in the period as provided for in Rule 23(1), the respondents may apply to have it set down for hearing consistent with this Court's Practice Directives. But also, the respondents may put the applicants on terms to set the exception down for hearing, failing which they can apply to have it struck out.⁵

[15] I am satisfied, accordingly, that a proper case has been made out to set aside the respondents' second notice of bar as constituting an irregular step with costs following the result. The respondents were given the opportunity to withdraw the notice, prior to the delivery of the Rule 30 notice.

Order

1. The respondents' notices of bar are set aside in terms of Rule 30 of the Uniform Rules of Court;
2. The respondents are to pay the costs of this application; and
3. The exception brought by the respective applicants on 5 October 2022, must be set down by the applicants on a date to be agreed to between the parties, and subject to the Court's availability failing which any party upon proper notice can do so.


MUDAU J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Plaintiffs:

Instructed by:

Mr. Z Ayob

Ismail Ayob and Partner

For the First and Fifth Defendant:

Instructed by:

Adv. D Wild

Webber Wentzel Inc

⁵ See *SB v Storage Technology Services (Pty) Ltd* [2021] ZAWCHC 210.

For the Second, Fourth and Sixth Defendant:

Adv. L Choate

Instructed by:

Webber Wentzel Inc

Date of hearing:

31 July 2023

Date of judgment:

25 August 2023

Mode of delivery:

This judgment was handed down electronically by circulation to the parties' representatives by email, uploading to CaseLines, and release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 25 August 2023.