

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 43711/2021

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED.

DATE: 8/6/2023

SIGNATURE

In the matter between:

THEA NIEMÖLLER

Excipient/Defendant

and

RUDOLF NIEMÖLLER

Respondent/Plaintiff

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 8 June 2023.

JUDGMENT

LG KILMARTIN, AJ:

[1] This is an opposed exception in terms of Rule 23 of the Uniform Rules of Court.

[2] The Defendant has raised exception to the Plaintiff's particulars of claim on the basis that the allegations contained therein are vague and embarrassing and do not sustain a valid cause of action.

[3] Before dealing with the relevant provisions of Rule 23, it is necessary to have regard to the common cause facts (as were set out in the factual chronology provided in the joint practice note), namely:

[3.1] on 16 September 2021, the summons was served on the Defendant;

[3.2] the Defendant served its notice of intention to defend on 4 October 2021;

[3.3] on 12 November 2021, the Plaintiff served and filed a notice of bar;

[3.4] the Defendant filed a notice of exception on 15 November 2021 ("the first notice of exception");

[3.5] on 18 February 2022, the first notice of exception was withdrawn and the Defendant tendered the Plaintiff's wasted costs associated therewith. That same day, a "*notice of exception*", dated 17 February 2022 (which was incorrectly described as such as it was actually a notice to the Plaintiff to remove causes of complaints in terms of Rule 23(1)(a)), was delivered by the Defendant;

[3.6] the Defendant served a second notice of exception on 14 March 2022 ("the second notice of exception").

[4] In paragraph 7 of the heads of argument filed on behalf of the Plaintiff, dated 20 January 2023, reference was made to the wording of Rule 23(1) and the time periods set out therein.

[5] In paragraph 8 of the Plaintiff's heads of argument the following was stated:

"Excipient did not comply with the rules, and does not apply for condonation for the late filing of the Exception. On this ground alone, the Exception stands to be dismissed."

[6] Rule 23(1) reads as follows:

"23 Exceptions and applications to strike out

(1) *Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, **the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto** and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that —*

(a) ***where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading,** afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and*

(b) *the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.*

(2) ...

- (3) *Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.*"

(Emphasis added).

[7] Where there has been non-compliance with the time periods in Rule 23, it is necessary to apply for condonation in terms of Rule 27, which reads as follows:

"27 *Extension of time and removal of bar and condonation*

- (1) *In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*
- (2) *Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make."*

[8] Upon being requested to address the court on the alleged non-compliance with Rule 23, the Defendant's counsel referred to *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa (5th Edition)* ("*Herbstein & Van Winsen*"), Chapter 29, at page 735, as authority for the proposition that it was incumbent upon the Plaintiff to file a Rule 30 notice if it wished to raise an irregular step based on the late filing of the second notice of exception without a condonation application. The relevant portion of *Herbstein & Van Winsen* reads as follows:

“A party is not obliged to apply to have an irregular step taken by an opponent set aside. If, however, an objection to the irregular step is made for the first time at the hearing, the party who could have invoked the rule earlier may be denied relief, or may even have to pay wasted costs occasioned by a resulting postponement. A party who is prejudiced by an irregular step should not simply treat it as a nullity and proceed as though it is not been taken. The prejudiced party must apply to court under Rule 30 and allow the court to exercise the discretion conferred upon it to decide what is to be done in relation to the irregular step. Where the irregular step causes no prejudice, it is best ignored or corrected by some non-litigious means, since an application to set it aside is likely to be dismissed.”

[9] The Plaintiff further contended that the failure to file a Rule 30 notice resulted in acquiescence on the part of the Defendant. This argument cannot be correct as in the matter of *Turbek Trading CC v A&D Spitz Limited*,¹ it was confirmed that acquiescence is not a substantive defence in our law.

[10] Upon further reading of *Herbstein & Van Winsen* the Court noted that the following is stated on page 740:

*“Thus, where particulars of claim fail to comply with Rule 18 and in addition are vague and embarrassing, the **defendant may either apply to have the particulars set aside in terms of Rule 18(12) read with Rule 30 or take exception under Rule 23(1).**”*² (Emphasis added)

[11] It is clear from the above passage that the Plaintiff was under no obligation to proceed in terms of Rule 30.

[12] With reference to the portion of *Herbstein & Van Winsen* which was referred to in argument, the facts of this case are distinguishable from what is

¹ 2009 JDR 1263 (SCA).

² The authors of *Herbstein & Van Winsen* refer to the matter of *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) at 469 I-J.

envisaged in the passage as this is not a case where the failure to comply with the time periods was only raised for the first time at the hearing. The non-compliance with Rule 23 was raised almost 2 months before the hearing. Had the Plaintiff acted swiftly, it could have filed a condonation application upon becoming aware of the objection. If the condonation application was not opposed, it could have been moved at the commencement of the hearing. If the condonation application was opposed, the exception could merely have been enrolled on a later date.

[13] As there has been non-compliance with Rule 23 and there is no condonation application, the exception falls to be dismissed with costs.

ORDER

In the circumstances, I make the following order:

1. The Defendant's exception is dismissed; and
2. The Defendant is ordered to pay the Plaintiff's costs incurred in relation to the exception.

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Dates of hearing:	14 March 2023
Date of judgment:	8 June 2023
For the Excipient/Defendant:	Adv M van der Westhuizen
Instructed by:	Van Greunen & Associates Inc.
For the Respondent/Plaintiff:	Adv Broodryk
Instructed by:	J Broodryk Attorneys

Neutral Citation: *Niemöller v Niemöller* (Case no. 43711/2021) ZAGPPHC (Date of judgment: 8 June 2023)