



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2200/2021

In the matter between:

MARTHINUS CHRISTIAAN VAN DEN HEEVER N.O.

1st Plaintiff

[cited in his capacity as duly authorised Trustee of
THE BRAKKUIL TRUST – IT 1095/98]

MARISSA VAN DEN HEEVER N.O.

2nd Plaintiff

[cited in her capacity as duly authorised Trustee of
THE BRAKKUIL TRUST – IT 1095/98]

ARNOLD RICHTER N.O.

3rd Plaintiff

[cited in his capacity as duly authorised Trustee of
THE BRAKKUIL TRUST – IT 1095/98]

and

THEUNIS GERHARDUS POTGIETER N.O.

1st Defendant

[cited in his capacity as duly authorised Trustee
of THE DOMINO TRUST- IT 1096/98]

JAN JOHANNES MARAIS N.O.

2nd Defendant

[cited in his capacity as duly authorised Trustee
of THE DOMINO TRUST- IT 1096/98]

KITTY POTGIETER N.O.3rd Defendant[cited in her capacity as duly authorised Trustee
of THE DOMINO TRUST- IT 1096/98]**WILLEM PETRUS FOUCHE N.O.**4th Defendant[cited in his capacity as duly authorised Trustee
of THE WOLWEKOP TRUST- IT 1094/98]**ALETTA JOHANNA CROUS N.O.**5th Defendant[cited in her capacity as duly authorised Trustee
of THE WOLWEKOP TRUST- IT 1094/98]**EMMERENTIA COETZEE N.O.**6th Defendant[cited in her capacity as duly authorised Trustee
of THE WOLWEKOP TRUST- IT 1094/98]**EMMERENTIA COETZEE**7th Defendant**KITTY POTGIETER**8th Defendant**WILLEM FRANCOIS BOUWER N.O.**9th Defendant[cited in his capacity as duly appointed
Executor in the deceased estate of the late
BAREND VAN DEN HEEVER]**MASTER OF THE HIGH COURT,
BLOEMFONTEIN N.O.**10th Defendant**ADRIAAN NEL**11th Defendant**CORAM:**

VAN ZYL, J

HEARD ON:

14 OCTOBER 2021

DELIVERED ON:

4 MARCH 2022

- [1] The plaintiffs are seeking an order that the first to eighth defendant's Notice in terms of Rule 23, dated 3 August 2021, be set aside, with the first to eighth defendants to pay the costs of the application. The first to eighth defendants are opposing the application.

Condonation:

- [2] The first to eighth defendants sought condonation for the late filing of their heads of argument. They duly filed an affidavit deposed to by their attorney of first instance in support of the application for condonation, in which affidavit it was explained how the failure to file the heads of argument timeously, came about. The plaintiffs did not oppose the application for condonation. However, they deemed it necessary to file an affidavit deposed to by the plaintiff's attorney of record in order to respond to certain allegations contained in the affidavit filed on behalf of the first to eighth defendants.
- [3] I considered it proper and in the interest of justice to grant the condonation and I consequently made the following order before I entertained the arguments on the merits of the application:
1. The first to eighth defendants' failure to file their heads of argument and Practice Note in terms of the provisions of Rule 13.3 of the Rules governing the conduct of proceedings in the Free State Division, is condoned.

2. The first to eighth defendants are ordered to pay the costs of the application.

Chronology of procedural steps:

- [4] No relief is being sought against the ninth, tenth and eleventh defendants. I will consequently, for the sake of expediency, henceforth refer to the first to eighth defendants as “the defendants”.
- [5] The procedural steps which led to the present application are not in dispute.
- [6] The plaintiffs issued summons against the defendants (and the ninth, tenth and eleventh defendants).
- [7] On 21 June 2021 the defendants filed their notice of intention to defend the action.
- [8] The defendants had to file their plea within 20 days from the aforesaid date, but failed to do so. The plaintiffs consequently filed a notice of bar in terms of Rule 26 on 27 July 2021.
- [9] On 3 August 2021 the defendants filed a notice in terms of Rule 23 in which it was stated that the plaintiffs’ particulars of claim is vague and embarrassing on the grounds set out in the notice and the plaintiffs were afforded a period of fifteen (15) days to remove the defendants’ causes of complaint.

[10] On 11 August 2021 the plaintiffs served a notice in terms of Rule 30(2)(b) in response to the defendants' Rule 23 notice on the basis that the said notice constitutes an irregular step. In terms of the said notice the plaintiffs afforded the defendants 10 days to remove the cause of complaint, failing which the plaintiffs would proceed with an application to set aside the defendants' Rule 23 notice.

[11] The cause of complaint set out in the plaintiffs' Rule 30 notice is the following:

1. The plaintiffs' notice in terms of Rule 23 was not delivered within 10 days of receipt of the summons as determined in Rule 23(1)(a).
2. The defendants' Rule 23 notice is neither a plea nor an exception as provided for in Rule 22(1).
3. The delivery of the Rule 23 notice consequently constitutes an irregular step and the defendants are *ipso facto* barred from filing a pleading.

Main submissions on behalf of the respective parties:

[12] Mr Snellenburg, who appeared on behalf of the defendants, referred to the fact that Rule 23(1) provides that an exception may be filed "*within the period allowed for filing any subsequent pleading*". Rule 23(1)(a), however, requires the peremptory filing of a notice when it is contented that the pleading is vague

and embarrassing. Mr Snellenburg consequently submitted that in the circumstances the filing of such a notice, as a compulsory precursor to the filing of an exception, in response to a notice of bar and within the stipulated 5-day period, constitutes a proper response to a notice of bar.

[13] In support of this submission Mr Snellenburg relied, *inter alia*, on the judgment in **Steve's Wrought Iron Works v Nelson Mandela Metro** 2020 (3) SA 535 (ECD). He, however, also referred to the unreported judgment in **Hill N.O. v Brown** (3069/20) [2020] ZAWCHC 61 (3 July 2020) in which the contrary view was expressed. Mr Snellenburg submitted that the **See Steve's Wrought Iron Works** judgment "*is on its own persuasive and the reasoning exemplary*". He consequently submitted that the reasoning and finding in the **Steve's Wrought Iron Works** judgment are to be followed instead of that of the **Hill N.O. v Brown** judgment.

[14] Mr Pretorius, who appeared on behalf of the plaintiffs, submitted that the amendment of Rule 23(1) with effect from 22 November 2019 impacted on the interpretation and application of Rule 26 and the admissibility of a Rule 23(1) notice that a pleading is vague and embarrassing filed in response to a notice of bar.

[15] Mr Pretorius pointed out that the **Steve's Wrought Iron Works** matter was heard on 17 October 2019 and judgment was handed down on 21 November 2019. It therefore concerned the interpretation and application of Rule 23(1) prior to its

abovementioned amendment. Conversely, the Hill v Brown matter, which was heard on 26 June 2020, concerned the interpretation and application of the amended Rule 23(1). Mr Pretorius submitted that since the present application also concerns the amended Rule 23(1), the reasoning and finding in the Hill N.O. v Brown judgment, namely that the filing of a Rule 23(1) notice that a pleading is vague and embarrassing does not constitute a valid response to a notice of bar, is likewise applicable to the present application.

Legal principles:

[16] Prior to the amendment of Rule 23(1), which amendment came into force on 22 November 2019, it was required that a notice that a pleading is vague and embarrassing was to be filed “*within the period allowed for filing any subsequent pleading*”. It used to read as follows:

“(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 set it down for hearing in terms of paragraph (f) of sub-rule (5) of Rule (6): Provided that where a party intends to take an exception that the pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the

date on which such reply is due, deliver his exception.” (Own emphasis)

[17] The amended Rule 23(1) now requires that a notice that a pleading is vague and embarrassing must be filed within 10 days of receipt of such pleading:

- “(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 delivery of such exception: Provided that –
- (a) where a party intends to take an exception that the 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) ...” (Own emphasis)

[18] As correctly pointed out by Mr Pretorius, in the **Steve’s Wrought Iron Works** matter the application was heard on 17 October 2019 (which is evident from the copy of the judgment available on SAFLII) and judgment was handed down on 21 November 2019. The finding that a notice of exception delivered within the 5-day period provided in a notice of bar, constitutes a proper response to a notice of bar, therefore concerned the interpretation and application of Rule 23(1) prior to the aforesaid amendment.

[19] In the judgment of **Hill N.O. v Brown** the amended Rule 23(1) was applicable; therefore a notice that the pleading is vague and embarrassing was required to have been filed within 10 days of receipt of the pleading. The background facts with regard to the relevant procedural steps in that application were similar to the facts *in casu*. In the said judgment the court stated as follows at paras [1] to [3]:

“[1] The plaintiff contends that the defendant’s delivery of a rule 23(1)(a) notice was an irregular step which should be set aside in terms of rule 30(1). It is not in dispute that on 15 April 2020 the plaintiff served a valid notice of bar in terms of rule 26 or that the defendant’s rule 23(1)(a) notice was served on the last day of the five-day period specified in rule 26. The question is whether the service of the Rule 23(1)(a) notice was a valid response to the notice of bar.

[2] ...

[3] As applied to a defendant’s response to a combined summons (which is our situation), the relevant provisions of the rules are these:

(a) ...

(b) ...

(c) ...

(d) If a defendant wishes to except on the first of these grounds (the vague and embarrassing ground), Rule 23(1)(a) requires him, as a precursor to the exception, to afford his opponent an opportunity of removing the cause of complaint within 15 days. The defendant’s notice to this effect must be served within 10 days of receipt of the combined summons. (The latter time-limit was introduced by an amendment to Rule 23(1) which came into force on

22 November 2019, and is shorter than the period previously allowed.)”

The court subsequently found as follows at para [11] of the judgment:

“[11] Be that as it may, the amended rule is unambiguous. In practice, sensible plaintiffs are unlikely to object to a Rule 23(1)(a) notice delivered a few days later than the strict limit imposed by the amended rule, but for present purposes the important point is that the framers of the rules plainly did not intend that the defendant should have a leisurely period to assess whether or not particulars of claim are vague and embarrassing. In the circumstances, a defendant can hardly complain if, after the expiry of the 20-day period allowed for a plea or exception, his opponent delivers a notice of bar having the effect of making the subsequent service of Rule 23(1)(a) notice irregular. In such a case, a Rule 23(1)(a) served after delivery of the notice of bar would, ex hypothesi, be at least 20 days out of time.” (Own emphasis)

The defendant’s notice in terms of Rule 23(1)(a) was consequently declared to be an irregular step and was set aside.

See also **Van Zyl N.O. v Smith** 2021 JDR 1848 (GP) at paras [6] –[8].

[20] Also in **Erasmus Superior Court Practice**, Van Loggerenberg *et al*, Juta Law Online Publications, December 2021 at RS 17, 2021, D1-309 the following is stated with reference to the words

“within the period allowed for filing any subsequent pleading” as contained in the amended Rule 23(1):

“This part of subrule (1) evidently applies only to an exception that a pleading lacks averments which are necessary to sustain an action or defence. In the case of an exception that a pleading is vague and embarrassing, paragraph (a) of subrule (1) must first be complied with before an exception on that ground could be delivered in terms of paragraph (b) of subrule (1).”

Conclusion:

[21] The defendants failed to file their Rule 23 notice that the particulars of claim is vague and embarrassing within 10 days of receipt of the summons as prescribed in Rule 23(1)(a). In the absence of any application for condonation for the non-compliance with the 10 days' period, it consequently constitutes an irregular step.

Discretion:

[22] Rule 30(3) provides as follows with regard to irregular proceedings:

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet. (Own emphasis)

[23] The court therefore has a discretion to set aside an irregular step. In **Erasmus Superior Court Practice**, *supra*, at RS 17, 2021, D1-356, the following principles enunciated in relevant case law in this regard are stated:

“...it is not intended that an irregular step should necessarily be set aside. The discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. The court is entitled to overlook in proper cases any irregularity which does not work any substantial prejudice to the other party.

[24] As previously pointed out, the background facts with regard to the relevant procedural steps in the **Hill N.O. v Brown** matter, were similar to those in the present matter. In that judgment the court found as follows at paras [12] and [13]:

“[12] The court has a discretion whether or not to set aside an irregular step, and the presence or absence of prejudice is usually decisive. In my view, the plaintiff will clearly be prejudiced if the rule 23(1)(a) notice is allowed to stand. The defendant...would be entitled to file an exception if the plaintiff fails to remove the alleged causes of complaint.

[13] On a proper construction of the rules, however, the defendant has not filed a proper response to the notice of bar and should now be under bar. If the irregularity of the rule 23(1)(a) notice is confirmed by this court and the notice set aside, the parties will know where they stand. The defendant, if he wishes to oppose the case, will have to apply in terms of rule 27 to have the bar lifted and will need to show good cause. Whether or not the defendant will be able to show good cause is not something on which I can form an opinion, because I do not know what facts the defendant will advance in support of a rule 27 application.”

[25] The aforesaid findings with regard to prejudice to be suffered by the plaintiff in that matter were the Rule 23 notice not to be set aside, are in my view *mutatis mutandis* applicable *in casu*. Furthermore, should I not set aside the defendants' Rule 23 notice, the plaintiffs will be prevented from obtaining the relief, for example default judgment, to which they otherwise may be entitled as a result of the defendants being under bar. As correctly contended by Mr Pretorius, that would further prejudice the plaintiffs.

[26] Consequently, in the exercise of my discretion, I am of the view that the defendants' Rule 23(1) notice is to be set aside.

[27] There is no reason why costs should not follow the outcome of the application.

Order:

[28] The following order is made:

1. The first to eighth defendants' notice in terms of Rule 23, dated 3 August 2021, is set aside.
2. The first to eighth defendants are ordered to pay the costs of the application, jointly and severally, payment by the one, the other to be absolved.

C. VAN ZYL, J

On behalf of the plaintiffs:

Adv. JJ Pretorius
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the 1st – 8th defendants:

Adv. N Snellenburg SC
Instructed by:
Kramer Weihmann Inc
BLOEMFONTEIN