



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

Case no: 69944/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO
OTHER JUDGES: NO
(3) REVISED.

26/09/2022

In the matter between:

COMPENSATION SOLUTIONS (PTY) LTD

Plaintiff

and

THE COMPENSATION COMMISSIONER

First Defendant

**DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR
OF THE NATIONAL GOVERNMENT OF THE REPUBLIC**

Second Defendant

JUDGMENT

Pillay AJ

1. There serves before me an application for default judgment on the basis that the defendants have failed to deliver a pleading after a notice of bar had been delivered.
2. The defendants dispute that the plaintiff is entitled to default judgment because they have delivered an exception in response to the notice of bar.
3. The summons in the action was served on 19 September 2019. The defendants were called upon to deliver a notice of intention to defend the action within 20 days of service of the summons. They duly did so on 10 October 2019.
4. On 8 November 2019, the plaintiff served a notice of bar calling upon the defendants to deliver a plea within five days.
5. On 28 November 2019, the defendant delivered two documents. The one was a notice in terms of rule 7(1) questioning the authority of the plaintiff's attorney to act on its behalf. The other was a notice in terms of rule 23(1) calling upon the plaintiff to remove the cause of complaints set out therein. While a response was delivered to the notice in terms of rule 7(1) there was none in response to the notice calling upon the plaintiff to remove the cause of complaints
6. On 11 December 2019, the plaintiff delivered a second notice of bar. By then the defendants had delivered a notice in terms of rule 23(1). On 17 December 2019, the defendants delivered an exception to the particulars of claim.
7. On 31 January 2020, the plaintiff delivered a third notice of bar. The defendants ignored the second and third notices of bar.

8. On 10 February 2020 the plaintiff served a notice of application for default judgment in terms of rule 31(5) on the basis that while the defendant had delivered an exception on 17 December 2019, it had failed to take any steps to set the matter down within the time periods prescribed and furthermore that the defendants had failed to deliver a plea or an exception in response to the notice of bar served on 31 January 2020, that is the third notice of bar.
9. The defendants' response to the application for default judgment was the delivery on 10 February 2020 of a notice in terms of rule 30 (2) calling upon the plaintiff to withdraw the notice of bar on the basis that it constituted an irregular step.
10. On 13 February 2020, the defendants delivered a notice of intention to oppose the plaintiff's application for default judgment.
11. In terms of rule 30(1) read with rule 30(2) if a party fails to withdraw the irregular step complained of, the party delivering the notice may bring an application to set aside the irregular step. The defendants failed to do so. The failure is of no consequence in this matter.
12. The status of the litigation is now the following:
 - (a) A notice of intention to defend was timeously delivered;
 - (b) A notice in terms of rule 23(1), the precursor to an exception was delivered by the defendants.
 - (c) The defendants delivered an exception but failed to apply to the Registrar within 15 days of its delivery for it to be set down for hearing.

- (d) A third notice of bar was delivered on 31 January 2020. The defendants did not respond to it.
 - (e) The plaintiff applied for default judgment. The defendants delivered a notice in terms of rule 30(2) but it was not followed with the application contemplated in rule 30(1).
 - (f) The defendant delivered a notice to oppose the application for default judgment.
13. The context to the application for default judgment is set out in the notice of application for default judgment in terms of rule 31(5).
 14. The plaintiff applied for default judgment because the defendants had failed to apply to the Registrar within 15 days of the delivery of the exception for a date for the hearing of the exception and because they are *ipso facto* barred for failure to deliver a pleading within 5 days of the third notice of bar being served, that is the one which was served on 30 January 2020.
 15. The application for default judgment serves before me. Two questions arise. The first, is a procedural issue whether the defendants are in default. The second is whether on the merits the plaintiff is entitled to judgment in its favour. If I find against the plaintiff on the procedural issue, I do not have to consider the second issue.
 16. Rule 23 (1) after the amendment thereto which came into effect on 18 October 2019 reads 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 apply to the registrar to set it down for hearing within 15 days after the delivery of such exception**". [emphasis added]*

17. The plaintiff construes this rule to oblige the excipient to apply to the Registrar for a date for the hearing of the exception within the prescribed time period. And if the excipient fails to do so, the exception lapses.
18. The plaintiff misconstrues the rule. The rule does not oblige the excipient to apply for a date, it entitles it to do so. Had it been intended to oblige the excipient to do so the word "must" and not "may" would have been used by the rule-makers. Furthermore, if it had been intended to visit the failure to timeously apply for a date with the penalty of a lapsed exception one would have expected the rule-makers to have crafted the rule to expressly say so. This, especially, considering that the effect of the exception lapsing would be that the excipient would be barred from participating in the action. There are instances where the rules do exclude a party from participating in the litigation if it fails to comply with the rules. Rule 35(7) is one example, another is rule 30A. However a party can only be excluded if a court expressly makes an order dismissing the claim or striking the defence.
19. The plaintiff wants to wish the exception away. This is evident from the notice of bar served on 30 January 2020, that is the third notice of bar. However, rule 26(1) does not apply if a pleading has been delivered. Rule 26 was not amended when rule 23(1) was amended with effect from 18 October 2019. Had it been intended that barring was available not only if the recipient of a notice of bar had failed to file either a plea or an exception but also if an excipient had failed to apply for a date

for the hearing of an exception, then rule 26 (1) would have been amended at the same time.

20. There is nothing in rule 23(1) which prevents the plaintiff from applying to the Registrar for a date for the hearing of the exception if the excipient fails to do so timeously.
21. The plaintiff's remedy was not a notice of bar. It could have applied for a date for the hearing of the exception after the time period allowed to the defendants to do so lapsed. It could also have invoked rule 30A.¹
22. The defendants delivered an exception in response to the first notice of bar. The plaintiff is thus precluded from applying for default judgment.
23. In the result the application for default judgment cannot succeed. Turning to costs. Had the defendants applied for a date for the hearing of the exception, this ill-conceived application would not have seen the light of day. In my view, the fair and reasonable order in the circumstances is that the parties should pay their own costs.

Order

24.

¹

30A Non-compliance with Rules

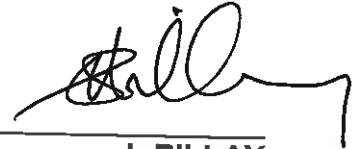
(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order-

- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

24.1. The application for default judgment is dismissed.

24.2. The parties are to pay their own costs.



L PILLAY

Acting Judge: Gauteng Division, Pretoria

26 September 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 September 2022

Date of Hearing: 13 April 2021

Date of Judgment: 26 September 2022

Appearances:

For the plaintiff: Adv Welgemoed

For the defendants: Adv MM Mojabelo and Adv B Kubeka