



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

Reportable: No Of interest to other judges: No 20 October 2022 Strijdom AJ

CASE NO: 5518/2021

In the matter between:

LABUCON RESOURCES (PTY) LTD

Applicant (Plaintiff)

And

NIKKEL TRADING 179 (PTY) LTD

Respondent (Defendant)

Judgment

Strijdom AJ

Introduction

[1] This is an interlocutory application in terms of Rule 30(2) to set aside the Defendants' notice in terms of Rule 23(1)(a).

[2] In this matter I will refer to the parties as in the main action.

Background

- [3] The Plaintiff issued summons against the Defendant on 4 February 2021.¹
- [4] The Defendant served its notice of intention to defend on 5 July 2021.²
- [5] The Plaintiff served a notice of bar on the Defendant on 3 August 2021.³
- [6] The Defendant served a notice in terms of Rule 23(1)(a) on the Plaintiff on 4 August 2021.⁴
- [7] The Plaintiff delivered a notice in terms of Rule 30(2)(b) on 5 August 2021.⁵
- [8] The Defendant delivered its exception on 27 August 2021.⁶
- [9] The Plaintiff launched its application in terms of Rule 30(2) on 1 September 2021.⁷

The issues

- [10] Whether the Defendants' notice in terms of Rule 23(1)(a) ought to be set aside as an irregular step. The exception in terms of Rule 23 was not argued before me.

The irregular step

- [11] The Plaintiff contended that the Respondent failed to deliver its Rule 23(1)(a) notice within 10 days of the receipt of the Plaintiff's particulars of claim as required by

¹ Caselines: P001-1.

² Caselines: P008-1.

³ Caselines: P002-Oa.

⁴ Caselines: P009-1.

⁵ Caselines: P002-Oa.

⁶ Caselines: P010-1.

⁷ Caselines: P013-Oa.

the rule providing for such notice. The Defendant served its Rule 23(1)(a) notice on 4 August 2021.

[12] It was submitted that the second irregularity is that the Defendant failed to file its exception within five days provided for in the Plaintiffs' notice of bar.

[13] It was further submitted that the Defendant proceeded to deliver its exception on 27 August 2021, after being barred from pleading as of the end of 10 August 2021.

[14] The Plaintiff relies on the judgments in Mc Nally NO v Codron 2021 JDR 0385(WCC) and Hill NO and Another v Brown 2022 JDR 0238 (WCC) in support of its argument.

[15] The Defendant relies on the judgment 'in the matter of Steves' Wrought Iron Works and Others v Nelson Mandela Metro'.⁸

[16] In the Steves Wrought matter the Plaintiff had also filed a notice of bar the Defendant had also delivered a notice in terms of Rule 23(1)(a) and the Plaintiff also contended that the notice in terms of Rule 23(1)(a) was irregular. The Court held that at [14] and [15] that:

"[14] Rule 23(1) provides that an exception may be filed 'within the period allowed for filing any subsequent pleading.' It requires however the peremptory filing of a notice if it is contended that the pleading is vague and embarrassing. A party is only barred from filing an exception (which is a pleading) if that party is time barred in accordance with rule 26..."

[15] In this instance the notice of exception was delivered within the five day period provided in the notice of bar. That is permitted in accordance with the authorities referred to and the plain wording of the rules."

⁸ 2020 (3) SA 535 (ECP).

[17] The Court dealt with the *Mc Nally* – matter as follows at para [16] to [18]:

“[16] Plaintiffs’ counsel relied upon the judgment in the Mc Nally NO and Others v Codron and Others where Yekiso J held that the filing of a notice of exception constitutes a procedural step which would not preclude a bar being imposed by notice of bar. The learned Judge took the view that the notice itself is not a plea whereas the exception is a plea. He however expressed the view that the filing of an exception is a proper response to the filing of a notice of bar. Since only a notice to except was filed it was set aside as an irregular step in terms of rule 30.

[17] The finding of Yekiso J runs counter to the authority of this division. It bears emphasis that it was specifically held in Felix⁹ that a party is entitled to proceed to except in response to a notice of exception which is a peremptory requirement where it is alleged the pleading is vague and embarrassing is permitted. This was followed in Landmark Mthatha (Pty) Ltd v King Sabata Dalinyebo Municipality and Others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others¹⁰

[18] I am bound by the decisions of this division unless I am persuaded that they are wrong. I am not so persuaded. To the contrary they are in my view correctly decided. The decision in Mc Nally in effect precludes a party who intends to object to a pleading on the basis that it is vague and embarrassing from taking

⁹ 1994 (4) SA 502 (SE) at 506E.

¹⁰ 2010 (3) SA 81 (ECM).

such exception upon receipt of a notice of bar unless that party had filed such a notice of intention to except within the initial period allowed for the filing of a plea. Such construction in my view, would defeat the purpose to be served by the process of excepting to a pleading.”

[18] It was held in Tuffsan Investments 1088 (Pty) Ltd v Sethole and Another that:

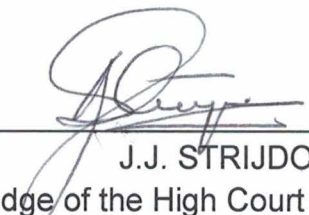
“[25] I am in respectful agreement with the findings in this regard of Felix, supra and Landmark Mthatha, supra. To hold the contrary, as in Mc Nally, supra, would disentitle a party after the initial period of 20 days within which to file an exception where the pleadings is vague and embarrassing to thereafter take such an exception. Such party would have difficulty in pleading to the vague and embarrassing allegations. It is trite that the very purpose of pleading is to crystallize the issues in dispute.

Conclusion

[19] In the case of all pleadings except a replication or subsequent pleading, the bar occurs only upon lapse of the notice of bar, i.e. within five days of its receipt. If within the five - day period a pleading which the party is entitled to file, is filed, there is no bar.

[20] In my view a notice of exception is a proper response to a notice of bar. The contrary view, viz that the notice of exception is not a pleading and that only the exception itself is a proper response to the notice of bar, would defeat the purpose served by the process of excepting to a pleading.

[21] In the result, the notice of exception was not irregular and the Plaintiffs' application in terms of Rule 30(2) is dismissed with costs.



J.J. STRIJDOM
Acting Judge of the High Court of
South Africa, Gauteng Division

Heard on: 29 August 2022
Date of Judgment: 20 October 2022

Appearances

For the Applicant: Advocate J.M. Butler
Instructed by: NVDB Attorneys

For the Respondent: Advocate N.G. Louw
Instructed by: Warrener De Agrela and Associates Inc.