



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED

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CASE NO: 3832/2019

In the matter between:

EMC CONSULTING ENGINEERS (PTY) LTD

APPLICANT

And

MOPANI DISTRICT MUNICIPALITY

RESPONDENT

JUDGMENT

MULLER J:

- [1] The applicant¹ seeks to set aside, with costs on an attorney and client scale, a notice of exception delivered by the respondent, as being an irregular step, in

¹ Hereinafter called "the plaintiff."

terms of rule 30. The respondent² launched a counter-application in terms whereof the following relief is claimed:

"declaring that the Respondent is entitled to negotiated, fair and reasonable opportunity to inspect the documents discovered by the Applicant in its reply to the Respondent's Rule 35(14) notice of 23 August 2019, being Annexure "E" to the founding affidavit;

compelling the Applicant to afford the Respondent such opportunity within 7 (seven) of the order of the Court;

if the Applicant fails to allow the Respondent such opportunity within the seven days' period, the Respondent is entitled to forthwith apply to the Court on the same, as may be supplemented, as they may be, for an order:

declaring the Applicant's particulars of claim to be irregular and/or improper step;

striking out such particulars of claim;

dismissing the Applicant's action and claim in Case no. 3832/2019 with costs, including the costs of two Counsel, and on the attorney and client scale."

- [2] For an understanding of the developments and the filing of notices and pleadings in the action, it is necessary to explain the chronological sequence of the relevant events.
- [3] The plaintiff instituted action for the recovery of R27 730 283.66. The defendant delivered a notice of intention to defend on 23 July 2019 with the result that a plea had to be delivered on or before 21 August 2019. However, the plaintiff on 20 August 2019 delivered a notice of bar. The notice of bar was admittedly delivered prematurely and was subsequently withdrawn. Nothing turns on this particular notice of bar which played no further role in the proceedings.

² Hereinafter called "the defendant."

- [4] On 23 August 2019 the defendant delivered a notice in terms of rule 35(14) requesting sight of certain documentation to enable the defendant to plead. In response to the said notice, the plaintiff delivered a reply on 11 September 2019 in which the defendant was informed that it may inspect the documents requested the following day 12 September 2019. The defendant failed to inspect the documents. I will return to this aspect, as the consequences of the reply and the failure to inspect the documents, are the subject matter of the counter-application.
- [5] On 13 September 2019 the plaintiff served a second notice of bar on the defendant. Counsel for the defendant conceded, during argument, that delivery of the second notice of bar was regular.³ The said notice of bar was, however, only filed on 16 September 2019 with the registrar. In terms of the notice of bar, the defendant was afforded five days within which to deliver its plea. The five day period, referred to in the notice of bar therefore, commenced on 17 September 2019 and expired on 23 September 2019.
- [6] Rule 26 prescribes:
- “Any party who fails to **deliver** a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred....” (The emphasis is mine.)
- [7] Similarly, rule 23(1) states:
- “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....” (My emphasis).

³ No notice in terms of rule 30 was delivered to declare the notice of bar an irregular step.

Provided that where a party intends to take an exception that a 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 complainant....."

- [8] The defendant served a notice of exception on 20 September 2019 on the plaintiff and thereafter filed the said notice with the registrar on 27 September 2019.⁴
- [9] Accordingly, it may be accepted without demur, that the five day period allowed by the notice of bar within which the defendant was required to deliver its plea expired prior to the date on which the notice of exception was delivered; put differently, the notice of exception was delivered out of time, the consequence of which is that the defendant was barred from delivering a notice of exception or any other subsequent pleading.
- [10] On 26 September 2019 plaintiff delivered a notice in terms of rule 30 in terms whereof the defendant was called upon to remove the notice of exception. The cause of complaint was that the notice of exception was not served within the period allowed for delivering any subsequent pleading.
- [11] Although the notice in terms of rule 30, was delivered prematurely, no issue was taken with its delivery. The defendant, in any event, took a further step by delivering an exception on 29 October 2019.
- [12] In my view this matter can be laid to rest with reference to the definition of "deliver" in rule 1, which states:

"**deliver**" shall mean serve copies on all parties and file the original with the registrar."

⁴ The exception was delivered on 29 October 2019.

- [13] The notice of bar was served on 13 September 2019. The said notice was "delivered," when it was filed with the registrar on 16 September 2019. It is the latter date which triggered the commencement of the five day period of the notice of bar. The five day period expired on 23 September 2019.
- [14] The same reasoning applies to the date on which the notice of exception was filed at court after service thereof on the plaintiff. The defendant was required by the notice of bar to deliver its plea within the period of five days which period expired on 23 September 2019.
- [15] It follows that the word "within" in rule 26⁵ must be given its ordinary literal meaning which must be interpreted that the defendant was required to serve copies of the notice of exception on the plaintiff and file the original with the registrar within that five day period, to comply with the rule. The notice of exception was served on 20 September 2019 but filed with the registrar on 27 September 2019. The latter date constituted the date of delivery thereof.
- [16] In *Wahl v Prinswil Beleggings (Edms) Bpk*⁶ the issue was whether the notice to defend was delivered after the *dies induciae* had expired. It was common cause that the defendant was in default on 28 July 1981 after summons was served and the 21 days *dies induciae* had expired. The notice of intention to defend was served on 28 July 1981 and filed with the registrar on 29 July 1981. The court explained what the effect was:

⁵ Read with rule 25.

⁶ 1984 (1) SA 457 (T) 460 F-H.

"Betekening van 'n kennisgewing van voorneme om te verdedig geskied ingevolge Hofreël 19 (1) deur dit af te lewer. Volgens Hofreël 1 beteken "aflewer" die betekening van afskrifte aan alle partye en die indiening van die oorspronklike by die Griffier.

As daar verder gekyk word na die bepalings van van Hofreël 4, wat slaan op betekening van stukke deur die Balju, dan is dit duidelik dat 'n afskrif van die oorspronklike kennisgewing gelaat word by die plek of persoon waar of aan wie beteken word, terwyl die oorspronklike by die Griffier ingedien word.

Behoorlike betekening het eers later in die loop van 28 Julie 1981 geskied toe ene Van Wyk 'n afskrif by respondent se prokureur se kantoor gelaat het. Betekening is formeel voltooi toe die oorspronklike op 29 Julie 1981 by die Griffier ingedien was."

- [17] The defendant delivered a notice of exception after the defendant was *ipso facto* barred to deliver subsequent pleadings in terms of the notice of bar delivered by the plaintiff. In the result, the application in terms of rule 30 should succeed.
- [18] It will serve no purpose to deal with the merits of the counter-application whilst the defendant is barred. An order in the terms which the defendant seeks will be ineffectual and meaningless and cannot, whilst the bar is operative, assist to enable the defendant to plead.
- [19] Counsel for the defendant argued that the plaintiff has failed to prove that it suffered any prejudice whereas the position of defendant is vastly different in that it suffered real prejudice and that its inability to plead was actually caused by the failure of the plaintiff to comply with the spirit of the rule 35(14) notice.
- [20] I do not deem it necessary to deal with the complaint raised by the defendant. The factual situation, simply is, that the defendant is barred. And until the bar

is lifted the defendant is precluded from delivery of a plea. Non-compliance with rule 35(14) is academic for as long as the defendant is barred.

- [21] I am unpersuaded that the prejudice referred to is of importance when the defendant is *ipso facto* barred from delivering a plea. Even if I am wrong, the plaintiff will be prejudiced if the defendant is allowed to continue to deliver notices and pleadings without the bar first being lifted and if the relief claimed in the counter-application should be granted before the bar is lifted. It cannot be countenanced and will, moreover, defeat the very purpose of the bar. It will lead to a parallel process being sanctioned by the court in conflict with the rules.
- [22] Counsel for the plaintiff conceded that the rule 30 application was not premised specifically on the dates on which the notices of bar and exception were delivered, but rather with the focus on the dates of service of the respective notices. The plaintiff relied mainly on the judgment in *Mc Nally NO and Others v Codron and Others* (WCC)⁷ that delivery of a notice of exception after a notice of bar had been delivered is not a pleading which cannot invalidate the notice of bar. Counsel for the plaintiff, very properly, also referred to the contrary views held in *Landmark Mthatha Ltd v King Sabata Dalidyebo Municipality and Others: In Re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others*⁸ and *Tuffs Investments 1088 (Pty) Ltd v Busisiwe Agnes Sethole (GNP)*.⁹

⁷ Unreported judgment dated 9 March 2011.

⁸ 2010 (3) SA 81 (ECM).

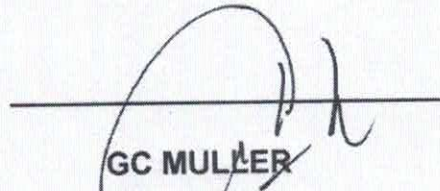
⁹ Unreported judgment dated 4 August 2015.

- [23] There is no need to attempt to resolve the differences of opinion expressed in those decisions because of the conclusion that I have reached.
- [24] The plaintiff is successful in respect of the rule 30 application as well as the counter-application. There is no reason why the plaintiff is not entitled to its costs. The costs must follow the result. It seems that it has now become the general practice, in this Division at least, to seek costs on the scale as between attorney and client as a matter of course. This application is no exception. The practice is to be censured. There are no special considerations arising from the facts or the conduct of the parties in this matter to warrant the award of such costs.¹⁰

Order

- 1. That the notice of exception delivered on 27 September 2019 be and is hereby set aside as an irregular step taken by the defendant/respondent.**
- 2. That the defendant/respondent is ordered to pay the costs of the rule 30 application, such costs to include the costs of two counsel.**
- 3. That the counter-application instituted by the defendant/respondent be and it is hereby dismissed with costs, such costs include the costs of two counsel.**

¹⁰ *Nel v Waterberg Landbouwers Ko-op Vereeniging* 1946 AD 597, 607; *Sentrachem v Prinsloo* 1997 (2) SA 1 (A) 21E-22E.



A handwritten signature in black ink, consisting of a large, stylized 'G' followed by 'C' and 'M', is written over a horizontal line. The signature is positioned above the printed name 'GC MULLER'.

JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

APPEARANCES

- | | |
|------------------------|------------------|
| 1. For the Applicant | : HW Sibuyise SC |
| | : Sibuyise |
| 2. For the Respondent | : G Shakoane SC |
| | : TG Ramatsekisa |
| 3. Date of the hearing | : 08 July 2020 |
| 4. Judgment delivered | : 15 July 2020 |