

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

Case no. 3962/17

Date heard: 31/1/19

Date delivered: 12/2/19

Not reportable

In the matter between:

NANDISWA STEMELA

Applicant

and

MEC FOR HEALTH, EASTERN CAPE PROVINCE

Respondent

JUDGMENT

Plasket J

[1] The applicant instituted an action against the respondent in which she claimed damages arising from her treatment by the respondent's employees at a public hospital. A notice of opposition was filed by the respondent but a plea was not filed. This resulted in the respondent being barred from pleading. An application for default judgment was then made by the applicant. At the hearing of that application, an order by agreement was made. It stated that the application for default judgment 'is hereby withdrawn with the **Leave of the Court**', that the respondent was 'given 20 days to file **plea**' and that the respondent was to pay the applicant's costs.

[2] Nothing appears to have been done by either party from 27 February 2018, when the order was made, until 23 May 2018, when the respondent filed a notice of exception in terms of rule 23(1) of the uniform rules, followed by an exception on 27 June 2018. The applicant responded with a notice in terms of rule 30 in which the respondent was accorded ten days to remove the cause of complaint. The notice, in identifying the irregular step alleged by the applicant, stated:

‘1 Whereas the Plaintiff instituted action proceedings against the Defendant. The Defendant filed its Notice to defend and failed to file a plea;

2 Consequent to the failure to file the plea, the plaintiff filed a notice of bar on the 01st November 2017 as a result the defendant remains ipso facto barred from filing any pleading

3 The defendant disregarded the notice of bar which remains effective by filing an exception to the plaintiff’s particulars of claim.

4 Now therefore the conduct by the defendant to just file an exception whilst under bar as stated above, constitutes an irregular step.’

[3] When the respondent did not withdraw its exception, the applicant brought an application in terms of rule 30 in which it sought an order that the respondent’s ‘rule 23 notices be and are hereby declared an irregular and/or improper step and set aside’, together with an order of costs in her favour. This application was opposed by the respondent on a number of grounds.

[4] The applicant made no mention, as she should have, of the default judgment and the order by agreement in the founding papers. This created a misleading picture of the facts, particularly because the order is central to the resolution of this dispute. The application for default judgment and the subsequent order were raised by the respondent in the answering affidavit.

[5] In the replying affidavit, the applicant’s case on the merits of the application was set out in the following terms (which I quote verbatim):

7.3 At the time when this matter served before Court for a default judgment, the defendant was under Bar and the Bar was never uplifted even by the Court Order. The only thing the court was the leave to the applicant to withdraw the application. The Court in its order has put it in no uncertain terms in paragraph 2 that . . . (“**the defendant is given 20**

days to file plea”) and surprisingly the defendant files a rule 23(1) notice. This step also constitutes an irregular step. The court never said the defendant to file pleadings.

7.4 The defendant has taken an irregular step by ignoring with a notice of bar and clear court Order. Anything to the contrary is denied as if specifically traversed.

7.5 I wish to implore this Honourable Court to pay no regard to the smoke and mirrors which the respondents are trying to create, so as to divert the courts attention from the true issues at hand.’

[6] Two issues arise for determination. The first is whether, when the exception was filed, the respondent was under bar. The second is whether, if the first question is answered in the negative, the respondent was entitled to file an exception rather than a plea.

[7] The rules are for the court and not the other way around. They are not an end in themselves, to be observed for their own sake. Instead, they serve the purpose of providing a mechanism for the expeditious resolution of justiciable disputes between parties. Formalism in their application is to be discouraged and they must be interpreted sensibly so as to facilitate the achievement of their purpose, rather than in such a way as to frustrate that object. *Federated Trust v Botha* 1978 (3) SA 645 (A) at 654D-G. Court orders, like any other document, should be interpreted purposively.

[8] When the parties agreed to the order, they agreed that the respondent would be allowed to file a plea. Of necessity that meant that the bar that had been in place was lifted. The order gave effect to that intention. There is thus no merit in the applicant’s argument that, despite the respondent being allowed to plead, the bar remained in place because it had not been expressly lifted. The effect of the lifting of the bar is that, if the applicant wanted to bar the respondent again, it would have had to file a notice of bar in terms of rule 26. It never did so with the result that the respondent was not barred from pleading even after the 20 day period had expired.

[9] The second issue – whether leave to file a plea included leave to file an exception – was dealt with in *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo*

Municipality & others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd & others 2010 (3) SA 81 (ECM).

[10] After a notice of bar had been served by a plaintiff on a third party, but before the five day period mentioned in rule 26, the third party filed an exception rather than a plea. The exception was argued and dismissed. The plaintiff applied for default judgment but the third party filed a plea nonetheless. It was argued on behalf of the plaintiff that it was entitled to proceed with its application for default judgment despite the filing of the plea because the notice of bar had remained operative when the third party filed its exception. In other words, it was argued that while the filing of the exception stopped the running of the five day period, as soon as the exception was dismissed, the clock began to tick again.

[11] Griffiths AJ rejected this argument. He held, at paras 12 and 13:

[12] Secondly, the rule states: "If any party fails to deliver any other pleading . . ." (my emphasis). It does not refer to a declaration or a plea. The reason for this is obvious. Form 10 to the first schedule to the rules (the standard combined summons) calls upon the defendant to deliver "a plea, exception, notice to strike out, with or without a counter claim". Although it has become practice (as has occurred in the present matter) to call upon the defendant (or third party) to file a plea without reference to an exception and notice to strike out (as in the combined summons), it is clear from the wording of this rule that it requires the defendant to take the next procedural step in the proceedings, be it an exception, plea or notice to strike out.

[13] It follows logically in my view that where a defendant, in response to a notice of bar, delivers an exception, he has taken the next procedural step in the matter and has thus complied with the demand made in the notice on pain of bar. In this regard, it has been held that an exception is in fact a pleading and thus falls squarely within the wording of rule 26.'

[12] Griffiths AJ also rejected the argument that by electing to file an exception, the third party had foregone its right to plead with the result that on the exception being dismissed, the third party was barred from pleading. He held that the third party was entitled, 'as of right', to except and then to plead; and that '[w]ere a defendant or third party to be required to elect between the two options of excepting or pleading, with the result that, once it elects to except it loses its right to plead, this would make a mockery of the exception procedure'. (Para 14.)

[13] As I am in respectful agreement with Griffith AJ reasoning in the *Landmark Mthatha* case, I accordingly find that it was not an irregular step for the respondent to file an exception even if the order only referred to a plea.

[14] The result is that there is no merit in the rule 30 application. It must be dismissed with costs. Two counsel appeared for the respondent. There is no justification for the appointment of two counsel in a simple and straightforward case such as this.

[15] The application is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant:

Mr F H Maliwa

Instructed by:

Makangela Mtungani Inc, Mthatha

For the respondent:

Mr M H Sishuba and Mr P Mhlana

Instructed by:

The State Attorney, Mthatha