IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

15/11/13

CASE NO: 12673/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED
	DATE: 15 Nov 2013
	SIGNATURE: .... Jansen

In the matter between:

MARIA ELIZABETH VAN DEN BERG	Plaintiff (Applicant)
and	
ARWYP MEDICAL CENTRE	1st Defendant (Respondent)
A J DYABALA	2nd Defendant
NETCARE UNITAS HOSPITAL	3rd Defendant
CLAUD KILIAN	4th Defendant

JUDGMENT

JANSEN AJ

Background:

[1] The applicant issued summons against the defendants, which met with a notice of intention to defend by the first defendant and

fourth defendant only and no plea was forthcoming from any of the other defendants. As a result, a notice of bar was filed by the plaintiff on the first defendant on 9 May 2012. This notice of bar elicited an exception by the first defendant filed on the plaintiff on 15 May 2012 which, *ex facie* the document, is to the effect that the plaintiff had not made out a cause of action in its particulars of claim (hereinafter referred to as the "first exception").

[2] At this stage the attorneys for the parties exchanged correspondence (purportedly aimed at reaching some sort of agreement). During these exchanges of correspondence, the first defendant's attorney was advised that the plaintiff would not amend her particulars of claim as they were not vague and embarrassing and/or lacked averments to sustain a cause of action and therefore that the first defendant should set the matter down for arguing an exception, but failed to do so.

[3] On 14 February 2013 a notice of a new firm of attorneys, acting for the first defendant only, was served on the plaintiff's attorney of record and filed at court on 15 February 2013.

[4] A notice in terms of Rule 23(1) to the effect that the particulars of claim are vague and embarrassing, dated 5 March 2013, was served on the plaintiff on 11 March 2013 (hereinafter referred to as the "second exception") and filed at court on 12 March 2013. This was

done without the first exception being withdrawn. As a result, the plaintiff filed a Rule 30 application calling on the first defendant to withdraw the exception of 15 May 2012 or to furnish heads of argument in respect thereof. It is emphasised that the Rule 30 application cites only the first defendant whereas the Rule 23(1) notice refers to four defendants in its heading. Only the first defendant is cited as respondent in this application, as only the first defendant filed a Rule 23(1) notice.

[5] The said Rule 30 application was launched on 11 April 2013 and was further preceded by a facsimile dated 13 March 2013, informing the respondent of the alleged irregular step and granting the respondent from 13 March 2013 to 15 March 2013 to file a plea or serve heads of argument in its 2012 exception. Rule 30(2)(b) requires a party to give a respondent ten court days for the removal of an alleged irregularity.

[6] The plaintiff was also always free to enrol the first exception, as was set out in ***Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (OPD)** at pages 754–755A.

[7] What is puzzling is that the indexed Rule 30 application does not contain all the relevant documentation. The exception served on the plaintiff's attorney of record on 5 April 2013, and filed at court on 8 April 2013, does not form part of the Rule 30 application. It

refers to four defendants in its heading but is correctly entitled "First Defendant's Exception".

[8] The application which is indexed and paginated contains the notice of motion served and filed on 11 April 2013, a founding affidavit, the first defendant's notice in terms of Rule 23(1) dated 5 March 2013 (but served on 12 March 2013), the first defendant's first exception, a notice of bar served on 9 May 2012 and the facsimile dated 13 March 2013, which preceded the Rule 30 application.

[9] The Rule 30 notice (the facsimile) which was sent to the first defendant gives it two ordinary days instead of ten court days within which to remove the alleged irregularity. The last day when the Rule 30 notice, seeking the removal of the alleged irregularity/irregularities could have been filed by the plaintiff, was ten court days after the plaintiff became aware of the irregular step, namely on 26 March 2013 (ten days after service of the Rule 23(1) notice on her attorneys of record, which took place on 11 March 2013). No such notice was ever filed. Had such a notice been filed the Rule 30 application had to be launched before 12 April 2013. As stated, it was launched on 11 April 2013. Furthermore, not only the Rule 23(1) notice (the "second exception"), but the subsequent exception filed on 8 April 2013, should have been attacked in the Rule 30 application, once the exception was served and filed.

[10] Rule 30(1) and (2) of the High Court Rules reads as follows:.—

> "**30 *Irregular Proceedings***
>
> ***(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.***
>
> ***(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—***
>
> ***(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;***
>
> ***(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent <u>an opportunity of removing the cause of complaint within ten days;</u>***
>
> ***(c) <u>the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2)</u>.***"

[11] Hence, the plaintiff's Rule 30 application itself, is wholly irregular and does not comply with either Rule 30(2)(b) nor Rule 30(2)(b)(c) because no Rule 30 notice was served and filed. The application is therefore bad in law and should fail.

[12] Nonetheless, because the Rule 30 application is before the court, the merits or demerits of the grounds of the alleged irregularity set out therein will be considered.

[13] The mere fact that an exception has already been taken does not prohibit a party from taking a second exception, as was argued on behalf of the plaintiff.

[14] The real question, however, is whether, in principle, the applicant is correct in stating that the further Rule 23(1) notice (and exception, which, as set out above, seems to have eluded the parties) constitute an irregular step. Seeking to argue, as the respondent's counsel did, that the first Rule 23 exception was filed merely to put a pleading in place after the notice of bar, and when it was not pursued, the notice of bar was somehow resuscitated, cannot be correct. A punitive costs order could have been sought against the respondent, as the plaintiff could have enrolled the exception as set out above.

[15] There is no irregularity in filing a second exception where the first exception has not yet been heard. No authority for the proposition that the filing of a second exception constitutes an irregularity, in circumstances where a previous exception has not yet been finalised, were cited to the court. The reason for this is obvious. It is trite that one can, for example, serve various requests for particulars for trial, in the same way that one can, for example, file more than one Rule 35(3) notice. There is nothing untoward in such conduct. This is so, *a fortiori*, in that one can except to a pleading and fail yet, when the trial is heard, take the self-same exception. An order dismissing an exception is not binding on the trial court[1] and the same argument may again be raised. The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs of an exception. Thus an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. If it does not have that effect the exception should not be entertained.

[1] *Conroy v Nicol and Another* 1951 (1) SA 653 (A); *Shifren and Others v SA Sentrale Ko-Op Graanmaatskappy Bpk* 1964 (2) SA 343 (O); *Lancino Finanical Investments (Pty) Ltd v Bennet* [2008] 4 All SA 220 (SCA).

[16] As stated, it was argued by counsel for the first defendant that because the first exception was not set down for hearing, the notice of bar was somehow resuscitated. This contention is incorrect. An exception is a pleading and amounts to compliance with a notice of bar. The plaintiff's remedy lay in setting the exception down for hearing as it was entitled to do. This is clear from the matter ***Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and Others: In Re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd and Others*** **2010 (3) SA 81 (ECM)** wherein a notice of bar and the effect of Rule 26 were analysed.

[17] Rule 26 provides as follows: —

> "***26 Failure to Deliver Pleadings - Barring***
>
> ***Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the***

pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading."

[18] In the ***Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality and Others*** *supra* case the following is stated in paragraph [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."

[19] It was also argued, on behalf of the plaintiff, that the second exception was out of time. In this regard, the plaintiff has only herself to blame. The plaintiff cannot state that she has suffered prejudice as her attorneys of record should have enrolled the first exception, had she wished the exception to be heard.

[20] Furthermore, the Rule 30 application is wholly defective as set out above, and the application should fail on this ground alone.

Order

In the event, the following order is made: –

1. The Rule 30 application is dismissed, with costs.

MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE PLAINTIFF
MADLELA GWEBU MASHAMBA INC

c/o SAMBO-MLAHLEKI ATTORNEYS
Suite 316
City Towers
221 Lilian Ngoyi Street (Van der Walt Street)
PRETORIA
REF: J GWEBU/VAN1/0001/JG

ATTORNEYS FOR THE FIRST DEFENDANT
SAVAGE JOOSTE & ADAMS INC
141 Boshoff Street
Nieuw Muckleneuk
PRETORIA
Tel No: (012) 452 8200
Fax No: (012) 452 8270
REF: MR W FORRESTER/AB/WG676

ATTORNEYS FOR THE SECOND TO FOURTH DEFEFENDANTS
MESSRS MACROBERT
Cnr Justice Mohammed and Jan Shobo Streets
BROOKLYN
Pretoria
Tel: (012) 425 3400
REF: 1018729

COUNSEL FOR THE FIRST DEFENDANT
ADVOCATE T.A.L.L. POTGIETER