

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 3818/2011

In the matter between:

KRAMER WEIHMANN AND JOUBERT INC.

Plaintiff

and

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION (SACCAWU)**

Respondent

JUDGEMENT:

MOLEFE, AJ

HEARD ON:

16 AUGUST 2012

DELIVERED ON:

16 AUGUST 2012

[1] This is an opposed application for default judgment by the applicant against the respondent. We are all well conversant with the background of this matter from when summons was served on the defendant on the 7 October 2011.

To avoid prolixity, I will only deal with the essential facts relating to the application before court today.

- [2] Declaration to the simple summons was served on the defendant/respondent on the 24 April 2012 and the defendant was procedurally, to have served upon the plaintiff, a plea or an exception by no later than the 24 May 2012 (20 court days thereafter).

On the 25 May 2012, a Notice of Bar was served on the defendant requiring the defendant to deliver its plea within 5 (five) days after the day upon which the notice was delivered, failing which the defendant would be *ipso facto* barred.

- [3] On the 30 May 2012, on the 3rd court day after the Notice of Bar was served, the defendant served upon the plaintiff in a Rule 23(1) Notice.

Notice in terms of Rule 23(1) reads as follows:

“Where any pleading is vague and embarrassing or lack 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 set it down for hearing in terms of paragraph (f) of sub-rule 5 of rule 6: 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 complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.”

- [4] In terms of the Rule 23(1), the plaintiff in *casu* was afforded an opportunity to remove the cause of complaint within 15 days from the 30 May 2012, failing which the defendant was to deliver its exception.

I am in agreement with the applicant’s counsel’s submissions that the party faced with a rule 23(1) Notice could “either amend the pleading in question or stand by the pleading and face the risk of an exception”¹

In this case, the last day for the plaintiff to remove the cause of complain or face the risk of an exception was the 20 June

¹ Erasmus J in *Erf 1026 Tygerberg CC t/a Aspin Promotions SA v Pick ‘n Pay Retailers (Pty) Ltd*, 2005 (6) 527(c) at 534.

2012.

However, on the 5 June 2012, the plaintiff proceeded with the application for default judgement against the defendant/respondent on the basis that “verweerder buite tyd kennisgewing in terme van reël 23(1) afgelewer het op 30 Mei 2012, en na eiser se kennisgewing van pleitbelet.”

- [5] The applicant’s counsel has argued that the single most determining fact in this application is that the notice in terms of rule 23(1) was filed by the defendant after the time allotted for the filing of the plea had already lapsed and more importantly, after the defendant had already been called upon to file its plea by means of a Notice of Bar.

It was also counsel’s submission that when an exception is aimed at a declaration, it must be delivered within the time period allowed to file a plea and that once a notice of bar has been delivered, such an exception is out of time.

- [6] I do not agree with counsel’s argument and submission.

Rule 26 clearly states that a party who fails to deliver a

pleading within the time stated in the rules may be barred. A party who receives a notice of bar may file any relevant pleading, for instance, instead of filing a plea, a defendant may file an exception. Once the relevant pleadings has been filed the bar falls away.²

The respondent in *casu* duly filed a relevant pleading before the expiration of the period provided in the notice of bar.

- [7] Also, according to rule 23(4) wherever any exception is taken to any pleading or an application to strike out is made no plea, replication or other pleading over shall be necessary.

An exception serves as a means of taking objections to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing affecting the ability of the other party to plead. (my emphasis)

- [8] A plaintiff can accordingly not object to the rule 23(1) notice on the ground that it was delivered outside the prescribed period allowed for the delivery of a plea, but before the

² Landmark Mhatha (Pty) Ltd v King Sabata Dalindyebo Municipality; In re African Bulk Erathworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd 2010 (3) SA 81 (ECM) at 88H – i.

expiration of the period provided in the notice of bar.

Hence the requirement that the defaulting party ought to be placed under bar by way of notice to file the relevant pleadings within the five (5) day period, before such party is regarded as being in default of filing, the pleading concerned and *ipso facto* barred.

When the respondent filed the rule 23(1) notice on the 30 May 2012, the respondent was still within the 5 day notice of bar period as the 5th day only lapsed on the 1 June 2012.

- [9] It follows logically in my view that where the respondent in response to a notice of bar delivers a rule 23(1) notice, he has taken the next procedural step in the matter and has thus complied with the court rules.

Furthermore, the rule 23(1) notice need not be signed by counsel or an attorney with a right of appearance as it is not an exception.

- [10] In **FELIX AND ANOTHER v NORTIER NO & OTHERS(2)**

1994 (4) SA 502 SE at 506D – H; the court decided that “after a notice of bar was served, the first defendant was perfectly entitled to file a notice of exception and not limit himself to filing a plea within the time period laid down by rule 26”.

[11] I therefore have reached the conclusion that the defendant’s/respondent’s rule 23(1) was filed timeously with the period of 5 days extended by the notice of bar and that the defendant had duly complied with the court rules.

[12] It has been suggested by the defence counsel that costs *de bonis propriis* be awarded against the applicant herein. Counsel has supported his suggestion with a number of cases in his heads of argument. I do not believe that legal practitioners should be personally punished by costs orders on every occasion that their own view of a legal position is not upheld by the court. A cost order *de bonis propriis* does not seem to be warranted in these circumstances.

[13] For these reasons, I order that the application for default judgment be dismissed and the applicant to pay the costs of the application.

D. S. MOLEFE, AJ

On behalf of plaintiff/applicant:

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On behalf of defendant/respondent:

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