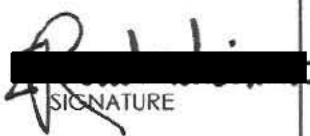




**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2024-073741

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3)	REVISED: YES / ☒ NO
16/10/24 DATE	
 SIGNATURE	

In the matter between:

NTOKO, CHARMAINE PETUNIA N.O.

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Raubenheimer AJ:

Summary

Procedure – Notice of Bar – No plea filed – Default judgement – effect of Notice of Intention to amend.

Order

[1] In this matter I make the following order:

[1.1] The application for the dismissal of the default judgment application as well as for the defendant to be permitted to file a plea is dismissed.

[2] The reasons for the order follow below.

Introduction

[3] The matter came before me during the September 2024 recess as part of the special RAF default judgment court project.

[4] It was enrolled for default judgment on the basis that the defendant was placed under bar on 14 August 2024.

[5] The plaintiff served a notice of amendment on 25 September 2024.

[6] The matter was enrolled for Monday, 30 September 2024 but was stood down to Wednesday, 2 October 2024 as the defendant's attorney indicated that there is a possibility that the matter could settle.

[7] On Wednesday, 2 October I was informed that the matter had not settled and the attorney for the Defendant submitted that she would seek an order dismissing the application for Default judgment together with an order in terms of which the defendant be permitted to file a Plea.

- [8] The defendant did not bring an application to have the Bar lifted.
- [9] The matter was stood down to Thursday, 3 October 2024 and both representatives were required to submit Heads of Argument.
- [10] The matter proceeded on Thursday, 3 October 2024 with arguments from both parties.

The procedural chronology

- [11] The incident wherein the plaintiff was injured occurred on 21 September 2021.
- [12] Summons was issued on 8 July 2024.
- [13] The defendant entered an appearance to defend on 15 July 2024 and thereafter did not file a Plea.
- [14] The defendant was placed under bar on 14 August 2024.
- [15] The Notice of set down on the Default Judgement roll was served on the defendant on 27 August 2024 and the Application for Default Judgment on 23 September 2024.
- [16] The Plaintiff filed a notice of a amendment on 25 September 2024.

The submissions

- [17] The defendant's attorney argued that the filing of a Notice of Intention to Amend has the effect of automatically reopening the pleadings and lifting the Bar, affording the defendant a right to plea and consequently removing the matter from the default judgement roll.

- [18] For support of its contentions the defendant relied on the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹, *Jordaan v Road Accident Fund*² and *Doovey v University of the Free State and Another*³
- [19] Neither of the mentioned judgments dealt with the question of the lifting of a Notice of Bar and could consequently not be authority for the proposition that a Notice of Intention to Amend automatically lifts a Notice of Bar and entitles the defendant to file a Plea.
- [20] A further important distinction between the authorities relied on by the defendant and the case *in casu* is that in all of the mentioned authorities there was a full and comprehensive exchange of pleadings between the parties. No such exchange of pleadings occurred *in casu* as the defendant did not file a plea and as a result was placed under Bar.
- [21] In all of the authorities referred to by the defendant the pleadings had closed and had the Notice of Intention to Amend been filed only after close of pleadings.
- [22] In the present matter, the pleadings could not have closed as the defendant had not yet filed a plea. The defendant has not entered “the fray and did not deliver a plea”⁴ consequently, the dispute between the parties has not yet become “frozen”⁵
- [23] The most important distinction however is that in the authorities relied on by the defendant was there no Notice of Bar and consequently, no response to the Notice of Bar.

¹ 2012 4 SA 593 (SCA)

² (2022/03746) [2023] ZAGPJHC 1260 (3 October 2023)

³ (5668/2018) [2021] ZAFSHC 45 (22 February 2021)

⁴ Ngubane v Road Accident Fund 2022(5) SA 231 (GJ)

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality (n 1 above)

[24] The applicant submitted that a party under Bar has to apply for the Bar to be lifted as prescribed in Rule 27. Such application is to be a substantive application.

[25] If the application is granted then only will the defendant be permitted to file a plea.

The legal position according to the rules

[26] Barring is dealt with in Rule 26 of the Uniform Rules of Court. The Rule provides as follows:

“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”

[27] When a party is in default of pleadings⁶ the delivery of a Notice of Bar is peremptory⁷ as opposed to where a party is in default of appearance, such party will be ipso facto barred when the time for the Notice of Intention to Defend has lapsed.⁸

⁶ Pete, S. Hulme, D *et al* (2016) Civil Procedure: A Practical Guide 3rd Ed Oxford University Press.266

⁷ Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd 2010 (3) SA 81 (ECM) at 86B–C. Santam Insurance Co Ltd v Manqele 1975 (1) SA 607 (D)

⁸ Woolf v Zenex Oil (Pty) Ltd 1999(1) SA 652 (W)

[28] On receipt of a Notice of Bar the defendant has to either file a plea or apply for an extension of the time afforded to file a plea. Should the defendant do neither of these and the time limit for the filing of the Bar has lapsed the only way that the defendant can file a plea is to bring a substantive application to have the bar lifted in terms of Rule 27.

[29] In *Ingosstrakh v Global Aviation Investments and Others*⁹ the court stated as follows with reference to the process for the lifting of a bar:

"Before Ingosstrakh's contentions are considered, it has to contend with the fact that it is under bar from delivering its plea. As stated already, Global's notice of bar was served on 4 November 2015, affording Ingosstrakh five days in which to file its plea. The last day for it to do so was 11 November 2015. It did not do so. Instead, it launched the application to set aside the service of summons. As a result, as from 11 November 2015, Ingosstrakh has been under bar. The effect thereof is that unless and until the bar is uplifted, Ingosstrakh has no right to deliver its plea. Its application for the upliftment of the bar was dismissed on 2 September 2016."

[30] The court proceeded and dealt with the procedure to be followed for the upliftment of the bar. It stated as follows:¹⁰

"Rule 27 of the uniform rules deals with the extension of time, removal of bar and condonation. In terms of rule 27(3) the court may, on good cause shown, condone any non-compliance with the rules. Thus, in order to succeed in this regard, Ingosstrakh would be expected to show good cause why condonation should be granted for its failure to deliver its plea. Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a demonstration that a party is acting bona fide; and that such party has a bona fide defence which prima facie has some prospect of success. Good cause requires a full explanation of the default so that the court may assess the explanation."

⁹ [2021] 3 All SA 316 (SCA) para 7.

¹⁰ 2021 (6) SA 352 (SCA) para 21.

[31] In respect of the explanation for the default requirement the court stated the following:¹¹

"With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh's failure to file its plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015 to file its plea. There is simply no explanation whatsoever why a plea was not filed during that period."

[32] The defendant did not launch an application to have the bar lifted, neither did it apply for condonation for the delivery of its plea. It instead relied on the mistaken proposition that a bar is automatically lifted with the filing of a Notice of Intention to Amend. This was the election that the defendant made and did so at its peril well knowing of the existence of a prescribed procedure to have a bar lifted.

Order

[33] The application for the dismissal of the default judgment application is dismissed.

[34] The application for permission to file a plea is dismissed.

[35] The defendant is ordered to pay the costs for the Application on an attorney and client scale on scale C


E RAUBENHEIMER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

¹¹ 2021 (6) SA 352 (SCA) para 22.

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **16 October 2024**

FOR THE PLAINTIFF:

Adv Marais SC

INSTRUCTED BY:

Ndzalama Ngobeni Attorneys Inc

COUNSEL FOR THE RESPONDENT:

Ms Ameersingh, State Attorney

INSTRUCTED BY:

Road Accident Fund

DATE OF HEARING:

03 October 2024

DATE OF JUDGMENT:

16 October 2024