



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 4968/2023

In the matter between

ORAMOK (PTY) LTD

PLAINTIFF

and

MANGAUNG METROPOLITAN MUNICIPALITY

DEFENDANT

Neutral citation: Oramok v Mangaung Metropolitan Municipality

Coram: Nemavhidi AJ

Heard: 20 June 2024

Delivered: This judgment was handed down and released to SAFLII. The date for hand-down is deemed to be 12 September 2024.

Summary: Rule 30A application to set aside Notice of Exception in terms of Rule 23(1)-whether Rule 23(1) is an appropriate response to a Notice of Bar

ORDER

The Applicant's application to set aside the notice to except in terms of Rule 23(1) of the Uniform Rules of the Court is dismissed.

JUDGMENT

Nemavhidi AJ

Introduction

[1] The application before the court is one of Rule 30A by the plaintiff in the main action. The plaintiff seeks to set aside the notice to except in terms of rule 23(1) of the Uniform Rules of Court served by the defendant with regards to the plaintiff's declaration. The question before the Court with regards to the rule 30A application is whether the notice to except in terms of rule 23(1) is an appropriate response to the notice of bar.

[2] The applicant alleges that the respondent is precluded from serving the notice in terms of rule 23(1) after the applicant served and filed the notice of bar. The applicant considered that the notice to except is an irregular step and proceeded to serve and file a notice in terms of rule 30A on the respondent. The applicant gave the respondent ten days to remove the cause of the complaint. However, the respondent did not respond to the notice. This left the applicant with no alternative but to seek relief from the court in this interlocutory application.

[3] A notice of bar is an instrument used by a litigant to warn the opponent to plead and to give an extension of time to the opponent to allow the opponent to respond to a pleading. Should the opponent fail to heed the notice of bar the litigant would be *ipso*

facto barred.

[4] On the last of the *dies* afforded by the applicant, the respondent served a notice titled 'Respondents Notice of Exception in terms of Rule 23(1) of the Uniform Rules of Court'.

[5] A litigant may use the procedure to except to a pleading in the following circumstances:

- (i) The pleading lacks averments which are necessary to sustain an action or defence as the case may be and or;
- (ii) The pleading is vague and embarrassing.

[6] The respondent states that the applicant's declaration is contrary to rule 18(6), which requires that every pleading which relies on the true copy thereof, or of the part relied on in the pleading, should be annexed to the pleading. The applicant relies on a written and partly oral contract. However, he did not attach a copy of that contract. Furthermore, the respondent avers that plaintiff did not plead the material facts which gave rise to a cause of action as his particulars of claim do not sustain a complete cause of action.

[7] In *Felix and Another v Nortier NO and Others*,¹ Leach J held that a defendant is entitled to file a notice of exception after a notice of bar had been served and need not limit themselves to filing their plea within the period prescribed by Rule 26. This position was supported by the court in *Steve's Wrought Iron Works and Others v Nelson Mandela Metro*² (*Steve's Wrought Iron Works*) where the court held that precluding a party from raising an exception upon receipt of a notice of bar lest such party had initially filed the notice within the prescribed period allowed for the filing of their plea, would defeat the purpose served by the process of excepting to a plea.

[8] In *Landmark Mthatha (Pty) Ltd v King Sabata Dlalindyebo Municipality and Others: In re: Africa Earthworks (Pty) Ltd and Others*,³ the court in the Eastern Cape followed the approach in the Felix case. However, in *Barnes and Another v Kushite Investment*

¹ *Felix and Another v Nortier NO and Others* 1994 (4) 502 (SE).

² *Steve's Wrought Iron Works and Others v Nelson Mandela Metro* [2019] ZAECPHC 78; 2020 (3) SA 535 (ECP).

³ *Landmark Mthatha (Pty) Ltd v King Sabata Dlalindyebo Municipality and Others: In re: Africa Earthworks (Pty) Ltd and Others* 2010 (3) SA 81 (ECM).

Holdings (Pty) Ltd,⁴ the Gauteng high court held that the weight of authority is to effect that a notice of intention to except in terms of rule 23(1) constituted a pleading for the purposes of rule 26, or at least 'the next procedural step in the proceedings' and therefore constituted a valid response to a notice of bar. In arriving to this conclusion, the Court quoted with approval the Eastern Cape High Court judgment in *Steve's Wrought Iron Works*.

[9] A similar approach was also adopted by the Pretoria High Court in the case of *Tuffsan Investment 1080 (Pty) Ltd v Sethole*.⁵ In this case the court held that the defendants were entitled to serve the notice of intention to except within the period set out in the notice of bar. Similarly, the Free State High Court, in the case of *Kramer Weihmann and Joubert Incorporated v SA Commercial Catering and Allied Workers Union*,⁶ held that a party faced with a notice of bar may file any relevant pleading in response to a notice of bar. The court held that the filing of a rule 23(1) notice of intention within the time stipulated in the notice of bar constituted a relevant pleading.

[10] The cases cited above are to the effect that a party faced with a notice of bar may file any relevant pleadings in response to a notice of bar. The filing of a rule 23(1) notice of intention to except within the timeframe stipulated in the notice of bar constitute a relevant pleading.

[11] In the result, the following order is made:

The Applicant's application to set aside the notice to except in terms of rule 23(1) of the Uniform Rules of the Court is dismissed.


 P.P. MB NEMAVHIDI AJ

⁴ *Barnes and Another v Kushite Investment Holdings (Pty) Ltd* [2022] ZAGPPHC 491.

⁵ *Tuffsan Investment 1080 (Pty) Ltd v Sethole and Another* [2016] ZAGPPHC 653.

⁶ *Kramer Weihmann and Joubert Incorporated v SA Commercial Catering and Allied Workers Union* [2012] ZAFSHC 152.

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