

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA JUDGMENT

Reportable

Case no: 515/2023

In the matter between:

ALEXIA KOBUSCH

FIRST APPELLANT

WAYNE KOBUSCH

SECOND APPELLANT

WOODMORE MANOR CC

THIRD APPELLANT

and

WENDY WHITEHEAD

RESPONDENT

Neutral citation: *Alexia Kobusch and Others v Wendy Whitehead* (515/2023)
[2025] ZASCA 24 (27 March 2025)

Coram: MOTHLE, MOLEFE and UNTERHALTER JJA and MJALI and
MANTAME AJJA

Heard: 6 September 2024

Delivered: 27 March 2025

Summary: Civil procedure – barring a party to proceedings – exception based on lack of averments to sustain a cause of action – whether the exception was delivered after the respondent was barred – no valid exception – exception dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Madondo AJP, sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following order:
'The exception is dismissed with costs.'

JUDGMENT

Molefe JA (Mothle and Unterhalter JJA and Mjali and Mantame AJJA concurring):

[1] This is an appeal against the judgment and order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), upholding an exception on grounds that the appellants' (the plaintiffs in the main action) particulars of claim lack averments necessary to sustain a cause of action. The appellants contend that the delivery of a rule 23(1)(a)¹ notice by the respondent (the defendant in the main action) was an irregular step which should have been set aside in terms of rule 30(1). The respondent served a notice to abide by the decision of this Court in respect of the order appealed against, subject to no cost order being sought or granted against her.

[2] The first appellant is Ms Alexia Kobusch, a major female residing at Villa 6[...], Street [...], Al Reef, Abu Dhabi, United Arab Emirates. The second appellant is Mr Wayne Kobusch, a major male businessman residing at Villa 6[...], Street [...], Al Reef, Abu Dhabi, United Arab Emirates. The third appellant is a close corporation duly registered and incorporated in accordance with the Close Corporations Act 69 of 1984, and having its registered office at 5[...] G[...] L[...], Witpoort, Midrand. The first and second appellants are members of the third appellant and leased horses from the third appellant, the registered owner and breeder of these horses.

[3] The respondent is Ms Wendy Whitehead, a major female professional racehorse trainer, who carries on business as a sole proprietor, under the name

¹ The reference to the rules in the judgment refers to the Uniform Rules of Court.

and style of Wendy Whitehead Racing Stables, and having her principal place of business at Summerveld Training Centre, JB McIntosh Drive, Summerveld, Shongweni, Durban. For convenience, the parties shall be referred to as in the main action.

[4] On or about 18 March 2021, the first and second plaintiffs entered into a racehorse training agreement with the defendant (the racing agreement). The terms of the racing agreement were, inter alia, that the defendant would train the plaintiffs' horses for purposes of improving their skill, fitness, speed and anaerobic endurance to race reasonably competitively, within a reasonable period of time. The racing agreement was expressly cancelled by the first and second plaintiffs on 21 February 2022, and they reclaimed the monies that they had paid to the defendant in terms of the agreement.

[5] The plaintiffs sued the defendant for damages allegedly arising from a breach of a contract, delictual breach of a legal duty to care, damages for the defendant's defamatory remarks, and for payment of restitutionary damages for patrimonial loss of the diminished value of their horses. Summons was issued and served on the defendant on 25 April 2022. On 5 May 2022, the defendant served her notice of intention to defend. A plea in terms of rule 22(1) was due to be served by 2 June 2022. The defendant delivered no plea, and on 3 June 2022, the plaintiffs delivered a notice of bar in terms of rule 26, calling on the defendant to deliver a pleading within 5 days, that is by 10 June 2022.

[6] The defendant did not comply with the demand, but on 9 June 2022, thirty-one days after receipt of the summons, she delivered a notice to remove causes of complaint in terms of rule 23(1)(a), and notice to strike in terms of rule 23(2). She complained that the particulars of claim lack averments necessary to sustain an action and are vague and embarrassing, and calling upon the plaintiffs to remove the cause of complaint within 15 days. On 23 June 2022, the plaintiffs delivered notice of an irregular step in terms of rule 30(2)(b), calling on the defendant to remove the cause of complaint within 10 days, which expired on 7 July 2022. The defendant instead delivered an exception dated 6 July 2022 on 13 July 2022.

[7] The high court found that the defendant's rule 23(1)(a) notice was delivered out of time and was accordingly set aside as an irregular proceeding. The high court however upheld the exception on grounds that the particulars of claim lacked averments necessary to sustain a cause of action. The plaintiffs applied for leave to appeal the judgment and order of the high court. The high court granted leave to appeal to this Court, alternatively to the full court of the division. Such an order is irregular. The high court must decide the court to which leave is granted. We proceed on the basis that the high court intended to grant leave to this Court.

[8] The question to be determined in this appeal is whether the service of the rule 23(1)(a) notice was a valid response to the notice of bar or whether it was procedurally incorrect as it was delivered out of time and the defendant was barred from filing a pleading.

[9] The relevant provisions of the Uniform Rules of Court are these:

a) In terms of rule 19, a defendant has 10 days from service of the summons to deliver a notice of intention to defend. The defendant delivered her notice of intention to defend within the prescribed 10-day period.

b) In terms of rule 22(1), a defendant must file his or her plea (with or without a claim in reconvention) or an exception (with or without an application to strike out) within 20 days after serving the notice of intention to defend. The defendant failed to file her plea or exception within the prescribed 20-day period.

c) In terms of rule 26, a notice is served requiring a defendant to deliver his pleading within 5 days after delivery of a notice of bar. If a defendant fails to do so, he or she is barred and the case proceeds as an unopposed matter, unless a defendant succeeds in having the bar lifted in terms of rule 27.

[10] Rule 23(1) provides that:

'23 Exceptions and applications to strike out

(1) Where any pleading is vague and embarrassing, or lacks 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 apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that –

- (a) where a party intends to take an exception that a pleading is vague and embarrassing such a party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and
- (b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.'

[11] Rule 23(1) therefore permits two distinct grounds of exception, namely, that the particulars of claim are vague and embarrassing, or that they lack averments necessary to sustain a cause of action. If a defendant wishes to except on the ground that the particulars are vague and embarrassing, the defendant's notice to this effect must be served within 10 days of receipt of summons. As a precursor to such an exception, rule 23(1)(a) requires a defendant to afford his opponent an opportunity to remove the cause of complaint within 15 days. If the plaintiff replies to the notice and the defendant considers that the reply does not remove the cause of complaint, the defendant must file an exception within 10 days of receipt of the plaintiff's reply. If there is no reply, the defendant must file his exception within 15 days from the date on which such a reply is due.

[12] As aforementioned, the high court set aside the defendant's exception insofar as it was based on a claim that the particulars of claim were vague and embarrassing. The reason was that the defendant did not deliver its rule 23(1)(a) notice timeously. Such an exception was accordingly and correctly set aside as an irregular proceeding.

[13] The high court, however, upheld the exception that the plaintiffs' particulars of claim lacked averments necessary to sustain a cause of action. This exception was based on the premise that the plaintiffs, as lessees of the horses (not being the owner), cannot sue on contracts that such lessees had concluded with the defendant, and, that the plaintiffs had no right to be in possession or control of such horses.

[14] The key issue before this Court is whether the notice service under rule 23(1)(a) was a valid response to the notice of bar served on the defendant on 3 June 2022. An exception on the ground that the particulars of claim lack the necessary averments to sustain a cause of action is a 'pleading'. Like a plea, a properly drawn exception concludes with a prayer for relief.² A notice in terms of rule 23(1)(a) is not a pleading, it is merely a precursor to an exception.³

[15] The defendant served her notice of intention to defend the plaintiffs' summons on 5 May 2022. The defendant had 20 days from filing of this notice, to deliver his plea or an exception which would have to be confined to a contention that the particulars of claim lacked the necessary averments to sustain a cause of action. This was due to be served on 2 June 2022.

[16] No plea and/or exception was served and on 3 June 2022, the plaintiffs delivered a notice of bar, and calling on the defendant to deliver a pleading within 5 days, that is by 10 June 2022. On 9 June 2022, the defendant delivered a notice in terms of rule 23(1)(a) and rule 23(2) ('the defendant's notice'). The defendant's notice complained that the plaintiffs' particulars of claim (i) lack averments necessary to sustain a cause of action; (ii) are vague and embarrassing; and (iii) are vexatious.

[17] The question is whether the defendant's notice was a proper response to the notice of bar. The defendant's notice afforded the plaintiffs 15 days to remove the cause of complaint, failing which the defendant would except to the plaintiffs' particulars of claim. For the purposes of rule 23(1), the defendant was required to give notice to remove the cause of complaint in respect of her complaint that the particulars of claim are vague and embarrassing. Rule 23(1) requires no such notice in respect of an exception that the particulars of claim lack averments necessary to sustain an action ('a true exception'). The defendant nevertheless gave notice of a true exception and also afforded the plaintiffs an opportunity to remove this cause of complaint. However, the defendant was required by rule 23(1)

² *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 552H.

³ *McNally NO and Others v Codron and Others* [2012] ZAWCHC 17.

to give notice of her complaint that the plaintiffs' particulars of claim are vague and embarrassing and did so.

[18] Whether a notice given in terms of rule 23(1) constitutes a pleading has given rise to some debate. We are inclined to the view that the rules of court must be understood in a practical way to advance the process of litigation and not to have the rules become an obstacle course without purpose.⁴ Where the next step to be taken to plead a party's case is a notice, as rule 23(1) requires for a complaint that the particulars of claim are vague and embarrassing, then that should be taken to be a pleading for the purposes of rule 26 to satisfy the bar. The notice is the required next step to challenge a pleading. If this were not so, a litigant would have to apply to lift the bar, simply to be able to file the very notice that the rules required, so as to raise the complaint that the particulars of claim are vague and embarrassing. The defendant's notice thus did answer what the plaintiffs' bar required in respect of the challenge that the plaintiffs' particulars of claim are vague and embarrassing. However, there was no reason why the defendant could not have pleaded her true exception – there was no need to give notice that she intended to do so because rule 23(1) contains no such requirement.

[19] It follows that the defendant's notice sufficed to secure her vague and embarrassing complaint, but did not preserve the defendant's true exception which was not brought within the time specified for a further pleading under the bar. Therefore, the defendant was required to seek to lift the bar in respect of her true exception.

[20] On a proper interpretation of the rules, the defendant did not file a proper response to the notice of bar in respect of her true exception, and is now under bar in respect of that exception. The high court should not have entertained the exception until an application was made to lift the bar. The defendant should have filed an exception as a pleading and not a notice.

⁴ *Makaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC).

[21] Although the appeal should succeed on the procedural point only, the defendant's exception substantively lacks merit. The complaint is directed against the plaintiffs' claims which are contractual claims for the restitution of monies paid to the defendant in terms of the racing agreement, together with ancillary relief related to the agreement. The defendant's contention is that the first and second plaintiffs have no locus standi to sue on the racing agreement because they had leased the horses in respect of which the racing agreement was concluded.

[22] In my view the defendants' contention is bad in law for the simple reason that it is trite that a lessee is entitled to be in possession and control of the item that is leased. Furthermore, the third plaintiff, to the extent that it has an interest, has been joined in the action.

[23] The high court ought to have dismissed the exception in its entirety, both on procedural and substantive grounds. The defendant has not advanced any valid exception to allege that the particulars lack averments necessary to sustain a cause of action.

[24] In relation to costs, the respondent has elected to abide by the decision of this Court on condition that costs are not awarded against her. However, the appellants had to come to this Court to overturn orders of the high court. Therefore, unless the respondent abandoned the judgment of the high court, she remains liable for the costs of this appeal. This Court has consistently held that costs follow the result, and a successful party is entitled to his or her costs. The respondent has not advanced any compelling reasons to justify a departure from this principle. While courts retain a discretion in awarding costs, such discretion must be exercised judicially with due consideration of all relevant circumstances. In the absence of exceptional circumstances, the ordinary rule that costs follow the result must apply. The respondent, having been unsuccessful, must bear the costs of the appeal.

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

- 1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following order:

‘The exception is dismissed with costs.’

D S MOLEFE
JUDGE OF APPEAL

Appearances

For the appellants:

J P Crampton

Instructed by:

Warrick De Wet Redman Attorneys, Durban
Honey Attorneys, Bloemfontein.