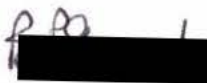


Reportable:	<u>NO</u>
Of interest to other Judges:	<u>NO</u>
Revised:	<u>YES</u>
Signature:	 17.3.2025



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 27880/2022

In the matter between:

INGQWELE CONSULTING AND PROJECTS MANAGEMENT (PTY) LTD

(Registration No: 2013/125698/07)

Applicant

and

CUMMINS SOUTH AFRICA (PTY) LTD

(Registration No: 2000/009321/07)

Respondent

This judgment is issued by the Judge whose name is reflected hereon. This judgment is handed down electronically by circulation to the parties by email and by uploading it to the electronic file of this matter on Case Lines.

The date of this judgment is deemed to be the date upon which it is uploaded onto Case Lines.

JUDGMENT

GEACH, AJ

Introduction

- [1] This is an interlocutory application in a pending action, in which pending action the respondent sues the applicant for the repayment of an initial payment in the sum of R 2 283 462.00 that was made by the respondent to the applicant under

a construction agreement, in terms of which applicant had undertaken to effect specified power station alterations but which agreement applicant subsequently allegedly materially breached and repudiated.

- [2] In the present interlocutory application, the applicant (which is the defendant in the aforesaid action) seeks the uplifting of a bar purportedly precluding it from pleading;¹ whilst the respondent (being plaintiff in the said action) seeks, by way of its conditional counter application, a default judgment against the applicant, asserting that the applicant was barred from pleading.

Postponement

- [3] At the very outset when this matter was called on 20 March 2024, counsel for the applicant sought from the bar a postponement of this application due to the unavailability of the applicant's senior counsel who had drafted the application for uplifting of the bar, because of his appointment *pro tem* as an acting judge. In support of the postponement, applicant referred to *S v Zonke and others* (CC 30/15) [2023] ZANWHC 31 (10 March 2023) at par [20]-[21] and [27](d); and tendered the wasted party and party costs occasioned thereby. The respondent opposed any postponement, emphasizing that the non-availability of counsel hardly justified a postponement, referring to *Centirugo AG v Firestone (SA) Ltd 1969 (3) SA 318 (T) at 320-1*. In addition, the respondent pointed out that an application for postponement must be made timeously,² which applicant had not done. Correspondence previously exchanged between the parties, was handed up by respondent, from which it appeared that as long ago as January 2024,³ the applicant had requested the removal of the matter from the roll of 18 March 2024 (where it had been enrolled by the respondent) on account of the "unforeseen unavailability" of counsel, with a request that it be set down for 17 April 2024. In reply on 18 January 2024, respondent pointed out that the notice of set down for 18 March 2024 had been served as far back as 6 December

¹ Respondent states this is more properly termed "removal of the bar"; and also refers to "setting aside the notice of bar".

² *Isaacs and Others v University of the Western Cape* 1974 (2) SA 409 (C) at 411; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 76; *Rabie v Cotterell N.O and Others* (813/2017) [2023] ZAECELLC 1 (31 January 2023) par [16].

³ Although that letter is erroneously dated 18 January 2023 (a common mistake at the start of a new year). Respondent's reply thereto dated 18 January 2024 refers to applicant's "letter received on even date"; and the Respondent's letter dated 15 March 2024 refers to Applicant's letter of "18 January 2024".

2023; that the matter should proceed on 18 March 2024; and that the applicant was at liberty timeously to brief alternative counsel in order to attend to the matter. In response, on 19 January 2024, the applicant retorted that it was the party that bore the responsibility for enrolling the matter; and declared: "In the absence of your indulgence to remove the matter from the roll, we will have no option but to argue for postponement before the court on the day in question". Nonetheless, applicant on 14 March 2024 repeated its request for the matter to be removed from the roll by agreement between the parties; and this time tendering the concomitant wasted costs, which applicant had not done before then, advising that senior counsel retained on the matter "is not available for either 18 or 19 March 2024 due to his stint as an acting judge until mid-April"; which request elicited the response on 15 March 2024, that despite having had a two-month opportunity to brief alternative counsel, applicant had clearly not done so; and the respondent would be proceeding with the matter as set down for 18 March 2024. As far as concerns the earlier request to reschedule the matter to 17 April 2024, the respondent's counsel indicated that he was not available for such date. Citing *Persadh and another v General Motors South Africa (Pty) Ltd 2006 (1) SA 455 (SE)* respondent relied upon its procedural right to proceed.⁴ Having regard to the applicable principles,⁵ especially those cases that are pertinent to the non-availability of counsel,⁶ since applicant had certainly had time enough to brief alternative counsel, the postponement was accordingly refused and the applicant was ordered to pay the opposed party and party costs occasioned by the unsuccessful application for postponement.

⁴ *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (SCA) par [28]; *Vhulahani: Isaac Mpho and others v Steel King Centre (Pty) Ltd and others* (340/2020) Gauteng Division, Johannesburg (20 February 2024) par 13; *Chance and Luna (Pty) Ltd and others v Killarney Country Club* (2022/018731) [2024] ZAGPJHC 432 (2 April 2024) par [5] and par [18]; L[...] M[...] T[...] v A[...] W[...] T[...] (17399/2020) Gauteng Division, Johannesburg (18 December 2024) par [22].

⁵ *Myburgh Transport v Botha t/a S A Truck Bodies* [1991] 4 All SA 574 (Nm) at 576-8; *National Police Service Union and others v Minister of Safety and Security and others* 2000 (4) SA 1110 (CC) par [4] at 1112; *Lekolwane and another v Minister of Justice* 2007(3) BCLR 280 (CC) par 17; *Psychological Society of South Africa v Qwelane and others* 2017 (8) BCLR 1039 (CC) par 31; *The Lion Match Co (Pty) Ltd v Commissioner SARS* (A 202/2020) Gauteng Division, Pretoria (29 May 2023) Full Court par [13].

⁶ In addition to the case of *Centirugo AG* relied upon by the respondent: *Ecker v Dean* 1939 SWA 22 at 23-4; *Gert Wibbelink and another v The unknown individuals entering and/or trespassing and/or settling and/or building on the immovable property known as Portion [...] of Erf [...] Jan Niemand Park and others* (64145/2021) Gauteng Division, Pretoria (5 September 2022) par [9]-[11]; *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* (326/2021) [2022] ZASCA 143 (24 October 2022) par [9]-[10].

Although this cost order patently includes the costs of respondent's counsel, no specification of the scale of counsel's costs is required herein.⁷ For purposes of taxation it is declared that one-half (50%) of the court time utilized for this matter was taken up by this abortive application for postponement.

Uplifting of Bar

- [4] Counsel who argued the unsuccessful application for postponement on behalf of the applicant proceeded, as was expected of him,⁸ to argue the interlocutory application for uplifting of the bar.
- [5] It is incumbent on an applicant to show good cause in order to obtain uplifting of a bar.⁹

Good Cause

- [6] "The use of the words '*good cause shown*' gives this court a broad discretion as to whether or not to uplift the bar" (*Minister of Police and another v Majola (86299/2015) [2018] ZAGPPHC 700 (16 February 2018) par [9]*).¹⁰ "Our courts have been hesitant to formulate an exhaustive definition of what constitutes '*good cause*' because to do so will impede unnecessarily the discretion of the court" (*Minister of Police and Another v Majola (86299/2015) [2018] ZAGPPHC 700 (16 February 2018) par [10]*);¹¹ and: "In deciding whether sufficient cause has been shown the basic principle

⁷ Rule 67A, effective as from 12 April 2024, has been held not to apply retrospectively (*Ndarangwa v Marivate Attorneys Incorporated (61033/2021) [2024] ZAGPPHC 471 (17 May 2024) par [80]*).

⁸ *National Police Service Union and others v Minister of Safety and Security and others 2000 (4) SA 1110 (CC) par [7] at 1113; Shilubana and others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae) 2007 (5) SA 620 (CC) par [15] at 625; Eugene Nico Bester N.O (estate late David Hartley) v Master of the High Court and another (17428/2021) Western Cape Division, Cape Town (16 August 2023) par 7.*

⁹ *Rule 27(1); A.M v S.M.M (45707/2021) [2023] ZAGPJHC 965 (25 August 2023) par [13]; Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and others 2000 (3) SA 87 (W) par [12] at 93; Trakman N.O. and others v Trakman N.O. and others 2023 JDR 0630 (GJ) par [1]; Nkosi v Road Accident Fund 2024 JDR 4755 (GJ) par 27; Manufacturing, Engineering and Related Services Sector Education & Training Authority v Mhlaba 2023 JDR 3516 (GJ) par [13]; Vico Mining (Pty) Ltd v Advance Industrial Solutions (Pty) Ltd 2023 JDR 1367 (GJ) par 5; Dlwathi v Nelson and another 2021 JDR 3093 (GP) par [33]; Benade v Absa Bank Ltd 2014 JDR 1155 (WCC) par 9; Orthotouch (Pty) Ltd v Delta Property Fund Ltd 2021 JDR 1770 (GJ) par [12].*

¹⁰ *Dlwathi v Nelson and another 2021 JDR 3093 (GP) par [33]; Wesley v Minister of Police (219/20) [2023] ZANWHC 32 (3 March 2023) par [11]; Benade v Absa Bank Ltd 2014 JDR 1155 (WCC) par 9; N.Q.M v N.W.M and another (2018/39527) [2022] ZAGPJHC 5 (3 January 2022), NM v NM 2022 JDR 0134 (GJ) par 6; Barkhuizen NO. v Firststrand Bank 2021 JDR 2786 (FB) par [9].*

¹¹ *van Aswegen v Kruger 1974 (3) SA 204 (O) at 205; Roopnarain v Kamalapathy and another 1971 (3) SA 387 (D) at 577; Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 614; Ford v Groenewald 1977 (4) SA 224 (T) at 225; Road Accident Fund v Ntshiza 2012 JDR 2546 (ECP) par [5]; MEC for the Provincial Department of Infrastructure Development v Pro-Plan Consulting Engineers (Pty) Ltd 2024 JDR 2703 (GJ) par [9]; Mathie v Ruijter*

is that the court has a discretion to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides" (*Minister of Police and another v Kgosietsile* (1766/2021) [2024] ZANWHC 52 (29 February 2024) par [7]).

- [7] When it comes to an application for the uplifting of a bar, such wide discretion must be exercised by the court in accordance with the circumstances of each case,¹² viewed holistically;¹³ or 'all of the merits of the matter' as a whole;¹⁴ after a proper consideration of all the relevant circumstances.¹⁵ Essentially it is a question of fact in each case.¹⁶ As stated in *Minister of Police and another v Lekgari* (413/22) North West Division – Mahikeng (17 October 2023), 2023 JDR 3979 (NWM) par [19]:

"In principle, that discretion should be exercised dispassionately on the conspectus of the application that the court is seized with, taking due cognizance of the particularities and exigencies".

Litigation History

- [8] In the present case, following service of the respondent's summons on 13 June 2022;¹⁷ and applicant's notice of intention to defend on 28 June 2022;¹⁸ the applicant, on 27 July 2022, delivered a so-called "Notice of Exception" to the

Stevens Properties (Pty) Ltd 2015 JDR 1163 (KZP); *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3.

¹² *Nu-Shop Holdings (Pty) Ltd v Kastle Properties (Pty) Ltd* (D9608/2021) Kwazulu-Natal Local Division, Durban (14 August 2024), 2024 JDR 3422 (KZD) par [8]; *Pick 'n Pay Retailers (Pty) Ltd v Abdoola and another* 2024 JDR 1036 (KZD) par [9]. "In an application for the removal of bar the Court has a wide discretion which it will exercise in accordance with the circumstances of each case": *Smith N.O. v Brummer N.O. and another*; *Smith N.O. v Brummer* 1954 3 SA 352 (O) at 357-8 per Headnote at 353; *Colia Louis Family Trust v Komsberg Farming (Pty) Ltd* (In Liquidation) 2015 JDR 2111 (Nm) par [9]; *Rose and another v Alpha Secretaries Ltd* 1947 (4) SA 511 (A) at 517-8.

¹³ *Nkosi v Road Accident Fund* 2024 JDR 4755 (GJ), *G.A.N v Road Accident Fund* (2020/9960) [2024] ZAGPJHC 1134 (5 November 2024) par 27

¹⁴ *Olwagen v Minister of Agriculture* 2015 JDR 1197 (GP) par 16; *Dlwathi v Nelson and another* 2021 JDR 3093 (GP) par [33]; *NM v NM* 2022 JDR 0134 (GJ), *N.Q.M v N.W.M and another* (2018/39527) [2022] ZAGPJHC 5 (3 January 2022) par 6; *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307; *Barkhuizen NO. v Firststrand Bank* 2021 JDR 2786 (FB) first par [10].

¹⁵ *Mathie v Ruijter Stevens Properties (Pty) Ltd* 2015 JDR 1163 (KZP)

¹⁶ *Trakman N.O. and others v Trakman N.O. and others* 2023 JDR 0630 (GJ) par [29] referencing *Cairns v Cairns* 1912 AD 181: "decided upon the circumstances of each particular application."

¹⁷ The summons was in truth not issued on 13 June 2022 (as asserted in both par 1 of Respondent's Chronology and par 4 of the Joint Practice Note), nor as suggested in Respondent's Heads of Argument herein par 2.1 and par 3 of the Practice Note, but indeed on 23 May 2022, as appears *ex facie* the summons itself. (Furthermore, the Return of Service is at Case Lines 006-10 there being in fact no Case Lines 001-68 at all - contrary to the contention in par 13.1 of Respondent's Answering Affidavit; founding affidavit for the application to compel par 3; and the application for default judgment par 1).

¹⁸ Erroneously said to have been served on 29 June 2022 in par 2.2 of Respondent's Heads of Argument herein.

respondent's particulars of claim,¹⁹ more accurately a "notice of intention to except",²⁰ bearing in mind the terms of the proviso to Rule 23,²¹ complaining of both the particulars of claim as vague and embarrassing; and embarrassment on applicant's part if compelled to plead thereto; affording respondent 15 days within which to remove these causes of complaint.²² This was followed by an exception proper on 29 August 2022.²³ In terms of Rule 30(2)(b) the respondent gave notice,²⁴ on 7 September 2022, of a perceived irregular incompatibility between the relief as set out in the applicant's two notices of exception;²⁵ and complaining that Rule 23 does not contemplate either: judgment in favour of the applicant; or: dismissal of the action.²⁶ This notice was, however, never followed up by any application in terms of Rule 30(1) as such. Presumably by way of response, the applicant served a second so-called Notice of Exception on 18 October 2022, duplicating the initial notice of intention to except but now with different prayers,²⁷ which immediately elicited from the respondent a further notice of irregularity,²⁸ served on 20 October 2022.²⁹ However, once again, this second notice under Rule 30(2)(b) was never followed-up with any application in terms of Rule 30(1). Instead, the applicant having failed to prosecute its own

¹⁹ Although the notice erroneously refers to "Defendant's particulars of claim".

²⁰ As contemplated in Rule 23(1)(a).

²¹ which proviso reads as follows: "Provided that— (a) where a party intends to take an exception that a pleading is vague and embarrassing such 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."

²² The fact that this notice was out of time in terms of Rule 23(1)(a) is not at all relevant.

²³ Within the time limits prescribed by Rule 23(1)(b), counting from 27 July 2022.

²⁴ The First Notice of Irregular Proceedings.

²⁵ The notice of intention to except foreshadowing: striking out of the particulars of claim, affording respondent 15 days to amend same (Prayers 1-2); or, alternatively, dismissing the particulars of claim and granting judgment in favour of the applicant (Prayer 3), both with costs (Payer 4); whereas the actual exception itself sought with costs (Prayer 3) the upholding of the exception (Prayer 1) giving respondent 15 days to amend its particulars of claim (Prayer 2) failing which, granting applicant leave to set the matter down for an order dismissing respondent's claim (Prayer 4).

²⁶ See *Group Five Building Ltd v Government RSA (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A).

²⁷ Now reading merely that the Respondent's particulars of claim be struck out (Prayer 1) with 15 days to amend (Prayer 2) and costs (Prayer 3).

²⁸ The Second Notice of Irregular Proceedings.

²⁹ Complaining that this further Notice of Exception "is largely synonymous to the exception filed on 29 August 2022". Indubitably, what the Applicant ought to have done, if so advised, was simply to have amended the first so-called Notice of Exception in accordance with Rule 28.

exception, the respondent took steps to do so;³⁰ and ultimately the exception was set down by the respondent for hearing on 15 May 2023.

- [9] On 15 May 2023 this court ordered as follows “exception is dismissed with costs on an attorney and client scale”.³¹ It is to be observed that in making such order, the court did not place the applicant on terms to deliver a plea, in line with the current practice in this regard,³² although this is indeed sometimes done.³³

³⁰ Including, Respondent having filed its own heads of argument on 12 October 2022, launching an application to compel the Applicant to file its heads of argument and setting down such application for adjudication on 28 February 2023; on which date, however, it was removed from the roll with the applicant to pay the costs of the application, the Applicant having forestalled same by filing its heads of argument in support of its exception belatedly on 21 February 2023.

³¹ Court Order dated 15 May 2023 (per Khumalo J).

³² LL v AM and others 2025 (1) SA 455 (GP); Lebotsi Renovations and Project Management (Pty) Ltd and another v Vrey and others 2025 JDR 0452 (GP); Klaas Creative (Pty) Ltd v Buffalo City Metropolitan Municipality 2025 JDR 0344 (ECMk) par [25]; Navigare Securities (Pty) Ltd and another v Vickers and Peters Financial Planning (Pty) Ltd and another 2025 JDR 0130 (GP) par [48]; Forty Squares (Pty) Ltd and others v GL Palmer & Co 2025 JDR 0408 (GJ) par [23]; Global Phashash Group (Pty) Ltd v Ngwathe Local Municipality 2024 JDR 5053 (FB) par [21]; Mphahlwa v MEC for Health Eastern Cape 2025 JDR 0354 (ECB) par [49]; Arioscan (Pty) Ltd v Marlie 2024 JDR 4978 (WCC) par 18; Maximum Profit Recovery (Pty) Ltd v Vaal Central Water Board 2024 JDR 4923 (FB) par [13]; Distedu Holdings (Pty) Ltd v Minister of Cooperative Governance and Traditional Affairs 2024 JDR 4899 (GP) par [30]; Jurgen v Crooks NO 2024 JDR 4405 (GJ) par [38]; Filtaquip (Pty) Ltd v Glencore Operations South Africa (Pty) Ltd 2024 JDR 4208 (GJ) par 115.1; Chivers v Padayachee 2024 JDR 4156 (GP) par [35]; RR and another v CK 2024 JDR 4148 (FB) par [25]; LC v JC and others 2024 JDR 3828 (WCC) par [49]; Leroko v Sediko 2024 JDR 3801 (FB) par [26]; Starstruck Trading CC v Köhne and another 2024 JDR 3886 (KZP) par [25]; van Dyk v M3T Developments (Pty) Ltd 2024 JDR 3629 (WCC) par [37]; Gross v Modlin 2024 JDR 3532 (GJ) par [72]; Bata Brands SA v Rexview Investments (Pty) Ltd and others 2024 JDR 3148 (GP) par [12]; Saint Gobain Construction Products South Africa (Pty) Ltd v Mathula Investment and Construction CC and others 2024 JDR 3004 (GJ) par [23]; Khoza v IFA Fair-Zim Hotel and Resort (Pty) Ltd and another 2024 JDR 3078 (KZD) par [47]; Emalahleni Local Municipality v Vatala and another 2024 JDR 2209 (ECMA) par [16]; Great Force Investments 178 (Pty) Ltd v Glencore Operations South Africa (Pty) Ltd and another 2024 JDR 2012 (GJ) par [12]; Exilite 4205 CC v Jacobs and another 2024 JDR 1491 (NWM) par [41]; Phoenix International Logistics (Pty) Ltd v Stax of Wood CC and another 2024 JDR 1518 (WCC) par [37]; Hughes v Hughes and others 2024 JDR 3070 (KZP); Maziya General Services CC v Minister of Public Works NO and another (Appeal Judgment) 2024 JDR 0397 (ECMA) par [28]; Absa Bank Ltd v Farber 2024 JDR 0537 (GJ) par [21]; Malone v Government of the United Kingdom and another 2024 (2) SACR 341 (KZD) par [59]; Schoeman v Firststrand Bank Ltd 2024 JDR 0330 (GP) par 74; UD v JHO 2024 JDR 0549 (LP) par [13]; Christo Strydom Nutrition v University of the Free State 2023 JDR 4802 (FB) par [53]; Shoprite Checkers (Pty) Ltd v Premier of the Western Cape Province and another 2023 JDR 4533 (WCC) par [59]; Zamakhuhle Private Hospital v Hlatswayo 2023 JDR 4425 (GJ) par [22]; Solatha General Trade CC v Intertown Transport (Pty) Ltd 2023 JDR 1985 (ECP) par [16]; Strydom NO and others v Van Zyl 2023 JDR 1459 (NWM) par [17]; Sterrenberg v Firststrand Bank Ltd 2023 JDR 1170 (NWM) par [28]; Estate Late Frans Kruger NO v Questek Holdings (Pty) Ltd and others 2023 JDR 0886 (GJ) par [17]; Exilite 4205 CC v Hugh Harold Jacobs and another (2347/2022) Northwest Division, Mahikeng (8 April 2024) par [41]; L.C v J.C and Others (17335/2022) [2024] ZAWCHC 247 (9 September 2024) par [49]; Zerbatoone Mining (Pty) Ltd v Dwarsrivier Chrome Mine (Pty) Ltd (3389/2021) Limpopo Division, Polokwane (24 March 2023) par [20].

³³ For example, in Tikka Tikka Projects (Pty) Ltd and others v Carrim Holdings (Pty) Ltd (046271/2022) Gauteng Division, Pretoria (14 May 2024): “ORDER 1. Exception is dismissed. 2. The defendant must file its plea and counterclaim if any within 10 days of this order and judgment”; and in Phillipus Edward Aggenbach v Ronel Wessels (1696/21) North West Division – Mahikeng (3 July 2024): “Order [26] In the premises, I make the following order: (i) The exception is dismissed with costs. (ii) The defendant is to file a plea within ten (10) days from the date of this order.”

- [10] On 16 May 2023 the respondent served a notice of bar dated 15 May 2023, calling upon applicant to plead within five days thereafter, failing which applicant would be *ipso facto* barred in terms of Rule 26.³⁴ In terms of the notice of bar the applicant had to deliver its plea by no later than 23 May 2023. The applicant failed to do so.
- [11] On 24 May 2023 the respondent filed an application for default judgment in light of the applicant having failed timeously to respond to the notice of bar.
- [12] This application to uplift the bar was served by the applicant on 30 May 2023.
- [13] On 22 June 2023 respondent filed a notice to oppose this application; and on 23 June 2023 filed its answering affidavit. Applicant filed no replying affidavit.
- [14] On 26 June 2023 respondent served its conditional counter-application seeking default judgment should applicant's application to uplift the bar be unsuccessful.
- [15] On 5 July 2023 applicant delivered its plea, together with two counterclaims.
- [16] The service of applicant's plea and counterclaims elicited a further complaint of irregularity from the respondent in terms of Rule 30(2)(b),³⁵ followed this time evidently by an application under Rule 30 to set aside both the plea and the counterclaims with costs (although this is not before the court), on the basis that such pleadings were served by the applicant without any judicial sanction, notwithstanding the expiry of the period stipulated in the respondent's notice of bar.

Factual Background

- [17] The salient facts pertinent to this present application for uplifting of the bar are that, following the dismissal of the applicant's exception with punitive costs on

³⁴ Rule 26 stipulates: 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.

³⁵ The Third Notice of Irregular Proceedings, which is dated 6 July 2023 and was served thereafter on 10 July 2023, not on 6 July 2023 as is fallaciously alleged in par 10.1 of the Rule 30 affidavit.

15 May 2023, the respondent served the notice of bar in question upon the applicant, on 16 May 2023, the very next day.

[18] That is the notice of bar that the applicant now seeks to have uplifted.³⁶

Submissions

[19] The applicant characterizes the filing of the notice of bar by respondent the day after the dismissal of the exception as “surprising”, and argues that the notice of bar was premature:

[19.1] submitting that whether the respondent’s notice of bar was competent is a factual question and that the question that falls crisply for determination is whether respondent should be allowed to file a notice of bar one day after the dismissal of the exception; and

[19.2] complaining that the respondent’s attitude that the applicant’s plea was due within twenty days after the filing of its notice of intention to defend as contemplated in Rule 22(1),³⁷ that is by no later than 27 July 2022,³⁸ and is out of time, implies that “the intervening factor of the exception is neither here nor there”; and

[19.3] suggesting that it is trite that a party should be allowed reasonable time to file its plea after the dismissal of an exception in the absence of a court setting a date upon which the plea should be filed.

[20] Respondent adroitly identifies the gist of applicant’s case for uplifting as being that the notice of bar was premature and unreasonable, yet the respondent contends that there was nothing unreasonable in it having served the notice of bar as it did; and that it was procedurally entitled to do so.

Notice of Bar

[21] There is no doubt that the notice of bar was a competent procedural next step

³⁶ Although the applicant’s notice of application for the uplifting of the bar (“Application to Lift the Plaintiff’s Notice of Bar dated 24 May 2023”) refers to a notice of bar dated and filed on 24 May 2023, this is clearly a typographical error, as it appears from the founding affidavit as well as from the notice of bar itself, that the notice of bar in question was in actual fact dated 15 May 2023 and served by respondent on 16 May 2023, one day after the dismissal of the applicant’s exception. Indeed, this is common cause. Furthermore, there was only ever a single notice of bar in this matter.

³⁷ Rule 22 (1) stipulates: Where a defendant has delivered notice of intention to defend, he shall within 20 days after the service upon him of a declaration or, as is the case herein, within 20 days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.

³⁸ 20 court days (Rule 1) after the date of service of the notice of intention to defend (*Black v Jackson’s (SA) Enterprises* 1952 (2) SA 184 (N) at 186) on 28 June 2022 expired on 27 July 2022 (not on 28 July 2022 as erroneously stated in Respondent’s Chronology at par 5 and Respondent’s Heads at par 2.2).

in the observance of the respondent's procedural rights at the time. Rule 26 provides for an automatic bar where a party has failed to file a replication or subsequent pleading within the time provided for in the Rules, but for all other pleadings it requires a notice of bar to be filed before the defaulting party can be precluded from filing such pleading. In particular, this relates to the delivery of a plea. Rule 26 requires that a notice of bar be served upon a defendant who has failed to deliver his plea, giving him five days to do so, failing which he will *ipso facto* be barred.³⁹ Respondent was correct in resorting to a notice of bar. In *Ketse and another v Motlhabedi* (M03/2021) [2024] ZANWHC 10 (18 January 2024) *par* [38] in which case the defendant withdrew its exception, it was stated:

"With the withdrawal of the exception, the status of the action proceedings would have been that the defendant would not have pleaded. For the default application to have proceeded to its natural conclusion a Notice of Bar would have to be served on the defendants, to compel a plea, given the delivery of the Notice of Intention to defend by the defendants, coupled with the absence of a plea".

The dismissal of applicant's exception in the present case had exactly the same result.

- [22] Similarly, inasmuch as the withdrawal of an exception indubitably has the same result as the dismissal thereof, the court in *Ketse and another v Motlhabedi* 2024 JDR 0377 (NWM) was faced with competing applications: on the one hand, for an order declaring that the defendants were not under bar; and, on the other hand, for default judgment in favour of the plaintiff against the defendants (*Ketse par* [1]-[2]). In this case an exception was served after the notice of bar, rendering it comparable to that of *Landmark*. In *Ketse* as per the *consensus* of the parties, the application for the declarator that defendants were not under bar was the sole issue for adjudication (*Ketse par* [3]). The dispute arose after defendants, on 12 December 2019, withdrew their exception that had been served during April 2019 in response to a notice of bar served by the plaintiff. This exception was delivered outside the prescribed period allowed for the delivery of a plea, but before the expiration of the period provided in the plaintiff's notice of bar (*Mokgokong v University of North West* (314/16) [2017]

³⁹ Dass and others *NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) *par* [8] at 51; Cooper, Petronella Magdalena *v The Road Accident Fund* (24056/2020) Gauteng Division, Pretoria (15 April 2024) *par* [9].

ZANWHC 22 (8 June 2017) par [12]-[13]). When the defendants sought clarity as to the date upon which the Notice of Bar of April 2019 had become operable, to determine when the defendants were *ipso facto* barred, plaintiff retorted that after the withdrawal of the exception the defendants had one day to file a plea. Put differently, on the withdrawal of the exception, the plea had to be filed the following day. In terms of a specified timeline, the defendants had according to the plaintiff until 13 December 2019 to deliver their plea. Notably, this was a day after the exception application had been withdrawn (*Ketse par [15]*). By the time *Ketse* was heard, it was in that case unfortunately not necessary to deliberate on how long the defendants would have had following the withdrawal of their exception to deliver their plea. Of importance to the present matter, the court held that the plaintiff was not entitled to fall back on that notice of bar predating the exception, but was required to serve a second notice of bar:

"[35] Having concluded that the filing of an exception to the Notice of Bar, was a proper legal consequence, what then follows is a determination of precisely when was the defendants' *ipso facto* barred, if such, a legal occurrence had come to fruition. This requires a retrofitting of the chronological common cause timeline. Cutting aside the verbiage, it is common cause that the defendants withdrew the exception on 12 December 2019. What next procedurally occurs fell for adjudication.....

"[38] The Notice of Bar of 19 April 2019 was overtaken by events. With the withdrawal of the exception, the status of the action proceedings would have been that the defendant would not have pleaded. For the default application to have proceeded to its natural conclusion, a second Notice of Bar would have to be served on the defendants, to compel a plea, given the delivery of the Notice of Intention to defend by the defendants, coupled with the absence of a plea.

"[40] In the premises, the following order was made: 'The respondent is to deliver a [second] Notice of Bar on the applicants within five (5) days of this order'."

- [23] Significantly the court in *Lenders* case added that its conclusion was: "subject, however, to the giving of a peremptory notice;"⁴⁰ and: "I think, therefore, that as a calendar month had expired when the exceptions were first heard as well as when they were finally disposed of, the defendant was, in the absence of an Order of Court, liable to be barred at least after peremptory notice";⁴¹ which led the court in *Landmark* to hold: "A defendant clearly has a period of time within which to plead. Once that time period has come and gone, such right is clearly exhausted, *subject to the giving of a*

⁴⁰ *Lenders* at 288.

⁴¹ *Lenders* at 288-9.

notice of bar. In my view, the *Lenders* judgment says nothing more than this”.⁴² That view is shared and accepted by this court.

Crucial Enquiry

[24] The crucial enquiry with regard to this interlocutory application for the uplifting of the bar is whether or not the notice of bar was served prematurely.

Analysis

[25] In terms of Rule 26 a notice of bar may only be served if the other party fails to deliver the relevant pleading within the time laid down in the Rules or within any extended time allowed in terms thereof.⁴³ It must immediately be stated that no extension for delivering the plea was granted by the respondent, despite a request by the applicant for such an indulgence. Accordingly, the question is simply whether the respondent's notice of bar was served within the time laid down in the Rules. Unfortunately, the Rules provide no answer in this regard.

[26] The rules of court certainly appear to be silent on the matter, but sometimes circumstances do arise which are not provided for in the rules.⁴⁴ The High Courts of South Africa have the inherent power to protect and regulate their own process, taking into account the interests of justice.⁴⁵ The power in section 173 of the Constitution vests in this court the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner.⁴⁶

[27] There can be no quarrel with applicant's contention that any notice of bar should have been served or filed once the time for filing a plea after the dismissal of

⁴² Landmark par [19] at 88.

⁴³ Rule 26 reads: “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.”

⁴⁴ *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par [32]-[33] at 98-9; *Eke v Parsons* 2016 (3) SA 37 (CC) par [40] at 53; *Social Justice Coalition and others v Minister of Police and others* [2022] ZACC 27 (19 July 2022) par [70]-[73].

⁴⁵ Sec 173 of the Constitution.

⁴⁶ *Road Accident Fund v LPC and others* 2021 (6) SA 230 (GP) par [33] at 246; *SABC Ltd v NDPP and others* 2007 (1) SA 523 (CC) par [35]-[37] at 539-40.

the exception had elapsed. However, that begs the question: what time did the applicant have within which to file a plea after the dismissal of the exception?

- [28] In *Natal*,⁴⁷ prior to the adoption of the Uniform Rules of Court, Order XI Rule 56, provided that after a decision on an exception “any pleading which should be filed shall be filed within eight (8) days from the date of the order dealing with the exceptions, save so far as the Court may otherwise order”,⁴⁸ which required any pleading which had to be filed *inter alia* by an unsuccessful excipient to be filed within eight days, unless the Court ordered otherwise.⁴⁹ “The consequence of that was that, in terms of Order XI Rule 56, the defendant had eight days after the Court's order within which to file a plea” (*Milne N.O. v Abdoola 1954 (2) SA 238 (N) at 238*). Presently the Rules of Court contain no equivalent provision.
- [29] Nowadays, by virtue of Rule 22(1), a defendant delivering notice of intention to defend in respect of a combined summons shall within 20 days after the delivery of such notice, deliver a plea, with or without a claim in reconvention, or deliver an exception, with or without application to strike out.⁵⁰ Although that period expired on 27 July 2022, the filing by the applicant of its exception on 29 August 2022 was not out of time, in the absence of any notice of bar at that stage;⁵¹ and consequently the applicant's exception completely fulfilled the applicant's obligation in terms of Rule 22(1) to respond to the respondent's summons.
- [30] Respondent's attitude is that by the time applicant's exception was dismissed, the applicant had already had 11 months to prepare its plea; and that applicant embarked on an unmeritorious and frivolous route under circumstances where it had more than a year to consult with its attorney and draw a plea. Almost a year passed without a plea having been filed. However, whilst its exception was pending, there was no call for the applicant to address the issue of pleading nor to concern itself with formulating its defence. On the contrary, the applicant was perfectly within its rights to concentrate and focus solely upon the exception at

⁴⁷ See: *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T)* at 792.

⁴⁸ *Furman v Cardew: In re Cardew v Cardew and Furman 1955 (3) SA 24 (N)* at 26.

⁴⁹ *City Printing Works v Maharaj and another 1948 (1) SA 71 (N)* at 72; *Furman v Cardew: In re Cardew v Cardew and Furman 1955 (3) SA 24 (N)* at 26.

⁵⁰ *Tracy Hill NO and another v Mark Brown (3069/20) Western Cape Division (3 July 2020)*; 2022 JDR 0238 (WCC) par [3](b).

⁵¹ *Kobusch and others v Whitehead (5217/2022P) [2022] ZAKZPHC 83 (15 December 2022)* par [34]-[35].

that stage of the proceedings, because by virtue of Rule 23(4), wherever any exception is taken to a pleading or an application to strike out is made, no plea, replication nor other pleading over shall be necessary.

Precedents

[31] A case very much in favour of the respondent, is the abovementioned decision in *Lenders*, although that case was not mentioned in argument before this court.

[31.1] In the *Lenders* case defendants had excepted to plaintiff's declaration, but their exceptions were overruled on 22 July 1902.⁵² On that date, no order was made fixing the time within which the defendants had to file their plea.⁵³

[31.2] A copy of the order dismissing the exceptions was served by the plaintiff upon the defendants on 25 July 1902,⁵⁴ simultaneously with a so-called peremptory notice⁵⁵ requiring them to file a plea on pain of bar "within 48 hours". The defendants' attorneys retorted that the defendants were not in default.

[31.3] On the defendants' failure to comply with such notice, the plaintiff approached the registrar in order to file its notice. However, the registrar refused to accept same,⁵⁶ adopting the stance that the defendants were not in default as they were entitled to one month within which to file their plea.⁵⁷ The plaintiffs sought an order directing the defendants to file their plea within 48 hours from the time of the service of the order of court upon them.⁵⁸ It was argued on behalf of the defendants that when the order was given dismissing their exceptions, in the absence of a time being fixed in that order within which to plead, the plaintiff was required to give one month's notice to plead, answer or except.⁵⁹ (The relevant

⁵² *Lenders & Co and FH Lenders & Co (South African Agency) v Pechey Bros* 1902 NLR 231 especially at 238-9.

⁵³ *Lenders* at 286; see Headnote at 285.

⁵⁴ i.e. a mere three days later.

⁵⁵ The equivalent of the present-day notice of bar (*Landmark infra* par [17] at 87).

⁵⁶ The Registrar was summarily rebuked for this refusal and admonished that his duty was to accept all notices that were filed with him whether he agrees with them or not; and that it was a matter for the court to determine whether those notices were rightly or wrongly lodged (at 287).

⁵⁷ *Lenders* at 286; see Headnote at 285.

⁵⁸ *Lenders* at 286.

⁵⁹ *Lenders* at 286-7 (per Hathorn KC, as he then was).

Rule at that stage required a defendant to plead, answer except, or make claim in reconvention within one calendar month after the day of service of notice of the filing of the declaration⁶⁰).

[31.4] The *Lenders* case was succinctly summed up in *Albers International Road Markings v Mrs. Shirley Albers (858/14 and 859/2014) [2016] SZHC108 (1st July 2016) delivered 5 July 2016*, a decision of the High Court of Swaziland:

"[5] I drew an analogy from the case of *Lenders & Co. and F. H. Landers [sic] & Co. (South African Agency) v Pechey Bros (1902) 23 NLR 285*. In that case [the court] approached the matter on the question as to when the defendant ought to have filed a plea. Was it eight days from the date of the dismissal of the exception [as the rules then provided filing within 8 days before they were amended] or from the date of the declaration? Bale CJ pointed out as follows: "*I had certainly understood as regards the first question that the practice was that the period ran from the date of service of declaration, in the absence of any order of court [8] It was then concluded: "*I think, therefore that as a calendar month had expired when the exceptions were first heard as well as when they finally disposed of, the defendant was, in the absence of an order of court liable to be barred at least after peremptory notice" [9] In summary their Lordships held firstly that the *dies* begin to run from the date of a declaration....".**

[32] By contrast, in favour of the applicant, is the decision in *Oos Vrystaat Kaap Operations Ltd v Frelon Boerdery (Pty) Ltd 2021 JDR 0985 (FB)* another case not cited in argument before this court, but which would appear to be dispositive of the dispute under the present Rules of Court. In that case the following was held:

"[9]. It is common cause that the defendants excepted to the particulars of claim of the Plaintiff as a result of which the Plaintiff amended the said particulars of claim. It can be accepted that the exception raised was good in law as the Plaintiff rectified the particulars of claim. The exception was withdrawn on 19 November 2019 and this gave the Defendants 20 days to deliver the plea in terms of Rule 22(1). The Plaintiff however, hardly two court days after the withdrawal of the exception, [then] filed a notice of bar. The notice of bar filed just two days of the period allowed to the defendants to file a plea was thus premature.

"[10] It is the contention of the Plaintiffs that the Defendants accepted the notice of bar without protestation of it being premature or improper. This argument does not assist the Plaintiff. The Plaintiff does not at all address the issue of the impropriety or otherwise of the notice. In the submissions before me, no contention is made that the

⁶⁰ *Lenders* at 288.

filing of the notice was proper. It would seem to me that the Plaintiff concedes that the notice of bar is premature but contends that because the defendants did not contend it, and that they filed the notice to except in terms of Rule 23(1), then in that case they (Defendants) waived their rights. I cannot agree.

"[11] The Defendants filed a Rule 23(1) notice pursuant to an improper notice of bar. If the argument of the Plaintiff was anything to go by, then this would mean that the Plaintiff, on its part, was not entitled to apply for default judgment without first having dealt with the notice of exception. Plaintiff should have, in that case applied for the setting aside of the notice as an irregular step. That they also did not do. In my view the second [sic] notice of bar was prematurely filed and is a nullity. Anything done pursuant to it must also be a nullity. The defendants are consequently not under a bar. In my view, this finding disposes of this application. An application for default judgement cannot be granted based on an improper notice of bar. It is unnecessary to deal with the counter application." [emphasis added]

[33] In the view of this court, for the reasons that follow, the decision in *Oos Vrystaat Kaap Operations Ltd v Frelon Boerdery (Pty) Ltd* is to be preferred.

[34] Having been decided in two Divisions of the High Court different from this one, neither of the above precedents is binding upon this court,⁶¹ albeit the *Lenders* case was a decision of a Full Court.⁶²

[35] the abovementioned case of *Landmark* is a prominent one in the context of the present landscape. As explained in *Cooper, Petronella Magdalena v The Road Accident Fund (24056/ 2020) Gauteng Division, Pretoria (15 April 2024) par [10]*:

"In *Landmark* ..., the court was dealing with a default judgment application which was filed after the dismissal of an exception filed by the respondent subsequent to the filing of a notice of bar by the applicant. By way of background, African Bulk Earthworks had sued the applicant who then joined the respondents, claiming a contribution or indemnification. The respondents failed to plead timeously and notices of bar were served on them. Within the five-day period for the filing of the plea, the (first) respondent delivered a rule 23(1) notice advising of its intention to except to the

⁶¹ "One High Court is not bound by another. Provincial and local divisions are bound by decisions made within their own territorial areas of jurisdiction, and not by other provincial and local divisions of the High Court" (Brickhill, *Precedent and the Constitutional Court* (2010) 3 Constitutional Court Review par 5.1(1) p92); *Harper v Absa Trust Ltd NO and others* 2023 JDR 3440 (WCC) par 56; and: "the decision of a local or provincial division of a high court of a given province has only persuasive authority in all other provinces" (Devenish, *Doctrine of Precedent in SA*, Vol 28 No 1 OBITER 2007 par 1 p3 and par 4 p8).

⁶² "I am bound by a single judge in Johannesburg and in Pretoria, and not by three judges say sitting in Cape Town" (*African Global Holdings (Pty) Ltd v Lutchman NO. (Commissioner for the South African Revenue Services and Fidelity Security Services (Pty) Ltd Intervening Parties*) 2021 JDR 0068 (GJ) par [35]). Wallis, *Who's decisis is stare?* 2018 SALJ p5-17. Devenish, *Doctrine of Precedent in SA*, 2007 OBITER par 1 p3. See *Nedbank Ltd v Mashaba and other similar matters* 2024 (3) SA 155 (GJ) par [43] at 165 with reference to the Mpumalanga full court decision in *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML).

applicant's third-party notice, and the exception duly followed. The exception was heard and dismissed, without any direction as to the filing of a plea. The application for default judgment was subsequently delivered and the respondent delivered its plea. The applicant argued that it was entitled to pursue default judgment, despite the filing of a plea by the respondent because the notice of bar delivered before the filing of the exception, remained operative even though the respondent has brought an exception to that notice. The court dismissed the application for default judgment and reasoned that the first respondent duly complied with the notice of bar and was not required, upon dismissal of the exception, to seek an order granting leave to deliver its plea. Accordingly, so the court held, for the applicant to have been in a position to seek default judgment, it would have had to deliver a further notice of bar on the first respondent, requiring it to plead." [italics added].

[36] The *Lenders* case was distinguished in *Landmark* par [17] at 87 and par [19] at 88 because in *Landmark* the impugned notice of bar was served before the exception was taken,⁶³ whereas in the *Lenders* case the bar was *not* served before the exception was taken.⁶⁴ Obviously, in the present matter, the *Lenders* case is not capable of being distinguished on that basis because in the present matter, no bar was served before the exception was taken, exactly the same as in the *Lenders* case. In both the *Lenders* case and the present matter, the bar was served after the exception had been taken (and, also, after the exception had been dismissed). In this respect, the *Lenders* case would seem indeed to be on all fours with the present matter.

[37] However, the fundamental finding in the *Lenders* case was as follows: "The defendants having already filed their plea in this case, no order is necessary".⁶⁵ That should surely have been the end of the matter.

[37.1] However, the court in *Lenders* added, along the wayside:⁶⁶ "for future guidance the decision of the Court is asked for upon two questions which have arisen in the course of the proceedings".⁶⁷

[37.2] In *Landmark*, what followed in the judgment in the *Lenders* case, was

⁶³ *Landmark* par [4] at 84.

⁶⁴ *Lenders* at 286.

⁶⁵ *Lenders* at 287.

⁶⁶ See *True Motives 84 (Pty) Ltd v Mahdi and another* 2009 (4) SA 153 (SCA) par [100]-[101] at 185-6; *NUMSA v Eskom Holdings Soc Ltd and others* (J735/21) Labour Court of South Africa, Johannesburg (6 July 2021) par [7].

⁶⁷ *Lenders* at 287.

typified,⁶⁸ as constituting an *obiter dictum*,⁶⁹ properly so called.⁷⁰ That classification is endorsed. Accordingly, for this reason as well, it is not binding upon this court. (On the other hand, the *Oos Vrystaat* case does not reveal any relevant *obiter dictum*).

[37.3] Although not a precedent binding, the *Lenders* case, being a judgment of an eminent bench, led by Bale CJ, is nevertheless a weighty existing authority on the very question before the court in this matter and it would be remiss of this court not to have careful regard to it,⁷¹ more particularly as the first of the two abovementioned questions identified in that case, is precisely the same as the question that arises in the present case.⁷²

⁶⁸ Landmark par [17] at 88.

⁶⁹ i.e., a non-binding observation, remarks made in passing, not setting binding precedent, the question not arising on the facts. "It is trite that *obiter dictum* refers to a judge's comments or observations made in passing on a matter arising in a case before the court, which does not require a decision. *Obiter* remarks are not essential to a decision and do not create binding precedent" (van der Westhuizen v Road Accident Fund (21947/2022) [2024] ZAGPPHC 742 (29 July 2024); 2024 JDR 3333 (GP) par [6]); "The nature of an *obiter dictum* is that it does not bind any other court, even lower courts. It is a mere expression of an opinion upon points of law which is not necessary for the decision of the case. At most it is valued as a reasoned statement which may well influence another court in future decisions, but it is not binding on such other courts" (The Director-General of the Department of Agriculture, Forestry and Fisheries for the Republic of South Africa and another v Nanaga Property Trust represented by its trustee for the time-being (4689/2014) Eastern Cape Division, Grahamstown (21 April 2016) par 6). An *obiter dictum*, is in no way binding (R v Crause 1959 (1) SA 272 (A) at 281; Competition Commission of SA v Standard Bank of SA Ltd 2020 JDR 0685 (CC) par [78]; New Nation Movement PPC and others v President of the RSA and others 2019 (5) SA 533 (WCC) par [23] at 537); "there is no doubt that *obiter dicta*, however weighty, are not entitled to be regarded as binding upon any court however humble it might be" (Petersen v Jajbhay 1940 TPD 182 at 185). "The doctrine of precedent decrees that only the *ratio decidendi* of a judgment, and not *obiter dicta*, have binding effect" (Turnbull-Jackson v Hibiscus Coast Municipality and others 2014 (6) SA 592 (CC) par [56] at 615; Regenesys Management (Pty) Ltd v Ilunga and others 2024 (5) SA 593 (CC) par [212] at 663).

⁷⁰ Lethena and others v Minister of Police and another 2024 (1) SACR 92 (GJ) par [136]-[137] at 105. See Camps Bay Ratepayers' and Residents' Association and another v Harrison and another 2011 (4) SA 42 (CC) par [30] at 56-7. "The fact that *obiter dicta* are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent. Only that which is truly *obiter* may not be followed" (Turnbull-Jackson v Hibiscus Coast Municipality and others 2014 (6) SA 592 (CC) par [56] at 615-6). Compare: Pretoria City Council v Levinson 1949 (3) SA 305 (A) at 316-7.

⁷¹ "But, depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration (Durban City Council v Kempton Park (Pty) Ltd 1956 (1) SA 54 (N) at 59 and Rood v Wallach 1904 TS 187 at 195-6)" (Turnbull-Jackson v Hibiscus Coast Municipality and others 2014 (6) SA 592 (CC) par [56] at 616). Airlink (Pty) Ltd v South African Airways SOC Ltd and others (11399/2022) [2023] ZAGPJHC 832 (25 July 2023); 2023 JDR 2709 (GJ) par [15]; van der Westhuizen v Road Accident Fund (21947/2022) [2024] ZAGPPHC 742 (29 July 2024); 2024 JDR 3333 (GP) par [6]).

⁷² The second question debated in *Lenders* was whether the peremptory notice afforded the defendants too short a period (48 hours thereafter) within which to plead (at 287), the court holding that such short notice was insufficient; and that the plaintiff should have given the defendants at least two clear days from the date of service of such peremptory notice within which to plead (at 289). This second question is of no relevance in the present matter, the Respondent having duly afforded the Applicant five days

That question was formulated in *Lenders* as follows: "The first [question] is, whether when an exception to a declaration has been overruled, the defendant has a month, reckoned from the date of the dismissal of the exceptions, within which to file his plea, or only a month from the date of service of declaration".⁷³ In the present case the same question arises, *viz*: the applicant contends it should be allowed a reasonable period within which to plead following dismissal of the exception; whilst the respondent contends that such period had already expired by the time the applicant's exception was dismissed. In answering this postulated first question, the full court in *Lenders* stated:⁷⁴ "It has, however, been the practice for the defendant who has failed upon his exception to ask and for the Court to grant, a time in which to file a plea. The period is, I think, nearly always limited to a few days, and the period allowed by the Court runs from the day when the exceptions are disposed of. If the defendant had a month from the date of the dismissal of the exceptions such an order would, in most cases, be unnecessary. This practice supports my reading of the Rules" which reading of the Rules was articulated as follows:⁷⁵ "It seems to be clear that when the defendant has pleaded, answered, or excepted, he has, in the absence of a special Order of Court, exhausted his right";⁷⁶ and further: "In the absence of an Order of Court, the defendant, by exceptions, if unsuccessful, has exhausted his right, either wholly or to the extent of the number of days which have intervened between the service of the declaration and the hearing of the exceptions....".⁷⁷ This is founded on the proposition that "when a defendant has pleaded, answered or excepted, he has, in the absence of a special Order of Court, exhausted his right".⁷⁸ However, that proposition was rejected in *Landmark* in the following terms:⁷⁹ "were a defendant or third party to be required to elect between the two options of excepting or pleading, with the result that, once it elects to except it loses its right to plead, this would make a

after delivery of the notice of bar within which to plead, in perfect compliance with Rule 26 (see par [10] above).

⁷³ *Lenders* at 287.

⁷⁴ per Bale CJ (sitting with Finnemore J and Beaumont AJ).

⁷⁵ *Lenders* at 288.

⁷⁶ *Lenders* at 288.

⁷⁷ *Lenders* at 288.

⁷⁸ *Lenders* at 288.

⁷⁹ *Landmark* par [14] at 86.

mockery of the exception procedure". That rejection is correct.⁸⁰ Nowadays, furthermore, there is Rule 23(4) which renders it unnecessary *inter alia* to file a plea, when an exception is taken,⁸¹ which provision was absent from those Rules applicable in the time the *Lenders* case was decided. For this reason, in addition, the *Lenders* case might be regarded as jurisprudentially obsolete, having applied a now outdated and therefore different body of Rules.⁸²

[38] Somewhat analogous to the question at hand are the decisions in this Division of *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* (40739/2017) [2019] ZAGPJHC 51 (7 March 2019); 2019 JDR 0496 (GJ) and *Mncube v Wesbank* 2023 JDR 2968 (GJ):

[38.1] As recorded in *Mncube par* [31]: "The root of the controversy in that matter [i.e., *Nqabeni Attorneys Inc v God Never Fails Revival Church and others*] was the proper interpretation of Rule 22 and 28 of the Uniform Rules of Court, i.e. does a defendant have twenty days to respond to an amended declaration, relying on Rule 22(1) or fifteen days relying on Rule 28(8)?"⁸³

[38.2] In *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* the respondent had filed a notice of bar when the applicant did not plead within 15 days after the respondent's amendments had been effected in terms of Rule 28. That notice of bar was filed on the 19th day after the effecting of those amendments. The applicant sought the setting aside of the notice of bar as an irregular proceeding in terms of Rule 30 on the basis that 15 days constituted short notice as the applicant was entitled to 20 days within which to plead.

[38.3] As encapsulated in *Mncube par* [32]: "In summary, Sutherland J held as follows: '12.1 When a plaintiff accomplishes an amendment to a declaration, and no plea has yet been filed, the defendant is put on terms to comply with

⁸⁰ *Stemela v MEC for Health, Eastern Cape Province* (3962/17) [2019] ZAECHMHC 4 (12 February 2019) par [12]-[13].

⁸¹ It may be observed that the position is identical in the Magistrates Court inasmuch as Magistrates Court Rule 19(4) now similarly provides: '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'.

⁸² See *Devenish, Doctrine of Precedent in SA*, Vol 28 No 1 OBITER 2007 par 5 p10 par 9 p19; *van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC).

⁸³ *Nqabeni Attorneys Inc v God Never Fails Revival Church and others supra par* [2].

Rule 22(1) and thereby file a plea within 20 days”. It followed that in *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* the notice of bar was irregular and fell to be set aside,⁸⁴ which it duly was.⁸⁵

[38.4] In this regard, it was held in the *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* case:⁸⁶

“[8] Frequently, a declaration is sought to be amended after a plea has been filed. The risk exists that the initial plea is non-responsive to the declaration in its amended form and in such a case, the defendant has 15 days to “adjust” its plea. That is not the position on these facts. [9] *Accordingly, the provisions of Rule 22(1) apply to the time for delivering a plea for the first time,*⁸⁷ not those of Rule 28(8)⁸⁸.” [italics added]

[38.5] The decision in *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* was applied in *Mncube*, which held in effect that the 15-day period prescribed by Rule 32 commenced running afresh after the plea had been amended,⁸⁹ explaining: “[33] Accordingly having regard to the aforementioned case law, I find that the respondent had fifteen days from the date on which the applicant delivered his plea consolidating both the amendments on the 26th of July 2022 within which to deliver its notice of application for summary judgment. The respondent delivered its application for summary judgment on the 17th of August 2022, being fifteen days after the date on which the applicant’s plea consolidating both the amendments was delivered. [34] I accordingly find that the respondent’s application for summary judgment is not irregular and does not fall to be set aside in terms of the provisions of Rule 30”.

[38.6] This court is obliged to follow the approach adopted in these decisions emanating from this Division, both of which are, with respect, palpably correct.⁹⁰

⁸⁴ *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* par [13].

⁸⁵ *Nqabeni Attorneys Inc v God Never Fails Revival Church and others* par [14](1).

⁸⁶ per Sutherland J.

⁸⁷ i.e., 20 days.

⁸⁸ i.e., 15 days.

⁸⁹ Rule 32(2)(a) provides that “within 15 days *after the date of delivery of the plea*, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts”.

⁹⁰ “I am required to follow those decisions of this Division of a single judge unless I am of the view that they are clearly wrong” (*Nedbank Ltd v Mashaba and other similar matters* 2024 (3) SA 155 (GJ) par

Determination of the crucial enquiry

- [39] Having regard to the above, it is hereby held that when an exception taken by any defendant, who has not yet pleaded, is dismissed, without the court that dismisses such exception specifying a period within which the defendant's plea is to be delivered, then that defendant must plead within twenty (20) days,⁹¹ which period of twenty (20) days is to be reckoned as from the date upon which such exception is dismissed.
- [40] Lest it be thought that this finding is unduly accommodating to the unsuccessful excipient and lenient towards that defendant, it must be emphasised that this is merely the default position, should the court dismissing the exception decide not to prescribe any time, appropriate under the circumstances, within which the specific defendant concerned must if so advised, deliver a plea. In the event of that court determining that the unsuccessful exception was, e.g., factitious, specious or simply a stratagem designed to engineer a delay, when dismissing the exception that court will doubtlessly grant the reproachable defendant much less time than twenty (20) days within which to plead.

Prerequisites for uplifting

- [41] The respondent argues strenuously that the applicant has failed to comply with the well-established requirements for demonstrating "good cause" under Rule 27, self-evidently falling short, as argued, on every single requirement; and in particular, the applicant failed to provide a proper and satisfactory explanation for its delay; nor has applicant furnished under oath any basis at all for a *bona fide* defence. In addition, applicant omitted to address the question of prejudice to the respondent. In the premises, the respondent believes that the applicant is not *bona fide* but merely engaged in a stratagem of delaying the action; and is simply bent on frustrating the respondent in its civil claim, intentionally and recklessly disregarding the Rules of Court.

[25] at 161). "Courts equal in status can depart from an earlier decision only when the court which determined it before clearly erred (*Collett v Priest* 1931 AD 290 297; *R v du Preez* 1943 AD 562 at 583; *Robin Consolidated Industries Ltd v CIR* 1997 (3) SA 654 (SCA) at 666)" (*Brickhill, Precedent and the Constitutional Court* (2010) 3 Constitutional Court Review par 5.1(3) p92).

⁹¹ Commensurate with that period contemplated in Rule 22(1), against the backdrop of Rule 23(4).

[42] Notwithstanding that the courts have over a period of time crystallised various elements representing "good cause" for the removal of a bar;⁹² and formulated two principal,⁹³ or rather, three,⁹⁴ requirements for determining the existence of 'good cause' encompassing the need to demonstrate a good defence,⁹⁵ that is a *bona fide* defence which *prima facie* has some prospect of success,⁹⁶ it is nonetheless well established that the requirement of "good cause" gives the court a wide discretion in the matter,⁹⁷ having regard to all the circumstances or all of the merits of that specific discrete case at hand.⁹⁸ These factors are not individually decisive.⁹⁹ Furthermore "The particular circumstances of each case will

⁹² Smith N.O. v Brummer N.O. and another; Smith N.O. v Brummer N.O. 1954 (3) SA 352 (O) at 358; Barkhuizen NO. v Firststrand Bank 2021 JDR 2786 (FB) par [11]; Absa Bank Limited v Bilobrk N.O. 2022 JDR 1426 (WCC) par 25; Tlhabanyane v Standard Bank of SA Ltd (92483/19) [2023] ZAGPJHC 1489 (16 October 2023); 2024 JDR 0242 (GP) par [16].

⁹³ van Aswegen v Kruger 1974 (3) SA 204 (O) at 205; *du Plooy v Anwes Motors (Edms) Bpk* 1983 4 SA 212 (O) at 217; Colia Louis Family Trust v Komsberg Farming (Pty) Ltd (In Liquidation) 2015 JDR 2111 (Nm) par [9]; Nedcor Investment Bank Ltd v Visser N.O. and others 2002 (4) SA 588 (T) at 591; NM v NM 2022 JDR 0134 (GJ), *N.Q.M v N.W.M and another (2018/39527) [2022] ZAGPJHC 5 (3 January 2022)* par 7; Absa Bank Limited v Bilobrk N.O. 2022 JDR 1426 (WCC) par 24; Ingosstrakh v Global Aviation Investments (Pty) Ltd and others 2021 (6) SA 352 (SCA) par [21] at 360; Mpembe and another v Minister of Police and another 2024 JDR 2198 (NWM) par [37]; Msibi v Msibi 2023 JDR 3286 (GJ) par [13]; A.M v S.M.M (45707/2021) [2023] ZAGPJHC 965 (25 August 2023) par [13]; S.T.C v K.Z.K (069787/2023) [2024] ZAGPJHC 1066 (21 October 2024) par [24]; Futeni Collections Ltd v OB Davids Property and 31 others 2015 JDR 1146 (Nm) par [3]; "In order to succeed in my view, it is necessary for the applicant to establish two essentials. First there must be reasonable explanation for the delay and secondly, the plea must raise a triable issue". *IA Bell Equipment Co Namibia (Pty) Ltd v E S Smith Concrete Industries CC* 2015 JDR 1137 (Nm) par [9]; Nathaniel Holdings (Pty) Ltd v Xtreme Intelligence Systems (Pty) Ltd (9255/202) Gauteng Division, Johannesburg (03 March 2023); 2023 JDR 0609 (GJ) par [8]; Chitandó v Khoza 2024 JDR 4556 (GJ) par [24].

⁹⁴ Benade v Absa Bank Ltd 2014 JDR 1155 (WCC) par 10; Showroom Centre (Pty) Ltd and others v Kagan 2023 JDR 4198 (GJ) par [31]-[33]; van Schalkwyk v Bredenkamp (7650/2024) [2024] ZAWCHC 380 (19 November 2024), 2024 JDR 4985 (WCC) par [17]; Trakman N.O. and others v Trakman N.O. and others 2023 JDR 0630 (GJ) par [14]. "In most of the authorities a third requirement is also laid down, namely, that the grant of the indulgence sought must not prejudice the plaintiff (or defendant) in any way that cannot be compensated for by a suitable cost order" (NM v NM 2022 JDR 0134 (GJ); N.Q.M v N.W.M and another (2018/39527) [2022] ZAGPJHC 5 (3 January 2022) par 8). Wesley v Minister of Police (219/20) [2023] ZANWHC 32 (3 March 2023) par [12](v); Born Free Investments 128 (Pty) Ltd v Makulu Plastics & Packaging CC [2014] ZAGPPHC 253 (GP 71816/13; 2 April 2014) par 9; Body Corporate Santa Fe Sectional Title Scheme NO 61/1994 v Bassonia Four Zero Seven CC 2018 (3) SA 451 (GJ) par [13]-[16] at 454-5.

⁹⁵ Swarts v Minister of Justice 1940 TPD 210 at 214; Moluele and others v Deschatelets N.O. 1950 (2) SA 670 (T) at 676; Dalhouzie v Bruwer 1970 (4) SA 566 (C) at 574-5; P L J van Rensburg en Vennote v Den Dulk 1971 (1) SA 112 (W) at 113; Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 216-7; Coutries v Levergy Marketing Agency (Pty) Ltd 2020 JDR 2234 (GJ) par 27; Msibi v Msibi 2023 JDR 3286 (GJ) par [17]. Scarr v Mitchell 2014 JDR 1121 (KZP) par [3]; N.Q.M v N.W.M and Another (2018/39527) [2022] ZAGPJHC 5 (3 January 2022), NM v NM 2022 JDR 0134 (GJ) par 6

⁹⁶ Ingosstrakh v Global Aviation Investments (Pty) Ltd and others 2021 (6) SA 352 (SCA) par [21] at 360; Msibi v Msibi 2023 JDR 3286 (GJ) par [13].

⁹⁷ See par [6] above.

⁹⁸ See par [7] above.

⁹⁹ Temoso Technologies (Pty) Ltd v Anthillsap (Pty) Ltd 2004 JDR 0661 (T) Full Court par [22] applying to an application for the uplifting of a bar the cases of United Plant Hire (Pty) Ltd v Hills and others 1976

determine which of the factors are relevant” (*Grootboom v NPA and another* 2014 (2) SA 68 (CC) par [22] at 76). A failure to satisfy every one of these oft-repeated requirements in any distinct matter, does therefore not necessarily result in a refusal to uplift the bar, as in a proper case it would be limiting unduly the wide discretion conferred upon the court if they were all to be regarded absolutely as vital prerequisites in every single application for such relief.¹⁰⁰ To this extent, with respect, the proposition¹⁰¹ must be qualified that: “In summary, to succeed in lifting the bar, the defendant must present a *bona fide* explanation covering the entire delay, demonstrate genuine intent, provide a *bona fide* defence to the action and prove that any resultant prejudice to the plaintiff can be adequately addressed. Failure to satisfy these criteria would render the application for condonation untenable”. On the contrary, everything depends entirely upon the unique circumstances of the particular case under consideration.

Explaining the delay

- [43] The circumstance that the notice of bar failure was illegitimate militates against the failure to explain the delay in responding thereto timeously within five days. In short: Absent a legitimate or valid notice of bar, there was no delay.

Bona fide defence

- [44] It is true that applicant merely baldly declares that the plea denies respondent's claims and the counterclaims allege damages and monies due to applicant by the respondent. Nonetheless on the face of it, triable issues appear to be raised.
- [45] Putting up a *bona fide* defence in order to secure the uplifting of a bar was hyperbolically described in *Coutries v Levergy Marketing Agency (Pty) Ltd* 2020 JDR 2234 (GJ) par 27 as “a fundamental requirement” (*sic*), yet it was said in *Ferris v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) par [39] at 43-4 that “applicant's

¹ SA 717 (A) at 720 adopted in *Burton v Barlow Rand Ltd t/a Barlows Tractor & Machinery Co; Burton v Thomas Barlow & Sons (Natal) Ltd* 1978 4 SA 794 (T) at 797.

¹⁰⁰ See: *Kajee and others v G & G Investment and Finance Corporation (Pty) Ltd* 1962 (1) SA 575 (N) at 576-7. “In my view, the applicants have failed to provide any satisfactory explanation for the two time periods mentioned. This by no means results in the dismissal of the application” (*Minister of Police and another v Lekgari* 2023 JDR 3979 (NWM) par [22]); compare: *The MEC Department of Education and another v Despatch Preparatory School* 2022 JDR 2539 (ECB) par [16]-[17].

¹⁰¹ stated in *Nkosi v Road Accident Fund* 2024 JDR 4755 (GJ), *G.A.N v Road Accident Fund* (2020/9960) [2024] ZAGPJHC 1134 (5 November 2024) at par 33.

prospects of success is merely one of the 'relevant factors' to be considered".¹⁰² It seems superfluous in the unique circumstances of the present case to require the applicant to show a good defence.¹⁰³ In any event, at this stage the court should not "scrutinise too closely whether the defence is well founded; as long as *prima facie*, there appears to the Court sufficient reason for allowing the defendant to lay before the court the facts he thinks necessary to meet the plaintiff's claim".¹⁰⁴ "In other words, it is only where the case appears to be hopeless that the applicant will be out of Court on the affidavit of merits (cf. *Ford v SA Mine Workers' Union*, 1925 TPD 405 at 406)".¹⁰⁵ Of course, in an application to uplift a bar so as to enable some particular defendant to plead, there will, *ex hypothesi*, generally be no pleadings by that which may be evaluated by the court in assessing whether such viable defence is presented. In the present case, however, the applicant has delivered a plea¹⁰⁶ albeit belatedly and in the face of the supposed bar, accompanied by two counterclaims. Such pleadings may be expected to set out the applicant's case.¹⁰⁷ In addition thereto, there is the affidavit filed by applicant in opposition to the respondent's Rule 31 default judgment application, although respondent denigrates it as a nullity. Inasmuch as the facts upon which applicant proposes relying are disclosed in such pleadings, the applicant's defence embracing the counterclaims, does appear to pass muster. Without at all prejudging any of the issues, applicant's defence is *prima facie* not patently unfounded and is based upon facts which if proved, would seemingly constitute a defence. "In this regard it has been held that the minimum that the applicant must show is that his defence is not patently unfounded and that it is based upon facts which must be set out in outline, and which, if proved, constitute a defence (See *du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O))" (*Vico Mining (Pty) Ltd v Advance Industrial Solutions (Pty) Ltd* 2023 JDR 1367 (GJ) par 12).¹⁰⁸ The causes of action as espoused in the two counterclaims, whatever their ultimate fate might be, do not appear *prima facie* to be wholly deficient or entirely unsustainable. It was said in *F v Minister of Safety and Security and others* 2012 (1) SA 536 (CC) par [34] at

¹⁰² *Barkhuizen N.O. v Firststrand Bank* 2021 JDR 2786 (FB) par [13]; *ABSA Bank Ltd v Bilobrk N.O.* 2022 JDR 1426 (WCC) par 26.

¹⁰³ See par [42] above.

¹⁰⁴ *Swarts v Minister of Justice* 1940 TPD 210 at 214.

¹⁰⁵ *Gordon and another v Robinson* 1957 (2) SA 549 (SR) at 551.

¹⁰⁶ Which was served upon the respondent on 5 July 2023, although presently it lacks a prayer for relief.

¹⁰⁷ As required in particular by Rules 22(2) and 18(4).

¹⁰⁸ Also: *Mpembe and another v Minister of Police and another* 2024 JDR 2198 (NWM) par [41].

546: "It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible"; in the light of which the following observations are apposite herein: "Likewise, in the present case, I think it will be in the interests of justice to have all the issues raised by the defendant being fully and properly ventilated before the court" (*Nu-Shop Holdings (Pty) Ltd v Kastle Properties (Pty) Ltd (D9608/2021) Kwazulu-Natal Local Division, Durban (14 August 2024), 2024 JDR 3422 (KZD) par [27]*) and: "the interests of justice demand that I allow the defendant an opportunity to have all the issues raised in its defence being fully and properly ventilated before the court" (*ibid par [28]*).

- [46] In the circumstances of the present case, given the finding that the notice of bar was premature, the defence that is put up to respondent's claim by applicant, despite the failure of the applicant to expand thereon under oath, encompassing as it does the counterclaims, cannot in good conscience be rejected out of hand at this stage as being spurious or entirely devoid of merit. In the circumstances of the present case, unique as they are, that is sufficient.

Conclusion

- [47] The question whether the service of the impugned notice of bar was premature must therefore be answered affirmatively. The notice of bar must be set aside, removed or uplifted. Accordingly, the relief sought by the applicant in paragraph 1 of its notice of motion falls to be granted, namely, that such notice of bar be lifted.¹⁰⁹
- [48] The relief sought by the applicant in paragraph 2 of its notice of motion,¹¹⁰ has been rendered superfluous by virtue of the filing by the applicant of its plea and counterclaims on 5 July 2023. It is for the respondent to file the next pleading. Rule 25(1) stipulates that a plaintiff shall, within fifteen days after the service on it of a plea, deliver a replication to the plea, where necessary; and a plea to any claim in reconvention, which plea shall comply with Rule 22. Applying the same

¹⁰⁹ The notion that Rule 30 might have been better suited to achieve this result is beside the point. No such procedural objection was raised herein. Both parties were content enough to accept that the relief sought competently resorted under Rule 27.

¹¹⁰ "That the Defendant be granted to file its Plea within 10 days from date of the order" (Notice of Motion par 2).

considerations as before, it appears just that respondent, if so advised, should do so within fifteen days after the date of this judgment.

- [49] Respondent's counter-application was instituted only conditionally on uplifting failing, which it has not. That condition has not been met. As a result of the finding that the application for uplifting of the bar succeeds, the applicant is not in default and the respondent's conditional counter-application for default judgment does not arise for adjudication. It may be mentioned that although the applicant attempted to do so, respondent's view is that the applicant filed no answering papers to the counter-application; and that whatever the applicant purported to do in this regard is a nullity and should be ignored. As is correctly pointed out by the applicant, the application for default judgment is predicated on the validity of the notice of bar. As that notice has been held herein to have been premature, it may be observed that no application for default judgment founded on that discredited premise should succeed,¹¹¹ though it is indubitably unnecessary to make such a finding herein.
- [50] Respondent's application in terms of Rule 30(1)(c) to set aside the applicant's plea and counterclaims as irregular because of the bar is not before this court. Suffice it to say that such application has been subverted by this judgment and both the need and the justification for such relief have vanished. Given the finding that the said notice of bar was ineffectual, suffice it to say that pursuing such pending Rule 30 application will be futile.

Costs

- [51] Applicant has shown good cause for the bar to be uplifted. This is not a matter in which the applicant is seeking an indulgence, which is normally the situation concerning the uplifting of a bar. On the contrary, this is a case wherein the respondent acted prematurely and overhastily in delivering the notice of bar to begin with; and thereafter, despite applicant's protestations, refused to accept that it had done so, failing to abandon or withdraw the unwarranted notice of bar and declining to accommodate the applicant. In view of this intransigent attitude, the applicant was obliged to bring this interlocutory application to have

¹¹¹ "An application for default judgement cannot be granted based on an improper notice of bar" (Oos Vrystaat Kaap Operations Ltd v Frelon Boerdery (Pty) Ltd 2021 JDR 0985 (FB) par [11]).

the bar uplifted. Respondent unsuccessfully opposed the relief sought herein by the applicant. Under the circumstances, there is no justification for departing from the general rule regarding costs,¹¹² namely, that costs follow the result.¹¹³

[52] Such party and party costs on the opposed scale awarded to the applicant will undeniably include the costs of applicant's counsel.¹¹⁴ For purposes of taxation it is hereby declared,¹¹⁵ that one-half (50%) of the court time herein was taken up by the application for uplifting of the bar.

Order

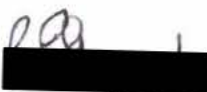
[53] In the premises the following order is made:

[53.1] The application for uplifting of the bar is upheld with opposed party and party costs.

[53.2] The respondent's notice of bar dated 15 May 2023 and served on 16 May 2023 is hereby set aside.

[53.4] The periods contemplated in Rule 25(1) shall be deemed to commence upon the date of this judgment.

[53.5] It is noted and repeated that the applicant's application for postponement was dismissed on 20 March 2024 with opposed party and party costs.



B P GEACH

ACTING JUDGE OF THE HIGH COURT

¹¹² Mphuru and another v Minister of Police and another 2024 JDR 5202 (GJ) par [90].

¹¹³ Cilliers, Law of Costs (3rd edition) par 2.08 page 2-8 (Issue 11); Lebogo v Department of Health and Social Development Limpopo Provincial Government (2432/2015) [2024] ZALMPPHC 28 (13 March 2024) par [91].

¹¹⁴ Although, as counsel's work was completed prior to 12 April 2024, it is unnecessary to specify a scale of costs for counsel (Mashavha v Enaex Africa (Pty) Ltd and others 2024 JDR 1686 (GJ) par [12]).

¹¹⁵ As was the case with the application for postponement (see par [3] above).