THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 3069/20

In the matter between

TRACY HILL N.O. **FIRST PLAINTIFF**

LINDIWE FLORENCE KAABA N.O. **SECOND PLAINTIFF**

And

MARK BROWN **DEFENDANT**

Coram: Rogers J

Enrolled: 26 June 2020

Delivered: 3 July 2020 (by email to the parties and release to SAFLII)

JUDGMENT

Rogers J

[1] The plaintiff contends that the defendant's delivery of a rule 23(1)(*a*) notice was an irregular step which should be set aside in terms of rule 30(1). It is not in dispute that on 15 April 2020 the plaintiff served a valid notice of bar in terms of rule 26[1] or that the defendant's rule 23(1)(*a*) notice was served on the last day of the five-day period specified in rule 26. The question is whether the service of the rule 23(1)(*a*) notice was a valid response to the notice of bar.

[2] The parties sensibly agreed that I could adjudicate this matter on the papers without oral argument.

[3] As applied to a defendant's response to a combined summons (which is our situation), the relevant provisions of the rules 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.

(b) In terms of rule 22(1) he must file his plea (with or without a claim in reconvention) or exception (with or without an application to strike out) within 20 days after serving his notice of intention to defend.

[1] The parties did not deal with the possible implications of Covid-19 measures. The defendant delivered his notice of intention to defend on 2 March 2020. He had twenty (court) days within which to file a plea or exception. By virtue of para 5(*c*) the Covid-19 directions promulgated by the Minister of Justice and Correctional Services in the *Government Gazette* on 26 March 2020, the running of this 20-day period was suspended as from midnight on 26 March until 31 March when the said directions were superseded by new directions, also promulgated in the *Government Gazette*, which omitted the said para 5(*c*). By my calculation, the 20-day period thus expired on 1 or 2 April 2020, depending on whether one includes or omits the day of 31 March in the calculation. Although the notice of bar was dated 2 April 2020, it was only served on 15 April 2020, and was thus validly served.

(c) Rule 23(1) permits two distinct grounds of exception, *viz* that the particulars of claim are vague and embarrassing or that they lack averments necessary to sustain an action.

(d) If the defendant wishes to except on the first of these grounds (the vague and embarrassing ground), rule 23(1)(*a*) requires him, as a precursor to the exception, to afford his opponent an opportunity of removing the cause of complaint within 15 days. The defendant's notice to this effect must be served within 10 days of receipt of the combined summons. (The latter time-limit was introduced by an amendment to rule 23(1) which came into force on 22 November 2019, and is shorter than the period previously allowed.)

(e) 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 his 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 reply was due.

(f) If a defendant fails to deliver his 'pleading' within the time laid down in the rules, the plaintiff may, in terms of rule 26, serve a notice requiring him to deliver his pleading within five days after delivery of the notice. If the defendant fails to do so, he is barred and the case proceeds as an unopposed matter unless the defendant succeeds in having the bar lifted in terms of rule 27.

[4] An exception is a 'pleading' (*Haarhoff v Wakefield* 1955 (2) SA 425 (E); *Tyulu & others v Southern Insurance Association Ltd* 1974 (3) SA 727 (E) at 729B-D; *Icebreakers No.83 (Pty) Ltd v Medi Cross Health Care Group (Pty) Ltd* [2011] ZAKZDHC 15; 2011 (5) SA 130 (KZD) para 2). Like a plea, a properly drawn exception concludes with a prayer for relief (*Marais v Steyn & 'n ander* 1975 (3) SA 479 (T) at 483A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 552H), typically – in the case of an exception to particulars of

claim – a prayer that the exception be upheld with costs and that the particulars of claim be set aside.

[5] Accordingly, the 'pleading' contemplated in rule 26 covers – in the case of a defendant who has failed to plead to particulars of claim – a plea as contemplated in rule 22(1) or an exception as contemplated in rule 22(1) read with 23(1). Either of these is a valid response to the rule 26 notice, and the defendant will not be barred.

[6] A defendant's notice in terms of rule 23(1)(*a*) affording the plaintiff an opportunity to remove an alleged cause of complaint is simply that, a notice. It claims no relief. It does not call for adjudication. If the plaintiff removes the alleged cause of complaint, the notice has served its purpose and receives no further attention in the case. If the plaintiff does not remove the alleged cause of complaint but the defendant decides not to follow up his notice with an exception, the notice likewise receives no further attention. If the plaintiff fails to remove the alleged cause of complaint and the defendant files an exception, it is the exception, not the preceding notice, that the court adjudicates.

[7] Accordingly, I agree with Yekiso J's judgment in *McNally NO & others v Codron & others* [2012] ZAWCHC 17 that a notice in terms of rule 23(1)(*a*) is not a pleading (and see also *De Bruyn v Mile Investment 307 (Pty) Ltd & others* [2017] ZAGPPHC 286 paras 25-26). The contrary is scarcely arguable.

[8] If a defendant is to avoid being barred pursuant to a notice in terms of rule 26, he must file a 'pleading', ie a plea or an exception. A rule 23(1)(*a*) notice, which is merely a precursor to an exception (which may or may not be delivered), is not a proper response.

[9] When regard is had to the various time-limits contained in the rules, there is nothing anomalous in this conclusion. The rules require a defendant promptly to form a view as to whether the particulars of claim are vague and embarrassing. Under the amended rule 23(1)(a) he is given 10 days from receipt of the particulars of claim to serve his rule 23(1)(*a*) notice. The period given to the defendant to serve such a notice is the same as the period given to him to file his notice of intention to defend. If he does not deliver a rule 23(1)(*a*) notice within that period, he has 20 days from the filing of his notice of intention to defend to deliver his plea or exception, though in this event an exception would have to be confined to a contention that the particulars of claim lack the necessary averments to sustain an action.

[10] It must be observed that in relation to a defendant's response to service of a combined summons, the reduced time-limit specified in the recently amended rule 23(1)(*a*) for the service of a notice to remove alleged causes of complaint may be unreasonably short. Previously the rules provided that a defendant should serve such a notice within the period allowed for his plea or exception (ie the pleading subsequent to the particulars of claim). Under the amended rule he must deliver the notice within 10 days of receipt of the combined summons. A defendant also has 10 days, from receipt of the combined summons, to obtain legal representation and deliver a notice of intention to defend. Since without legal advice a defendant is unlikely to know whether or not the particulars of claim are vague and embarrassing, one would expect the time-limit for serving such a notice to run from the date on which notice of intention to defend is served rather than from the date on which the defendant receives the combined summons.

[11] Be that as it may, the amended rule is unambiguous. In practice, sensible plaintiffs are unlikely to object to a rule 23(1)(*a*) notice delivered a few days later than the strict limit imposed by the amended rule, but for present purposes the

important point is that the framers of the rules plainly did not intend that a defendant should have a leisurely period to assess whether or not particulars of claim are vague and embarrassing. In the circumstances, a defendant can hardly complain if, after the expiry of the 20-day period allowed for a plea or exception, his opponent delivers a notice of bar having the effect of making the subsequent service of rule 23(1)(*a*) notice irregular. In such a case, a rule 23(1)(*a*) served after delivery of the notice of bar would, *ex hypothesi*, be at least 20 days out of time.

[12] The court has a discretion whether or not to set aside an irregular step, and the presence or absence of prejudice is usually decisive. In my view, the plaintiff will clearly be prejudiced if the rule 23(1)(*a*) notice is allowed to stand. The defendant, as appears from his attorney's heads of argument, considers that the notice is valid, from which it would follow that on the defendant's view he would be entitled to file an exception if the plaintiff fails to remove the alleged causes of complaint.

[13] On a proper construction of the rules, however, the defendant has not filed a proper response to the notice of bar and should now be under bar. If the irregularity of the rule 23(1)(*a*) notice is confirmed by this court and the notice set aside, the parties will know where they stand. The defendant, if he wishes to oppose the case, will have to apply in terms of rule 27 to have the bar lifted and will need to show good cause. Whether or not the defendant will be able to show good cause is not something on which I can form an opinion, because I do not know what facts the defendant will advance in support of a rule 27 application.

[14] In the circumstances I make the following order:

(a) The defendant's notice, purportedly in terms of rule 23(1)(*a*), dated 22 April 2020 is declared to be an irregular step and is set aside.

(b) The defendant must pay the plaintiff's costs in the rule 30 application.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

For Plaintiffs	C C Bester Instructed by Webber Wentzel 15th Floor, Convention Tower Heerengracht Foreshore Cape Town
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