

SOUTH AFRICA / JUDGMENT

Manufacturing, Engineering & Related Services Sector Education & Training Authority v Mhlaba (033076/2022) [2023] ZAGPJHC 1038 (18 September 2023) [2023] ZAGPJHC 1038

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

033076/2022

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IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
Case No: 033076/2022
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
NOT REVISED
18.09.23
In

the matter between:

MANUFACTURING,
ENGINEERING & RELATED
SERVICES
SECTOR EDUCATION & TRAINING AUTHORITY.
Plaintiff/Respondent
and
DR
JOSEPH QHUNAPHI MHLABA.
Applicant/Defendant

JUDGMENT

Coram NOKO J

Introduction

and Background

- [1] The plaintiff issued summons against the defendant for 1 billion rand in respect of the money lost as a result of irregularities allegedly committed by the defendant during his tenure as an employee of the plaintiff. The defendant entered appearance to defend but failed to serve his plea timeously and was therefore served with the notice of bar. In turn the defendant served notice of exception to which the plaintiff retorted that it was irregular as the defendant was ipso facto barred. The defendant on the other hand contends that notice of exception was served timeously. Though the application serving before me is for the exception the plaintiff invited the court to consider whether the defendant is not barred.
- [2] In this judgment the applicant and respondent will be referred to as defendant and plaintiff respectively.

Truncated sequence/ chronology of events

- [3] To put the process in context the following summary of the sequence of exchanges of pleadings and notices between the parties is instructive, viz.
- 2.1. 13 October 2022 service of summons on the defendant by sheriff.
 - 2.2. 27 October 2022 service of notice of intention to defend by Petker and Associates Inc., (Petker Inc.).
 - 2.3. 5 December 2022 service of plaintiff's notice of bar by email.
 - 2.4. 6 December 2022 service of plaintiff's notice of bar by hand.
 - 2.5. 7 December 2022 Notice of withdrawal served by email from Petker Inc.
 - 2.6. 7 December 2022 email from Petker Inc. to Ratshibvumo attorneys Inc.[1] (Ratshibvumo Inc.) enclosing notice of bar.
 - 2.7. 8 December 2022 email from plaintiff's attorneys to the defendant.
 - 2.8. 13 December 2022 service of notice of appointment of Ratshibvumo Inc. as attorneys of record for the defendant.
 - 2.9. 13 December 2022 service of notice of exception by email sent at 16:36.
 - 2.10. 14 December 2022 service of defendant's notice of exception by hand.
 - 2.11. 14 December 2022 service of plaintiff's notice in terms of rule 30 of the

Uniform Rules of Court[2].

Issues for

determination

[4] Issues for determination are whether:

4.1.the defendant is ipso facto barred,

4.2.the abandoning of the rule 30 notice has the effect of uplifting the bar and

4.3.the defendant has persuaded me that the particulars of claim are excipiable.

Parties' contentions and submissions

- [5] The plaintiff's counsel commenced by stating that both counsels have agreed that the plaintiff's counsel should address the court first to bring to the court's attention a certain issue. Prior plaintiff's counsel could continue addressing the court counsel for the defendant's counsel interjected and contended that the plaintiff's counsel intends to address the court regarding the notice in terms of rule 30 which was served after the defendant's notice of exception was served. The said rule 30 notice was not followed up to finality and was in fact abandoned.
- [6] According to the information at the defendant's disposal, so proceeded defendant's counsel, the defendant's erstwhile attorneys forwarded a notice of bar to the current defendant's attorneys of record by email on 7 December 2022 and indicated that it was served on them on 6 December 2022. Thereafter a notice of exception was served on 13 December 2022, which was on the fifth day after service of notice of bar by the plaintiff's attorneys and was therefore served on time. Since the exception as contended by counsel, was served on time the defendant was therefore not under bar.
- [7] Counsel for the defendant further contended that in the premises the plaintiff should therefore not persist with the issue of the notice of bar. The court should proceed to adjudicate over the application for exception which is set down for hearing before me alternatively the plaintiff's counsel should request a postponement to enable the plaintiff to proceed with the rule 30 application and further tender costs for the postponement. If the court was to hear arguments on the notice of bar, so went the argument, this would amount to an ambush, which cannot be countenanced by the court. In any event, the counsel continued, the plaintiff has served papers opposing the application for the exception and that should be considered as a further step as envisaged in rule 30(2)(a).

- [8] The defendant's counsel further that the plaintiff's submission that notice of bar was first served by email on the defendant's erstwhile attorneys has not been brought to the attention of the defendant's current attorneys. If the plaintiff is correct the dispute between the parties is only about one day. The persistence by the plaintiff to make arguments thereon is a delay for the matter to be finalised and this may not be what the plaintiff wanted and the adjudication of the application for exception would lead to finality.
- [9] The plaintiff on the other hand contended that the defendant was served with notice of bar and the defendant having failed to plead before the expiry of 5 days the defendant is ipso facto barred. The notice of bar was served on 5 December 2022 by email and hand delivered on 6 December 2022. Further that the defendant should not contend to be surprised or ambushed because, first, the plaintiff's attorneys sent an email on 8 December 2022[3] directly to the defendant after Petker and Associates withdrew as defendant's attorneys, making him aware that notice of bar was served on his attorneys on 5 December 2023. In addition, plaintiff's attorneys warned him of the implications of the notice to bar.
- [10] Secondly, the defendant's attorneys were made aware on 14 December 2022 (some nine months ago) through notice in terms of rule 30 that the defendant was under bar. This was also mentioned in the plaintiff's heads of argument dated 11 March 2023[4] and was also mentioned in the defendant's practice note dated 3 March 2023[5] where it was stated that the defendant has taken further step by filing opposing papers in respect of the application for exception and it is therefore inappropriate to raise the bar. To this end, so went the argument, the court cannot afford the defendant audience until the bar is uplifted. Furthermore, the proposal that the plaintiff should apply for postponement is rejected out of hand and the court should proceed and dismiss the application for exception.

Legal analysis and discussion

- [11] Rule 26 of the Uniform Rules of court provides that:

"26. 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.

- [12] The principles underpinning this rule is to ensure that delays are avoided without which a party may adopt a supine posture and do nothing to delay the finalisation of the matter. The notice of bar affords the opponent an opportunity to file a pleading, exception or notice to

strike out within a period of 5 days. If the party fails to serve a pleading within the period set out in the notice of bar such a party will automatically be excluded from further participating in the case and the other party is entitled to approach court to apply for default judgment.[6]

[13] A party who is placed under bar has a recourse in terms of rule 27 to uplift the bar and be given an opportunity to be allowed back and participate in the case. The court may on good cause shown uplift the bar[7]. I pause to ponder whether any pleading/s and/or notices served after a party has been ipso facto barred should be construed as *pro non-scripto*. Further discussion and application of rule 26 will be dealt with later in this judgment.

[14] Where a party commits an irregularity, the other party has an option of bringing an application in terms of Rule 30 of the Rules of court which provides that:

30. Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity.
 - (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days;
 - (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

[15] The plaintiff served notice in terms of rule 30(2)(b) contending that the defendant has taken an irregular step by serving notice of exception whilst under bar and the defendant was being afforded an opportunity to remove the cause of complaint. The defendant did not heed the notice and did not remove the cause of complaint. Under the circumstances the plaintiff was entitled to enrol the application for the court to set aside the notice of exception as an irregular step. The plaintiff decided not to pursue the application in terms of rule 30 to its finality and the question is whether the jettisoning of rule 30 process by the

plaintiff has an impact on whether the defendant is still ipso facto barred.

- [16] In view of the contention by the defendant in his practice note that the plaintiff has taken a further step[8] and should therefore not raise the argument that the defendant is barred, I asked whether the plaintiff's conduct in opposing the exception implicates the provisions of rule 30(2)(a) in terms of which such a conduct may be construed as vitiating the tenor of the notice of bar. The defendant's counsel answered in the negative.[9] This response by the defendant's counsel appears to be eschewing the argument that the plaintiff cannot argue rule 30 application as the plaintiff has taken a further step by serving papers opposing the exception which is proscribed by rule 30(2)(a). Even if the defendant persisted with that argument, it would have been inconsequential since rule 30 proceedings are not etched in peremptory terms, and the plaintiff may opt to apply for default judgment without invoking the provisions of the rule 30.[10]
- [17] The defendant was aware of the contention by the plaintiff timeously that defendant is barred and the defendant's contention that there was a semblance of an ambush appears not to have been accorded a proper reflection and therefore unsustainable. The fact that the defendant's legal representatives have in the face of the assertion that the defendant is under bar decided not to make inquiries with the previous attorneys to verify the facts as the notice of bar appears to have been received on 6 December 2023 is untenable and demonstrates a lacklustre posture adopted by the defendant.
- [18] As at time of argument there was no evidence or arguments by the defendant to gainsay the assertion that the notice of bar was served on the defendant's erstwhile attorneys by email on 5 December 2023 and to this end there is no real and genuine dispute which warrant that the issue be dealt with anywhere else. In the premises the overwhelming uncontroverted evidence shows that, first, the notice of bar was served on 5 December 2022, and a hard copy delivered on 6 December 2022, secondly, the defendant was personally cautioned of the import and effect of the notice of bar on 8 December 2022, thirdly, the defendant was made aware thereof on 14 December 2022 and further in the heads of argument dated 11 March 2023. Lastly reference in the defendant's practice note regarding the notice of bar fortifies plaintiff's contention that the defendant's counsel was not being ambushed and that the defendant or his representatives were just incurious.[11] The contention that the defendant's erstwhile attorneys did not provide more information can also not to provide refuge for the defendant's conduct. The defendant is therefore ipso facto barred.
- [19] This judgment relates to a procedural issue, I have therefore not considered the merits of the application for exception and the invitation by the plaintiff that I should dismiss the application for exception is declined.

Costs

- [20] There are no reasons why the costs should not follow the results.

Order

[21] I make the following order:

“The defendant being ipso facto barred, the application for exception is struck off the roll with costs”.

MOKATE VICTOR NOKO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 18 September 2023.

Appearances

For the Applicant:

Adv Z Kara

Attorneys for the Applicant:

Ratshibvumo Inc. Attorneys Johannesburg.

For the Respondent:

Adv N Ralikhuvana

Attorneys for the Respondent

TJ Maodi Inc. Johannesburg

Date of hearing: 6 September 2023

Date of judgment: 18 September 2023

[1] Defendant’s current attorneys of record.

[2] See CaseLines 02-7.

[3] See Caselines 02-11.

[4] See CaseLines 04-174.

[5] See CaseLines 04-28.

[6] The effect of the notice of bar “... is that the pleadings are deemed to be closed and the appellants were accordingly barred from filing a plea.” See reportable judgment in *Khethiwe Dlodlo and Others v Omega Constructions and Building (Pty) Ltd* (CA85/2022)

[2022] Eastern Cape Division, Makhanda (1 March 2022) at para 6.

- [7] Rule 27 provides as follows: 27. Extension of time and removal of bar and condonation (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules. (3) The court may, on good cause shown, condone any non-compliance with these Rules
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- [8] See Excipient's Practice Note, CaseLines p 04-28 where the excipient stated that "... The respondent ineptly replied to the respondent's exception (sic). This is irregular and non-compliant with the Rules of the Court. Despite serving a notice to remove cause of complaint on the excipient, the respondent has not prepared a Rule 20 application and has not timeously set the Rule 30 application down for hearing. The respondent this cannot rely on the excipient purportedly being barred from pleading into to extricate itself from the obvious excipiability of its particulars of claim."
- [9] This is correct since the bar can be uplifted by consent failing which by court order.
- [10] See Superior Court Practice – Erasmus at B1-191. "A party is not obliged to invoke the rule. In order to have proceedings set aside on the ground of irregularity but may avail himself of any other remedy

available to him under the rules. Thus, it has been held that an objection in limine that a notice of hearing of an application for summary judgement did not comply with the rule 30(2) need not be raised by way of formal application under this subrule; a plaintiff may in terms of rule 31(2)(a) apply for judgement by default without making application to have any irregular notice of appearance to defend set aside...”

[11] Consistent with the nonchalant posture adopted by the defendant are, failure to serve subsequent pleading within period prescribed after he entered

appearance to defend hence been placed under bar, the notice of exception was served after hours on the last day (as alleged by defendant), and the failure to react to the notice in terms of 30. (emphasis added).

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