

SOUTH AFRICA / JUDGMENT

Mokgokong v University of North West (314/16) [2017] ZANWHC 22 (8 June 2017)

[2017] ZANWHC 22

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

314/16

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HIGH

COURT

REPUBLIC

OF SOUTH AFRICA

NORTH

WEST HIGH COURT, MAFIKENG

Chambers

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CASE

NUMBER: 314/16

In

the matter between:-

JOHNY

MOKGOKONG PLAINTIFF

And

THE

UNIVERSITY OF NORTH

WEST DEFENDANT

JUDGMENT

GUTTA J.

[1] This is an interlocutory application in terms of rule 30 of the Uniform Rules of Court.

[2] On the 10 January 2017, plaintiff filed a notice in terms of rule 30(2)(b) wherein he objected to defendant's notice in terms of Rule 23(1) as irregular for failing to comply with rule 22(1) and 17(1) of the Uniform Rules of Court. Defendant was called upon in the notice to withdraw its notice in terms of rule 23(1) for the following reasons:

2.1 The notice in terms of rule 23(1) was out of time.

2.2 The defendant on 31 May 2016 served a notice of exception on the plaintiff, followed by an exception on 27 June 2016, and same was set down for hearing on 8 December 2016 where the court dismissed the exception with costs. The matter is *res judicata* as it involves the same subject matter, based on the same ground and the same parties. The court order granted on 8 December 2016 has not been set aside. The rule 23(1) served on defendant is an abuse of court process.

[3] Defendant opposed the application in terms of Rule 30 on the grounds that the plaintiff could not rely on rule 30 to raise the objection that defendant's notice in terms of rule 23(1) constitutes *res judicata*.

[4] Defendant further denied that the notice in terms of rule 23(1) constitutes *res judicata* and submitted the following:

4.1 Defendant had previously raised an exception against plaintiff's summons and particulars of claim on the grounds that no cause of action was disclosed and that it was vague and embarrassing.

4.2 When the exception came before court on 8 December 2016, plaintiff raised a point in limine that the exception was not properly before court as the defendant's notice in terms of rule 23(1) had not been signed by an attorney.

4.3 The court upheld the point in limine and, dismissed the exception with costs, without hearing argument on the merits of the exception.

Can *res judicata* be raised as an irregular step in terms of rule 30

[5] In terms of rule 30(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". An irregular step is a positive step which advances the proceedings one stage nearer completion[1].

[6] In *Cochrane v City of Johannesburg*[2] the court at paragraph [31] said “the irregular step mentioned in the rule related only to an irregular step taken by a party in respect of the Uniform Rules of Court. I am, accordingly, of the view that, if rule 30 was intended to serve as a notice of objection in respect of proceedings other than the Uniform Rules of Court, it would be casting the net too far and would lead to abuse. In any event, Rule 30 was never intended to serve as a basis for the objection to procedural irregularities in respect of other legislation Rule 30 was meant to deal with irregular steps taken by parties involved in litigation where the irregularity emanated from the use of the Rules of Court”. (Own Emphasis)

[7] Our courts have pronounced on this issue and held that rule 30 applies only to irregularities of form and not to matters of

substance[3]. In *De Polo v Dreyer and Others*[4], the court at 1061 held that: “the plaintiff applies to set aside the defendant’s application as an irregular proceeding

under Rule 30. Usually, as will appear from a case to which I was referred, a special defence such as prescription, want of locus standi, prematurity or the like, is raised by way of special plea, and may be subject to a replication, thereafter to be dealt with perhaps under Rule of Court 33, especially Rule 33(4)” and at 1065 the court said “a substantive application, purporting to be under rule 30, is in my view, not a competent method of raising the special defence which is in issue”.

[8] The defence of res judicata is a matter of substance and not form as it requires a consideration of the merits of the matter[5], as a defendant relying on this defence must show:

- a) that there has already been a prior judgment.
- b) in which the parties were the same; and
- c) the same point was in issue.

[9] I am accordingly of the view that the defence of res judicata does not emanate from the use of the rules of court and is not an irregular step under rule 30. Hence defendant’s objection to plaintiff’s reliance on res judicata in the rule 30 application is upheld. Plaintiff could raise the special defence in the exception and allow the issue to be properly

ventilated.

[10] Accordingly this court need not consider the defence of res judicata in relation to defendant’s notice in terms of rule 23(1).

Was the notice in terms of Rule 23(1) out of time

[11] Rule 23(1) of the Uniform Rules of Court reads:

“Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provide that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provide further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception”.

- [12] There are several cases where our courts have held that an exception is a pleading and, as such, a notice of bar is necessary before a plaintiff can object to an exception on the grounds that it was filed out of time[6].
- [13] Thus plaintiff cannot object to the exception on the ground that it was delivered outside the prescribed period allowed for a delivery of a plea but before the expiry of the period provided in the notice of bar.
- [14] In casu, plaintiff did not, after the court dismissed the exception on the 8 December 2016, serve defendant with a notice of bar.
- [15] Accordingly there is no merit in plaintiff’s objection that the notice in terms of Rule 23(1) was filed out of time.

ORDER

- [16] In the result, plaintiff’s application in terms Rule 30 is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 01 JUNE 2017

DATE OF JUDGMENT : 08 JUNE 2017

ADVOCATE FOR PLAINTIFF : ADV MS TSHABALALA

ADVOCATE FOR DEFENDANT : ADV JS GRIESELL

ATTORNEYS FOR APPLICANT : T J MATSIMELA ATTORNEYS

(Instructed by: M L Kekana Incorporated)

ATTORNEYS FOR RESPONDENT : M E TLOU ATTORNEYS & ASSOCIATES

(Instructed by: Gildenhuys Malatji Incorporated)

- [1] Market Dynamics(Pty) Ltd t/a Brian Ferris v GrÖgor 1984 (1) SA 152(W) at 153C; Tyoli Structures Africa (Pty) Ltd v KRB Electrical Engineers; Masana Mavuthani Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana 2011(3) SA 231 (GSJ) 235 A-B
- [2] Lowrey v Steedman 1914 AD 532
- [3] Singh v Vorkel 1947(3) SA 400 (C) at 406; Odendaal v De Jager 1961
- (4) SA 307(O) at 310 F-G
- [4] 1989(4) SA 1059 at 1065 B-E
- [5] 2011(1) SA 553 (GSJ)
- [6] Felix and Another v Nortier NO and Others 1994(4) SA 502 (SEC) at 506 E; Tyuly v Southern Insurance Association Ltd 1974 (3) SA 726 (EC) at 729 B – E Landmark Mthata (Pty) Ltd v King Sabata Dalinyebo Municipality and Others: In re Africa Bulk Earthworks (Pty) Ltd v Landmark Mthata and Others 2010(3) SA 81 (ECM)
- [6] Felix and Another v Nortier NO and Others 1994(4) SA 502 (SEC) at 506 E;
- Tyuly v Southern Insurance Association Ltd 1974 (3) SA 726 (EC) at 729 B – E
- Landmark Mthata (Pty) Ltd v King Sabata Dalinyebo Municipality and Others: In re Africa Bulk Earthworks (Pty) Ltd v Landmark Mthata and Others 2010(3) SA 81 (ECM)

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