

SOUTH AFRICA / JUDGMENT

V.D.W. v van der Westhuizen Attorneys (5333/2017) [2023] ZALMPPHC 2 (18 January 2023) [2023] ZALMPPHC 2

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

5333/2017

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NO: 5333/2017

REPORTABLE: YES/NO

OF INTEREST TO THE

JUDGES: YES/NO

In

the matter between:

A

[....] V [....] D [....] W [....]

APPLICANT

And

VAN

DER WESTHUIZEN ATTORNEYS

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant and S [...] R [...] V [...] D [...] W [...] were married to each other, and the parties divorced on 9th December 2016. The decree of divorce has also incorporated the deed of settlement which the parties have reached and signed. R [...] is the sole proprietor of the respondent. On 27th July 2017 the applicant instituted an action against the respondent for alleged money lent and advanced to the respondent which was allegedly not covered in the deed of settlement.
- [2] The respondent defended the applicant's action. On 18th September 2017 the respondent filed her special plea, plea and counter claim. The applicant did not file his plea to the respondent's counterclaim. On 6th December 2017 the respondent served the applicant with a notice of bar.
- [3] The applicant has brought application for the extension of time in terms of Rule 27 of the Uniform Rules of Court to allow him to file an exception to the respondent's special plea, plea and counterclaim; and also for the upliftment of the notice of bar that was filed on 5th December 2017. The applicant alleges that on 18th September 2017 he had instructed his erstwhile attorney Mr Ruan Britz to brief a counsel to consider a special plea to the respondent's plea. On 10th October 2017 the applicant served the respondent with a notice of exception for the respondent to remove the cause of complaint. The respondent did comply with applicant's notice of exception.
- [4] The applicant alleges that he had some differences with his erstwhile attorneys and they withdrew as his attorney of record on 12th October 2017. From 12th October 2017 to 5th December 2017 he was without the assistance of a legal representative, and was able to appoint his new attorneys who are based in Potchefstroom on 6th December 2017. The applicant alleges that after the withdrawal of his erstwhile attorneys he tried to revive their relationship without success, and that he had no intention of delaying the matter. Further that the reason why he was only able to appoint a counsel again in December 2017 was that he was still indebted to his erstwhile counsel, but has now resolved that. It is the applicant's contention that he will be severely prejudiced if the extension is not granted as he will be required to plead to the respondent's counterclaim, and further that it will be impossible to plead unless the respondent removes the cause of complaint with reference to the notice served on 10th October 2017.
- [5] The respondent in its answering affidavit has stated that the exception raised by the applicant against the respondent's

special plea, plea to the merits and counterclaim, is without legal substance, vexatious and a mala fide attempt to mislead the court to strike out the respondent's legal plea and defense, in an attempt to avoid the divorce order. The respondent submit that the applicant is not entitled to the

relief he is seeking in his intended exception, and that the granting of extension of time with the scant information provided in the founding affidavit of the applicant, will cause the respondent irreparable prejudice taking into account the excessive costs of litigation in the High Court. According to the respondent, the applicant merely had to reply to the special plea and plea on the merits filed by the respondent and plead to the counterclaim, let the action proceed to trial where he will have the opportunity in open court to present his case and proof his allegations on a balance of probabilities.

- [6] It is the respondent's contention that the applicant's current attorneys of record have been representing the applicant in a maintenance case in the Potchefstroom magistrate court since 19th October 2017, and that the allegations by the applicant that he was without assistance of an attorney from 12th October 2017 to 5th December 2017 is without substance. However, the respondent does concede that the applicant was initially represented by Ruan Britz of Nelis Britz attorneys, who at the time had appointed the applicant's current attorneys as the corresponding attorney. The respondent further concede that the applicant's erstwhile attorneys have withdrawn as his attorneys of record. Further that on 26th October 2017 the applicant's current attorneys have informed the respondent that they were awaiting instructions from the applicant to file an appearance as attorneys of record, and that the applicant had informed his current attorneys that no complaint needed to be removed.
- [7] The respondent avers that on 26th October 2017 it had informed the applicant's current attorneys that it had no intention of removing the alleged cause of complaint as there were no grounds for an exception, and that the applicant needed to proceed with his application. That the applicant's current attorneys informed the respondent that they will take instructions from the applicant regarding a settlement, but they never reverted back to the respondent. Seeing that the applicant was passive in his litigation as there was no movement with his exception application or any news about the settlement, the respondent opted to file a notice of bar on 5th December 2017. It is the respondent's contention that the applicant chose to ignore the rules of the court and did not care whether his ignorance causes prejudice to the respondent.
- [8] The applicant has brought an application for the extension of time and removal of the notice of bar in terms of Rule 27 of the Uniform Rules of Court. Rule 27 provides that in the absence of an 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 the rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any steps in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. The test for granting an order in terms of Rule 27 is on good cause been shown.
- [9] In terms of Rule 27, the court has therefore a discretion to grant or refuse the order which the applicant is seeking. To enable the court to exercise its discretion, the applicant in his founding affidavit must explain satisfactorily and sufficiently in full the reasons for his/her

default. Since the applicant is the plaintiff in the main action, the applicant must also show that his action is clearly not ill-founded. The applicant must also show that the order he is seeking will not prejudice the respondent in any way that cannot be compensated by a suitable costs order. (See *Smith v Brummer* No[1]).

- [10] On 10th October 2017 the applicant had served the respondent with a Rule 23(1) notice which the respondent did not comply with it. In that notice the applicant is complaining about the respondent's special plea. The applicant in that notice had also stated that he will be unable to ascertain whether to continue to file a reply and a plea of defence to the respondent's counterclaim. The applicant's exception has not yet been adjudicated despite the respondent having notified the applicant that it had no intention of removing the applicant's cause of complaint.
- [11] The respondent had filed a notice of bar barring the applicant from pleading on its counterclaim. From the applicant's notice in terms of Rule 23(1), it is clear that he is complaining about the respondent's special plea and counterclaim.
- [12] An exception is a pleading, and in terms of Rule 23(4) whenever an exception is taken to any pleading, no plea, replication or other pleading shall be necessary. In terms of this sub-rule it will not be necessary for a party to plead once an exception is filed. That exception must be dealt with to finality before a party will be required to plead or file a replication.
- [13] However, in the case at hand the applicant had not yet filed an exception and had filed only a notice to remove the cause of complaint. According to the applicant's notice in terms of Rule 23 the exception would have been filed after the expiration of the 15 days period. The 15 days period had lapsed without the respondent complying with the applicant's notice. Despite that the applicant did not file the actual exception. There was therefore nothing preventing the respondent from filing a notice of bar since the process of filing a plea has not been suspended by the actual filing of the exception. It was still an intention to except which does not suspend the process of filing a plea.
- [14] The applicant's Rule 23 notice was served on the respondent on 10th October 2017 and the respondent had until the 31st October 2017 to rectify the cause of complaint. The respondent does concede that the applicant's erstwhile attorneys have withdrawn as his attorneys of record on 12th October 2017 immediately after the filing the applicant's notice of exception. However, the respondent submit that Mr Daneel Joubert of van der Staden & Booysen Inc who was the corresponding attorney of the applicant's erstwhile attorney in a maintenance case that was also involving the applicant and respondent in Potchefstroom magistrate court was representing the applicant, and therefore the applicant was at no stage without a legal representative.
- [15] Mr Joubert is the applicant's current attorney of record, and formally came on record in this matter during December

2017. The maintenance case he was representing the applicant in Potchefstroom magistrate court is separate from the current case. When Mr Joubert was representing the applicant in Potchefstroom magistrate court he was acting as a corresponding attorney and taking instructions from the applicant's erstwhile attorneys. It can therefore not be said that for the mere fact that he was acting as a corresponding attorney of the applicant's erstwhile attorneys had stepped into the shoes of the applicant's erstwhile attorneys when they withdrew as the applicant's attorneys of record. The applicant must formally give him mandate to proceed with the matter which he did so during December 2017. This court is satisfied that from the 12th October 2017 until December 2017 the applicant was without a legal representative in the current matter. As a lay person, in my view, the applicant had given a good and satisfactory explanation why the exception was not filed after the expiration of the 15 days period as stated in his Rule 23 notice.
- [16] Turning to prospects of success, the applicant is claiming from the respondent an amount of R500 000.00 which he alleges is for money lent and advanced, and also an amount of R655 000.00 which the applicant alleges the respondent was acting as a conveyancer where it was instructed to administer the transfer of one of his properties after that property was sold, but that the respondent never paid him the proceeds from that sale. In relation to the claim for alleged money lent and advanced, the respondent in its answering affidavit has admitted payment of that amount by the applicant into its trust account, but has stated that in its opinion it is a fabricated cause of action. In relation to the proceeds of the property sold, the respondent admit that transaction, but has stated that it was a business transaction in respect of the property bought by the parties, and therefore forms part of the respondent's accrual, and will be taken into account by the referee when calculating the assets and liabilities of the parties.
- [17] The respondent does not deny the two transactions as alleged by the applicant, but denies the circumstances under which the two transactions were entered into, which creates a material dispute of fact which cannot be decided of papers. Evidence will need to be led and the credibility of the witnesses be tested through cross examination. Since the respondent is not disputing the existence of the two transactions, in my view, the applicant is having a fairly good chance of success with his claims.
- [18] Under the circumstances I am satisfied that the applicant had shown good cause for the grant of extension of time and removal of the notice of bar. The applicant is therefore entitled to the relief he is seeking.
- [19] In the result the following order is made:
- 19.1 The extension of time in terms of Rule 27 of the Uniform Rules of Court to allow the plaintiff to file his exception to the special plea of defence, plea on the merits and counterclaim of van der Westhuizen Attorneys, represented by S [...] v [...] D [...] W [...] is granted.
- 19.2 The notice of bar filed on 5th December 2017 is uplifted.

19.3 The respondent to pay the applicant's costs on party and party scale.

JUDGE OF THE HIGH OF SOUTH

AFRICA, POLOKWANE DIVISION

APPEARANCES:

Counsel for the applicant :

HW Botes

Instructed by :

Rorich Wolmarans & Luderitz Inc

Counsel for the respondent :

Adv J du Plessis

Instructed by :

Van der Westhuizen Attorneys

Date heard :

24th November 2022

Electronically circulated on :

18th January 2023

[1] 1954

(3) SA 352 (O)

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