

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSKEI DIVISION)**

CASE NO: 1427/06

In the matter between:

FIRSTRAND BANK LIMITED

PLAINTIFF

and

SYBIL N MAYEZA

DEFENDANT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE	SIGNATURE
14/05/2008	M. [Signature]

JUDGEMENT

GREENLAND AJ

Nature of the proceedings

[1] By summons served on 04 January 2007 Plaintiff sued Defendant for return of monies allegedly stolen whilst she was in the employ of Plaintiff. After entering appearance to defend, Defendant filed an exception (instead of filing a plea to the summons).

- Plaintiff now seeks an order setting aside Defendant's exception; and
- Defendant seeks an order upholding the exception.

Sequence of Pleadings and Court hearings

[2] For the sake of clarity it is necessary to set out the sequence of pleadings served and court hearings *with the latter in italics* --

Summons

04 January 2007

Appearance to Defend

20 February 2007

Rule 23 (1) Notice by Defendant

04 April 2007

AND FURTHER TAKE NOTICE THAT if the DEFENDANT fails to deliver his plea within the time period as aforesaid shall be in default of filing his plea and ipso facto barred from pleading."

b) This Notice of Bar was in terms of Rule 26 which requires that, as regards a pleading that is not a replication or subsequent pleading, a party is barred if he/she fails to deliver a pleading specified in a notice of bar within three days of service of such notice.

The Bar

[5] In terms of Rule 22 as read with Rule 23 Defendant should have delivered her plea or exception within 21 days of the date on which she served her appearance to defend, i.e., within 21 days of 20 February 2007. The filing of the Exception on 31 August 2007 was hopelessly out of time in terms of Rule 23. However no automatic bar accrued and Notice of Bar was required. See *Tyulu v Southern Insurance Assn Ltd* 1974 (3) SA 726 (E).

The result of her not filing a plea or exception within five (5) days of receipt of the Notice of Bar is that, by 15 June 2007, she was *ipso facto* barred.

Defendant's excuse

[6] During the hearing this Court's attention was drawn to the fact that the Notice of Bar required Defendant to "deliver his plea" and makes no reference to her exception of which she had, in any event, given notice of under Rule 23(1). Put simply, Defendant submitted that as the Notice of Bar required her to file "a plea" and not "an exception" her failure to file her exception within the five (5) days could not attract the sanction of the bar.

Plaintiff countered by pointing out, correctly in my view, that the word "plea" means any pleading and this includes an exception. It is also the case that the very fact of the Notice of Bar, which could only have been in terms of Rule 26, indicated that it was Defendant's exception that was being referred to. That an exception is a pleading is set out in *Haarhoff v Wakefield* 1955 (2) SA 425 (E) and *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 556.

Defendant's present stance of seeking to advance the excuse that Plaintiff referred to a "plea" as opposed to "her exception" is on all fours with the stance adopted by defendant in *FELIX AND ANOTHER V NORTIER*

NO AND OTHERS 1994 (4) SA 502 (SE). In that case Leach J described such argument as "specious".

Court's Discretion

[7] There can be no doubt therefore that the Defendant is barred. There has been no formal application for condonation or upliftment of the Bar. Her counsel however did plead with the Court to grant such order as will, as he put it, "*take us forward*". To this I will ascribe the meaning "as is fair reasonable and just".

Rule 27 gives the Court a wide discretion "on good cause shown". It seems to me that Defendant can be to some extent forgiven for failing to appreciate that the reference to "his plea" in the Notice of Bar meant that she needed to file "her exception" within five (5) days.

The problem is that the matter was brought to her attention on 06 September in a Rule 30 Notice which spelled out in full the legal position and specifically brought it to her attention that an application for upliftment and/or condonation was imperative. She was given ten (10) days to act or face an application to have her exception struck down for being an irregular step. Another Rule 30 Notice was also served on 02 October 2007. To date she has made no application for condonation or upliftment apart from her counsel's belated plea that the Court use its discretion to "*take the matter forward*".

Having carefully considered the matter I am regrettably disinclined to volunteer complete relief to the defendant. Had it not been for the fact that the problem had been brought to her attention by two (2) formal notices I would have been inclined to condone her situation. It is, of course, trite that the Rules are there to ensure the timeous and cost effective resolution of litigated disputes. It is incumbent on litigants to be respectful of the letter and spirit of the Rules. An unfortunate consequence of disregard for the Rules is that the Court's time is wasted and resources needlessly expended in having to deal with and resolve matters that then present in unnecessarily problematical format. As can be seen from the table in [2] above there were no less than there (3) abortive court hearings in this matter.

The authorities listed at page 162 of *UNIFORM RULES OF COURT, NATHAN BARNET BRINK*, 3RD Ed, indicate that the Court should have regard to the merits of the defaulting party's case. In my view the offending exception does appear to have merit. The particulars of claim

appear to have been hastily drafted and are self-evidently problematical. I have therefore factored this into my decision.

In my view fairness and justice require that I should not non-suit the Defendant. However she has to be visited with the costs of her indiscretion.

Order

[8] In the circumstances it is ordered that –

- a) The exception filed by Defendant is declared to be an irregular step in the pleadings and is set aside.
- b) Defendant is given leave to file a plea, including an exception, within 14 days hereof, and thereafter the Rules shall apply to such pleading as if filed in the ordinary course.
- c) As regards costs –
 - (i) Defendant shall pay all costs incurred as from and including 06 September 2007 excluding the costs of the further Rule 30 Notice served on 02 October 2007;
 - (ii) All other costs are reserved.


GREENLAND AJ

DATE HEARD:

09 MAY 2008

JUDGMENT DELIVERED:

14 MAY 2008

FOR PLAINTIFF:

ADV J. L. HOBBS

INSTRUCTED BY:

KEIGHTLY INCORPORATED

**60 CUMBERLAND STREET
MTHATHA**

FOR RESPONDENT:

ADV M. H. SISHUBA

INSTRUCTED BY:

**V. GWEBINDLALA & ASS
2ND FLOOR, MEEG BANK BLD
SUTHERLAND STREET
MTHATHA**