**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED
28/01/2020
DATE SIGNATURE

Case No 2938/14

In the matter between:

**THE BODY CORPORATE OF KINGFISHER CLOSE** Applicant

and

**RAMMUTLANA BOELIE SEKGALA** Respondent

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**JUDGMENT**

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**VAN OLST, AJ**

[1] This is an opposed application for judgment against the Respondent on the basis that the Respondent has been barred.

[2] Mr N G Louw appeared on behalf of the Applicant and indicated that:

[a] The Respondent is the owner of Unit 123 Kingfisher Close, Caron Road, Rembrandt Park, Ext 11 and by virtue of his ownership, the Respondent became a member of the Applicant and is therefore liable to make payment of levies.

[b] The Respondent failed to make payment of levies as a result of which Summons was issued against the Respondent.

[c] Default judgment was granted against the Respondent for payment of an amount of R142,136.66 together with interest and costs.

[d] On 29 July 2014 the Respondent launched an application to have the judgment rescinded. Although it appears that the rescission application was served on the Applicant's attorneys, the application did not come to the attention of the attorneys, as a result of which the application was never opposed and the default judgment rescinded on 26 August 2016.

[e] When the rescission order came to the Applicant's attention, the Applicant applied to have the rescission order rescinded. On 30 July 2015 an Order was granted by Madam Justice Hassim AJ, who ordered that the application be postponed sine die and that the Defendant would not be required to file a Plea until the Applicant's rescission application was disposed of.

[f] During March 2017, the Applicant withdrew the application for rescission and served a Notice of Withdrawal on the Respondent. As a result of the withdrawal of the rescission application there was no longer any pending proceedings preventing the Respondent from filing a Plea.

[g] Despite the delivery of the withdrawal of the rescission application by the Applicant, the Respondent did not file a Plea to the Applicant's Particulars of Claim. As a result of the Respondent's failure, the Applicant's attorneys caused a Notice of Bar to be served on the Defendant.

[h] In response to the Notice of Bar, the Respondent delivered a Notice in terms of Rule 30 complaining that the Notice of Bar constitutes an irregular step given the Order granted on 30 July 2015.

[i] On 14 June 2017, the Applicant's attorneys addressed a letter to the Respondent dealing with the history of the matter, that the Notice of Bar does not constitute an irregular step, in that the Applicant withdrew the rescission application and should the Respondent wish to pursue the Rule 30 Notice, he is required to bring an application in terms of Rule 30 on or before 7 July 2017.

[j] The Respondent did not reply to the letter dated 14 June 2017 and did not proceed to bring an application in terms of Rule 30 on or before 7 July 2017 or thereafter. The Respondent also did not file a Plea to the Applicant's Particulars of Claim.

[k] According to the Applicant, the Respondent is therefore barred.

[l] The Applicant proceeded with an application that judgment be granted in favour of the Applicant as set in the Notice of Motion.

[3] The aforesaid application was duly served on the Respondent and Respondent gave Notice of Intention to oppose the said application. In the Answering Affidavit the Respondent raised various points, namely:

[i] That there are other matters pending against the Respondent which relates to the same subject matter and refers to four matters to support a defence of *lis pendens*, alternatively *res judicata*.

[ii] Waiver in that the Applicant waived its right to persist with the claim for levies under the abovementioned case number, when it instituted a further claim for levies under case number 27938/14.

[4] Mr Louw comprehensively addressed the points raised by the Respondent in his Answering Affidavit in his Heads of Argument and I am of the opinion that I do not need to repeat his address in this regard in my judgment.

[5] The Respondent appeared in person at the hearing of this application. The Respondent also filed Heads of Argument and raised the following points during argument:

[a] The first point *In limine:* the Respondent argued that Applicant's summons has not been issued in that the Summons has not been signed by the Registrar of the High Court as required in terms of Rule 17(3) of the Uniform Rules of Court. He furthermore argued that in as much as the Summons must be signed by both the Registrar of the High Court and the attorney for the Plaintiff, failure to do so renders the Summons a nullity. On this basis alone the application for default judgment fails to be dismissed with costs. I was referred to case law in this regard.

[b] The second point *in limine*: the Respondent argued that the Applicant's application for rescission has not been withdrawn and remains alive. The Respondent argued that the Notice of Withdrawal was in fact served on him but not filed with the Registrar of the High Court and argued that "delivery" means "service and filing". I was referred to the specific case law in this regard.

[c] The third point *in limine*: the Respondent argued that the Notice of Bar was only served on him but never filed. According to the Respondent

Rule 26 of the Uniform Rules of Court requires a five day period from date of "delivery" of the Notice of Bar and according to him it relates to "service and filing" of the Notice of Bar.

[d] The fourth point *in limine*: the Applicant failed to apply for default judgment in terms of Rule 31(5) of the Uniform Rules of Court whereby the Applicant should have approached the Registrar of the High Court to grant default judgment in its favour The Applicant chose to proceed with an application by way of notice of motion in terms of Rule 6(5) of the Uniform Rules of Court and as such I was addressed on the cost implications pertaining to the option by the Applicant to proceed with an application in terms of Rule 6(5). According to the Respondent, if the Applicant proceeded with an application for default judgment before the Registrar of the High Court, the Respondent would have been in a position to have same set aside.

[e] The fifth point *in limine*: the Respondent argued that the amount claimed falls within the monetary jurisdiction of the Magistrate's Court as a result of which the Applicant instituted action in the "wrong" court, namely the High Court of South Africa. The Respondent also pointed out that if judgment was granted against him in the Magistrate's Court, he would have been entitled to an automatic appeal.

[f] The Respondent refers to various case law pertaining to his aforesaid argument and as a result of his aforesaid argument, he indicated that the Applicant is not entitled to default judgment as claimed.

[6] Mr Louw addressed me on the issues raised by the Respondent during argument and his Heads of Argument:

[a] The point of *lis pendens* or *res judicata* cannot be upheld in view thereof that the Summons issued in this Court under case number 26737/2017 is still pending and deals with failure to pay arrear levies for a period subsequent to the arrear levies under the present case. In other words,

the Respondent failed to pay arrear levies to the Applicant for the period relating to the action before me and thereafter also failed to pay levies for the subsequent period. The Summons under case number 26737/2017 did not replace the present matter before me.

[b] It cannot be argued that the Applicant waived the present claim as a result of the action instituted under case number 26737/2017 and I refer to what I have stated above.

[c] A bare denial of service of the Notice of Withdrawal of the rescission application by the Applicant does not suffice. Although Mr Sekgala argued that the Notice of Withdrawal was incomplete in view thereof that it was not "filed" with the Registrar of the High Court, he did submit that it was in fact served on him.

[d] I was referred to Erasmus pertaining to the Uniform Rules of Court that failure by the Registrar to "sign" the Summons can be and failure to sign the Particulars of Claim can similarly be condoned - Rule 27(3) of the Uniform Rules of Court. The Registrar of the High Court will not issue a Summons if it does not comply with the Uniform Rules of Court. The Summons was issued and a case number was allocated and the Summons was stamped.

[e] It is correct that if a Rule of the Uniform Rules of Court makes provision for "delivery" it means "service and filing". It is furthermore correct that the copy of the Notice of Bar in the application has not been filed in that it was not stamped by the Registrar of the High Court. However, it was conceded by the Respondent that the Notice of Bar was served on him on three occasions.

[f] Mr Louw indicated that the Respondent's argument regarding automatic appeal is misplaced.

[g] I was addressed on the monetary jurisdiction of this court when the action was instituted and I was also addressed on the implication of instituting the action in this court relating to costs.

[h] It was furthermore pointed out that despite the fact that the Respondent indicated that he is going to proceed with another Rule 30 application to set aside the Notice of Bar, he did not do so.

[7] Under the circumstances, the following:

[a] In **Nandiswa Stemela v MEC for Health, Eastern Cape Province** [unreported] **Case Number 3962/17**, Plasket J pertinently pointed out the following in para [7]:

"[7] The Rules are for the court and not the other way round. They are not an end in themselves, to be observed for their own sake. Instead, they serve the purpose of providing a mechanism for the expeditious resolution of justiciable disputes between parties. Formalism in their application is to be discouraged and they must be interpreted sensibly so as to facilitate the achievement of their purpose, rather than in such a way as to frustrate that object.".

[b] The crux of the application before me is clear - whether a Notice of Bar was served on the Respondent [Defendant in the main action] and whether the Respondent [Defendant in the main action] filed his Plea subsequent to the Notice of Bar having been served on him. The Notice of Bar appears on pages 220 - 221. The Returns of Service of the Notice of Bar appears from pages 222 - 224.

[c] The Respondent proceeded with a Notice in terms of Rule 30 to have the Notice of Bar set aside as an irregular proceeding regard having been had to the Order granted on 30 July 2015. The Notice in terms of Rule 30 appears from pages 225 to 226. In reply, the attorneys for the Applicant submitted a comprehensive letter to the Respondent

addressing the sequence of events as from 27 May 2014 until the date of the letter, to wit 14 June 2017 [pages 227 - 229]. The Respondent was specifically invited to, should he wish to pursue the Notice in terms of Rule 30, the Respondent must proceed with a substantive application on or before 7 July 2017. Needless to say, the Respondent did not proceed with a substantive application regarding his Notice in terms of Rule 30 which resulted in the present application being launched by the Applicant, which application was duly served on the Respondent on 17 July 2019 [see Return of Service on page 232].

[d] The wording of Rule 26 of the Uniform Rules of Court is very clear and I quote:

"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: ...."

[e] In Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality & others: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd & others 201(3) SA 81 (ECM), Griffiths AJ held in paragraphs [12] and [13] as follows:

"[12] Secondly, the rule states: 'If any party fails to deliver any other pleading ....' (my emphasis). It does not refer to a declaration or a plea. The reason for this is obvious. From 10 to the first schedule to the rules

(the standard combined summons) calls upon the defendant to deliver 'a plea, exception, notice to strike out, with or without a counter claim'. Although it has become practice.... to call upon the defendant (or third party) to file a plea without reference to an exception and notice to strike out (as in the combined summons), it is clear from the wording of this rule that it requires the defendant to take the next procedural step in the proceedings, be it an exception, plea or notice to strike out.

[8] It follows logically in my view that where a defendant, in response to a notice of bar, delivers an exception, he has taken the next procedural step in the matter and has thus complied with the demand made in the notice on pain of bar. In this regard, it has been held that an exception is in fact a pleading and thus falls squarely within the wording of rule 26.".

[f] It is therefore clear that:

[i] The Respondent in this application filed a Notice in terms of Rule 30 subsequent to the Notice of Bar having been served on him [pages 225-226].

[ii] The Respondent did not pursue the necessary application pursuant to the Notice in terms of Rule 30 subsequent to the Notice of Bar having been served on him.

[iii] The Respondent has not taken any further step pursuant to the Notice of Bar having been served on him.

[g] The argument by the Respondent that the "delivery" of the Notice of Bar is incomplete in that the Notice of Bar was not "filed" with the Registrar of the High Court in that the copy of the Notice of Bar in the application does not bear a stamp from the Registrar of the High Court that it was in fact "filed". It cannot be argued that the time period within which the Respondent was to file his Plea in the present action is "stayed" pending the filing of the Notice of Bar with the Registrar of the High Court.

[h] The further argument addressed by the Respondent in his Answering Affidavit have been dealt with above and in as much as the Respondent, in his Heads of Argument, indicated that he is of the opinion that the Summons is a nullity for the reasons advanced by him, have been addressed by the Applicant.

[9] I am furthermore of the opinion that the Applicant is not entitled to costs on the High Court scale and tariff. The monetary value of the claim does not fall within the jurisdiction of the High Court.

**[10] The Applicant's application for judgment by default is therefore granted and I make the following order:**

**1. Judgement is granted in favour of the Applicant against the Respondent for:**

**1.1 Payment of an amount of R142,136.66;**

**1.2 Payment of interest on the amount of R142,136.66 at the rate of 10.25% per annum as from date of Summons to date of payment;**

**1.3 Costs of suit, including the costs of the application on the party and party scale according to the tariffs of the relevant Magistrate's Court alternatively District Court.**

E VAN OLST
Acting Judge of the High Court,
Gauteng Division, Pretoria

Appearances:

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| For the Applicant: | Mr N G Louw |
| Instructed by: | Rorich Wolmarans & Luderitz Inc |
| For the Respondent: | Mr R B Sekgala |
| | Respondent in person |
| Applicant heard on: | 17 February 2020 |
| Judgment delivered on: | 28 February 2020 |