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

CASE NO: 097739/23

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 31 JANUARY 2025
SIGNATURE: [redacted]

In the matter between:

SIMONA OERTEL	Applicant
and	
WILLEM KOK	First Respondent
MARNE GROBLER	Second Respondent
DDD DIESEL DELIVERIES PROPRIETARY LIMITED (Registration Number 852590/07)	Third Respondent

The matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 31 January 2025.

J U D G M E N T

Mazibuko AJ

Introduction

[1] This is an application seeking an order declaring the filing of the respondents' notice to remove cause of complaint in response to the notice of bar and their exception as irregular steps to be set aside. Further, to declare the respondents *ipso facto* barred with effect from 10 November 2023 and for the dismissal of respondents' counter-application. The application is opposed.

Brief background

[2] In September 2023, the applicant issued summons against the respondents for damages suffered due to alleged defamation by the respondents against the applicant. Service of the summons upon the respondents was on 3 October. On 4 October, the respondents duly served and filed their notice of intention to defend the action.

[3] The defendants' failure to file their plea on or before 1 November prompted the applicant to serve and file a notice of bar on 2 November, calling the respondents to deliver their plea within 5 days. On 6 November, the respondents delivered a notice, affording the applicant an opportunity to remove cause of complaints, rendering the particulars of claim excipiable on the grounds that they were vague and embarrassing. Alternatively, they lacked the necessary averments to sustain a cause of action.

[4] On 10 November, the applicant's attorneys delivered a notice on the respondents' attorneys of record, contending that the respondents' notice to remove the cause of complaint constituted an irregular step as it failed to comply with provisions of rule 23(1)(a) since it was not delivered within 10 days of receipt of applicant's summons. The parties' attorneys exchanged correspondence but could not reach a consensus.

[5] On 27 November, the respondents filed an exception to the particulars of claim. The applicant filed this application on 12 December. The respondents opposed it and filed a counter-application on 15 February 2024. On 29 February, the applicant filed a replying affidavit, among other things, raising a point *in limine*

regarding the late filing of the respondents' answering affidavit and counter-application.

Discussion

Points in limine

[6] Raising a point *in limine*, the applicant argued that the respondents' answering affidavit and counter-application should be disregarded as *pro non scripto* and dismissed, as they were due on 6 February 2024 and were only delivered on 15 February without any condonation application.

[7] The respondents argued that the applicant failed to prove it suffered substantial prejudice due to the late filing of their answering affidavit.

[8] The respondents' answering affidavit was not delivered on time. To the extent that the applicant had on 29 February, having been aware of the respondents' belated answering affidavit, filed a replying affidavit, it had taken a further step in the proceedings, and its argument for this complaint can no longer be sustainable as the subsequent step taken by the applicant has cured any irregularity. The applicant suffered no prejudice. Accordingly, the point *in limine* is not upheld.

[9] The respondents also complained and stated they were raising an objection *in limine* that the founding affidavit does not make out a prima facie case for the relief sought, as the prejudice requirement is not mentioned in the founding affidavit. The judgment will not deal with this issue as a separate issue but will be dealt with when determining the application itself.

Notice to remove cause of complaint

[10] The applicant argued that the respondents' notice to remove cause of complaint, in response to the notice of bar, was an irregular step and should be set aside.

[11] The respondents contended that it was a proper response to the notice of bar as the notice to remove cause of complaint is only required where the pleading

is vague and embarrassing. Further, an exception may be delivered within the time required for filing a further pleading, and the notice was delivered before the expiration of the 5 day period in terms of the notice of bar.

[12] The provisions of rule 23(1)[1] state that a party may take an exception that a pleading is vague and embarrassing or lacks averments necessary to sustain an action or defence. Such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of such notice. The party excepting shall deliver the exception within 10 days from the date on which a reply to its notice is received or within 15 days from which such reply is due.

[13] Having been served with summons on 3 October, the respondents' notice to remove cause of complaint was due on 17 October. In terms of rule 23(1)(a), upon receipt of summons, the defendant who, like the respondents in *casu*, takes exception to particulars of claim, must within the 10 day period allotted, not only decide whether or not to defend the action but also to form a view whether they can adequately plead to the particulars of claim as they stand. If they cannot, they must take exception within those 10 days. Therefore, when the respondents filed such notice on 6 November after receipt of the notice of bar, they were out of time.

[14] The following question is whether their step of filing same after receipt of the notice of bar was irregular. In the matters of Braviz Fine Foods & Another v

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[1] *Rule 23(1)(a) 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 apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—*

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.

Lamex Foods Europe & Another,[2] and Van Zyl NO & Another v Smit[3], dealt with separately, the courts refused to accept a rule 23(1) notice as a proper step pursuant to the receipt of a notice of bar. I am bound by the decisions of this Division. However, I am persuaded differently.

[15] Notably, in my view, this approach deprives the excepting party after the initial period of 10 days within which to file an exception where the pleading is vague and embarrassing to take such an exception thereafter. Such a party would have difficulty pleading to the vague and embarrassing allegations. Then, the very purpose of pleadings, which is to crystallize the issues in dispute, is then defeated.

[16] I align myself with the views expressed in the matter of McNally N.O v Codrun and Others[4], which was confirmed in the matter of Tuffsan Investments 1088 (Pty) Ltd v Sethole and Another,[5] where the court stated that the defendants were entitled to serve a notice in terms of rule 23(1) within the period allotted in the notice of bar.

[17] I do not find that filing the notice to remove cause of complaint in terms of rule 23(1) within the period allotted in the notice of bar was irregular. However, it remains a notice and is not a proper response to a notice of bar since a proper response to a notice of bar is a pleading, which in this case would have been a plea or the exception itself. *See Hill NO and Another v Brown*[6]*.* The exception was not filed within the period allotted in the notice of bar. They sought no condonation for its late filing at the time. On a proper reading of the rules and authorities, the respondents have not filed a proper response to the notice of bar and should now be under bar with effect from 10 November 2023.

Notice of bar

[2] Case number (12678/2020) ZAGPJHC [2021].
[3] Case number (41425/2020) ZAGPPHC [2021].
[4] 2012 JDR 0385 (WCC) [2012] ZAWCHC 17 (19 March 2012).
[5] (22826/2015) [2016] ZAGPPHC 653 (4 August 2016) at par 25 -26.
[6] [2020] ZAWCHC 61

[18] In the alternative, the respondents seek an order for the upliftment and removal of the notice of bar and condonation for the late filing of the exception.

[19] Rule 27 reads:

'(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.

(3) The court may, on good cause shown, condone any non-compliance with these Rules.'

[20] The respondents are required to satisfy the requirements to uplift the bar, which should be founded on good cause being shown. There are two requirements to show good cause; first, they have to give a satisfactory explanation for the delay. It was held that the defendant must at least furnish an explanation for his default comprehensively such that the court should be able to determine his motives.[7]

[21] Secondly, he must show he has a bona fide defence. In the matter of Smith, N.O. v Brummer N.O. and Another[8], it was stated that good cause will be constituted as follows: *'In an application for removal of bar the court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the court is to grant such an application where: (a) the applicant has given a reasonable explanation of his delay; (b) the application is bona fide and not made with the object of delaying the opposite party's claim; (c) there has not been a reckless or intentional disregard of the Rules of Court; (d) the applicant's action is clearly not ill-founded, and (e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to*

[7] Silber v Ozen wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A.
[8] 1954 (3) SA 352 (OPD).

costs; The absence of one or more of these circumstances might result in the application being refused'.

[22] The respondents explained that they were extremely busy from October 2023 until 3 November due to the third respondent moving to a new office and the first and second respondents vacating the applicant's property due to the acrimony and attitude of the applicant. They had a consultation with their attorneys only on 6 November. Whereafter, the notice to remove the cause of complaint was filed. The applicant's failure to remove the cause of complaint prompted the respondents to file the exception notice.

[23] Neither the moving to a new office of the third respondent nor that of the first and second in vacating the applicant's property are acceptable grounds for failure to timeously file a notice in terms of rule 23(1) or prepare a plea. I believe the respondents were lax in their participation in these proceedings. Their enthusiasm to defend the matter is shown only on receipt of the summons, and they expressed this a day after the service of summons when they filed the notice of intention to defend. The respondents must respect the court rules as it is with other litigants.

[24] Secondly, they argue that the misimpression regarding whether their notice in terms of rule 23 was a pleading was bona fide, as supported by the authority. The delay was not intentional nor to cause delay or prejudice to the applicant, so it was submitted. The submission in this regard is not sustainable since if the respondents placed reliance on a particular authority, they are also expected to consider other authorities not in their favour. They cannot choose the ones that favour them whilst disregarding a plethora of authorities against their argument.

[25] Regarding the second requirement, whether the respondents have demonstrated that they have a bona fide defence. They have only filed the notice of intention to defend. The plea and, to a certain extent, their exception could indicate whether they raise a bona fide defence. None is before this court. In the interest of justice, I find that the respondents ought to be afforded an opportunity to defend the action. Accordingly, condonation for the late filing of

the exception ought to be granted. Further, the bar, which has been in effect since 10 November 2023, ought to be uplifted and removed.

[26] Regarding the costs, the applicant brought the application in good faith when the respondents persisted in their belief concerning the proper response to the notice of bar. They had other recourse, for instance, bringing a substantial condonation application for late filing of the notice in terms of rule 23, rather than making the submissions they chose to make, thereby causing the applicant to incur unnecessary costs. Though the respondents were partly successful, I find no grounds for why the respondents ought not to bear the costs of this application.

[27] In the circumstances, the following order is made;

Order:

1. The applicant's point *in limine* regarding respondents' late filing of their answering affidavit is dismissed.
2. The application regarding irregularity is dismissed.
3. The bar is uplifted and removed
4. Respondents' condonation application for the late filing of notice in terms of rule 23(1)(a) and (b) is granted.
5. Further steps in pursuit of rule 23 shall be taken and delivered within 10 days of receipt of this judgment if the respondents so elect.
6. The respondents must pay the applicant's costs, including that of counsel at scale B.

[redacted]

N G M MAZIBUKO

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing:	06 November 2024
Judgment delivered on:	31 January 2025

APPEARANCES:

For the Appellant:	Adv G Y Benson
Attorney for the Applicant:	Farinha Ducie Christofi Attorneys
For the Respondent:	Adv R De Leeuw
Attorney for the Respondent:	EW Serfontein & Associates INC