



By the time you filed your Notice to Defend we had already applied for default judgment and the matter was before Justice Dunn on the 12th August and was postponed to a date to be arranged with the Registrar for us to lead oral evidence in proof of damages.

Your Notice to Defend is accordingly way out of time and we do not know what you intend doing about it. We do not know yet if your notice was filed but if it was we shall apply for it to be struck off.

Note however that we are still open to negotiations but only on the quantum of damages.

I had occasion to point out at the hearing that paragraph 2 of the plaintiff's letter did not accurately reflect the order I made in the matter on the 12th August That does not , however, have any bearing on this application. The plaintiff took no steps whatsoever to have the notice of intention to defend set aside The plaintiff instead filed a notice of bar calling upon the defendants to file their plea within 72 hours The notice was filed on the 18th September 1997 The defendants did not plead as required and filed the present application

The headnote in the case of OOSTELIKE TRANSVAAL KO-OPERASIE v AURORA BOERDERY 1979 (1)SA 521 (reported in Afrikaans) reads as follows –

A plaintiff is not entitled simply to ignore the late delivery by a defendant of his notice of intention to defend and without more to bring an application for judgment by default. The correct procedure is first to set aside the irregular proceeding.

This decision followed a long line of decisions that are referred to in Herbstein and Van Winsen THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA 3rd edition 242 The plaintiff had indicated as far back as the 21st August that the defendants' notice to defend was out of time If he objected to the filing of the notice he ought to have proceeded under Rule 30 and had it set aside His election to file a notice of bar, giving the

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defendants an opportunity to plead, indicates an acceptance and condonation of the filing of the notice. That being the case the opposition to the present application comes as somewhat of a surprise. All that the defendants are seeking to do is to regularise the notice to defend, a matter which the plaintiff has hitherto not concerned himself with . Except for pointing out to the defendants the need to comply with the Rules of court in future, I do not find it necessary in the circumstances to deal with the reasons advanced by the defendants for the delay in filing the notice. The late filing of the notice is accordingly condoned .

The removal of the bar must follow the condonation of the late filing. There is , however, another ground on which the plaintiff cannot resist the application The defendants were given 20 days within which to file a notice of intention to defend No notice was given to the defendants as to the time period within which they were required to file their plea. A Sheriff is required in terms of Rule 17, to inform a defendant at the time of service of a summons inter alia that , if he disputes the claim , and wishes to defend he shall –

- a. within the time stated therein, give notice of his intention to defend;
- b. thereafter, if the summons is a combined summons, within twenty-one days after giving such notice, deliver, with or without a claim in reconvention , a plea, or application to strike out.

The provisions of sub-rule 17(1) appear in form 11 of the First Schedule to the Rules and are as a matter of practice printed on the standard form of summons used in this court. I have had occasion in another matter, emanating from the offices of the attorneys who issued the present summons , to point out this deficiency. As matters stand the defendants would be perfectly within their rights to await

notification from the plaintiff as to the time period within which to file a plea. In essence, the defendants cannot be said to have been in default of a plea necessitating the filing of the notice of bar.

The application is granted and as a mark of the court's displeasure at the manner in which the plaintiff has approached the application, I order that the plaintiff pass the costs

B. DUNN

JUDGE.