



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1583/2013

In the matter between:

CARL BOY CARVALHO

APPLICANT

AND

ROYAL SWAZILAND SUGAR

CORPORATION LTD

FIRST RESPONDENT

NJABULO MAMBA

SECOND RESPONDENT

Neutral citation: *Carl Boy Carvalho v. Royal Swaziland Sugar Corporation Ltd and Another (1583/2013) [2014] SZHC181 (7th August 2014)*

Coram:

M.E. SIMELANE, AJ

Heard : 23rd July 2014
Delivered : 7th August 2014

Summary

Rule 30 - Notice of Bar - defendant filing an Exception instead of Plea as demanded from the Notice of Bar - nothing wrong with filing exception as no bar operates against it - Rule 26 restated - application in terms of Rule 30 dismissed and costs to be costs in the cause.

JUDGMENT
7th AUGUST 2014

- [1] The plaintiff per Notice of Bar served on 13th March 2014 upon the defendants required the latter to file its plea after the time for doing so had lapsed.
- [2] The defendant was to file its plea on or before the 18th of March 2014.
- [3] Instead of filing a plea the defendant filed a Notice of Exception on the 17th March 2014 challenging the Plaintiffs Particulars of Claim that they did not detail the grounds of negligence.
- [4] The plaintiff on the 19th March 2014 duly filed a Rule 30 application first attacking the procedure adopted by the defendant to file an Exception instead of a Plea. The Plaintiff argued that the Defendant was barred from filing an Exception and was out of time. The only pleading that could be filed at that stage was only a Plea.
- [5] On the second ground of the Rule 30 application the plaintiff argued that the exception is bad in law and does not go to the root of the cause of action. Rule 30 provides as follows:

“30. (1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding:

Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.

(2) Application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity alleged.

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

(5) Where a party fails to comply timeously with a request made or notice given pursuant to these Rules the party making the request or giving the notice may notify the defaulting party that he intends, after the lapse of seven days to apply for an order that such

notice or request be complied with, or that the claim or defence be struck out. Failing compliance within the seven days, application may be made to court and the court may make such order thereon as to it seems fit."

- [6] It was however conceded by Mr. Siboniso Dlamini that the matter for argument was the Rule 30 application and not the Exception. In *D.Z. Civil and Building (PTY) Ltd v. Standard Bank Ltd* (56/1999) SZSC 6 [2000] *Van Der Heever JA* held that:

"... one cannot ask for two judgments on the same cause of action It smacks of either negligence or ineptitude or harassment to run tandem actions based on the same summons against the opposition."

- [7] Both lawyers filed comprehensive Heads of Argument for which I am grateful.
- [8] Mr. Siboniso Dlamini argued that in terms of Rule 26 of the High Court Rules the defendant was barred from filing any other pleadings without having applied for condonation.
- [9] In terms of Rule 22 a defendant must file a Plea within 21 days after filing his Notice of Intention to Defend. It is common

cause that this did not happen in the present matter hence the Notice of Bar.

[10] He further argued that since in the Notice of Bar a Plea was demanded, it was not open to the Plaintiff to file another Pleading. He cited the judgment of *Comfort Hlatshwayo v Lidwala Insurance Co. Ltd* Case No. 503/2013 [2014] [SZHC 30] where at page 10 it was held:

"[10] Clearly a Notice of Bar follows upon a party's failure to file a specific pleading. A strict reading of the rule in question therefore enjoins the defaulting parties to file a specific document demanded in terms of the Notice of Bar and not any other document. Clearly the Notice of bar called upon the Defendant to file a plea specifically and not any other as Defendant seems to have done by filing an exception. It was, in my view, and on the clear reading of the Act, no longer open to it to do so and the exception it purported to file in answer to the Notice of Bar ought to be dismissed on this ground alone."

[11] Rule 26 provides as follows:

"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 three 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.”
(underlining my emphasis).

[12] It must be seen that an Exception does not fall into the classes of pleadings where a party would be automatically barred if he/she fails to file same as it is not mentioned in terms of Rule 25.

[13] Mr. Mangaliso Magagula argued that an exception is a pleading and I must take note that the Notice of Bar only required a Plea and did not specifically deal with pleadings in general.

[14] In terms of Rule 23 of the High Court Rules an exception may be filed *“within the period provided for filing any subsequent and pleading”*. In the same Rule it is provided that *“no plea, replication or other pleading over shall be necessary”*, where an exception is taken **(See: Rule 23 (4))**.

[15] The Notice of Bar read as follows:

“Take Notice that the Plaintiff requires the first defendant to file its Plea within 72 hours from time of receipt hereof failing which they shall ipso facto be barred from doing so”

[16] In his Heads of Argument Mr. Mangaliso Magagula argued as follows:

“4. *It is respectfully submitted that an exception is a pleading. See:*

Nathan Barnett and Brink, Uniform Rules of Court, 3rd Edition at page 160.

5. *On account of an exception being a pleading, a party may only be barred from filling an exception once he is ipso facto barred.*

6. *Nathan supra states the following:*

“an exception is a pleading and cannot be objected to as having been filed out of time unless notice of bar has been given: Tyulu v Southern Insurance Assn Ltd 1974 (3) SA 726 (E).

7. *In Tyulu v Southern Insurance Association n Ltd 1974 (3) SA 726 (E) Eksteen J: dealing with the similar issue*

involving a rule identical to Rule 26 held (head note) that:

“an exception is a pleading and, in the case of an exception to a declaration as disclosing no cause of action or as being vague and embarrassing i.e. in a case in which no automatic bar comes into effect, a notice of bar is required in terms of Rule of Court 26 before the Plaintiff can object to the exception on the ground that it was filed out of time.”

See also in this regard the judgment of: Leach J, Felix and Another v Nortier NO and Others (2), 1994 (4) SA 502 at 506 (D-E)

“He conceded however, correctly in my view that after the notice of bar was served on 19th October 1993 the first defendant was perfectly entitled to file a notice of exception and not to limit himself to filing a plea within the time period laid down by Rule 26.”

At G-H, the learned judge went on to state the following:

“Moreover, the reference to the ‘plea’ in the notice of served on 19th October 1993 must be similarly construed. The plaintiffs were not entitled to insist on the defendants filing only a plea, they could only insist on the defendants taking the next step in the proceedings upon pain of bar if they did not.”

8. In conclusion, we respectfully submit that the plaintiff’s objection has no merit and the Rule 30 application should be dismissed with costs.”

[17] Mr. Mangaliso Magagula respectively argued that I should not follow the judgment of Comfort Hlatshwayo because the honourable court had not been made aware of the cited judgment in their Heads of Arguments which are highly persuasive in our jurisdiction

[18] I agree with the defendants’ contention that an exception is a pleading and they were not barred from filing an exception

unless the Notice of Bar was specific that it was barring **all pleadings** not filed.

[19] In any event the time for filing a Plea was to lapse on the 18th March 2014 but the exception was filed a day before the cut off date.

[20] Rule 26 might be rendered useless if lawyers are not vigilant that it requires the Notice of Bar to specifically Bar subsequent pleading if they are not filed within 3 days. A Plea is not the only Pleading required in terms of Rule 26 for an exception could be filed. A Request For Further Particulars could also stay the time for filing a plea.

[21] May I comment obiter that it is procedurally incorrect to move a Rule 30 application against an Exception in the manner the Plaintiff has done herein. A Rule 30 application applies only to irregularities of form and not to matters of substance. See: *Singh v. Vorkel 1947 (3) SA 400 (C) at 406.* This I say without deciding on the exception as it ought to be argued on another day with proper heads of arguments.

[22] In the premise the Notice in Terms of Rule 30 is hereby dismissed and costs to be costs in the cause.

**MBUSO
SIMELANE
ACTING JUDGE**

For Applicant : **Siboniso Dlamini**
For First Respondent : **Mangaliso Magagula**