

IN THE HIGH COURT OF' ESWATINI

CASE NO. 952/21

HELD IN MBABANE

In the matter between:

M & F' ENGINEERING (PTY) LTD

Plaintiff

And

**HAN CY CONSTRUCTION (PTY)
LTD**

Defendant

**NEUTKAL
CITATION:**

*M & F Engineering (PTY) LTD v Hancy
Construction (PTY) LTD (952 21) [2021] SZHC
(34) (14/03/2022)*

CUORUM:

B.W MAGAGULA AJ

Heard: 25/02/2022

Delivered: 14/03/22

Summary:

Rule 30 Notice of bar instead of Defendant filing a plea as called upon to do so in the notice of bar it filed notice to request further particulars the Plaintiff interpret that as an irregular step held request for further particulars also upsets the running of the dies as set out in the notice of bar Rule incompetent in the circumstances as the step of requesting further particulars cannot be said to be irregular Rule 30 notice dismissed costs to be costs in the course.

Judgment

Background facts

[1] The parties before Comi are currently engaged in litigation where the Plaintiff seeks to recover from the Defendant a sum of E148, 000. 00, being an ear rentals and penalties arising from a lease agreement between the parties.

[2] After the Plaintiff had issued combined summons against the Defendant, the latter exercised its rights in terms of the Rules of Court and entered an appearance to defend the action. However, it failed to file a plea within the time period stated in the rules of Court as expected. The Plaintiff then filed a notice of bar. Before the three day period stated therein could run in full, the Defendant filed a request for further particulars. It is exactly this step that forms the basis of the Rule 30 notice. The Plaintiff is of the view that it was no longer competent for the Defendant to file a request for further particulars because it had missed the opportunity to do so when it did not file same within the period allowable to file a plea. In a way of protest against this step, which the Plaintiff considered as irregular, it then filed the notice in terms of Rule 30, on the basis that the filing of a request for further particulars is an irregular

step. The Defendant holds a different view.

ISSUES FOR DETERMINATION

[3]The Court is called upon to determine the Rule 30 notice and to decide on whether or not the Defendant's request for further particulars is an irregular step which ought to be set aside.

PLAINTIFF'S ARGUMENTS

[4]The Plaintiff argues that in terms of Rule 22 of the rules of Court, where the Defendant has delivered a Notice of Intention to defend, he is expected to deliver a plea within twenty one days. The Plaintiff further argues that in terms of Rule 26, if a party fails to deliver any other pleading within the time frame laid down in the rules, any other party may by notice serve upon him and require him to deliver such a pleading within three days after the day upon which the notice is delivered he shall be in default. The Plaintiff argues that the aforesaid Rule stipulates that the party must file the pleading that is specified in the notice of bar, not any other pleading. Therefore, in the matter before Court when the Defendant filed, it was expected to file a plea within the three day period stipulated in the notice of bar.

[5]What the Plaintiff contends was irregular is that, instead of the Defendant complying strictly with the wording of the notice of bar which are called upon it to file a specific pleading which was a plea, the defendant appears not to have complied in terms of the Plaintiff's argument because it then did not file a plea but then delivered a request for further particulars.

[6] It is the filing of the request for further particulars instead of the plea that has irked the Plaintiff and has propelled it to interpret the step as irregular, hence it attracted the Rule 30 notice that is currently the subject of determination before Court. The Plaintiff argues that it was no longer open to the Defendant to file the request for further particulars, after it had missed its deadline of twenty one days as stipulated in terms of rule 22 of the rules of Court.

[7] The Plaintiff further argues that the manner in which the request for further particulars, even if the Court would consider it as a pleading, is also not in the format stipulated in terms of the Rules of Court. The Plaintiff argues that further particulars are governed by Rule 21 of the rules of Court. In terms of sub Rule (1) thereof, the Court may order a party to deliver further particulars of any claim. The Plaintiff submits that even though the Rule does not specify the time frame within which such application can be made, Rule 22 requires a Defendant to file a plea within 21 days of filing the notice of intention to Defendant. Therefore, by extension, so the Plaintiff argues, if there is a need for further particulars, that request must also be made within that period.

[8] The Plaintiff further argues in terms of Rule 21 (3), an order under this rule shall not be made before the delivery of a plea. Unless the Court is of the opinion that the order is necessary to enable the defendant to plead for some special reason.

[9] In buttressing this argument, the Plaintiff referred the Court to the decision of **Willy Ntshangase v Swaziland Savings and Development bank &**

ano ther¹. The Plaintiff also urges the Court that it should reject the format through which the Defendant has made the further particulars. Plaintiff contends that Rule 21 (4) stipulates that where an Applicant under this rule did not apply by letter for the particulars he requires, the Court may refuse to make an order. Unless the Court is of the opinion that there are sufficient reasons for failing to apply by letter. The Plaintiff interprets this provision of the rule to suggest that a party has to first to apply for further particulars by letter, before making a formal application to Court to compel the other party to furnish the particulars. In that respect, the Plaintiff cited the case of **Railways & Harbours v Deal enterprises (Pty) Ltd 1975 (3) SA**

DEFENDANT'S ARGUMENTS

[I OJ] The Defendant argues *contra*, that there is nothing irregular with the filing of a request for further particulars, after one has been served with a notice of bar. The Defendant argues that the Plaintiffs combined summons were not sufficiently particularised to enable it to plead. Hence, it was necessary for it to request for the further particulars from the Plaintiff

[I I] The Defendant further argues that, when it received the notice of bar from the Plaintiff which had been filed under Rule 26, it was given a window of three days to file a plea. The Defendant asserts that it could not be forced to file the plea in circumstances where the particulars of claim required that it be given further particulars. In other words the Defendant refuses that its arm as **it** were can be forced to file a specific pleading, when the situation or the nature of the particulars of claim do not warrant. The argument advanced by the

' High Court case No.3501/2007

Defendant is that, the summons read in conjunction with particulars of claim which it was expected to plead to, was not in compliance with Rule 18 (4), as it lacked sufficient particularity to enable it to plead thereto.

[12] The Defendant maintains that it was necessary for it to file the request for further particulars in order to cure the deficiency that was apparent in the particulars of claim to be pleaded to. The contention is further that, the furnishing of the particulars that were requested would possibly cure the defect that was apparent thereto. In my view, the nature and the depth of the further particulars sought, is not necessary for the Court to determine the merits and the demerits of the request for further particulars. What the Court should determine is the principle, of whether a Defendant by filing a request for further particulars upsets the *dies* that are stipulated in the notice of bar.

THE LAW

[13] Rule 26 is clear in its formulation, it states as follows:

"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 this rule 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. "

[14] The captioned "any other pleading", is informative in this rule.

THE COURT'S ANALYSIS AND CONCLUSION

[15] The ultimate question that the Court must decide is whether the Defendant upon being served with the notice of bar was confined to filing of a plea and nothing else. Ultimately that is the question that is for determination.

[16] A close reading of rule 26 read together with the notice of bar filed by the Plaintiff, especially the reading of rule 25 Court pre supposes that if Defendant fails to deliver any other pleading within the time laid down in the rules or within the extended time allowed, the party may by notice served upon him require him to deliver such a pleading within three days after the day upon which the notice is delivered.

[17] In my interpretation of this rule, basically the rule opens a window to the Defendant despite that the initial *dies* within which he was supposed to file the pleading had lapsed. It then accords him a further three days to file the pleading which in this case is the plea.

[18] Now the natural flow of events would be, if the Plaintiff had extended the three day period for the Defendant to file a plea as it were, would the Defendant not file an exception for instance, if the Plaintiffs particulars of claim were expiable? In my view there is nothing that stops a Defendant to except to the particulars within the three day window given in the notice of bar, if the patiiculars of claim are expiable. That argument in my view would extend to the filing of a request for further particulars. If the particulars in the Defendant's view, lack the necessary pa1iicularity that would enable the Defendant to plead, then there is nothing in the rules that prevents the

Defendant to request for those further particulars. Especially if it is done within the three day window before the Defendant is ipso facto barred

[19] There is a lot of merit in the analysis and reasoning by his Lordship M.E Sirelane (as he then was) in the matter **Carl Boy Carvalho v Royal Swaziland Sugar Cooperation limited & another**" where he eloquently stated the position to be as follows;

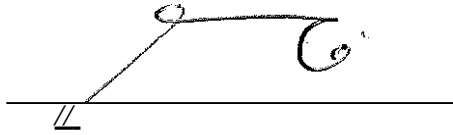
"Rule 26 might be rendered useless if lawyers are not vigilant that it requires the notice of bar to specifically bar subsequent pleading if they are not filed within three days. A plea is not the only pleading required in terms of rule 26 for an exception could be filed, a request for further particulars could also state the time for filing the plea".

[20] I align myself with the reasoning adopted as in the above decision. It is my considered view as well, that there is nothing that prevents the Defendant from filing a request for further particulars after being served with a notice of bar. The Defendant cannot be confined to filling a plea, if the circumstances necessitate the filing of a request for further particulars.

[21] In the circumstances, I find that it was not irregular for the Defendant to file a request for further particulars. Defendant could not be confined to filing only a plea within the three day period as stipulated in the notice of bar.

[22] For the foregoing reasons, the notice in terms of Rule 30 ought to fail.

[23] The costs will be costs in the course



B.W. MAGAGULA

ACTING JUDGE OF THE HIGH COURT OF ESWATINI

FOR PLAINTIFF : Mr R. Phakathi (MH Mdlu/i Attorneys)

FOR DEFENDANTS: /vfr Ci.vhla11ga (Afotsa, Afavu.1.0 & Attorneys)