# IN THE HIGH COURT OF SWAZILAND

## JUDGMENT

**Case Nos. 858/14**

In the matter between:

**YASHELLA INVESTMENTS (PTY) LIMITED** **Plaintiff**

**vs**

**MRS SHIRLEY ALBERS** **Defendant**

**AND** **Case No. 859/14**

**ALBERS INTERNATIONAL ROAD MARKINGS (PTY) LTD** **Plaintiff**

vs

**MRS SHIRLEY ALBERS** **Defendant**

**Neutral citation:** ***Albers International Road Markings v Mrs. Shirley Albers (858/14 and 859/2014) [2016] SZHC108(1st July 2016)***

**Coram:** **M. Dlamini J**

**Heard:** **28th June,2016**

**Delivered:** **5th July, 2016**

*The question for determination is what step was defendant to take after the service of the notice of bar- the* ***dies*** *begin to run from the date of a declaration -once a person is served with a declaration or a notice of bar, he is expected to file a plea, exception or a claim in reconvention. Any other pleading falls outside the requirements of rule 22. -The words "****subsequent pleadings****" or ".... ****any other pleadings****" must be read in line with rule 22. Any contrary interpretation or reading to include other pleadings outside those specifically mentioned under rule 22 would result in defeating the intention of the legislature which was clear and concise on the nature of the pleadings to be filed by in terms of rule 22.*

Summary: The defendant (Mrs Shirley Albers) has filed a rule 30 application on the basis that plaintiff's application for default judgment is irregular as shedid file a notice in terms of rule 7 when she was served with a notice of bar.

Epilogue

[1] By reason that the above two cases raise the same issue, the parties have agreed that the matters be dealt with simultaneously. The plaintiff instituted action proceedings by means of a combined summons on 26th June 2014. The defendant filed a notice to defend on 27th June 2014. The *dies* for filing a plea expired on 3rd September 2014. Plaintiff filed a notice in terms of rule 26 notifying defendant to file a plea within three days failing which she shall be *ipso facto* barred. Instead of Mrs Shirley Albers filing a plea, she served the plaintiff with the following:

> *"NOTICE IN TERMS OF RULE 7*
> *TAKE NOTICE THAT the defendant challenges the authority of Madau, Simelane, Mntshali to act in the matter and requires:*
>
> *i) a Power of Attorney to act;*
> *ii) the resolution underlying the Power of Attorney;*
> *iii) the minute of the General meeting appointing these persons acting as directors of the plaintiff, or such other evidence of appointment of directors as may be sufficient in law.*

*DATED AT MBABANE ON THIS 8th DAY OF SEPTEMBER 2014."*

[2] Plaintiff responded by submitting two documents *viz.* Power of Attorney and minutes of shareholders which it referred to as Minutes of General Meeting in its filing and service notice on 24th October 2014.It appears that plaintiff changed Counsel and appointed C. J. Littler & Co. to represent iton 15th February 2016 and duly notified the defendant. The plaintiff then enrolled the matter for hearing for the 19th February 2016 for default judgment and served Mrs Shirley Albers' attorneys. On the 18th February 2016 Mrs Shirley Albers' lawyers served plaintiff with a notice in terms of rule 30, claiming that the plaintiff has taken an irregular step.

Parties' submission

[3] Although Mrs Shirley Albers in support of her rule 30 application highlighted a number of grounds in her notice, during submission, the same were not pursued. It was submitted on her behalf that the notice of bar was fully complied with when she filed a notice in terms of rule 7. Once the plaintiff believed that it had complied with the rule, that is, Mrs Shirley Albers demands under rule 7, and after a lapse of time,

plaintiff ought to have filed a notice of bar and not rely on the notice of bar served on the 3rd September 2014.

[4] Plaintiff argued that the notice of bar is clear on what was requested of the defendant. Defendant was called upon to file a plea failing which she was barred. Any other process filed by defendant following the notice of bar is not to be considered by reason that it fell short of a plea.

Adjudication

[5] The question for determination is what step was defendant to take after the service of the notice of bar. In making my determination, I drew an analogy from the case of **Lenders & Co. and F. H. Landers & Co. (South African Agency) v Pechey Bros (1902) 23 NLR 285**. In that case defendant, following serving upon it of a declaration, filed an exception. The court upheld the exception to the declaration. However, on appeal, the exception was dismissed. The plaintiff filed a notice of bar. The Registrar refused to accept the notice of bar on the basis of communication by defendant's attorney to the Registrar that the defendant was not at fault. The plaintiff set the matter down. **Bale CJ**sitting with **Finnemore J** and **Beaumount AJ**, approached the matter on the question as to when the defendant ought to have filed a plea. Was it eight days[1] from the date of the dismissal of the exception or from the date of the declaration? **Bale CJ** pointed out as follows:

[1]as the rules then provided filing within 8 days before they were amended.

*"I had certainly understood as regards the first question that the practice was that the period ran from the* ***date of service of declaration, in the absence of any order of court****, and as regards the second question, that the defendant had at least two clear days after service of the peremptory notice*[2] *to plead, within which to file this plea."* (my emphasis)

[6] The learned Judge proceeded to state with reference to rule 22 (1)[3]:

"*The 16th Rule of court requires the defendant to "***plead, answer, except, ormake claim in reconvention,*** within 8 days next after the filing of the plaintiff's declaration and notice served thereof in writing, unless upon application of the court, further time be granted to him for that purposes."*(my emphasis)

[7] His Lordship **Bale CJ** eloquently pointed out:

"*It seems to be clear that when the defendant has pleaded, answered, or excepted, he has, in the absence of a special order of court, exhausted his right."*

[8] It was then concluded:

*"I think, therefore that as a* ***calendar month had expired when the exceptions were first heard as well as when they finally disposed of, the defendant was, in the absence of an order of court liable to be barred at least after peremptory notice."*** **(my emphasis)**

[9] In summary their Lordships held firstly that the *dies* begin to run from the date of a declaration. Secondly, once a person is served with a declaration or a notice of bar, he is expected to file a plea, exception or a claim in reconvention. Any other pleading falls outside the requirements of rule 22.

[2] refers to notice of bar.
[3] which was rule 16 then in the Natal Province.

[10] *In casu*, the declaration was served on 26th June 2014 in terms of the returns of services filed in both cases. The defendant had twenty one days to serve a plea, exception or a claim in reconvention in terms of rule 22. However, defendant did not do so. He was barred and afforded three days to serve the above pleadings but failed to do so. I appreciate the submission by learned Counsel on behalf of Mrs Shirley Albers that rule 26 refers to "*deliver in subsequent pleadings*" or "*.... any other pleadings*" and that the words "*subsequent pleadings*" or "*any other pleadings*" are inclusive of a notice in terms of rule 7. I do not think so in light of the *ratio decidendi* extracted from **Lenders** case *supra*. The words "*subsequent pleadings*" or "*.... any other pleadings*" must be read in line with rule 22. Any contrary interpretation or reading to include other pleadings outside those specifically mentioned under rule 22 would result in defeating the intention of the legislature which was clear and concise on the nature of the pleadings to be filed in terms of rule 22. In other words, a defendant who chooses to ignore filing the pleadings specified under rule 22, runs the risk of time bar. A party who wishes to file a pleading other than one mentioned under rule 22 may do so subject to bearing in mind that its time of filing the pleadings specified under rule 22 is running out. At any rate a party may apply to court for extension of time[4] if for instance a notice for a power of attorney or for further particulars is not forthcoming before the expiry of twenty one days of filing his plea, exception or claim in reconvention.In the final analysis, the defendant is debarred from filing his plea.

[11] There is another approach to the issue raised in the case at hand. Rule 7(1) provides:

"*Power of Attorney*

[4] in terms of rule 27

*Subject to the provisions of sub-rule (2) and (3), a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within ten days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorized so to act, and to enable him to do so the court may postpone the hearing or the action or application.*

[12] Defendant had ten days after service of the summons (as presumably that is the date she first became aware of the questionable authority) upon which to file the notice under rule 7. The defendant however, filed on 8th September 2014 i*pso facto* way out of time. If defend wished to file after ten days, she ought to have applied to his court in terms of the said rule. This was not done.

[13] Can the Court *mero motu* allow a party to file after the *dies* has lapsed? Rule 27 (1) and (2) provides:

"*Extension of Time and removal of bar and Condonation.*

*(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 fit.*

(2) *Any such extension may be ordered although the application therefore is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.*"

[14] From the reading of the above, it appears that the application for extension of time ought to be made either before the lapse of twenty one days of filing of a plea (as per sub (1) or after the twenty one days (as per sub (2)). No

application for extension of time has been made in the present application. I appreciate the observations in **Gamedze and 2 Others v Fakudze (14/2012) [2012] SZSC 52 (30 November 2012**) to the effect that rules of court are not sacrosanct but meant to be observed. However, the court then proceeded to point out at paragraph [18]:

> *"It is however also the judicial accord across jurisdictions, that the court will insist on strict compliance with the rules of procedure meant to* ***safeguard the fundamental right of the adverse party to fair hearing such as notice*****."** (my emphasis)

[15] In other words, whatever decision the court takes, it must be guided by the dictates of justice as to the fundamental rights to a fair hearing. *In casu*, the fundamental right of Mrs Shirley Albers who is adversely affected is that she be granted the right to be heard in her defence. After all I consider that Mrs. Shirley Albers was under the misapprehension that rule 7 as a subsequent or other pleading was appropriate in the circumstances to comply with the notice of bar served upon her. This was not an unreasonable misapprehension. It is not as if she set down and did nothing after receiving the notice of bar. She did take a step, a*lbeit*, irregular by filing what she believed to be a pleading. Further,it is the spirit of administering justice outlined in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors ) Civil Appeal Case No. 23/2006**that rules of court are meant to serve justice and that cases should be decided on their real merits rather than form. **Gardiner JP** in **Ncoweni v Bezuidenhout 1927 CPD** 130 propounded, *"The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it,…"***Hiemstra J**[5] stated the same position of the law with much vigor when he said, *"I am not prepared to allow the rules of procedure to*

[5]**Registrar of Insurance v Johannesburg Insurance Co. Ltd (1) 1962 (4) SA 546** (W) at 547C-D

*tyrannise the Court when an important matter has to be thrashed out fully and all the facts have to be put before the Court."*

(16) I therefore grant defendant an extension of time to file her plea. However, this will not come without a costs order. I therefore enter as follows:

1) Defendant's rule 30 application is hereby dismissed with costs;

2) Defendant is granted an extension of three days to file in terms of rule 22 with costs;

3) Matter is postponed to 25th July 2016 and parties are hereby ordered to have closed pleadings, with each party granted four days after defendant's filing in terms of rule 22 above to file further pleadings or take necessary steps as the case may be.

____________________

**M. DLAMINI**
**JUDGE**

For Plaintiff: **L. Mamba**

For Defendant: **S. S. Hlophe**