REPORTABLE

CASE NO. I 2930/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOBUS MARTHINUS BRONKHORST **PLAINTIFF**

and

MARIUS DE VILLIERS **DEFENDANT**

CASE NO. I 2934/2010

CHRISTIAAN MARTHINUS VAN ZYL **PLAINTIFF**

and

MARIUS DE VILLIERS **DEFENDANT**

CORAM: **CORBETT, A.J**

Heard on: 27 September 2011

Delivered on: 24 October 2011

JUDGMENT

CORBETT, A.J: .

[1] At issue in this matter, is the question whether the delivery by the defendant of a notice of exception in terms of Rule 23 (1) of the High Court Rules ("the Rules") has the effect that a notice of bar delivered by the plaintiff in terms of Rule 26 is so uplifted.

[2] The relevant facts of both the matter under case number I 2930/10 and I 2934/10 are identical, except that the plaintiffs are different persons. By agreement between the parties both cases were argued together and identical heads of argument were filed in respect of both matters. Accordingly both matters are dealt with jointly in this judgment, given that both matters revolve around the same point taken in law. Where I refer to the plaintiff, reference is to both Jacobus Marthinus Bronkhorst and Christiaan Marthinus van Zyl.

[3] The background facts are as follows:

[3.1] On 15 June 2011, more than 15 days after the plaintiff had delivered his amended particulars of claim, the plaintiff delivered a notice of bar in terms of Rule 26 calling upon the defendant to deliver his plea within 5 days from delivery of the notice, failing which he would *ipso facto* be barred from so doing.

[3.2] On 22 June 201, i.e on the last day of the 5 day period, the defendant served a notice of exception in terms of Rule 23 (1) of the Rules on the plaintiff. The notice stated that the defendant intended to except to the particulars of claim on the grounds of such particulars being vague and embarrassing and that, should the plaintiff not remove the cause of complaint within 14 days from the date of receipt of the notice, the defendant would proceed with an exception.

[3.3] The plaintiff took the view that the notice in terms of Rule 23 (1) was not a pleading, and accordingly the defendant was *ipso facto* barred on 23 June 2011 from filing a further pleading. On 19 July 2011 the plaintiff set the matter down for default judgment, to be heard on 29 July 2011. Prior thereto on 25 July 2011, the defendant delivered an exception wherein the defendant excepted to the particulars of claim on the basis that they were vague and embarrassing.

[4] Rule 23 (1) of the Rules reads as follows:

"**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 set it down for hearing in terms of paragraph (f) of subrule (5) of rule 6: <u>Provided that where a party intends to take an exception that a pleading is vague and embarrassing he or she shall within the period allowed as aforesaid by notice afford his or her opponent an opportunity of removing the cause of complaint within 14 days</u>: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his or her exception.**"

[5] An embarrassed litigant accordingly cannot except to his opponent's pleading on the basis that his or her opponent's pleading is vague and embarrassing unless he or she has complained and afforded the opponent 14 days within which to react to the complaint.[1] The notice is peremptory and a condition precedent to taking an exception.[2]

[6] Rule 23 thus contemplates two scenarios: firstly, where the exception is brought on the basis that the particulars of claim do not disclose a cause of action, the defendant simply delivers the exception to the plaintiff; and secondly, where the exception is taken asserting that the particulars of claim are vague and embarrassing, the defendant is required to file two documents, a notice I would refer to as the "*notice of exception*" stating the basis for the embarrassment and giving the defendant 14 days to remove the cause of complaint, and – for want of

[1] Chapman v Proclad (Pty) Ltd, 1978 (2) SA 336 (NC), at 339E-F
Trope and Another v South African Reserve Bank, 1993 (3) SA 264 (AD), at 268 A –C
[2] Gauiseb v Minister of Home Affairs, 1996 NR 90 (HC), at 93 A - E

a better term - the "*exception itself*". Where the embarrassment is not removed the two documents are usually identical in substance because the cause of complaint remains the same.

[7] The notice of exception was filed by the defendant within the 5 day period of the notice of bar. In order to determine the effect of the filing of the notice of exception on the notice of bar, regard must be had to the wording of Rule 26. It reads 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, and <u>if any party fails to deliver any other pleading within the time laid down in these rules</u> or within any extended time allowed in terms thereof, <u>any other party may by notice served upon him or her require him or her to deliver such pleading within 5 days after the day upon which the notice is delivered</u>, and 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 be *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.**"

[8] It is common cause that the defendant did not file a plea or other pleading within the time period laid down in Rule 22. The plaintiff was thus within his rights

to file a notice of bar in terms of Rule 26. The crisp issue is this: by filing the notice of exception within the 5 day period, did the defendant uplift the bar entitling the defendant to continue to prosecute his defence to the plaintiff's claim?

[9] It was contended by Mr Frank SC , who appeared together with Mr Dicks, that the defendant had merely delivered the notice of exception in terms of Rule 23(1) within the time period stipulated in the notice of bar for the filing of a subsequent pleading. A distinction was sought to be made between the notice of exception and the exception itself, it being contended that the notice of exception was not a pleading within the meaning of Rule 26, whilst the exception itself was. By only filing the notice of exception – so the argument was developed – the defendant failed to file a pleading within the period provided for in the notice of bar with the result that the defendant was *ipso facto* barred. In terms of the plaintiff's submission the defendant only delivered a pleading in the form of the exception itself on 25 July 2011 after being barred. It is on this basis that the plaintiff has set this matter down and seeks an order of default judgment against the defendant as contemplated by Rule 31 (2) (a) of the Rules.

[10] Mr Barnard, who appeared on behalf of the defendant, contended that the delivery of the notice of exception in terms of Rule 23 (1) constitutes compliance with the provisions of Rule 26 and consequently the bar was lifted. He pointed to the peremptory "two notice" procedure where an exception is brought on the

basis that the particulars of claim are vague and embarrassing. He argues that the delivery of the notice of exception is part of a process prescribed in the Rule 23, constituting the first step in the bringing of an exception and as such is a pleading for the purposes of Rule 26. He maintains that any other interpretation would lead to absurdity, and indeed hardship for the defendant.

[11] Rule 26 requires that in order to lift the bar the defendant must deliver a "*pleading*" within the 5 day period. An exception is a pleading[3] and accordingly, where an exception is filed within the 5 day period provided for in the notice of bar, the recipient of the notice will not be *ipso facto* barred. A notice of bar is accordingly required in terms of Rule 26 before the plaintiff can object to the exception on the ground that it was filed out of time.[4].

[12] It was submitted in the heads of argument filed on behalf of plaintiff, without reference to authority, that it is trite law that a notice, including a notice in terms of Rule 23(1), is not a pleading, and for that matter not a pleading as contemplated by Rule 23(1). There is no definition of the word "*pleading*" in the Rules. Rule 18 under the heading "*Rules relating to Pleadings generally*" provides in sub-rule (3) that:

> "**Every pleading shall be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain <u>a distinct averment</u>**".

[3] Barclays National Bank Ltd v Thompson, 1989 (1) SA 547 (AD), at 556J
[4] Tyulu and Others v Southern Insurance Association Ltd, 1974 (3) SA 726 (E), at 729 C - D

This formulation is the nearest that the Rules come to a definition of a "*pleading".* In this context the word "averment" connotes the following:

> **"aver *vb* avers, averring , averred(*tr*) 1 <u>to state positively</u> 2 *law* <u>to allege as a fact</u> or prove to be true**
>
> **averment *n*"**.
>
> **Collins English Dictionary, 6th Ed. (2006) at 102**

[13] In **Halsbury's *Laws of England*** [5] the term "*pleading*" is used in civil cases –

> "**… to denote a document in which a party to proceedings in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing**".

As to its function in litigation, in the matter of **Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082** the Court stated that –

> '**The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed**.'[6]

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[5] 4th ed (Reissue) Vol. 36(1) para 1

[6] Quoted with approval in Imprefed (Pty) Ltd v National Transport Commission, 1993 (3) SA 94 (A), at 107C - D

[14] The Courts have at times sought to draw a distinction between court documents which pass muster as "*pleadings*" and those which do not. For instance, in **Ex parte Vally: In re Bhoolay v Netherlands Insurance Co of S.A. Ltd**[7], Galgut J stated that:

> "**I have always understood a pleading to be a document which contains distinct averments or denials of averments. If I am correct in that view and in the view that Rule 18 (3) purports to describe a pleading, a request for further particulars cannot be said to be a pleading**".

Based on the **Vally** decision, and the distinction sought to be drawn between a pleading and request for further particulars, the learned authors Herbstein and Van Winsen[8], are of the view that it then follows that a notice to except in terms of Rule 23 (1) would not qualify as a pleading[9].

[15] I am in respectful disagreement with this view. By reference to Rule18(3) and to the authorities quoted *supra*, the question is to be answered by reference to the characteristics of the document and its purpose. There can be no quarrel with the conclusion that a request for further particulars made in terms of Rule 21 is not a pleading. The request does nothing more than allude to the issues which the defendant wishes clarity on in order to plead or to tender an amount in settlement. Questions are posed, as opposed to a party setting out positive

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[7] 1972 (1) SA 184 (W), at 185F - G
[8] The Civil Practice of the High Courts of South Africa, 5th Ed(Cilliers et al)
[9] At 562 - 563

allegations as to the facts. A notice to except, on the other hand, has a different construct and another purpose. Positive averments are made in a notice to except. This is illustrated by the wording of the notice, *in casu*, which states:

> "**1. PLEASE TAKE NOTICE that the defendant intends excepting to the particulars of claim as it is vague and embarrassing in the following respects:**
>
> **1.1 In paragraph 4 of the particulars of claim the plaintiff alleges that the underlying *causa* is a written agreement for the sale of 33,3% members interest in Darima Enterprises CC.**
>
> **1.2 In paragraph 3 of the particulars of claim the plaintiff refers to annexure "A" as the relevant written agreement upon which it relies.**
>
> **1.3 In paragraph 2 the agreement provides that the sale is that of a portion of the business:**
>
> **"2. SALE OF THE BUSINESS**
>
> **2.1 It is recorded that the Seller hereby sells to the Purchaser, who hereby purchases from the seller as an indivisible 33,3% membership interest of the total going concern with effect from the effective date, the business, comprising the business assets - …"**

1.4 The further provisions of the agreement confirm that the agreement is for the sale by the plaintiff of a portion of a business, *inter alia*, clause 1.2.3, 3, 5, 7.1.1and 7.1.2.

1.5 Consequently the allegations in the particulars of claim are in conflict with the provisions of the written agreement. The provisions are mutually destructive. The defendant is prejudiced in that it is embarrassed and it is not able to plead."

[16] In the notice the defendant sets out distinctly in numbered paragraphs the averments upon which he intends to base an exception to the plaintiff's particulars of claim. The tenor of the complaint is that the allegations in the plaintiff's particulars and the written agreement of sale annexed thereto are mutually destructive. The only differences between the notice and the exception are that: firstly the notice refers to the intention to except whilst the exception states that the defendant "*hereby*" excepts; and secondly, the notice provides the plaintiff with the opportunity to remove the cause of complaint, whilst in the exception the defendant prays that the exception be upheld and the plaintiff's claim be dismissed with costs. By delivering the notice, the plaintiff and the Court are fully apprised of the averments and the issues upon which the defendant is to rely at the hearing of the exception. Conceivably a litigant could in the same pleading delivered in terms of Rule 23 (1) refer to the exception and give the other party, in terms of a notice contained therein, an opportunity to

remove the cause of complaint, failing which the exception would stand. In this context, I am of the view that to seek to distinguish the two documents and to conclude that one is a pleading whilst the other is not, is to be blind to their obvious similarities and the purpose they serve in advancing a litigant's case.

[17] There is *obiter* authority for the view that a notice delivered in terms of Rule 23(1) constitutes the bringing of an exception. In the matter of **Landmark Mthatha v King Sabata Dalindyebo Municipality, 2010 (3) SA 81 (ECM), at 86 D – E [12]** Griffiths AJ stated at **p. 85 B [7]**:

> "**As an aside, and correctly in my view, Mr Coetzee conceded that the rule 23(1) notice, delivered by the first respondent within the five-day period given in the notice of bar, amounted to the bringing of an exception in terms of rule 23(1), as the first respondent was obliged, in terms of that subrule, to, by notice, afford the applicant an opportunity to remove the cause of complaint within 15 days.**"

I am in respectful agreement with the *obiter dictum* in this matter, for the reasons I have mentioned.

[18] In any event, I am of the view that the Court, in interpreting its Rules, must have proper regard for the purpose thereof. The Rules constitute the procedural machinery of the Court and are intended to expedite the business of the Courts

[10]. On the balance to be achieved in the interpretation of the Rules of Court, Schreiner JA in **Trans-African Insurance Co. Ltd v Maluleka** [11] said:

> "**No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.**"

This Court also possesses the inherent jurisdiction to grant relief – or to refuse the granting thereof – when insistence upon exact compliance with the Rules of Court will result in substantial injustice to one of the parties. [12]

[19] The plaintiff is within its rights to adopt the position it does, believing on its interpretation of the Rules that the notice of bar has not been uplifted by the filing of the notice of exception, and defendant being in default of the filing of its plea, that it is entitled to default judgment. If one accepts that the purpose of the Rules, broadly speaking, is to provide a framework within which litigants formulate their cases to be adjudicated on their real merits, then I have some difficulty in accepting that the plaintiff's interpretation of the Rules serves this purpose. With the delivery of the notice of exception the plaintiff – as I have already alluded to – was fully informed of the averments founding the exception.

[10] SOS Kinderdorf International v Effie Lentin Architects, 1993 (2) SA 481 (Nm HC), at 491 D – E
[11] 1956 (2) SA 273 (A), at 278 F - G
[12] Herstein & Van Winsen, *supra*, at 30

In divorcing the notice from the exception itself, although the purpose of the notice is to provide a procedural indulgence to the plaintiff, the effect is that the plaintiff avoids the adjudication of an issue material to his claim. Of course the Court could still consider, in determining whether the plaintiff is entitled to default judgment, whether the plaintiff's particulars of claim sustain a cause of action against the defendant. However, I have a deep sense of unease that a procedure designed to benefit the plaintiff can be used against him or her in a contrived fashion to strike at the defendant's defence and shut the doors of Court on the defendant. It is a different matter where the defendant simply fails to take any further procedural step in the case. It is my view then that the interpretation advanced by the plaintiff would result in substantial injustice to the defendant and cannot be sustained.

[20] The effect of this approach to interpretation would seem to be similar to the approach adopted to Rule 26 of the South African Rules (which is couched in similar terms to our Rule 26), in **Felix and Another v Nortier NO and Others (2), 1994 (4) SA 502 (SE)** the Court said:

> "**The plaintiffs were not entitled to insist on the defendants filing only a plea – they could only insist on the defendants <u>taking the next step in the proceedings</u> upon pain of bar if they did not.**" [13]

[13] at 506 G - H

This should be understood as including the raising of an exception which would involve both the delivery of the exception itself, and as a condition precedent thereto and as the first step, the delivery of the notice of exception.

[21] This conclusion is fortified not only by the *obiter* remarks of the Court in the **Landmark Mthatha** matter, but also by a judgment by Strydom JP (as he then was) in this Court in the matter of **Council of the Municipality of Windhoek v Coetzee t/a M W Coetzee Builders, 1999 NR 129 (HC), at 134 B – D** where the following was said:

> "**The reasoning in the *Tyulu* case *supra* and the *Felix* case *supra* therefore also apply to the situation where a claim in reconvention is instituted, and the defendant could not, by specifying in his notice of bar a particular pleading, thereby prevent the plaintiff to exercise his rights in terms of the Rules of Court and file an exception. The converse is also true, namely, that although a notice of bar does not mention an exception, the opposite party will also be barred from subsequently raising an exception once the days set out in the notice of bar have lapsed. In the circumstances the point *in limine* is dismissed.**"

[22] In adopting a purposive approach to the interpretation of the Rules, the Court should avoid an interpretation that leads to absurd or harsh results for litigants. Where, for instance, a litigant wished to except to a plea on the ground that it was vague and embarrassing, on the plaintiff's argument he or she would

be *ipso facto* barred from doing so should the exception not be delivered within 15 days after delivery of the plea. At the same time such party would also have to give 14 days notice to the other party in terms of Rule 23 (1). The party excepting would only be entitled to deliver a notice of exception itself once the 14 day period had expired. Should the 14 day period in terms of Rule 23 (1) be calculated as 14 clear days after the date of the delivery of the notice, the 15 day period in terms of Rule 25 would expire on the same day as the 14 day period in terms of Rule 23 (1). In the context of the application of Rule 25 this interpretation would render the right to except to a plea meaningless. It would also prejudice the litigant in the prosecution of his or her case. This consequence, in my view, further militates against the interpretation advanced by the plaintiff.

[23] In my view, where an exception is raised or the next procedural step is taken in terms of Rule 23 (1) within the time period stated in the notice of bar filed in terms of Rule 26, the notice of bar is lifted. The emphasis is to be placed on the "*raising of an exception*" or the "*taking the next step in the proceedings*" and should not be narrowly construed to connote the filing of the exception itself. This interpretation accords with my understanding of both the **Coetzee** case and the *obiter* remarks in the **Landmark Mthatha** judgment. To hold otherwise, would be to sacrifice the spirit of the Rules of Court on the altar of rigid formalism.

[24] In conclusion, for the reasons articulated *supra*, I find that when the defendant filed the notice of exception in terms of Rule 23 (1) this constituted compliance with the provisions of Rule 26 with the effect that the notice of bar was uplifted.

[25] As a result, the order I make is:

[25.1] The application for default judgment is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:	Adv. T J Frank SC Adv. G Dicks *Instructed by R Olivier & Co*
***ON BEHALF OF THE DEFENDANT**:*	*Adv. P Barnard*

Instructed by Kirsten & Co. Inc.