



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case No.: 359/2022

Date Heard: 11 May 2023

Date Delivered: 8 August 2023

In the matter between:

HENNIE EHLERS BOERDERY CC

Applicant/Defendant

and

APL CARTONS (PTY) LTD

Respondent/Plaintiff

JUDGMENT

RONAASEN AJ:

Introduction

General

[1] This judgment relates to an application in terms of rule 30 of the Uniform Rules of Court ("rule 30"). The application ("the rule 30 application") was brought against the background of the facts set out, below. The defendant, by way of the rule 30

application, seeks to have declared irregular the plaintiff's affidavit filed in support of an application for summary judgment (the defendant is the applicant and the plaintiff the respondent in the rule 30 application).

[2] The summary judgment procedure, currently embodied in rule 32 of the Uniform Rules ("rule 32") has been part of our civil procedure since the middle of the previous century. Substantial amendments to rule 32 took effect on 1 July 2019. It is the application of the rule in its amended form which is the focus of the rule 30 application.

[3] Shortly after the introduction of summary judgment into our country the procedure was described (in terms which remain equally apt today in respect of the regime which applies at present under rule 32 in its amended form) as follows in *Meek v Kruger* 1958 (3) SA 154 at 157A:

"This new procedure was not intended to 'shut (a defendant) out from defending' unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights." [case references omitted]

[4] Rule 32, as amended, is intended to be a refinement made in a continued effort to achieve the goal set out in the above-mentioned quotation namely, to establish whether a defendant has disclosed a *bona fide* defence to a plaintiff's claim in the form of a triable issue.

[5] In terms of the amended sub-rule 32(1) a plaintiff may now only bring an application for summary judgment after the defendant has delivered a plea.

The amended sub-rule 32(2)(b)

[6] It is particularly the requirements of the amended sub-rule 32(2)(b) which are central to the issues I must determine. I commence by associating myself with the remarks of the author DE Van Loggerenberg in the second edition of *Erasmus – Superior Court Practice* at RS 18, 2022, D1-386 to the effect that the rule in its amended form is not a model of clarity and is likely to increase the workload of judges as well as costs for parties, which creates an unsatisfactory situation. As will become clear this matter is no exception.

[7] Sub-rule 32(2)(b) as amended requires a more detailed affidavit to be filed in support of an application for summary judgment (as opposed to the formulaic supporting affidavit previously allowed) and is framed in the following terms:

“The plaintiff shall in the affidavit referred to in sub-rule (2)(a), verify the cause of action and the amount, if any, claimed and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.”

[8] Thus, in terms of the amended sub-rule 32(2)(b), broken down into its component parts, the affidavit supporting the application for summary judgement must contain:

8.1. a verification of the cause of action and the amount, if any, claimed;

8.2. an identification of any point of law relied upon;

- 8.3. an identification of the facts upon which the plaintiff's claim is based; and
- 8.4. a brief explanation as to why the defence as pleaded does not raise any issue for trial. According to the defendant the plaintiff's alleged failure to comply with the brevity qualification attached to this final requirement is at the core of the dispute between the parties.

Litigation history

[9] The plaintiff instituted action against the defendant in February 2022 in which it sought payment from the defendant of the sum of R9 144 961.22 and ancillary relief in respect of fruit packaging cartons it had allegedly sold and delivered to the defendant, pursuant to a partially written, partially oral agreement concluded between them. The sum claimed is the balance allegedly owing by the defendant, the total sum due having been reduced by a payment made by the defendant.

[10] The defendant, in April 2022, pleaded to the particulars of claim and contemporaneously delivered a claim in reconvention. In its plea the defendant admitted to the conclusion of an agreement with the plaintiff and the delivery of packaging cartons but, in summary, raised the following main defences:

- 10.1. the agreement between the parties was not in the terms alleged by the plaintiff;
and
- 10.2. the plaintiff had delivered the wrong or defective packaging cartons, resulting in the defendant suffering damages, hence its claim in reconvention.

[11] The defendant admits making payment to the plaintiff of the sum of R6 968 751.93, which it avers is the full extent of its indebtedness to the plaintiff. The plaintiff contends that the payment was made in reduction of a larger sum due and that the sum of R9 144 961.22 is the balance owing by the defendant.

[12] Consonant with the amended sub-rule 32(1), after delivery of the plea, the plaintiff applied for summary judgment, in April 2022. In purported compliance with sub-rule 32(2)(b) its application was supported by an affidavit comprising some 20 pages and annexures of 14 pages.

[13] In response to the application for summary judgment the defendant, in June 2022, launched the rule 30 application, contending that the affidavit filed by the plaintiff in support of its application for summary judgment was an irregular step, on grounds with which I shall deal more fully, below.

[14] In terms of the rule 30 application the defendant seeks an order declaring that the plaintiff's affidavit supporting its summary judgment application is irregular and that the entire affidavit be set aside. It further asks that the plaintiff be directed to file a supporting affidavit complying with sub-rule 32(2)(b).

The issues to be determined

[15] The rule 30 application raises the following issues for determination:

- 15.1. whether rule 30 is the appropriate procedural mechanism to challenge an affidavit supporting an application for summary judgment for its alleged want of compliance with sub-rule 32(2)(b); and
- 15.2. if so, does the affidavit filed by the plaintiff, as currently formulated, fall to be declared irregular and set aside for want of such application?

[16] Obviously if the former of the two above-mentioned questions is decided against the defendant, that would be dispositive of the rule 30 application.

Is rule 30 the appropriate procedural mechanism in the circumstances

The defendant's complaint

[17] The defendant's complaint against the plaintiff's affidavit supporting its application for summary judgment is introduced as follows in its founding affidavit in the rule 30 application:

- "16. The Respondent's affidavit in support of the Summary Judgement application fails to meet the jurisdictional requirement of Uniform Rule 32(2)(b) in that instead of providing a brief explanation as to why the defence pleaded does not raise an issue for trial, the Respondent has filed an affidavit which is 20 pages long (which evidently has already been condensed in spacing to reduce the amount of pages) consisting of no less than 76 paragraphs into its 16 pages of annexures are attached (36 pages in total).

17. In addition, the Respondent has sought to introduce new evidence, either by way of emails which it has attached to its affidavit (which emails are not attached to its Particulars of Claim) or by way of allegations made in its affidavit (not made in its Particulars of Claim)."

The application of rule 30 generally

- [18] The rule 30 application was argued on the basis of an acceptance by the parties of the principle that rule 30 applies only to irregularities of form and not matters of substance. *Erasmus* RS 2022, D1-351 and the authorities referred to there.

- [19] This immediately raises the question as to whether compliance with what the defendant describes as the jurisdictional requirements of sub-rule 32(2)(b) is a matter of form or substance – more about this aspect later.

Relevant legal principles applicable to the provisions of sub-rule 32(2)(b)

- [20] In respect of the requirement that a plaintiff applying for summary judgment must, in the supporting affidavit, set out the facts on which the plaintiff's case is based our courts, in interpreting the amended rule 32, have in general terms held that a plaintiff should not be entitled to introduce evidence of facts that do not appear in the particulars of claim or declaration. *Absa Bank Ltd v Mphahlele N.O. and Others* [2020] ZAGPPHC 257 (26 March 2020) at [32] and *Morgan Cargo (Pty) Ltd v EV Zakharov* [2022] ZAWCHC 132 (4 July 2022) at [20].

[21] As to the requirement relating to "*the brief explanation as to why the defence as pleaded does not raise any issue for trial*" it has also been held in general terms that in meeting this requirement a plaintiff is not entitled to introduce new evidence as to why, at summary judgment stage, a defendant should not be given leave to defend an action and to attempt to show that the plaintiff has an unanswerable case. *Mphahlele* at [33].

[22] General principles, however, must be applied to the factual situation which prevails in a specific case. In this regard I align myself with the approach suggested in *Absa Bank Ltd v Sable Hills Waterfront Estates CC and Others* 2022 JDR 0742 (GP), as follows:

"[18] I do not find it necessary in the present circumstances to delineate the precise ambit of what is permissible in this portion of Rule 32(2)(b) which requires the plaintiff in its affidavit to identify '*the facts upon which the plaintiff's claim is based and to explain briefly why the defence, as pleaded, does not raise any issue for trial*'. I accept that the plaintiff should, by and large be restricted to the facts are set out in its particulars of claim. But there may well be circumstances in which a factual matter raised in the particulars of claim or pleaded in the plea may permissibly be clarified or elucidated without advancing a new factual premise for the claim or seeking to introduce substantial, supplementary facts. The test in this regard will depend on the particular facts and will no doubt be developed over time.....

[19] The contentions regarding the prohibition against the plaintiff gaining a tactical advantage are formulaic when stated in such general terms and lack factual foundation. The new summary judgment procedure is implicitly aimed at exposing the defendants pleaded defence to the scrutiny of the plaintiff and the court; no procedural unfairness arises from this.....".

[23] The above-quoted passages encapsulate the respective contentions in this application which, in a nutshell, are to the following effect:

23.1. the defendant in the rule 30 application relies on the abovementioned general principles (whilst endeavouring to apply them to the facts of this case) in contending that the plaintiff's affidavit supporting its application for summary judgment goes beyond the scope of the pleadings and what is intended by sub-rule 32(2)(b); and

23.2. the plaintiff, on the other hand, maintains that there are two principal issues flowing from its particulars of claim, namely, first, the precise terms of the agreement between itself and the defendant and, second, whether it complied with the terms of the agreement by delivering fruit packaging cartons to the defendant which were fit for purpose. It then submits that the facts put up in the summary judgment affidavit are there to elucidate those basic premises rather than to establish new factual premises by introducing substantial supplementary facts.

[24] It is against this background that I must determine whether the rule 30 application is the appropriate procedural mechanism to resolve these disputes. As stated, this raises the question as to whether the requirements with which an affidavit supporting an application for summary judgment, as set out in sub-rule 32(2)(b), must comply are formal or substantive in nature.

[25] In my view the requirements which an affidavit supporting an application for summary judgment has to meet are substantive in nature rather than formal, as:

- 25.1. the intention with the amended rule was to do away with a formulaic supporting affidavit;
- 25.2. the plaintiff, in a lucid manner, is required to identify any point of law relied upon, as well as the facts upon which the plaintiff's claim is based and to furnish a brief explanation as to why the defence as pleaded does not raise any issue for trial - clearly these requirements are substantive rather than merely formal. The intention of the procedure is to expose both the claim and the defence to the scrutiny of the court for it to be in a position to determine whether the defendant has raised a triable issue;
- 25.3. the necessity of dealing with the defence raised and furnishing an explanation as to why it does not raise a triable issue cannot but be a substantive requirement. It obliges the plaintiff to come to grips with the substantive elements of the pleaded defence and set out why, having regard to those substantive elements, the defence does not constitute a *bona fide* defence; and
- 25.4. the brevity qualification attached to the explanation is relative and the extent of the explanation will in the first place be dependent on the extent and nature of the substantive elements of the defence raised in the plea. Compliance with the brevity requirement cannot therefore necessarily be judged solely on the number of pages or paragraphs the explanation encompasses. Each case will depend on its own circumstances.

[26] In assessing compliance with the requirements of sub-rule 32(2)(b) comparisons with judgments dealing with overly voluminous applications in terms of Uniform Rule 43

("rule 43") are not of assistance. The requirements in applications in terms of rule 43 that the founding and opposing affidavit must be in the form, respectively, of a declaration and a plea are formal in nature. Rule 43 envisages various types of relief in pending matrimonial actions but does not seek in any way to deal with or prescribe the substantive jurisdictional requirements necessary to obtain such relief.

Conclusion on the question as to whether rule 30 is the appropriate procedural mechanism in the circumstances

[27] In the three judgments referred to above the disputes as to the precise ambit of what was permissible content in the affidavits supporting summary judgment were all determined by the courts hearing the applications for summary judgment and not as part of a separate procedure as to the regularity of the affidavits. In the *Mphahlele* and *Morgan Cargo* matters the approach adopted was to ignore the offending portions of the supporting affidavits. I refer to paragraphs [38] and [20] of the respective judgments.

[28] The court in the matter of *T-Systems (Pty) Ltd v BDM Technology Services (Pty) Ltd* 2020 JDR 2086 (GJ) also had to deal with an application in terms of rule 30, where it was sought to set aside a summary judgment application, *inter-alia*, on the basis that the affidavit supporting the application for summary judgment had exceeded its permissible ambit. In dismissing the application, the court expressed itself as follows:

"[38] I disagree that the Rule 30 application is a suitable means of addressing the irregularities complained about. Although dressed up as procedural issues, the objections are substantial in nature. I do not believe the approach is consistent with the purpose of Rule 30. It would

undermine the essence of the summary judgment procedure. I would discourage this approach, which delays the resolution of summary judgment applications in real-time.”

[29] I agree with the finding in the *T-Systems* matter. In associating myself with the remarks in the above-quoted passage, I add the following:

- 29.1. the *T-Systems* judgment fortifies my conclusion that the requirements of sub-rule 32(2)(b) are substantive requirements and not merely formal;
- 29.2. rule 30 is therefore not the appropriate procedural mechanism to address complaints that affidavits supporting summary judgment applications exceed the ambit of what is the permissible content of such affidavits;
- 29.3. complaints as to whether the supporting affidavits in summary judgment proceedings have exceeded the permissible ambit are more appropriately addressed when the summary judgment application is argued. It would be open to a defendant to apply for allegedly offensive portions of the founding affidavit to be struck out alternatively to submit to the court hearing the summary judgment application that they be ignored;
- 29.4. the overriding consideration that a defendant in summary judgment proceedings must demonstrate the existence of a *bona fide* defence remains unaltered by the amended summary judgment procedure. This requires a defendant to deal even with argumentative material in the plaintiff’s supporting affidavit. This should not occasion a problem for a defendant with a *bona fide*

defence. If it fails to do so, it does so at its peril. *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at [41];

- 29.5. the court hearing the summary judgment application is equally, if not better, able to discern whether the plaintiff's supporting affidavit amounts to an abuse of the process of the court and exceeds the permissible ambit of the sub-rule;
- 29.6. as a matter of policy, applications brought in terms of rule 30 to address substantive shortcomings in a summary judgment application must be discouraged. Such applications will interminably delay the completion of summary judgment applications and frustrate the purpose of summary judgment proceedings which, in appropriate circumstances, is to bring a speedy conclusion to litigation in cases where defendants have no prospects of avoiding the plaintiff's claim and have entered an appearance to defend merely to delay. In the context of the present matter and from the litigation history set out above it is apparent that more than a year after the plaintiff instituted its action the matter remains bogged down in an opposed interlocutory dispute;
- 29.7. the relief the defendant proposes in the rule 30 application (no doubt so framed to address the concern expressed in in paragraph [37) of the *T-Systems* judgment, where the defendant sought to bring an end to the summary judgment application by means of a rule 30 application) is not assured of achieving a speedy resolution of the summary judgment application. It is quite possible that the defendant may again object to the re-formulated supporting affidavit, leading to yet more delays.

[30] Rule 30 applications were brought in two matters in the Cape Town High Court where the respective plaintiffs sought summary judgment in terms of the amended rule 32. The rule 30 applications in those matters were brought to in an attempt to set aside the summary judgment application as the plaintiffs in both matters, contemporaneously with the delivery of the summary judgment applications, had delivered replications. The defendants contended that the delivery of the replications constituted a waiver of the right to apply for summary judgment. The rule 30 applications in those matters were not addressed at the substantive requirements of sub-rule 32(2)(b) and are therefore distinguishable from this matter. *Quatro Citrus (Pty) Ltd v F&E Distributors (Pty) Ltd t/a Cape Crops* [2021] JOL 49833 (WCC) and *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* [2023] ZAWCHC 129 (29 May 2023).

[31] I therefore conclude that rule 30 is not the appropriate procedural mechanism to address complaints regarding the substantive requirements of sub-rule 33(2)(b). My conclusion thus disposes of the rule 30 application.

[32] In reaching this conclusion I have deliberately not expressed any opinion on whether the plaintiff's affidavit supporting its summary judgment application meets the substantive requirements of sub-rule 32(2)(b) or on the merits of the defendant's complaints and contentions that the affidavit does not meet those requirements. Those issues must be left for the determination of the court hearing the summary judgment application.

[33] For these reasons the rule 30 application must be dismissed with costs. Given that this matter raised novel issues, which were not without complexity I consider that it was justified for the plaintiff to employ the services of two counsel.

Order

[34] Thus, I make the following order:

1. The rule 30 application is dismissed with costs, such costs to include the costs attendant on the employment of two counsel.
2. The defendant is directed to deliver its affidavit opposing the summary judgment application within 15 days of the date of this order.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

**KD Williams for the applicant,
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