

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

Case Number: 6307/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **2 JUNE 2023**

SIGNATURE:

NEDBANK LIMITED

Plaintiff

and

CORNE ELIZABETH KRUGER

Defendant

JUDGMENT

SC VIVIAN AJ

1. This is an application for summary judgment. Argument in the matter was heard simultaneously with argument in case number 3013/2022 involving the same parties. I delivered a separate judgment in that matter.
2. In my view, the verifying affidavit in this matter is defective and summary judgment can accordingly not be entered against the Defendant.
3. There are two separate claims in this matter. Both arise from instalment sales agreements concluded between the Plaintiff and the Defendant. The Plaintiff essentially seeks to make out a case for cancellation of each agreement and return of the motor vehicle that is the subject of each agreement.

4. In the verifying affidavit, the deponent says: “I verify the cause of action as well as the amount contained in the summons as being true and correct.” (my underlining)
5. She continues to explain that she has been involved in the Plaintiff’s claim against the Defendant. She says that she has examined various documents. These include:
 - 5.1. The Defendant’s “*application for finance*”;
 - 5.2. “*Contemporaneous notes of the Applicant's staff together with system generated remarks concerning the conduct of the Respondent's account with the Applicant*”;
 - 5.3. “*The Applicant's bank statements, reflecting the debits and credits pertaining to the Respondent's account on the respective dates. Included is a detailed statement of account ...*”
6. The deponent says: “*Respondent has no bona fide defense to the claim ...*”
7. There are of course a number of difficulties with this formulation. First, there is no monetary claim in the particulars of claim. Second, there are two claims and two account numbers.
8. Mr Welgemoed, who appeared for the Plaintiff, submitted that these were technical issues and that there is no need for formalism in the verifying affidavit. He referred me to the decision in **Cape Business Bureau v van Wyk**.¹ In that case, Baker J considered a verifying affidavit that purported to verify as cause of action that was pleaded against two defendants in the alternative. The learned Judge held: “*If plaintiff fails to verify his cause of action with clarity and exactitude, it is defective and its claim will fail ...*”² That decision applied a

¹ Cape Business Bureau v van Wyk 1981 (4) SA 433 (C)

² At 439E

decision of this Court, which is binding on me unless I consider it to be clearly wrong, which I do not.³

9. However, in **Roestof**, Blieden J granted summary judgment where the verifying affidavit purported to verify the cause of action against “the defendants”, but there was in fact only one defendant cited in the particulars of claim. The learned Judge held: *“If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him.”*⁴

10. In **Shackleton**,⁵ Wallis J (as he then was) referred to **Roestof** and held:

“Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then cadit quaestio. Its defects do not

³ Visser v De La Rey 1980 (3) SA 147 (T) at 150 E

⁴ At 496 G

⁵ Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP)

disappear because the respondent deals with the merits of the claim set out in the summons.”⁶

11. The author of Erasmus on the Superior Court Act submits that the approach in **Shackleton** is to be preferred and to be applied under the Rule in its amended form.⁷ **Shackleton** was in turn followed by Yacoob J and Modise AJ in **Gauteng Refinery**.⁸
12. Insofar as **Shackleton** differs from **Roestof**, I am according to the rules of *stare decisis* bound to follow **Shackleton** because **Shackleton** has been followed by a two-Judge bench in Gauteng.
13. In my view, there are significant defects in the verifying affidavit and accordingly the application for summary judgment. These are not cured by the fact that the Defendant has dealt with the merits of her defence.
14. Further, there is good reason to adopt a strict approach to a verifying affidavit, particularly under the amended Rule. As Binns-Ward J explained in **Tumileng**:

“What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a “formulaic” supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.”⁹

⁶ At para 25

⁷ Erasmus on Superior Court Practice, Vol. 2, page D1-402G

⁸ Gauteng Refinery (Pty) Ltd v Eloff 2023 (2) SA 223 (GJ) at para 10

⁹ Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) at para 22; approved in this Division in Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd 2021 (2) SA 587 (GP) at para 46

15. Where the Plaintiff relies on a defective verifying affidavit, this suggests, a failure of the deponent to apply her mind to the content of that affidavit. Where the deponent signs an affidavit that verifies the amount claimed in a single claim, but there is no amount claimed and there are two claims, this creates the impression that she has not considered very carefully her ability to allege that the defendant does not have a *bona fide* defence. Such consideration necessarily involves a careful consideration of what particulars of claim read with the plea. Where the deponent claims to have considered a single application for finance and information relating to a single account, but the claim asserts two accounts, then this cements such impression.
16. The Plaintiff has accordingly not made out a proper case for summary judgment.
17. Both counsel submitted that if I came to this conclusion, the appropriate order would be to grant the Defendant leave to defend. I do not agree, where the application for summary judgment is defective, the appropriate order is to dismiss the application. This is in any event the order sought in the resisting affidavit. The Defendant's counsel was content with an order that costs of the summary judgment be costs in the cause.
18. I accordingly grant the following order:
 - 18.1. The application for summary judgment is dismissed.
 - 18.2. The Defendant is granted leave to defend.
 - 18.3. Costs of the application for summary judgment are costs in the cause.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE PLAINTIFF: CJ Welgemoed

FOR THE DEFENDANT: M Jacobs

Date of hearing: 02 June 2023

Date delivered: 02 June 2023