SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 62780/2021

1. **REPORTABLE: NO**
2. **OF INTEREST TO OTHER JUDGES: NO**
3. **REVISED: YES**

DATE: 12/06/2023

In the matter between:

ABSA BANK LIMITED **Plaintiff**

and

MISS SANDRA KAREN YOLINDA VAN DER COLFF **Defendant**

JUDGMENT

DELIVERED:

This judgment was handed down electronically by circulation to the parties' legal representatives via email and publication on CaseLines. The date of hand-down is deemed to be on 12 June 2023.

L. Meintjes AJ:

Introduction

1. The plaintiff is ABSA Bank Limited and the defendant is Miss Sandra Karen Yolinda van der Colff. Hereinafter, I shall refer to the parties respectively as ABSA and Ms Van der Colff. This is done for purposes of convenience as well as to avoid confusion and no disrespect is thereby intended.

2. Subsequent to Ms Van der Colff having filed her Plea in the action instituted by ABSA against her for, *inter alia*, the return of a motor vehicle purchased in terms of an Instalment Sale Agreement ["*ISA*"], ABSA applied for Summary Judgment. Ms Van der Colff opposes such application and duly filed her Opposing Affidavit. However, ABSA's attorney effected certain amendments to its application for Summary Judgment that prompted Ms Van der Colff to object thereto on the basis that it constituted an irregular step. As a result, Ms Van der Colff launched an interlocutory application against ABSA seeking to set aside the application for Summary Judgment as an irregular step. This court is consequently called upon to determine:

2.1 Firstly, Ms Van der Colff's interlocutory application in terms of Rule 30(1); and

2.2 Secondly, and depending on the outcome on the first issue, the merits of ABSA's application for Summary Judgment.

Application in terms of Rule 30(1)

3. I proceed to set out the relevant factual matrix in chronological order underpinning this issue:-

3.1 On 9 December 2021, ABSA initiated action proceedings against Ms Van der Colff by way of Combined Summons[1];

3.2 On 4 May 2022, ABSA duly amended its Particulars of Claim [hereinafter "*Amended Particulars of Claim*"] as required by Rule 28[2];

3.3 On 7 July 2022, Ms Van der Colff delivered her Plea to the Amended Particulars of Claim[3];

3.4 On 28 July 2022, ABSA delivered its application for Summary Judgment[4]. Same consisted of (i) a "*NOTICE OF APPLICATION FOR SUMMARY JUDGMENT IN TERMS OF RULE 32 AS AMENDED*" [hereinafter "*Notice of Motion*"]; and (ii) an "*AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT*" [hereinafter "*Supporting Affidavit*"]. Both the Notice of Motion and the Supporting Affidavit shall hereinafter be referred to collectively as "*original Rule 32 application*". There are two observations that I need to make in respect of the original Rule 32 application and which constitutes the errors that ABSA's attorney attempted to correct. These two observations shall hereinafter be referred to collectively as "*errors*". They are:-

3.4.1 the Notice of Motion on page 3 thereof records that the Supporting Affidavit of Dumisane Dudu Langa ["*Langa*"] will be used in support of the original Rule 32 application. However, the Supporting Affidavit thereto was in actual fact deposed to by Clifford Lesley Thomson ["*Thomson*"] who is a manager AVAF Stakeholders in ABSA's Collection Division[5]; and

3.4.2 at paragraph 2 of the Supporting Affidavit deposed to by Thomson he alleges that he is duly authorised to depose to such Supporting Affidavit on behalf of ABSA "*as it appears more fully from SJ1 annexed hereto*". The said

[1] CaseLines [CL] 01-1.
[2] CL05-1 to CL05-2.
[3] CL07-1 to CL07-8.
[4] CL08-29.
[5] CL08-56 read with CL 08-57.

Annexure SJ1 constitutes a document entitled "*Internal Mandates Authorisation*". This document sets out the various levels of authority of employees and/or managers of ABSA and their signing powers. However, same refers to Langa and no mention is made of Thomson whatsoever[6];

3.5 It is alleged by Ms Van der Colff that ABSA delivered a further and/or new application for Summary Judgment on 3 August 2022 thereby attempting to cure and/or correct and/or eliminate the errors. What happened on this day is vividly explained by ABSA's attorney[7] in its Answering Affidavit[8] to the interlocutory application in terms of Rule 30(1). I take the liberty to quote *verbatim* from paragraph 28 to 52 thereof:

"28. In accordance with Rule 32(2)(a), the application was accompanied by an affidavit in support of the application for summary judgment signed and deposed to by Clifford Lesley Thomson (the supporting affidavit). For sake of convenience, I annex the affidavit downloaded directly off CaseLines as "AA3".

29. The affidavit was signed and commissioned on 27 July 2022 before Maryke Schultz ("Schultz") a practicing attorney.

30. On 28 July 2022 at approximately 08h30 the application for summary judgment was delivered as it appears more fully from "AA2".

31. As appears from the CaseLines Audit Report, which I annex hereto as "AA4":

31.1 the application for summary judgment was uploaded onto CaseLines on 28 July 2022 at approximately 08:44.

31.2 the proof of service of the application for summary judgment was uploaded onto CaseLines on 28 July 2022 at approximately 08:45; and

[6] CL08-57 read with CL08-79 to CL08-84.
[7] Mr Ashly Zelhle Seckel.
[8] CL12-79 to CL12-84.

31.3 the application for a date on the unopposed motion roll was uploaded onto CaseLines on 28 July 2022 at approximately 09:01.

32. On 3 August 2022, I went onto the CaseLines platform to ascertain why I had not been allocated a date on the unopposed motion roll.

33. At the same time, I contacted the registrar of the unopposed motion court to ascertain why I had no been allocated a date on the unopposed motion roll.

34. I was advised by the registrar that I was required to upload a blank notice of set down as well as a compliance affidavit in order to be allocated a date for hearing on the unopposed motion roll.

35. In order to circumvent having to re-draft the relief sought in the notice of motion in the notice of set down, I attempted to extract the notice of motion directly from CaseLines in order that I may copy the relief sought in the notice of motion and paste into the notice of set down.

36. In doing so, I erroneously removed the entire application from CaseLines instead of just removing the notice of motion.

37. I immediately began to re-upload the application for summary judgment onto CaseLines.

38. It was at this juncture that I ascertained that the incorrect resolution attached to the supporting affidavit marked SJ1 was served on the applicant[9].

39. I further ascertained that the notice of motion erroneously referred to the supporting affidavit of Dumisane Dudu Langa whereas the supporting affidavit was in fact deposed to by Clifford Lesley Thomson.

[9] In the context meaning Ms Van der Colff.

40. I therefore perused the original application for summary judgment that I had retained in my office file (as we no longer file the originals at court because of CaseLines) and ascertained that the original application for summary judgment subsequently uploaded onto CaseLines contained the correct resolution marked SJ1 whereas the copies served on the applicant contained the incorrect resolution marked SJ1.

41. The above error was a result of there having been a mix in the annexures when commissioning which resulted in the deponent to the application for summary judgment initialling two different resolutions.

42. The above error was ascertained prior to issuing and the correct annexure was a part of the issued application, however the wrong annexure was somehow inadvertently attached to the served version.

43. When re-uploading on CaseLines, I sought to use the served version and only then did I realise that the served version had a different annexure to the issued version.

44. I immediately addressed correspondence to the applicant's attorney of record wherein I recorded that:

> *"We note that in consolidating the affidavit for service, we inadvertently attached the incorrect annexure SJ1 from another matter. Attached hereto is the affidavit with the correct annexure SJ1".* [This particular email was sent on 3 August 2022 at 12:23 pm[10]];

45. A copy of the email correspondence is annexed hereto as AA5.

46. <u>The supporting affidavit attached to the mail is an exact replica of the supporting affidavit signed and deposed to by Clifford Lesley Thomson on 27</u>

[10] CL 12-131.

July 2022 and uploaded on CaseLines on 28 July 2022, with the correct resolution marked SJ2.

47. Pursuant to notifying the applicant's attorney of record of the position, I re-uploaded the same affidavit onto CaseLines along with proof of delivery dated 28 July 2022 (AA1), a blank notice of set down and a compliance affidavit as it appears from the audit report at AA4.

48. At the same time, I inserted the correct details into the notice of motion to reflect that the supporting affidavit was deposed to by Clifford Lesley Thomson. I believe that the applicant would not raise an issue to the correction as it is common cause that the deponent to the supporting affidavit is Clifford Lesley Thomson. I therefore assumed that the mistake would be common cause to both parties.

49. However, insofar as it is necessary, I have requested my counsel to move for an amendment to the notice of motion to reflect the correct deponent to the supporting affidavit, at the hearing of this application.

50. The supporting affidavit issued on CaseLines on 28 July 2022 therefore remained the same.

51. The initials of the deponent and the commissioner of oaths are both contained on the incorrect and correct Annexure SJ1 because both resolutions had been part of the papers placed before the commissioner and on realising the error I had undertaken to discard of the incorrect annexure but I somehow inadvertently failed to and to consequently include it in the bundle served on the applicant's attorneys.

52. This is unfortunately where the confusion set in, as the copy of the incorrect SJ1 was served on the applicant, whereas the original I retained in my office file

and uploaded onto CaseLines, contained the correct "SJ1"[11]*;* [own emphasis added].

3.6 On 5 August 2022, Ms Van der Colff caused to be served on ABSA's attorney a Notice of Irregular Proceedings as contemplated by Rule 30(2)(b)[12]. Because of the view taken by Ms Van der Colff that the extraction of the original Rule 32 application constituted a withdrawal thereof and that the re-uploading thereof (whereby ABSA's attorney endeavoured to correct the errors) constituted a new and/or fresh and/or second application for Summary Judgment, the aforesaid Notice of Irregular Proceedings complains that the second Rule 32 application that was re-uploaded onto CaseLines on 3 August 2022 constituted an irregular step as it is out of time while not seeking condonation. In addition, Ms Van der Colff also complained that the substitution of the annexure to the Supporting Affidavit constitutes an Irregular Step that was done without notice or authorization. As a result, the aforesaid notice afforded ABSA 10 (ten) days within which to remove the mentioned causes of complaint failing which she will proceed with an interlocutory application in terms of Rule 30;

3.7 On 8 August 2022, ABSA's attorney sent an email to Ms Van der Colff's attorney recording in summary fashion what I quoted above and therefore denying that the original Rule 32 application was withdrawn[13];

3.8 On 23 August 2022, Ms Van der Colff caused to be served simultaneously via email both her Opposing Affidavit resisting Summary Judgment as well as her interlocutory application in terms of Rule 30(1) to set aside as an irregular step: "*the Plaintiff's application for Summary Judgment in terms of Rule 32 as amended"*. She also sought costs against ABSA on an attorney and client scale[14];

3.9 On 24 August 2022, Ms Van der Colff's attorney sent an email to ABSA's attorney noting that the Summary Judgment application was provisionally enrolled for 1 September 2022, but was removed from CaseLines and that they received

[11] CL 12-72 to CL12-84.
[12] CL12-53 to CL12-55.
[13] CL12-56 to CL12-57.
[14] CL12-72 to CL12-80 read with CL12-58.

no final Notice of Set Down to proceed on the mentioned date. Confirmation was sought as to whether ABSA intended to proceed on 1 September 2022, or whether they may apply for a date on the interlocutory roll in order for the Rule 30 application to be heard[15];

3.10 On 31 August 2022, ABSA's attorney responded by email whereby ABSA delivered a Notice to Oppose the interlocutory application. It was further confirmed that the Summary Judgment was not set down for 1 September 2022 due to Ms Van der Colff having filed both an application in terms of Rule 30 and her Opposing Affidavit resisting Summary Judgment. In addition, the view was expressed that both applications should be determined in one hearing as a result of which ABSA will not proceed with Summary Judgment on 1 September 2022[16];

3.11 On 14 September 2022, ABSA delivered its Answering Affidavit to the Rule 30 application[17]; and

3.12 On 28 September 2022, Ms Van der Colff delivered her Replying Affidavit in respect of the Rule 30 application[18].

4. Ms Van der Colff contends the following in her Founding Affidavit supporting her application in terms of Rule 30(1):

4.1 The original Rule 32 application was withdrawn on 3 August 2022 without notice to her[19];

4.2 The second application for Summary Judgment that was uploaded onto CaseLines on 3 August 2022 whereby ABSA's attorney tried to cure the errors, constitutes a new and/or second application for Summary Judgment[20];

---

[15] CL12-135.
[16] CL12-134.
[17] CL12-134.
[18] CL12-156.
[19] CL12-12 [paragraph 6].
[20] CL12-12 [paragraph 7].

4.3 The aforesaid second Rule 32 application was consequently served and filed late without seeking condonation as the result of which the Summary Judgment application is not properly before the court[21];

4.4 The second Rule 32 application was improperly filed due to the fact that it was uploaded onto CaseLines prior to same having been served on Ms Van der Colff[22];

4.5 Because Annexure SJ1 was substituted with the correct annexure (but then incorrectly referenced as SJ2) in the Supporting Affidavit deposed to by Thomson on 27 July 2022, it constitutes an irregularity because it amounts to a material change to the papers filed which required Thomson to depose to a new Supporting Affidavit or Ms Van der Colff had to be informed thereof[23]; and

4.6 There is no proof of service in respect of the second Rule 32 application as only the proof of service in respect of the original Rule 32 application of 28 July 2022 was uploaded to CaseLines[24].

5. ABSA's contentions in its Answering Affidavit resisting the Rule 30(1) application are as follows:-

5.1 Rule 30(2)(a) provides that an application to set aside an irregular step may only be made if the applicant has not himself taken a further step in the cause with knowledge of the irregularity. Consequently, ABSA contends that because Ms Van der Colff delivered her Opposing Affidavit simultaneously with her Application in terms of Rule 30 that it constitutes the taking of a further step and is she therefore precluded to obtain relief in terms of Rule 30. Although ABSA specifically alleged that the Opposing Affidavit resisting Summary Judgment was delivered prior to adjudication of the Rule 30 application, it is common cause that both the Rule 30

[21] CL12-13 [paragraphs 8, 9 and 10].
[22] CL12-13 [paragraphs 11, 12 and 13].
[23] CL12-14 [paragraphs 14 – 16].
[24] CL12-14 [paragraphs 17 – 19].

application and the Opposing Affidavit resisting Summary Judgment was delivered via email simultaneously/together on 23 August 2022[25];

5.2 It is common cause that the original Rule 32 application was delivered on 28 July 2022. The contention is advanced that the omissions which occurred thereafter did not advance the proceedings one stage near completion as Rule 30 applies to positive steps or proceedings and not to omissions[26];

5.3 ABSA at no stage withdrew the original Rule 32 application by notice in terms of Rule 41(1)(a) and no proof thereof is provided by Ms Van der Colff. Consequently, the mere removal of documents from CaseLines does not constitute a withdrawal of the original Rule 32 application as CaseLines is merely utilized as a platform for the filing of pleadings, notices and affidavits in an action and/or application[27];

5.4 As revealed, Annexure SJ1 of the Supporting Affidavit to the original Rule 32 application was substituted with the correct annexure (although incorrectly referenced as Annexure SJ2). ABSA expressly abandoned the said annexure [I took this to mean that both Annexures SJ1 and SJ2 (whether the correct one or not) were abandoned];[28]

5.5 There is only one application for Summary Judgment and that is the one of 28 July 2022 that I refer to herein as the original Rule 32 application. As a result, a new and/or second application for Summary Judgment was not delivered on 3 August 2022. The reason therefore is simply because ABSA's attorney endeavoured to correct the errors as vividly explained in its Answering Affidavit that I quoted *supra;*[29]

---

[25] CL12-74 to CL12-77 [paragraph 7 – 20[.
[26] CL12-77 [paragraphs 21 and 22].
[27] CL12-84 [paragraphs 53 and 54].
[28] CL12-85 to CL12-86 [paragraphs 55 – 61].
[29] CL12-87 to CL12-89 [paragraphs 65 – 69].

5.6 As there is only one application for Summary Judgment [to wit, the original Rule 32 application that was duly served and filed within the prescribed time limit on 28 July 2022], it was not necessary for ABSA to seek condonation; and

5.7 The remainder of the contentions (in particular the conclusions drawn) by Ms Van der Colff were denied.

6. The following, *inter alia,* appears from Ms Van der Colff's Replying Affidavit in respect of the Rule 30(1) application, namely:

6.1 In respect of the contention that Ms Van der Colff lost her right to proceed by virtue of having taken a further step in filing her Opposing Affidavit resisting Summary Judgment, she contended that same did not amount to a further step as she was effectively forced to do so in order to protect her from ABSA proceeding with the Summary Judgment application that was provisionally enrolled for 1 September 2022. As ABSA had lodged papers on CaseLines prior to serving same on her, she contended that it was possible that ABSA could proceed to finally enrol the Summary Judgment application for 1 September 2022 despite her Notice of Irregular Proceedings. Put differently, had she not filed her Opposing Affidavit resisting Summary Judgment, the possibility existed that ABSA could proceed with the Summary Judgment on 1 September 2022. This is the reason why the email of 24 August 2022 was sent seeking confirmation that ABSA would not proceed with Summary Judgment on 1 September 2022 in view of the Rule 30 application that was launched on the previous day. In addition, and insofar as the Court may find that such Opposing Affidavit resisting Summary Judgment did constitute a further step, she required [30] that the Rule 30 application be condoned: "*as it was required to ensure the Respondent did not proceed to finally enrol its Summary Judgment application"*[31];

6.2 She noted the abandonment of Annexure SJ1 (and/or SJ2) to the Supporting Affidavit[32]; and

[30] Ms Van der Colff utilized the word "*submit*".
[31] CL12-144 to CL12-145 [paragraphs 3 – 5]
[32] CL12-145 [paragraph 7] read with CL12-147 [paragraph 16].

6.3 Although admitting that there was no formal notice of withdrawal served and filed in terms of Rule 41(1)(a), she persisted that the removal of any documents from CaseLines constituted a withdrawal of the original Rule 32 application[33].

7. Rule 30 is headed "*Irregular Proceedings*" and provides *verbatim* as follows:

"(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
(b) the applicant has, within 10 (ten) days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 (ten) days;
(c) the application is delivered within 15 (fifteen) days after the expiry of the second period mention in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or against some of them and grant leave to amend or make any such order as to it seems meet.
(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order".

8. Even though the "*second*" and/or further Rule 32 application was uploaded onto CaseLines prior to same having been served on Ms Van der Colff, I consider this to be irrelevant. The definition of "*deliver*" in the Rules is "*to serve copies on all parties*

[33] CL12-147 [paragraph 17].

and file the original with the Registrar". Although there is a usual practice of serving copies on the other parties to a cause before the original (containing the proof of receipt) is filed with the Court, there is no requirement that the one has to precede the other. As long as both service and filing takes place (irrespective of the sequence involved) there will be "*delivery*" and therefore compliance. The question is rather whether there was a withdrawal of the original Rule 32 application and to which I shall return shortly. Before getting to that issue, I consider that I must first address the issue as to whether Ms Van der Colff lost her right to seek relief in terms of Rule 30 by virtue of the provisions of Rule 30(2)(a).

9. Rule 30(2)(a) provides that an application in terms of Rule 30(1) may only be made if: "*the applicant has not himself taken a further step in the cause with knowledge of the irregularity*". Because the Opposing Affidavit resisting Summary Judgment was served simultaneously/together with the application in terms of Rule 30(1), it is contended that Ms Van der Colff is precluded by Rule 30(2)(a) to make application in terms of Rule 30(1).

10. A further step is some act that advances the proceedings one stage nearer completion[34]. Different phrases are utilized to express the same idea, such as (i) a step that advances the finalisation of the case and/or (ii) a step that at one stage or another affects the development of the suit as a whole.[35]

11. In *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 (WLD) at 904D-H an important rider was added in relation to the provisions of Rule 30(2)(a). It was held:

> "*I do not find these dicta sufficient. As far as I have been able to discover, none of the cases looks at the limitation (now contained in Rule 30(2)(a)) in the context of the purpose which it serves. Essentially that purpose is to create a species of estoppel: a party may not be heard to complain of an irregular procedural step if he acts in a manner which is at variance with an objection to that irregularity, even though he did not when taking the further step appreciate*

[34] *Petterson v Bernside* 1940 NPD 403 at 406.
[35] *Cyril Schmedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E and *SA Metropolitan Lewensversekerings Maatskappy v Louw NO* 1981 (4) SA 329 (O) at 333H-334E.

that the step of the other party was irregular. Presumably, there was a recognition that the taking of a further step was likely to lead the other party to act in reliance on that conduct and it was thought undesirable to open the way to disputes on wasted costs.

If that is the thinking behind the limitation, then the Petterson v Bernside dictum needs to be reformulated along the following lines: a further step in the proceedings is one which advances the proceedings one stage nearer completion and which, objectively viewed, manifests an intention to pursue the cause despite the irregularity".

12. I agree with *Jowell supra* particularly when one has regard to the provisions of the Rule 30(4) that provides that until a party has complied with any order made in terms of Rule 30, such party shall not take any further step in the cause. Put differently, the main proceedings (such as the Summary Judgment) continues until an order has been made in terms of Rule 30. The objecting party in terms of Rule 30 is therefore faced with a choice. However, the problem facing such a party is that the irregularity complained of could have serious prejudicial consequences if such party does not act in terms of Rule 30.

13. The facts of this case illustrate the predicament. On the one hand, Ms Van der Colff complains about irregular steps taken by ABSA that is prejudicial to her and which accordingly requires that she pursues an application in terms of Rule 30(1). On the other hand, she is confronted with an application for Summary Judgment that was already provisionally enrolled for hearing on 1 September 2022 and she also wishes to oppose such application for Summary Judgment. Should she simply have filed an Opposing Affidavit resisting Summary Judgment, then a species of estoppel would have been raised against her in terms of Rule 30(2)(a) if she thereafter proceeded to launch her application in terms of Rule 30(1). In such a case, she would have lost her right to challenge the irregularities despite its prejudicial effects. No such complaint would have been raised had she firstly proceeded with her application in terms of Rule 30(1) and thereafter proceeded to file her Opposing Affidavit resisting Summary Judgment – even if it was perhaps minutes or hours later. Nevertheless, in the latter situation, it is clear that if she firstly filed her

application in terms of Rule 30(1), she would in any event have been required to file her Opposing Affidavit resisting Summary Judgment as the main proceedings are not stayed until an order in terms of Rule 30(1) is granted. Having regard thereto that both the Opposing Affidavit resisting Summary Judgment and her application in terms of Rule 30(1) were served simultaneously/together by way of the email of 23 August 2022 as well as her explanation for having done so, I am of the view that these are quite opposed to an inference that she intended to pursue and/or defend the main cause despite the irregularity. Accordingly, and in my view, the procedure Ms Van der Colff adopted in the circumstances of this case did not preclude reliance upon Rule 30(1).

14. The next questions that arise are whether (i) the extraction of the original Rule 32 application from CaseLines constituted a withdrawal thereof; and (ii) the further Rule 32 application that was filed on CaseLines on 3 August 2022 constitutes a new and/or fresh Rule 32 application.

15. Rule 41(1)(a) provides:-

> *"A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party."*

16. It is common cause that ABSA did not serve and file a Notice as contemplated in Rule 41(1)(a) and therefore it was common cause between the parties that there was no formal withdrawal of the original Rule 32 application. Nevertheless, Ms Van der Colff's attorney argued that by withdrawing and/or extracting the original Rule 32 application from CaseLines, that such action still constituted a withdrawal thereof – in other words, a type of informal withdrawal that is the equivalent to a formal withdrawal in terms of Rule 41(1)(a).

17. I accept that CaseLines is a platform for filing documents, but not a platform for service[36]. On a common-sense basis, the mere extraction and/or removal of documents from CaseLines ought not and/or should not be regarded as a withdrawal of the particular proceeding concerned. If I may use the example of physically going to the Registrar's office (a situation that existed prior to CaseLines):- the mere extraction and/or removal of documents and/or even the entire Record from the physical court file in the Registrar's office was not and could not have been interpreted as a withdrawal of the particular proceeding concerned and I have been unable to find any case holding as such. I surmise that some of the reasons therefore are, *inter alia*, (i) firstly, there is a particular procedure prescribed for withdrawal that has to be complied with in terms of Rule 41(1)(a) as quoted *supra*; and (ii) secondly, it frequently happened that documents from the physical court files would be extracted and/or removed in order to comply with some or other directive and/or Rule, such as, but not limited to, index and pagination, etc. In other words, it could hardly in such circumstances be suggested that to extract documentation from the physical court file is some type of withdrawal of the proceedings (whether formally and/or informally). I am of the view that this line of reasoning applies and/or should apply *mutatis mutandis* to CaseLines.

18. Futhermore, and on a legal basis, I believe that the answer is to be found in the principles governing waiver. Waiver is first and foremost a matter of intention. Whether it is the waiver of right or a remedy, a privilege or a power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived. The test to determine intention to waive is objective. That means, first, that the intention to waive, like intention generally, is adjudicated by its outward manifestations; and secondly, that mental reservations, not communicated, are of no legal consequence and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes. The knowledge and appreciation of the party alleged to have waived is further an axiomatic aspect of waiver. The outward manifestations can consist of words; of some other form of conduct from which the

[36] *First Rand Bank Ltd t/a Wesbank v Maenetja Attorneys* (unreported) GP Case: 80057/2021 dated 17 September 2021 at par 58.

intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. It is furthermore trite that no one is presumed to waive rights as a result of which, one, the *onus* is on the party alleging it and, two, clear proof is required of an intention to do so. The conduct from which waiver is inferred must be unequivocal, that is to say, consistent with no other hypothesis[37].

19. Having regard to ABSA's explanation supra, I am of the view that ABSA had no intention to waive the original Rule 32 application by extracting same from CaseLines. They simply wanted to correct certain errors that was discovered when their attorney wanted to find out why the Summary Judgment had not been allocated a date on the unopposed motion roll. In fact, after the corrections, ABSA's attorney even notified Ms Van der Colff's attorney about the incorrect annexure that was attached. Furthermore, and save for the errors that was endeavoured to be corrected, the original Rule 32 application is in all respects identical with the purported further Rule 32 application. The conclusion is inescapable that ABSA had no intention to waive and that the reasonable person in Ms Van der Colff's shoes would also not have interpreted their attorney's conduct as a waiver of the original Rule 32 application by simply extraction and/or removing same from CaseLines.

20. The aforesaid conclusion carries with it that there was only one application for Summary Judgment – the one that I termed the original Rule 32 application. It is therefore not a case of there being two applications for Summary Judgment of which the first one was withdrawn. Put differently, the second and/or further Rule 32 application is nothing more than the original Rule 32 application whereby the errors were attempted to be corrected.

21. Although I accept for purposes hereof (without deciding) that the manner and/or *modus operandi* utilized by ABSA's attorney to correct the errors constitute irregular steps entitling Ms Van der Colff to apply in terms of Rule 30(1), my above finding inevitably results therein that her application in terms of Rule 30(1) must be dismissed. This is because:-

---

[37] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at par 15-18.

21.1 the Rule 30(1) application is directed to set aside the second and/or further Rule 32 application of 3 August 2022. The problem, however, is that there is no second and/or further Rule 32 application as I found earlier. The reason therefore is that the second and/or further such application was merely the original Rule 32 application that endeavoured to correct the errors. Put differently, there was and is only one application for Summary Judgment before the Court and that is the one of 28 July 2022 that I termed the original Rule 32 application;

21.2 it follows that the Rule 30(1) application can therefore only be directed at the original Rule 32 application or is at least susceptible to such interpretation. The problem is that Ms Van der Colff has neither alleged nor shown anything concerning the original Rule 32 application that constitutes an irregular step; and

21.3 the inevitable result is that because nothing of or concerning the original Rule 32 application (with its errors) constitute an irregular step, that the application in terms of Rule 30(1) falls to be dismissed.

22. It follows further from the above that when I deal with the Summary Judgment application *infra*, that I must consider the original Rule 32 application with its errors.

23. As regards costs, I consider that it will be fair that the general rule be applied in the exercise of my discretion, namely that the successful party is entitled to his/her costs.[38]

Summary Judgment

24. ABSA's Amended Particulars of Claim contains two claims against Ms Van der Colff. The relief sought in respect of both is the same. In this regard, ABSA sought in respect of both claims the following:

24.1 Cancellation of the ISA;

[38] Erasmus Superior Court Practice [Second Edition] at D5-7 [Service 20/2020].

24.2 An order for the return of the motor vehicle;

24.3 An order for payment of R648,117.47 together with interest thereon at the rate of 10.360% less the salvage value of the motor vehicle and which order is postponed *sine die*; and

24.4 Costs of suit plus Sheriff's fees.[39]

25. The first claim is premised on the conclusion of the ISA by means of an online application between ABSA and Ms Van der Colff on 12 July 2019 and in terms whereof, *inter alia*, (i) Ms Van der Colff purchased from ABSA a certain 2013 BMW 435i Coupe Sport AT F32 [hereinabove and hereinafter "*the motor vehicle*"] for the sum of R472,921.12; (ii) ownership in the motor vehicle will remain vested in ABSA and would only pass to Ms Van der Colff upon receipt of all monies owing; (iii) the purchase price was payable in 72 monthly instalments of R10,054.46 and beginning on 31 August 2019; (iv) in the event of Ms Van der Colff failing to effect any payment or committing any other breach, ABSA would be entitled to, *inter alia*, after due demand cancel the ISA, take the motor vehicle back and recover from her all amounts presently outstanding and those which would become due in future less the value of the motor vehicle as at the date on which ABSA obtains possession; and (v) a certificate signed by any manager of ABSA showing any amount owing shall be sufficient proof unless the contrary is proven of any amount due. A copy of the ISA is attached as Annexure A thereto. ABSA alleges further that it complied with its obligations by delivering the motor vehicle to Ms Van der Colff and for this purpose ABSA also attached as Annexure A7 the Release Note and Acknowledgement of Delivery signed by Ms Van der Colff acknowledging receipt of the motor vehicle. Ms Van der Colff is alleged to be in breach of the ISA in failing to pay the monthly instalments and/or failing to pay all insurance premiums in respect of the subject vehicle as a result of which ABSA elected to cancel the ISA.[40]

[39] CL05-11.
[40] CL05-42 to CL05-48 [paragraphs 1 – 12.10]

26. In view of the defence(s) raised by Ms Van der Colff [and to be dealt with *infra*], it becomes necessary to illustrate what is evidenced by the annexures attached to the Amended Particulars of Claim. In this regard:

26.1 As revealed Annexure A constitutes a copy of the ISA. I have already dealt with some of its terms hereinabove and merely note that all the boxes that were required to be completed were done so electronically. Put differently, it is evidently clear that Ms Van der Colff did not in manuscript complete the said boxes. In addition, the places provided for the signature of both Ms Van der Colff and ABSA remained blank and was therefore not signed by them in manuscript [in the form of wet ink]. Furthermore, and on the bottom half of each page and printed diagonally appears the following endorsement:

> *"Signed online*
> *By Sandra Karen Yolinda van der Colff*
> *6212270150084*
> *Account No: 9[....]0*
> *2019-07-12 10:48:57.0"* [41]*;*

26.2 It is patently clear that the ISA consist of 8 pages. However, further and/or other documentation were also attached under the collective reference of Annexure A without any elaboration whatsoever. Even though I have grave doubts that these constitute part of the ISA, I will for purposes of this judgment accept that they are in actual fact part of the ISA. I proceed to indicate synoptically what these other documentations evidence:-

26.2.1 A document headed "*National Credit Regulator – Notice in terms of Section 97(3) of the National Credit Act 34 of 2005*". My same comments in respect of the ISA *supra* apply. In other words, all the blocks were clearly filled out and/or completed electronically and there is no manuscript signature of Ms Van der Colff appearing thereon at the place provided. In addition, it contains the same diagonal endorsement[42];

[41] CL01-11 to 18.
[42] CL01-19 to CL01-20.

26.2.2 A document entitled "*National Credit Regulator – Nomination and Authority granted in terms of Section 106(6)(b) of the National Credit Act 34 of 2005".* My same comments in relation to the ISA apply here as well; [43]

26.2.3 A document entitled "*Authorisation for DebiCheck Debit Order/Debit Order in favour of ABSA Bank Limited ("ABSA") "You/We/Us"* and my same comments in respect of the ISA *supra* apply[44];

26.2.4 A document that appears to be an interim bank statement in respect of Ms Van der Colff's FNB Premier Select Cheque Account under account number 6[....]3 and which reflects entries for the period from 18 April 2019 to 22 June 2019. This bank statement also bears the stamp of FNB of 3 July 2019. Of relevance are the following appearing from this bank statement, namely (i) a deposit of R55,500.84 on 17 May 2019 with the description reading "BA4805793004" thereby eliminating a debit balance of R3,764.79 and leaving Ms Van der Colff with a credit balance of R51,736.05; (ii) a credit entry of R11,736.16 on 24 May 2019 with the description of "*Salary*"; and (iii) similarly, a further credit into her account on 25 April 2019 of R11,757.63 with the description "*Salary*"[45];

26.2.5 A document entitled "*Credit Application*" consisting of three pages and my same comments *supra* in respect of the ISA apply here as well [46];

26.2.6 A document entitled "*Release Note and Acknowledgement of Delivery*" consisting of two pages and my comments *supra* in respect of the ISA apply here as well. However, this particular document does not contain the diagonal endorsement [47];

---

[43] CL01-21.
[44] CL01-22 to CL01-23.
[45] CL01-24 to CL26.
[46] CL01-27 to CL01-29.
[47] CL01-30 to CL01-31.

26.2.7 A copy of Ms Van der Colff's Identity Document and which copy appears to have been made by an entity with the name Floorfin (Pty) Ltd. In fact, the word "*Floorfin*" appears to be embossed diagonally across her Identity Document [48];

26.2.8 A one page document which appears to be a salary slip issued on 30 June 2019 by a company with the name of Digit Earthmoving (Pty) Ltd in favour of Ms Van der Colff. Same reflects that she is purportedly a Regional Manager of the said company and that her basic monthly salary is R65,000.00 per month. After deductions, her nett pay is reflected as R46,286.79[49]; and

26.2.9 A document that appears to be a copy of the Registration Certificate in respect of the motor vehicle reflecting that ABSA is the title holder while Ms Van der Colff is the owner. In addition, same was issued on 16 July 2019 at Durban (Windsor Park).[50]

26.3 Annexure A1 that constitutes a copy of the "*Fais disclosure and needs analysis*". This document consists of six pages and was signed and initialled by Ms Van der Colff at the places provided in manuscript (in other words, wet ink) and is dated 12 July 2019. This particular document concerns her needs for and/or requirements in relation to the insurance for the motor vehicle and most, if not all, of the blank spaces was completed electronically. However, where Ms van der Colff was required to accept and/or decline certain proposals therein, one can vividly see that she signed at the spaces provided whereby she either accepted or declined the relevant proposal. In addition, this document does not contain the diagonal endorsement[51];

26.4 Annexure A2 that constitutes a copy of a document entitled "*Proposal/Schedule for Extended Cover Insurance"* together with the terms and

[48] CL01-32.
[49] CL01-33.
[50] CL01-34.
[51] CL05-52 to CL05-57.

conditions applicable thereto and consists collectively of thirteen pages. My same comments *supra* in respect of the ISA apply here also[52];

26.5 Annexure A3 that constitutes a copy of a document entitled "*National Credit Regulator – Disclosure in terms of Section 106(5)(b) of the National Credit Act 34 of 2005*". My same comments *supra* in respect of the ISA apply here as well[53];

26.6 Annexure A4 that constitutes a copy of a document entitled "*National Credit Regulator – Authority granted in terms of Section 106(6)(e) of the National Credit Act 34 of 2005*" and my same comments in respect of the ISA *supra* apply here as well[54];

26.7 Annexure A5 that constitutes a copy of a scan of Ms Van der Collf's drivers licence and which appears on the letterhead of Floorfin. It is noted that a certain Mr Jamie Patrick Dennigan (his ID Number is then given) thereby confirms that he scanned the barcode of the original drivers licence as presented to him by Ms Van der Colff and that the image and information as displayed therein correspondents to the image and information on the original drivers licence. Same is then dated 12 July 2019 with a timestamp of 11:09:10[55];

26.8 Annexure A6 that constitutes a copy of what purports to be Ms Van der Colff's income and expenditure statement. Same appears to have been signed by her at the bottom thereof in manuscript (in wet ink) and is dated 12 July 2019. The information therein was nevertheless electronically recorded and/or recorded by means of a computer and reflects that her gross remuneration is R65,000.00 and that she takes home R46,286.00. After taking into account her monthly debt repayments and living expenses, her disposable income is reflected as R20,458.00[56]; and

---

[52] CL05-58 to CL05-70.
[53] CL05-71.
[54] CL05-72.
[55] CL05-73.
[56] CL05-74.

26.9 Annexure A7 that constitutes a copy of a document entitled "*Release Note and Acknowledgement of Delivery*" and that is very similar to the one already dealt with *supra*. The difference is that the employee of the relevant dealership signed at the space provided, stated his employee number as well as the date in manuscript on the 1st page thereof which is left blank on the first Release Note forming parting of Annexure A. In addition, and on page 2 thereof, Ms Van der Colff signed in the presence of a witness (and it appears that the witness's signature is the same as that of the employee of the dealership), thereby confirming that she took delivery of the motor vehicle on 12 July 2019 at Durban. The particulars as to the spaces provided for when delivery was taken, and her signature signifying same was completed in manuscript (in other words, in wet ink). It is also clear that she ticked the relevant box in manuscript indicating where the requisite section 129 notice may be provided and/or delivered.[57]

27. ABSA's <u>second claim</u> against Ms Van der Colff in its Amended Particulars of Claim appears at paragraph 13 and onwards thereof.[58] This claim is premised on a fraudulent misrepresentation which entitled ABSA to cancel the ISA had it known of the true facts. The allegations in this regard are: (i) on 12 July 2019, Ms Van der Colff applied for finance from ABSA for the purchase of a motor vehicle and falsely represented her income to ABSA by the submission of a fraudulent payslip reflecting her income as R65,000.00 per month when in fact her income was approximately R11,736.16 per month; (ii) Ms Van der Colff knew it to be false; (iii) in amplification of her misrepresentation, Ms Van der Colff signed Annexures A1, A2 and A6; (iv) Ms Van der Colff intended that ABSA should act thereon and provide finance for the purchase of the motor vehicle; (v) ABSA acted on such representation that was false by providing finance for the purchase of the motor vehicle for the sum of R723,921.12; and (vi) Ms Van der Colff duly received the benefit of the motor vehicle and proof thereof as Annexure A7 was attached that was signed by Ms Van der Colff acknowledging delivery of the motor vehicle.

28. The following is evident from Ms Van der Colff's Plea:-

[57] CL05-75 to CL05-76.
[58] CL05-49 to CL05-50.

28.1 She denies having chosen a *domicilium citandi executandi*;

28.2 She denies that a valid agreement was concluded between them as she denies having made any online application to ABSA and indicates that her only interaction with ABSA was by physically attending ABSA's Durban branch as more fully set out in paragraphs 18 to 25 thereof. As a result, no online application could have been done and concluded. She also denies having signed the ISA that is attached as Annexure A and she also denies the diagonal endorsement thereof and which purports to be her online signature. In particular she denies a valid or binding signature or that the alleged online signature is hers[59];

28.3 She furthermore denies that any legal or binding ISA was or could have been concluded due to, *inter alia*, ABSA's purported failure to do a proper credit assessment as required in terms of the NCA as the salary slip forming part of Annexure A is incorrect and does not reflect her correct employer or remuneration. She specifically pleads that she has been employed by Kuene and Nagel for the past 15 (fifteen) years and that at the time when the ISA was allegedly entered into, she was earning a net amount of R11,000.00 and R12,000.00 per month. She then draws attention to the salary slip forming part of Annexure A and indicates that it does not reflect a salary amount which would have allowed ABSA to issue her with credit in the sum advanced. Of importance is that she further alleges that ABSA was a party to the fraud committed against her as appears more fully from paragraphs 18 to 25 thereof;[60]

28.4 Ms Van der Colff further denies the annexures attached as Annexure A1 to A6 (dealt with comprehensively above) and she specifically denies having made any application or signed any documents online[61]. In view of the above, she also denies the terms of the ISA as alleged by ABSA and accordingly denies the term dealing with a Certificate of Balance because there is no agreement between the parties in the terms as alleged by ABSA. In addition, and because the Certificate

[59] CL07-1 to CL07-2 [paragraphs 2 and 3].
[60] CL07-2 to CL07-3 [paragraph 4].
[61] CL07-3 [paragraph 5].

of Balance was signed by a "*team leader*" and not a manager, such certificate does not comply with the Certificate Clause in the ISA[62];

28.5 Ms Van der Colff further expressly denies that she personally received the motor vehicle as pleaded and drew attention to the fact that the "*Release Note and Acknowledgement of Delivery*" forming part of Annexure A is unsigned, while such annexure which was attached as Annexure A7 is denied as set out in paragraphs 18 to 25 thereof. Further to the aforegoing, and by virtue of what she has already pleaded, she denies that she is in breach and also denies the calculation of the purported arrears[63];

28.6 Although she admits demand, the jurisdiction of the Court and receipt of the Section 129 notice, she denies that she was required to act in terms of such a notice and again pleads that she is not in possession of the motor vehicle claimed[64];

28.7 As already indicated, she stated that further details will follow as per paragraphs 18 to 25 of her Plea. Paragraphs 18 to 25 of her Plea deals specifically with paragraphs 13 and onwards of ABSA's Amended Particulars of Claim. I quote the content thereof *verbatim*:-

"18. The content hereof is denied. The defendant specifically pleads that she was the victim of fraud perpetrated as follows:

> *18.1 During July 2019 the defendant was approached by a Mr Phillip Lloyd Sander with Identity Number 7[....]4 and with residential address at [....] N[....] S[....], D[....] L[....] R[....], Johannesburg with an offer to purchase a BMW 435i M Sport A/T (F32) with registration number NJ[....] ("the vehicle").*

[62] CL07-3 [paragraphs 6 and 7].
[63] CL07-3 to CL07-4 [paragraphs 9, 10 and 11].
[64] CL07-4 to CL07-5 [paragraphs 11 – 16].

18.2 Mr Sander had previously assisted the defendant in securing various funds and as a layperson, the defendant had not noticed any concerns in the transactions proposed by Mr Sander or concluded with him.

18.3 Mr Sander advised the defendant that he had a buyer for the vehicle and that she would in effect act as "bridging finance" in the deal after which she would be paid a fee for her involvement. Mr Sander further confirmed that either he or the buyer of the vehicle would pay all monthly instalments due on the vehicle until such time as the transaction was completed. Mr Sander also conveyed that the deal was approved by the plaintiff as their agents would draw the necessary paperwork.

18.4 Acting on advice of Mr Sander, the defendant provided him with her financial details to submit to an agent of the plaintiff to prepare the contract documentation. The defendant specifically denies that she provided Mr Sander with any proof of income or payslip other than from Kuene Nagel Freight Company.

18.5 The "deal" as stated above was completed at an ABSA Bank branch in Durban Central and Mr Sander provided the travel arrangements for the defendant to attend at the specific branch. The defendant signed various documents at the ABSA branch in Central Durban without perusing same, and she was advised that these documents reflected the agreement as discussed with Mr Sander. The plaintiff was represented by one of its agents, who had prepared the documents which were signed by the defendant, and the defendant signed the agreement based on the perceived validity of the agreement being prepared by an agent of the plaintiff.

18.6 After the documents at the ABSA branch were signed, the defendant was taken to Kent Motors to sign further documents, after which she returned to Johannesburg without taking possession of the vehicle, as the arrangement was for Mr Sander to drive the vehicle to Gauteng. The defendant only saw the vehicle once in Johannesburg, when Mr Sander attended at her premises to

show her "proof of delivery" before he would attend to deliver the vehicle to its buyer.

18.7 On 15 July 2019 the defendant received R60,000.00 to use as payment of the instalments for the vehicle, in accordance with the terms proposed by Mr Sander. From 15 July 2019 the defendant never received any further instalments and Mr Sander absconded with the vehicle.

19. Ad paragraph 14:

The content hereof is denied, and the plaintiff put to the proof thereof. The defendant specifically pleads that all the documents she signed were prepared by an agent of the plaintiff, and as such she could not have acted with intent to defraud the plaintiff. The plaintiff could not have been misled regarding the content of the documents, given that the plaintiff had prepared the documents and therefore tacitly accepted the content.

20. Ad paragraph 15:

The content hereof is denied and the plaintiff is put to the proof thereof. The defendant specifically denies that she signed the proposal for extended cover insurance and submits that the electronic signature reflected on this document is clear evidence that the agent(s) of the plaintiff were involved in the fraud perpetrated against the defendant.

21. Ad paragraph 16:

The content hereof is denied. The defendant submits that the plaintiff was party to the fraud perpetrated against the defendant, as the defendant made no representations to the plaintiff outside of the actions described above.

22. Ad paragraphs 17 and 18:

The content hereof is denied, and the plaintiff put to the proof thereof. The defendant specifically denies that she received the benefit of the vehicle, or that she entered into an instalment sale agreement with the plaintiff. The only agreement the defendant entered with the plaintiff was the agreement as set out in paragraph 18 whereby the defendant would act as "bridging finance" for the sale of a vehicle.

23. Ad paragraph 19:

The content hereof is denied. The defendant specifically denies receipt of any funds on loan.

24. Ad paragraph 20:

The content hereof is denied, and the plaintiff put to the proof thereof. The defendant specifically pleads that the plaintiff, acting through its duly appointed agent, knowingly entered into an agreement as set out in paragraph 18 above, alternatively the plaintiff was party to the fraud against the defendant.

25. Ad paragraph 21:

The content hereof is denied. The defendant further pleads that she duly brought the fraud perpetrator against her to the attention of the plaintiff, prompting the plaintiff to investigate the involvement of its agents in the matter. The plaintiff is accordingly aware that the defendant is not in possession of the vehicle and cannot return same to the plaintiff at present. The defendant submitted that the plaintiff is aware of the present location of the vehicle but has failed and/or refused to assist the defendant in resolving the fraud perpetrated against her."[my own emphasis]

29. As required by Rule 32(2)(b), ABSA in its Supporting Affidavit attempted to explain briefly why the defences as pleaded does not raise any issue for trial. In this regard:-

29.1 As regards *quantum*, ABSA attached a revised Certificate of Balance reflecting the current arrears, the full outstanding balance and accrued interest as Annexure SJ2[65]. In addition, this revised Certificate of Balance was signed by a "*manager*" and not the "*team leader*";

29.2 As regards her allegations of fraud, ABSA endeavoured to put a difference spin on her version and without any probative evidence in support thereof. In this regard, *inter alia*, ABSA alleged that from her averments the following could, *inter alia*, be ascertained, namely (i) she and Sander conspired jointly to defraud ABSA; (ii) because it is not the first financial transaction with Sander, they have previously committed fraud; (iii) Ms Van der Colff purportedly admits that she would derive a financial benefit from the fraudulent transaction in the form of a payment and/or financial fee; (iv) pursuant to conspiring with Sander, she knowingly misrepresented to ABSA's agent that she is financially able to meet the financial obligations by providing fraudulent financial documentation to induce ABSA to conclude the ISA and delivering the motor vehicle to her and in so doing she knew that such representations were false. Furthermore, it was submitted that insofar that Ms Van der Colff did not knowingly commit fraud and that she was induced by Sander, that a person who is induced to sign an agreement by fraud or misrepresentation and who is unaware of the nature of the document that he/she is signing, will nevertheless be bound if the other party to the transaction is innocent and unaware of the mistake – ie *quasi mutual assent;*[66]

29.3 As regards her denial that she made an online application and actually physically attended at ABSA's Durban Central branch, ABSA endeavoured to explain why such defence has no merit and/or does not raise a triable issue with reference to the various annexures attached to the Amended Particulars of Claim and alleged, *inter alia*, in this regard the following:

29.3.1 She attended the Durban Central branch with the intention of concluding the agreement. She signed Annexure A1 and provided copies of her fraudulent financial documentation to ABSA. This included a copy of her drivers

[65] CL-08 – CL-64 [paragraph 18 - 20].
[66] CL08-65 to CL08-68 [paragraphs 23 – 35].

licence [Annexure A5] that was scanned by ABSA's agent at 11:09:10 on 12 July 2019;

29.3.2 On the same date, she signed the Release Note acknowledging delivery and took delivery of the motor vehicle as appears from Annexure A7;

29.3.3 Having regard to the other documentation that was also signed together with the diagonal endorsement and the fact that she took delivery of the motor vehicle, it was contended that there was offer and acceptance as a result of which Ms Van der Colff is bound;

29.4 As regards the contention that ABSA failed to conduct a proper credit assessment, ABSA pointed out that it is Ms Van der Colff that provided fraudulent financial documentation which induced ABSA to enter into the agreement. In so doing, Ms Van der Colff did not fully and truthfully answer ABSA's request for information. In other words, ABSA invoked Section 81(4) of the NCA; and

29.5 As regards the averment that Ms Van der Colff never took delivery of the motor vehicle, ABSA again referred to Annexure A7 which Ms Van der Colff signed[67].

30. The following is, *inter alia*, apparent from Ms Van der Colff's Opposing Affidavit resisting Summary Judgment, namely:-

30.1 The capacity of Thomson to depose to the Supporting Affidavit was placed in dispute[68]. In this regard, his authority to depose to the Supporting Affidavit constituted the ground for such dispute.[69] In addition, reference was again made to the fact that the incorrect annexure was attached and which annexure did not refer to Thomson[70]- put in other words, reliance was placed on the errors;

[67] CL08-70 to CL08-76.
[68] CL08-34 [paragraph 8].
[69] CL08-35 [paragraph 9].
[70] CL08-35 to CL08-36 [paragraph 9].

30.2 She denied that Thomson can swear positively to the facts contained in the Supporting Affidavit. This denial was raised in relation to her defences and in particular to an affidavit she provided to the internal investigators of ABSA as far back as January 2021[71];

30.3 She persisted with her denial of having entered into an agreement with ABSA via an online application and continuously refers back to her Plea. As such, she concludes that as she did not complete any online application, that the document relied upon by ABSA cannot be the correct agreement between herself and ABSA. In this regard, she also states that she physically signed at an ABSA branch and that an employee of ABSA was involved in the fraud perpetrated against her[72]. In addition, she states that all the documentation was prepared by an agent of ABSA and that she did not complete any documents submitted to ABSA as she did not engage with ABSA and therefore could not have made any misrepresentation as alleged[73];

30.4 As regards her salary slip, she states that same is falsified and/or fraudulent. In this regard, she states that she provided a copy of her payslip from Kuehne & Nagel to Mr Sander and that it is he (that is Mr Sander) who at all material times engaged with ABSA until she attended ABSA's branch in Durban. She states further that at no point did she prepare any application to ABSA and that the only representations made, were made by an agent of ABSA when she attended at such branch, who informed her that all the documents were in order. In other words, the papers she signed with ABSA were prepared by an agent of ABSA, who indicated they were compliant[74];

30.5 She again confirms that she has never been in physical possession of the motor vehicle; and for the most part, she places the conclusions and/or averments made by ABSA in its Supporting Affidavit in perspective with reference to her Plea. In this regard, it should be noted that having regard to what Mr Sander told her concerning the nature of the transaction, that she states that ABSA was aware

[71] CL08-36 to CL08-37 [paragraphs 10 – 12].
[72] CL08-37 [paragraph 13] and CL08-38 [paragraph 16].
[73] CL08-38 [paragraphs 17.1 and 17.2].
[74] CL08-39 [paragraphs 17.3, 17.4 and 18].

of such nature and that she would not receive the benefit of the vehicle. This is so because of the involvement of ABSA's agent in preparing the documentation and that such agent was aware of the nature of the agreement she had with Mr Sander[75];

30.6 Attached to her Opposing Affidavit is a tax invoice issued by Mango Airlines setting out her flight itinerary to travel to from Lanseria to Durban and back on 12 July 2019 as well as certain of her bank statements pertaining to her cheque account held at FNB indicating what amounts she received as well as her salary. Of particular importance, is a document entitled "*Affidavit*" that she provided to the internal investigators of ABSA as far back as 25 January 2021 and wherein she indicates her history with Sander as well as the happenings surrounding the transaction for the motor vehicle during July 2019. In this regard she testifies*, inter alia*, to the following:-

30.6.1 She is a widow and receptionist employed at Kuehne Nagel Freight Company for the past 15 years and has little experience in commercial loan transactions. In addition, she has never purchased any vehicle before 2019 on an Instalment Sale Agreement;

30.6.2 During December 2017, she met Sander. During 2018 Sander informed her of his connections he had with banking institutions in order to arrange for finance pertaining to a proposed holiday trip with her friends. She was introduced to one of his connections at Nedbank who provided her with a loan for such trip. At a later stage during 2018, he also came to her house and asked whether she requires more/ other finance which he will also be able to arrange. As she did not require finance at that time, he responded that there might be a time that she requires immediate finance for emergencies and that he will arrange to get a loan from a bank on favourable terms for her. She agreed as a result of which she provided a copy of her ID document and 3 (three) months bank statements. It is patently clear that it is based on these types of representations that Ms Van der Colff became involved in commercial

[75] CL08-40 to CL08-42 [paragraphs 26 – 30.4].

loan transactions with financial institutions. The result thereof was that she receives certain funds from such financial institutions and the details thereof are then provided;

30.6.3 It appears that things did not go well with Mr Sander as a result of which he later asked her for monies and which she would in most cases pay to him either in cash or through an electronic funds transfer in amounts ranging between R4,000.00 to R5,000.00. From paragraph 20 and onwards of the said Affidavit[76] she sets out the happenings surrounding the finance provided by ABSA in respect of the motor vehicle and I take the liberty to quote same *verbatim*:-

"20. During July 2019 after becoming highly frustrated as I have not received any money from Mr Sander. After pressurizing him, he then advised that he has a contact where I can purchase a BWM 435i M Sport A/T (F32) with registration number NJ91675. Mr Sander informed me since I don't have a vehicle I will qualify easily for a loan. Furthermore, Mr Sander informed me that the vehicle is almost worth R1,000,000.00 and that he has a purchaser that will be willing and able to buy the vehicle. As a matter of fact, Mr Sander informed me that he showed pictures of this vehicle to the interested buyer and I will get my money back by reselling the vehicle. I have to pause again by stating that initially Mr Sander said that he would like to buy the vehicle for himself and that he is making a few big transactions where he would be able to buy the vehicle for R1,000,000.00. The new buyer was therefore a reassurance that I would definitely be able to resell the vehicle which was sold to me far beneath the market value. That is the reason I purchased the vehicle.

21. On 12 July 2019, Mr Sander informed me that the new buyer obtained a flight ticket with Mango Airlines for me to travel to Durban with reference number SKXLZB. Mr Sander promised that as from date that I am signing the agreement to purchase the vehicle until date the vehicle will be resold, Mr Sander or the new buyer will pay the monthly instalments.

[76] CL08-92.

22. Upon my arrival at the Durban Airport, an unknown person fetched me from the airport and took me to ABSA Bank in Central Durban. On my arrival at ABSA I asked to see a certain person, which name I think was given to me by Mr Sander, but whose name I unfortunately cannot recall. I am sure that on the bank documentation the name of the person will be depicted.

23. At ABSA, all documentation was ready for signature. I was thereafter taken to Kent Motors. Upon my arrival at Kent Motors, I attend the dealership. It was obvious that everybody at the dealership was acquainted with my expected arrival and were very friendly. After signing the papers at the dealership with the manageress, one Joyce, the motor vehicle was pointed out to me in the street. I was thereafter taken back to the airport and flew back to Johannesburg.

26. On 15 July 2019 I received in my bank account R60,000.00 as first instalment payment for the interim until the vehicle was registered in the name of the new buyer. I therefore paid two instalments on the instalments for the vehicle with the R60,000.00 that I received. I also repaid instalments on the loans which I received."

Deliberation

31. As regards the issue as to whether Thomson has personal knowledge, I find no merit therein. The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the Court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affAccavit, is sufficiently reliable to justify the grant of Summary Judgment.[77] It was therefore not required of Thomson to verify the defences that Ms Van der Colff will rely upon, but to verify the cause of action. As direct knowledge of the material facts underlying the cause of action can also be gained by a person who has possession of all the documentation, I

[77] *Stanford Sales & Distribution v Metraclark* [2014] ZASCA 79 (29 May 2014) at paragraph 11.

consequently find in the circumstances of this case that Thomson has personal knowledge and did swear positively to the facts.

32. As regards the issue as to whether Thomson was authorised, I find that same also has no merit. It will be recalled that Thomson merely testified that he is duly authorized to depose to the Supporting Affidavit – he alleged nothing pertaining to authority to launch and/or prosecute the Summary Judgment. The difference is important because it is trite that a witness may testify even though such witness is not authorized.[78]

33. Insofar as the argument of Ms Van der Colff pertains to authority to institute or prosecute the Summary Judgment, it is patently clear that Rule 32 does not in its terms require any form of authority (such as a resolution and/or minute) to accompany such application when instituting and/or launching same. The proper procedure to follow when authority is challenged to institute and/or prosecute an application is that laid down by Rule 7(1). As this procedure was not followed, this Court need not even deal with the question of authority.[79] From this it also follows that it was not even necessary to attach the Internal Mandates Authorisation (or some other variation thereof) to the Supporting Affidavit. In any event, as such annexure was abandoned and which abandonment was accepted, nothing turns on the issue of authorisation in view thereof that there was no challenge in terms of Rule 7(1).

34. As regards the issue whereby Langa was identified as the deponent to the Supporting Affidavit in the Notice of Motion while, in fact, it was Thomson who was such deponent, I also find that this argument has no merit. The reason therefore is that purely technical defences are not allowed in Summary Judgments. In this regard, it was held, *inter alia*, that:- *"Verlof om te verdedig was nie bedoel as 'n beloning vir noukeurige tekskritiek nie"*[80] and "*… where it is clear that the Rules have substantially been complied with and there is no prejudice to the defendant, I think that the Court should condone a failure to comply with a technical requirement of the*

[78] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) and *Ganes v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) at paragraph 19.
[79] *ANC Umvoti Council Calcus v Umvoti Municipality* 2010 (3) SA 31 (KZP) at paragraphs 28 and 29.
[80] *Bank van die Oranje-Vrystaat Bpk v OVS Kleiwerker* 1976 (3) SA 804 (O) at 807.

Rules"[81]. Even though Langa was wrongly referenced, it is clear that the deponent to the Supporting Affidavit was Thomson and Ms Van der Colff was not prejudiced by such oversight/error. In fact, and in this regard, prejudiced was not even alleged.

35. As regards the issue of the Certificate of Balance, I also find that there is no merit therein. This is because it is a question of construction whether the Certificate complies with the requirements of the Certificate Clause. Speaking generally, I am of the view that a "*team leader*" is the equivalent of a "*manager*" as envisaged by the Certificate Clause.

36. As regards the merits of the Summary Judgment itself, Ms Van der Colff has to "*satisfy*" me that she has a *bona fide* defence to the action. "*Satisfy"* does not mean "*prove*". What is required is that Ms Van der Colff set out in her affidavit facts which, if proved at the trial, will constitute an answer to ABSA's claim/s.[82]

37. She is required to show that same will constitute a "*bona fide defence*". In this regard, it is required of her to (i) show that she has disclosed the nature and grounds of her defence, and (ii) that on those facts she appears to have, either as to either the whole or part of the claim(s), a defence which is *bona fide* and good in law.[83] It will be sufficient for her if she swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing; or put differently, if her affidavit shows that there a reasonable possibility that the defence she advances may succeed on trial.[84]

38. Where the defence is based upon facts, in the sense that material facts alleged by ABSA are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.[85]

39. In other words, the Court does not decide the probabilities and effectively accepts the version of a defendant in Summary Judgment proceedings. The Court

---

[81] *Charsley v AVBOB (Begrafnisdienste) Bpk* 1975 (1) SA 891 (E) at 893 and *Lornan v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (TPD) at 393H – 396A.
[82] *Breytenbach v Fiat (Edms) Bpk* 1976 (2) SA 226 (T).
[83] *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) at 426.
[84] *Breytenbach & Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467.
[85] *Venter v Kruger* 1971 (3) SA 848 (N) at 852.

asks itself whether such defence, if proved at trial, would constitute a good defence to the action. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirements of *bona fides*.[86]

40. If one accepts her version of events together with the probative evidence in support thereof (such as, but not limited to, the Mango itinerary showing a return flight from Lanseria to Durban on 12 July 2019, lends support to her version that she was physically present at ABSA's branch in Durban Central as well as the dealership and that she could not have taken delivery of the vehicle as the return flight was on the same day. With this I am not trying and/or attempting to determine the truth of her version or the probabilities of her version as opposed to that of ABSA's. I am simply showing that her version is not needlessly bald, vague or sketchy), then she will clearly have a defence to the action instituted by ABSA. Afterall, there will in such circumstances be no online application and/or online agreement – she having expressly testified that ABSA has relied upon the wrong agreement as she has signed in manuscript (in wet ink). In addition, and on her version, an ABSA agent was involved in the alleged fraud of Mr. Sander with the result that what she believed she signed was different in its nature to that held out to her – in other words, *justus error* that vitiates her alleged agreement with ABSA. Furthermore, she also states that she is not in possession of the motor vehicle and it is trite that the *rei vindicatio*[87] is only available when the particular thing is in the possession of the defendant at the commencement of the action.[88] As she expressly testified that she never obtained possession and/or delivery of the motor vehicle, it follows that she is not in possession thereof at the commencement of the action and which would therefore also constitute a complete defence to the relief for possession/repossession.

41. ABSA placed reliance on *Karabus Motors Ltd v Van Eck* 1962 (1) SA 451 (C) where it was held that it is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent person,

---

[86] *Breytenbach* at 228.
[87] Both counsel agreed that the claim for repossession of the motor vehicle is based on the *rei vindicatio.*
[88] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C and *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 285.

it will have no affect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as an agent of, one of the parties. In the circumstances, I do not believe that this case adds any substance to ABSA's contentions. The reason therefore is that Ms Van der Colff expressly alleged that it was an employee and/or agent of ABSA that was involved that ultimately resulted in fraud being perpetrated upon both herself and ABSA. In other words, Karabus supports her as her case is one were the fraud is that ABSA – one of the parties to the agreement, even though such fraud was committed by one of its agents. Therefore and on her version, it will clearly be a case of *justus* error resulting in the agreements being invalid and void.[89]

42. I was also referred by counsel for ABSA to the unreported judgment in *FFS Finance South Africa (Pty) Ltd v Kruger*[90] where the defendant therein denied outright that the agreement relied upon was concluded at all. The defendant therein pointed out specifically to the fact that the agreement relied upon is set to have been signed electronically. He denied that it was so signed, and consequently disputed the existence of any agreement at all. Todd AJ found that the defendant therein provided no alternative explanation for the basis on which he received delivery of the vehicle and also did not point to the existence of any other agreement other than that relied upon by the plaintiff therein. As a result, Todd AJ held that the defendant therein failed to set out the material facts upon which his defence was based with sufficient particularity and completeness to enable the Court to decide whether or not the affidavit disclosed a *bona fide* defence[91]. Clearly, and *in casu*, Ms Van der Colff did not merely deny the existence of the ISA, but as offered an alternative explanation. More importantly, she did not take delivery of the motor vehicle. The facts *in casu* are therefore distinguishable from the *FFS Finance* matter.

43. Finally, and as regards the merits of the Summary Judgment, I retain a discretion and in order to avoid a possible injustice, I would in any event have refused Summary Judgment on this basis. *Ergo*, the matter should go to trial.

---

[89] *Sonap Petroleum (SA) (Pty) Ltd formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239I – 240B.
[90] Delivered in the Gauteng Local Seat, Johannesburg under case number 46506/2021 and dated 8 September 2022.
[91] At paragraphs 11 and 12.

43. Finally, and as regards costs, I do not believe that ABSA knew (despite the Affidavit of January 2021) that the contentions relied upon by Ms Van der Colff would entitle her to leave to defend. Certainly, their case was arguable. In addition, no argument was addressed to me in respect of Rule 32(9)(a). In the exercise of my discretion, I believe that the usual order of costs in these instances should follow.

ORDER

In the result, I make the following order:

1. The application in terms of Rule 30(2)(b) is dismissed with costs;

2. The application for Summary Judgment is refused with costs to be costs in the cause.

L MEINTJES
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 APRIL 2023
DATE OF JUDGMENT: 12 JUNE 2023

COUNSEL ON BEHALF OF ABSA:
ADVOCATE K MITCHELL
INSTRUCTED BY:
SMIT SEWGOOLAM INC
TEL: 011-646 0006
EMAIL: ashley@smitsew.co.za

COUNSEL FOR MS VAN DER COLFF:
RJN BRITS

(ATTORNEY WITH RIGHT OF APPEARANCE)

INSTRUCTED BY:

VR LAW INC

011-326 5620

EMAIL: rudi@vr-law.co.za