



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5770/2021

In the matter between:

DITHALE DEVELOPMENT SERVICES (PTY) LTD

Applicant

And

MANGAUNG METROPOLITAN MUNICIPALITY

Respondent

REASONS FOR JUDGMENT

[1] On 27 January 2023 I granted an order in terms of Rule 49(1) (c) of the Uniform Rules of Court for summary judgment against the respondent for payment of the amount of R15 3017 302.87 together with interest and cost on attorney and client scale.

[2] In terms of rule 49(1) (c), the respondent was required to request the reasons for the order within ten (10) days of the order. The respondent's request was only filed over a month later on 9 February 2023 without any request for condonation for the late filing. Nonetheless, taking into consideration the unusual manner in which the respondent sought to 're-enter' the proceedings,¹ I will oblige the respondent and provide the requested reasons.

¹ The respondent had withdrawn its Plea and had also not filed the opposing papers.

- [3] The following background facts were common cause: on 14 January 2022 the respondent entered an appearance to the defend the applicant's claim. The defendant's plea followed six (6) months later on 20 July 2022 triggering the applicant's summary judgment application which was launched on 11 August 2022.
- [4] On 22 August 2022 the respondent filed a notice to oppose the summary judgment without filing the opposing affidavit as a result, on 1 September 2022 the application was postponed to 29 September 2022. The respondent was granted leave to file a condonation application for the late opposing affidavit and the opposing affidavit by the 13th of September 2022.
- [5] On resumption of the application on 29 September 2022, the respondent had still not filed the opposing papers instead approximately two weeks earlier on 9 September 2022, the respondent withdrew the plea and simultaneously filed an exception. The applicant responded to the exception by filing a rule 30 notice complaining about the lateness of the notice and proceeded to set the application down for hearing of the summary judgment on 6 October 2022 contending that the application was unopposed due to the withdrawal of the plea.
- [6] As at the hearing of the application, the opposing papers were still not filed, the respondent had not even filed heads of argument. The explanation provided was that the respondent did not know how the matter was going to proceed having regard to the pending exception and the Rule 30 applications.
- [7] It was indisputable that a plea is a prerequisite to a summary judgment application.²

² Rule 32 (1) and (2).

- [8] The issues of contention between the parties were, whether the respondent's replacement of the plea with the filing of an exception and the filing of the rule 30 notice by the applicant respectively constituted a hindrance to the adjudication of the summary judgment application.
- [9] It was the applicant's case that having withdrawn its plea and also failed to file the opposing affidavit the summary judgment application was unopposed. The exception and the Rule 30 were not a hindrance to the adjudication of the application because in order to resist a summary judgment the respondent must set out its defence and the facts relied upon in that defence in the plea and the opposing affidavit. It was contended that the exception was irregular for want of compliance with rule 22 (1) in terms of which, the respondent was required to file the exception within twenty (20) days of having filed the notice to defend the action and before filing the plea. The rule 30 notice was in response to the defective exception it had no bearing on adjudication of the summary judgment application.
- [10] On the other side, except to insist that since both the rule 30 and exception proceedings are pending summary judgment could not proceed. Counsel for the respondent, Mr Thompson was at pains to try and explain the logic behind the withdrawal of the plea despite his concession that a plea is a prerequisite to summary judgment proceedings. Mr Thompson was also unable to refer me to any authority which alludes to the fact that an exception can be filed after a plea and most importantly, after summary judgment proceedings have been initiated. He asked for the dismissal of the application alternatively, the postponement of the application pending the outcome of the rule 30 and exception proceedings.
- [11] Pursuant to the amendment to rule 32, in the affidavit filed in support of the summary judgment application the applicant is now required to engage with the allegations raised in the respondent's plea in order to show why the alleged defence does not raise a triable issue. The rule states thus:

"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-

- (a) On a liquid document;*
- (b) For a liquidated amount in money;*
- (c) For delivery of specified movable property; or*
- (d) For ejectment;*

Together with any claim for interest and costs.

(2)

(a) Within 15 days after the date of deliver of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts."

[12] In order to ward off the summary judgment, the respondent ought to have filed an opposing affidavit setting out the nature and grounds of its defence and the material facts relied upon.³ On the facts germane to this matter the plea was withdrawn and the opposing affidavit was also not filed.

[13] As correctly pointed out by counsel for the applicant Mr Mazibuko, having withdrawn the plea and also failed to file the opposing affidavit the consequence is that the plaintiff's claim is uncontested.

[14] In sum, I agreed with the applicant's contentions that neither the pending Rule 30 and exception prohibited the adjudication of the summary judgment. I also held the view that the anomaly of filing an exception after the plea was merely a delaying tactic to prevent the summary judgment proceedings from being heard.

³ Rule 32 (3) (b).

- [15] In arriving at my conclusion regarding the judgment sought, I took into account that on the applicant's undisputed allegations the applicant had made out a case for the claim for unpaid invoices relating to the unblocking, maintenance and replacement of manholes and sewer pipes around Mangaung Metropolitan Municipality in terms of a written contract concluded between the parties.⁴
- [16] I found no reason/s to deprive the applicant its costs. The applicant sought costs on an attorney and client scale however, the agreement does not make provision for costs on an attorney and client scale. The order to that effect was erroneously granted accordingly, in terms of rule 42 (1)(a), the order in relation to costs is corrected to read: "Costs on a party and party scale."

NS DANISO, J

Counsel for Applicant:

Adv. MS Mazibuko

Instructed by:

Blair Attorneys

BLOEMFONTEIN

Counsel for Respondent:

Adv DR Thompson

Instructed by:

Raynard & Associates

BLOEMFONTEIN

⁴ Annexures "POC1" to POC3" of the particulars of claim.