



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL 1203/2022

In the matter between:

KUBUPAY (PTY) LTD

Plaintiff

And

MAYIBUYE TRANSPORT CORPORATION

Defendant

JUDGMENT

COLLETT AJ:

Introduction

[1] This is an application brought in terms of *Rule 23 (2)* of the *Uniform Rules of Court* for the striking out of certain content contained in the defendant's plea on the basis of such content being irrelevant.

[2] The plaintiff issued summons against the defendant for payment of the amount of R2 508 593.46 and ancillary relief for services rendered in terms of a written service level agreement (hereinafter referred to as '*the SLA* ') concluded between the parties on 15 July 2019.

[3] The defendant entered an appearance to defend and filed a plea to the plaintiff's particulars of claim.

[4] The plaintiff served a notice in terms of *Rule 23(1)* to afford the defendant an opportunity to remove the cause of complaint in respect of its plea alleging that certain of the content was irrelevant, vexatious and/or scandalous.

[5] Ultimately, an application to strike out was filed in terms of *Rule 23(2)* and the defendant has opposed the granting thereof.

The Rule 23(2) Notice

[6] The plaintiff in its application to strike out referred to the content of several paragraphs some of which it sought to be partially struck and other in *toto*.

[7] On 6 September 2022, the plaintiff delivered a notice in terms of *Rule 23* in respect of a striking out application and a Conditional Notice to Remove Cause of Complaint. This notice was subsequently amended on 10 November 2022. The plaintiff contended that '*it is prejudiced in pleading over and/or proceeding to trial on the defendant's plea as it presently stands*'.¹

[8] The plaintiff averred that the material identified for striking out, falls within the definition of '*irrelevant matter*'.

[9] The plaintiff alleged that it relied exclusively upon the SLA to found its cause of action in accordance with *Rule 18(4)*. The defendant in its plea referred to the terms and conditions of the tender specification as contained in the *Tender Document* as well as the *Tender Proposal* submitted to the plaintiff.

¹ Conditional notice in terms of Rule 23 (1), page 60

[10] The plaintiff contends that reference hereto had no relevance to the claim against the defendant and for this reason any reference thereto is irrelevant. Furthermore, that the defendant has failed to comply with *Rule 18 (6)* regarding the plea relating to either the ‘*Tender Document*’ or ‘*Tender Proposal*’(hereinafter referred to as ‘the agreements’).

[11] It is further averred that because of the defendant’s failure to attach these agreements to the plea, it cannot be said that the defendant relies on these documents. Accordingly, the court should strike out the contents of the paragraphs referring thereto.

[12] A perusal of the alleged offending paragraphs of the defendant’s plea, whilst admitting the SLA, refers to the SLA incorporating the terms and conditions of the tender specifications contained in the *Tender Document* and *Tender Proposal*. Thereafter the defendant pleaded the terms and conditions of the agreements in the ensuing paragraphs.

[13] The defendant avers that the plaintiff has not complied with *Rule 23(2)* as there is no founding affidavit in which the factual issues of relevance and prejudice are laid out.

[14] The defendant further contended that *Rule 18(6)* refers to the attachment of a contract in relation to a plaintiff who is asserting a cause of action. As the defendant is only bringing a defence, it has no duty to attach any agreement in terms of *Rule 18(6)*.

[15] Lastly, the defendant alleged that the plaintiff has failed to make out a case for alleged irrelevance of the content of the impugned paragraphs. It is alleged that liability is denied on the basis that the plaintiff has not performed in terms of the agreement.

The issues for determination

[16] whether the plaintiff’s application to strike out in terms of *Rule 23(2)* conforms with the *Uniform Rules of Court*.

[17] whether the defendant’s plea complies with *Rule 18(6)*.

[18] Whether certain content in the defendant’s plea ought to be struck out on the basis of the content being irrelevant.

Application to strike out Rule 23(2)

[19] *Rule 6* deals with the procedure relating to applications in general and, in particular, *Rule 6(11)* provides as follows:

‘Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.’

[20] *Rule 6(11)* refers specifically to ‘interlocutory and other applications incidental to pending proceedings’. Proceedings are regarded as ‘pending’ until their final determination.² It is accordingly competent for a party in a pending proceeding to invoke the provisions of *Rule 6 (11)*. By extension, an interlocutory application relates to a ‘pending’ proceeding.

[21] There is no doubt that applications in terms of *Rule 23* are indeed interlocutory applications.

[22] The question as to whether *Rule 6(5)* applies to applications premised under *Rule 6 (11)* was considered by Mullins J in *Chelsea Estates and Contractors CC v Speed-O-Rama*³ who concluded that:

‘there is no doubt that this is an interlocutory application. Furthermore in many interlocutory applications there is no need to file affidavits, and certainly the provisions of Rule 6 (5)(f) do not apply to such applications.’

[23] It was similarly concluded in *Yorkshire Insurance Company Ltd v Reuben*⁴ that the procedure outlined in *Rule 6(5)* need not be followed in circumstances where parties are already litigating. ‘Notice’ as referred to in *Rule 6(11)* does not mean notice of motion.⁵

² *Laubscher and Another v Commercial Union Assurance Company of South Africa Ltd and Another* 1976 (1) SA 908 (E)

³ 1993 (1) SA 198 (SE)

⁴ 1967 (2) SA 263 (E)

⁵ *Muller v Paulsen* 1977 (3) SA 206 E

[24] The application provided for in *Rule 23(2)* striking out averments in opponent's pleadings is in a special form of application as envisaged in *Rule 23(11)*.⁶

[25] What is required in a striking out application is identification of the averments to which objection is raised and the grounds for such objection.⁷

[26] In an application to strike out, the court must consider only the pleadings filed and cannot consider any other information introduced by way of affidavit or in any other manner⁸ thus vitiating the need for affidavits.

[27] There is accordingly no merit in the defendant's submission that the format of the plaintiff's application in terms of *Rule 23(2)* should comply with *Rule 6(5)(f)*.

Plaintiff's application in terms of Rule 23(2)

[28] The plaintiff alleges that the defendant's case, *inter alia*, refers to different agreement(s) other than the SLA, more particularly, '*the terms and conditions of the tender specifications contained in the tender document*' and the '*tender proposal submitted to the plaintiff*'.

[29] It is contended that reference is made to '*material terms*' of the agreements and that in this regard the defendant has failed to comply with *Rule 18(6)*, more particularly:

- '1. To state whether the contract is written or oral (or partly written and partly oral)'
2. to state when, where and by whom the contract was concluded; and
3. if the contract is written, to annex a true copy thereof or of the part relied on in the pleading to the pleading.'⁹

[30] The plaintiff submits that in view of the aforementioned non-compliance with *Rule 18(6)*, the agreements are '*merely referred to but not rely upon*' and accordingly the allegations in the paragraphs are irrelevant and should be struck out in terms of *Rule 23(2)*.

⁶ Viljoen v Federal Trust Ltd 1971 (1) SA 750

⁷ Ehler (Pty) Ltd v Silver 1947 (SA 173 (2) at 178

⁸ Viljoen v Federated Trust Ltd at page 754 para E - F

⁹ Plaintiff's heads of argument page 74, para 15

[31] The plaintiff's complaint is that the defendant's plea is defective for a failure to comply with *Rule 18(6)* which clearly raises an irregularity of form and not substance.

[32] Accordingly, the plaintiff's remedy is to be found in *Rule 18(12)* and the provisions of *Rule 30* should be invoked for such pleading to be deemed an irregular step.

[33] I am furthermore of the view that the plaintiff's reasoning of relevancy culminating in the *Rule 23(2)* application is the incorrect procedure and the plaintiff should have proceeded in terms of *Rule 30*.

[34] It is not necessary for me to make a finding on the compliance or otherwise with *Rule 18(6)*.

[35] The following order will issue:

1. The application is dismissed with costs.

S A COLLETT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Mr. A Bishop
Instructed by	:	Petersen Hertog Attorneys c/o Difford Underwood Inc. c/o Drake Flemmer & Orsmond Inc. East London Ref. Ms. Underwood
Counsel for the Respondent	:	Mr. Mazwazi
Instructed by	:	Mbabane & Maswazi Inc. Attorneys East London Ref. Mr. Maswazi
Date heard	:	20 July 2023
Date judgment delivered	:	27 July 2023