



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3005/2021

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: NO
02/09/2022	

In the matter between:

GAUTENG REFINERY (PTY) LTD

Appellant

and

PAUL DANIEL ELOFF

Respondent

Summary Judgment: Failure of plaintiff to explain in affidavit why counterclaim does not raise issue for trial not resulting in invalid affidavit – may be considered in determining merits of application.

JUDGMENT

YACOOB J:

1. The respondent is a former employee of the appellant. He resigned his employment after the appellant failed to pay him his salary for two months, in April and May 2020, and failed to pay a claim for travel expenses. The respondent instituted proceedings to recover the amount due and was granted summary

judgment in the District Court for R101 583.72. The appellant appeals this judgment.

2. The appellant had defended the action, and relied on impossibility of performance due to the level 5 Covid-19 lockdown as its defence. The appellant had also brought a counterclaim for damages of over R18 million against the respondent for breaching his employment agreement. The claim was based on the respondent's performance.
3. The appellant relies only on grounds of appeal set out in its supplementary notice of appeal, which was filed after the Magistrate provided reasons for the judgment:
 - 3.1. the Magistrate ought to have found that the respondent failed to comply with Rule 14(2)(b), and
 - 3.2. the Magistrate erred by failing to find the respondent's failure to respond to the counterclaim was fatal to the summary judgment application.
4. As can be seen the appellant has abandoned the initial defence of impossibility. It has also abandoned the ground contained in its initial notice of appeal, that the Magistrate ignored *prima facie* evidence of a *bona fide* counterclaim which exceeded the main claim, which ought to have been found to constitute an answer to the main claim for the purpose of summary judgment. It must be noted that no evidence at all was adduced regarding the counterclaim, simply an allusion to its existence was contained in the affidavit opposing summary judgment.
5. Mr D'Oliveira, in his heads of argument, casts these grounds as one ground, and the second ground as merely an expansion of the first. They are clearly related and can be considered together.
6. Rule 14(2)(b) of the Magistrates' Court Rules *inter alia* requires the plaintiff to, in its affidavit, "explain briefly why the defence as pleaded, does not raise any issue for trial". According to the appellant this required the plaintiff to deal also with the counterclaim, which the plaintiff has not done, resulting in non-compliance with the Rule.

7. The only issue then, as articulated in the supplementary notice of appeal, is whether the respondent's failure to deal with the counterclaim prevented the grant of summary judgment. The question is not whether the counterclaim ought to have been considered a *bona fide* defence and the summary judgment therefore dismissed.
8. In his application for summary judgment, the respondent dealt only with the contents of the plea. The appellant, in its affidavit opposing summary judgment, criticised the respondent's affidavit, but did not provide any facts in support of its opposition. The affidavit is remarkable in its vacuity. It must be noted that Rule 14(3)(b) of the Magistrates' Court Rules requires the defendant to satisfy the court, either by way of affidavit or oral evidence, that it has a *bona fide* defence, by disclosing fully the nature and grounds of the defence and the facts on which the defence relies. The appellant's affidavit contains almost no facts. However, if the respondent's application was fatally defective, this becomes irrelevant.¹
9. The magistrate in his reasons for judgment comments that the counterclaim appears to be the primary reason for opposition, that the counterclaim appears clearly to be an attempt to stymie the respondent's claim, and was not *bona fide*.
10. The appellant however does not rely on any substantive grounds for the appeal. Nor is it required to. It is well established that, because summary judgment is a remedy which prevents a defendant from running a defence, although it is one which is not *bona fide* and is only intended to delay, the plaintiff must fulfil all formal requirements. This is before the merits are considered.²
11. The question is, therefore, whether the respondent's failure to deal with the counterclaim is the sort of failure which is fatal to a summary judgment application.
12. It is now equally well established that, in determining whether a failure to comply is fatal, the court must take a more balanced approach. The purpose of the rule

¹ *Mowchenson and Mowchenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) 366C-H.

² *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at [26].

and the need for care is to ensure that a defendant with a triable defence is not shut out, and not to simply allow technical issues to delay payment.³

13. The appellant was unable to point to any authority for the proposition that a failure to deal with a counterclaim results in the invalidity of an affidavit to the extent that a court is precluded from dealing with the merits of the summary judgment application. This may well be because the bulk of authority precedes the amendment of the Rule and required the application to be brought before the plea, and therefore the counterclaim, was filed.
14. The existing authority allows a counterclaim to be considered in the same way as a plea, for the court to consider whether the counterclaim is frivolous, unsubstantial, and intended only to delay.⁴ To require as a formal requirement an explanation why the counterclaim does not raise an issue for trial is inconsistent with the purpose of the summary judgment rule. The counterclaim ought rather to be considered when the merits of the summary judgment application are considered, and a plaintiff who does not include an explanation of why the counterclaim does not raise a triable issue and therefore is a bar to summary judgment, runs the risk of failing on the merits.
15. In all the authorities to which we have been referred, the fatal non-compliance have been along the lines of whether the correct allegations are contained, whether it is clear that the deponent has knowledge and so on. These are formal requirements which go directly to validity and compliance. An explanation, as required by the new rule, is of a different character, and falls into the elements that must be considered when the decision maker is determining whether there is a triable issue.
16. This is particularly the case where a counterclaim is based on facts other than those on which the main claim is based, and a plaintiff's knowledge may not be as comprehensive as that of the defendant. To prevent a court from even considering whether the counterclaim constitutes a *bona fide* defence simply because a plaintiff has not explained why it does not seems to me highly inequitable, and errs on the

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at [31]-[33]; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423E

⁴ *Du Toit v de Beer* 1955 (1) SA 469 (T) at 473; *HI Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T) at 698; *Muller and Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA)

side of the highly, and unnecessarily, technical. The proper place for the consideration of the plaintiff's failure is in the consideration of the merits of the summary judgment application.

17. The appellant does not take issue with the magistrate's consideration and determination of the merits. Nor, in my view is there any basis on which it can do so.

18. For these reasons we make the following order:

The appeal is dismissed with costs.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.



T. MODISE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Appellant: A D'Oliveira
Instructed by: Wright Rose-Innes Inc

Counsel for the Respondent: RA Arcangeli
Instructed by: Arcangeli Attorneys

Date of hearing:	26 October 2021
Date of judgment:	02 September 2022