

## IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE HIGH COURT)

CASE NO: 1760/2012  
**Case Heard: 17/05/2013**  
Date Delivered: 24/05/2013

In the matter of

**ARTHUR MUNN NO**

**PLAINTIFF**

and

**OCEAN ECHO PROPERTIES 333 CC**

**1<sup>ST</sup> DEFENDANT**

**GLYNIS MILLICENT AYSEN**

**2<sup>ND</sup> DEFENDANT**

**PATRICK DEON SIMONS**

**3<sup>RD</sup> DEFENDANT**

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### JUDGMENT

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***ERASMUS AJ***

- 1 The plaintiff instituted action against the defendants, jointly and severally, for payment R1 156 710.74, plus interest and costs. The defendants gave notice of their intention to defend the action on 12 November 2012, after which the plaintiff delivered a notice of application for summary judgment.
- 2 For purposes of this judgment I shall refer to the plaintiff in the action as 'the Trust' and to the first, second and third defendants in the action as 'the defendants'.
- 3 It is alleged by the defendants that the notice of application for summary judgment does not comply with Rule 32(2) in that it does not state the date on

which its application will be set down for hearing. Based on this contention, they filed a notice in terms of Rule 30A on 28 January 2013. In terms of this notice the Trust was required to note that the defendants intended on making application for an order directing the Trust to comply with the said notice, alternatively an order setting aside the Trust's application for summary judgment should the Trust not remove the cause for complaint within 10 days of date of receipt of this notice. The Trust did not respond to this notice.

- 4 The defendants did not deliver an affidavit in terms of Rule 32(3)(b) in opposition of the application for summary judgment.
- 5 On 1 February 2013 the application for summary judgment was postponed to 8 February 2013. On 8 February 2013, by agreement between the parties, Pakati J postponed this application to the opposed roll of 17 May 2013. The Trust and defendants were represented when the application was postponed.
- 6 On 26 March 2013 the defendants lodged the an application in terms of Rule 30A seeking an order that the Trust be directed to comply with Rule 32(2), failing which the defendants be granted leave to approach the court on the same papers, duly amplified, for dismissal of the application for summary judgment. The defendants also sought a cost order against the Trust.
- 7 The application in terms of Rule 30A is supported by an affidavit of Nerisha Besesar, the attorney of the defendants. In terms of paragraph 3 thereof it appears as if she deposed to the affidavit in support of an application to set aside the Trust's application for summary judgment. She states that, notwithstanding the notice to remove the cause for complaint, the Trust has failed to remove the irregular step. She requests the relief set out in the Notice of Motion, which is, as already set out above, not setting aside the Trust's application for summary judgment.
- 8 On 5 April 2013 the defendants set down the application in terms of Rule 30A for 12 April 2013. The Trust gave notice of its intention to oppose this

application on 10 April 2013, but did not file opposing papers. On 12 April 2013 this application was also postponed to 17 May 2013.

- 9 Mr Grobler, on behalf of the Trust, argued that the defendants did not comply with the time frames laid down in the said rule in that the application in terms of Rule 30A was lodged almost two months after the initial notice. I do not agree. Rule 30A does not prescribe a fixed period within which to notify the defaulting party of its intention to seek compliance with the rules, as is required in terms of Rule 30(2).
- 10 Mr Grobler further submitted that the application is contrived in that two notices of application for summary judgment were delivered on 29 November 2012 and at least one indicated the date when application would be made. Apart from this, he submitted that the parties agreed for the hearing of the applications to take place on 17 May 2013. He contends that this, in itself, indicates that the cause of the complaint had been remedied within the 10 day period provided for in the notice in terms of Rule 30A and that the defendants were aware when the application for summary judgment would proceed. He submitted that the Rule 30A application be dismissed. I agree with these submissions.
- 11 On 12 April 2013, when the application in terms of Rule 30A was postponed, I specifically directed counsel for the defendants' attention to the fact that the notice of application for summary judgment on the court file contains the date and time in respect of when the application was to be made. In terms of this notice, filed as page 36 of paginated papers, the date and time of hearing of the main application was stated as Friday 1<sup>st</sup> of February 2013 at 10:00. It appears to have been delivered to the defendants' attorneys of record on 29 November 2012 at 2:55. The date stamp of the registrar appears to have been affixed to the first page of this notice on 30 November 2011. I accept that it was received by the registrar on 30 November 2012 and that it was on the court file throughout proceedings.

- 12 By the time that the defendants' attorney deposed to the affidavit in support of the application in terms of Rule 30A during March 2013, the application for summary judgment had been postponed on two occasions. If this notice had not been on the court file, the defendants would surely have stated this and addressed this issue in their papers. Had it not been on the court file, I would further have expected the defendants to immediately have taken steps to address this issue in a supplementary affidavit when counsel's attention was directed to the notice on the court file on 12 April 2013. This was not done.
- 13 On 15 May 2013, two days before the hearing of the applications, and after the Trust had filed heads of argument in respect of both the applications, the defendants filed a supplementary affidavit, deposed to by the same attorney. The purpose of this affidavit seems solely to allege that the notice of the application for summary judgment, which forms the basis of the application in terms of Rule 30A, 'has mysteriously gone astray from the Court's file'. She attached, as annexure 'A', a copy of a notice of application for summary judgment which does not contain a date and time as to when application for summary judgment will be made. The allegation that it 'had gone mysteriously astray from the Court's file' is not substantiated by any factual allegations. There is no allegation that the original annexure 'A' (or a copy thereof), was on the court file at some stage of proceedings.
- 14 In the defendants' heads of argument respect of the application in terms of Rule 30A, dated and filed 15 May 2013, the submission/allegation was made that the defendants did not receive any notice of the main application other than annexure 'A' to this affidavit. There is no such allegation in the defendants' papers that the notice of application for summary judgment on the court file and bound as page 36 of the paginated papers, was never delivered to the defendants.
- 15 There is no explanation in the papers as to why the supplementary affidavit and annexure 'A' were only filed at this late stage of proceedings. I would have expected the attorney who had deposed to the initial affidavit in support

of the application in terms of Rule 30A on 12 March 2013 to have referred to this document and that it should have been attached to the founding affidavit, as this forms the basis of the application.

- 16 In response to the supplementary affidavit and annexure 'A', the attorney of the Trust filed an answering affidavit on 15 May 2013. He sets out how it came about that annexure 'A' to the supplementary affidavit by defendants' attorney, complained of by the defendants, was delivered to the defendants' attorney on 29 November 2012. The mistake pertaining to the omission of the date and time was rectified on the same day. This is confirmed by his clerk. The fact that the notice of application for summary judgment on the court file bears the date stamp of the registrar of 30 November 2012, corroborates the version of the Trust's attorney.
- 17 Mr Jankowitz argued that the affidavit of Trust's correspondent attorney, filed after the supplementary affidavit on behalf of the defendants was filed, should not be allowed. As I have already stated, the supplementary affidavit of the defendants was only filed on 15 May 2013. The defendants offered no explanation for the late filing of this affidavit. It is the allegations in this affidavit, if any, which called for an answer by the Trust. In the exercise of my discretion, the affidavit on behalf of the Trust was admitted as evidence in the application in terms of Rule 30A.
- 18 It thus appears *ex facie* the notice of the application for summary judgment (page 36 of the paginated papers) and the affidavit by the attorney of the Trust that the defendants' cause for complaint had already been removed on 30 November 2012.
- 19 Even if I am wrong in finding that the Trust had delivered the second notice reflecting the date and time of when application was to be made, as contemplated in the rule, I would be entitled to overlook such an irregularity in procedure if it does not cause substantial prejudice to the party complaining of

it.<sup>1</sup> Technical objections should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. As I have already pointed out, on 8 February 2013, when the main application was postponed to 17 May 2013, it was done so by agreement between the parties. Both parties were represented in court during the postponement. This being so, the defendants were fully aware of the date and time on which the application for summary judgment would proceed, as early as 8 February 2013.

- 20 Mr Grobler requested that summary judgment be granted as the defendants had not filed an opposing affidavit, setting out a *bona fide* defence to the claim of the Trust despite being fully aware that the application for summary judgment would proceed on 17 May 2013. He submitted that the defendants' conduct is aimed at delaying the Trust's claim.
- 21 Mr Jankowitz argued that the application for summary judgment must be dismissed, alternatively that the notice must be struck out. This is not in accordance with the relief sought in the notice of motion in the interlocutory application. The defendants sought an order that the Trust be directed to comply with Rule 32(2). Mr Jankowitz further requested that the defendants be granted a postponement to file an opposing affidavit in respect of the application for summary judgment, should their application in terms of Rule 30A be dismissed.
- 22 The application in terms of Rule 30A involved procedural issues relating to alleged non-compliance with the Uniform Court Rules. The defendants are lay persons and were reliant on the advice of their legal representatives in respect of these issues. I am of the view that summary judgment, being the drastic remedy that it is, should not be granted without affording the defendants the opportunity to file opposing papers in respect of the opposition of the application for summary judgment.

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<sup>1</sup>**Mynhardt v Mynhardt**1986 (1) SA 456 (T) op 464A

23 I make the following order:

- 1 The application in terms of Rule 30A is dismissed;
- 2 The application for summary judgment is postponed *sine die*;
- 3 The defendants are ordered to file their opposing affidavit(s) in respect of the application for summary judgment, if any, within 10 days of the date of this order, failing which the Trust is authorized to enrol the application for summary judgment for adjudication on the unopposed motion court roll;
- 4 The defendants are ordered to pay the costs in respect of the application in terms of Rule 30A, which costs shall include the costs of 17 May 2013.

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**S L ERASMUS  
ACTING JUDGE  
NORTHERN CAPE DIVISION**

**For the Plaintiff:** AdvGrobler  
A Potgieter & Partners, Kimberley

**For the Defendants:** AdvJankowitz  
Van de Wall & Partners, Kimberley