



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 19455/2023

In the matter between:

ETHAN LOTTS

Respondent / Plaintiff

And

**NMI DURBAN SOUTH MOTORS (PTY) LTD
t/a BARONS BELLVILLE**

Applicant / Defendant

Coram: Parker, AJ

Matter heard on Thursday 08 August 2024

Judgment delivered on Friday 30 August 2024, electronically by circulation to the parties' representatives via email.

JUDGMENT

PARKER, AJ

Introduction

[1] The Plaintiff instituted action against the Defendant arising out of a sale of a motor vehicle purchased on 10 November 2022 financed by Standard Bank of South Africa Ltd (“SBSA”). After Plaintiff took delivery, numerous defects emanated from 11 November 2022, until Plaintiff finally returned the motor vehicle to defendant on 13 July 2023. Plaintiff claims positive malperformance, and issued summons on 1 November 2023 claiming *inter alia*:

- 1.1 Defendant breached the agreement, entitling him to a refund of the purchase price in the amount of R1 186 810.02.
- 1.2 Alternatively the delivery of a replacement vehicle as well as a monetary payment equal to the difference in value between the present value of such vehicle and the original purchase price of the current vehicle.
- 1.3 Plaintiff claims damages in the amount of R461 465.87 as compensation for the damages suffered by the plaintiff as a result of having to pay for vehicle financing whilst being deprived of the possession and use of the vehicle as a direct result of the wilful or negligent conduct of the defendant.

[2] Pursuant to defendant’s plea on 18 December 2023, the plaintiff served the defendant with the application for summary judgment on 5 February set down for hearing for 19 March 2024. On 19 February 2024, the defendant delivered a notice in terms of Rule 30 and Rule 30A on the basis that the summary judgment application constitutes an irregular step as it does not comply with Rule 32(2)(a), in that it was filed outside the timeframe prescribed by the Rules of Court. On 11 March 2024 the defendant delivered an application in terms of Rule 30(1) culminating in the hearing on 8 August 2024.

The issues for determination

[3] The issues to be determined are:

- 3.1 whether the application by defendant in terms of Rule 30, to set aside the plaintiff's summary judgment application is an irregular step, pertinently whether the *dies non*, as provided for in Rule 6(5)(b)(iii)(aa), is applicable to summary judgment applications;
- 3.2 whether there was compliance with Rule 32(2)(a), and,
- 3.3 if the summary judgment application has been filed outside the time frame prescribed by the Rules, whether the plaintiff has successfully complied with a condonation application for the late filing of the summary judgment application, and, if granted,
- 3.4 whether the summary judgment application complies with Rule 32(1).

Submissions by parties

[4] In support of the irregular step, defendant contends that the summary judgment was not filed within the 15 day period provided for in Rule 32 and that the plaintiff's reliance on Rule 6(5)(b)(iii)(aa) is misplaced because of the provisions of Rule 32.

[5] On the contrary, the *onus* is on plaintiff to properly comprehend and interpret Rule 6(5)(b)(iii)(aa) by taking into account the provisions of Rule 6(5)(b)(iii)(bb).

[6] The defendant rejected this argument on the grounds that if the plaintiff's argument regarding the applicability of Rule 6(5)(b)(iii)(aa) to the summary judgment application is correct, this does not assist the plaintiff because the application for

summary judgment is not only made on an affidavit, but has to be made by way of a Notice of Application for Summary Judgment.

[7] On the other hand the plaintiff submits that the upon a proper interpretation of Rule 6(5)(b)(iii)(aa) read with Rule 32(2)(a), the time period within which an applicant may apply for summary judgment is subject to the exclusion of *dies non*.

[8] The plaintiff further submits that the ordinary Rule of interpretation must be applied to determine the applicability of Rule 6(5)(b)(iii)(aa) to its application for summary judgment. Accordingly, plaintiff contends that there is a uniform approach, regarding the Magistrate Court Rules, Supreme Court of Appeal Rules and Constitutional Court's Practice Directives, to adopt *dies non* in respect of all applications supported by affidavits, save for urgent applications and interim matrimonial relief. This therefore, in plaintiff's view, enjoined the court to find that upon a proper interpretation of Rule 6(5)(b)(iii)(aa), summary judgment applications are not excluded and that the plaintiff's summary judgment application was made within the 15-day period prescribed by Rule 32, read with Rule 6(5)(b)(iii)(aa).

[9] The plaintiff submits in its heads of argument that in the event that the court find that the summary judgment application was an irregular step because it was instituted out of time, it's application should be condoned because the defendant stands to suffer no prejudice. However, no reasons for the delay was provided by the plaintiff as to his explanation for the delay in support of condonation, for the out of time application.

[10] However the defendant stands firm that the claims against it does not fall within the ambit of Rule 32(1) and accordingly the summary judgment application falls to be dismissed. I will deal with these submissions in the analysis which follows.

Evaluation

[11] The application and the principles relevant to summary judgment applications need not be restated, as it is well established, suffice to say that I considered Rule 31(1), Rule 32(2)(a)¹, the *dies non* in Rule 6(5)(b)(iii)(aa)² as well as Rule 6(5)(b)(iii)(bb)³.

[12] Whether or not any other application, including summary judgment, other than the ones brought under Rule 6(12) and Rule 43 find application under Rule 6(5)(b)(iii)(aa) was considered in *Mobile Telephone Networks (Pty) Ltd*⁴. The question that arises is why the Rules Board has only established provisions for two specifically named exclusions, namely Rule 6(12) and Rule 43 applications, if this Rule does not accommodate summary judgement applications and only applies to affidavits submitted in response to a notice of intention to oppose.

[13] Plaintiff persists that in consideration of the approaches provided by the Constitutional Court, the provisions of Rule 6(5)(b)(iii)(aa) are specific and that the exclusion of the period between 21 December and 7 January is applicable to the delivery of any affidavit. *“If one reads this Rule in context, which can only be with reference to subrule 6(5)(b)(iii)(bb) ‘any’ affidavit means any affidavit subsequent to the notice of intention to oppose, and those that are not excluded by this sub-rule, which include affidavit/s in support of summary judgment”*⁵. I do not agree. The argument that this Rule is applicable to applications brought under Rule 6 only and that summary judgment applications is brought under Rule 32, is not sustainable because Rule 43 was specifically mentioned as one of the exclusions of Rule 6(5)(b)(iii)(bb).

¹ Rule 32(2)(a) “A plaintiff who pursues summary judgment shall, within 15 days after the date of delivery of the plea by a defendant, 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.”

² “for purposes of this subrule, the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for delivery of the notice of intention to oppose or delivery of any affidavit”.

³ “the provisions of subparagraph (aa) shall not apply to applications brought under subrule 6(12) of this Rule and applications brought under Rule 43.”

⁴ *Mobile Telephone Networks (Pty) Ltd v Sugarberry Trading* 239 CC (1503/2021) [2023] ZANWHC 3 (19 January 2023) at para [24].

⁵ Ibid at para [25].

[14] Turning to a case relied upon by Plaintiff in *Absa Bank Limited v Fumani Shikwabana*⁶, the Court held that: “clearly the days between 16 December and 15 January cannot be reckoned in the computation of days allowed for delivery of any pleading as contained in the proviso in Rule 26. Any pleading’ means just that. Summary judgments were not made an exception”. Plaintiff’s reliance on this case by Plaintiff does not assist him as it is evident that summary judgement was not intended to be excluded⁷.

[15] In the event that I determine that the summary judgment application does not find application under Rule 6(5)(b)(iii)(aa) and that the plaintiff ought to have filed his application for summary judgment within the 15 days after the delivery of the plea, “I must consider the plaintiff’s application for condonation. It is only when I am not satisfied with the plaintiff’s application for condonation that the plaintiff’s application for summary judgment will be found to be an irregular step and set aside”⁸. No reasons for the delay was advanced by the plaintiff other than raising it in argument. Plaintiff was required to explain the delay and set out justifiable reasons for non-compliance in order to enable me to exercise my discretion in his favour, judicially, having regard to the degree of the delay, prospects of success, and importance of the case⁹ to plaintiff. Thus, there was no opportunity for me to consider weighing the merits of my discretion for condonation. It is undeniably a significant case for the plaintiff as he remains indebted to SBSA (who financed the transaction) moreover, he returned the motor vehicle to the defendant on 13 July 2023.

[16] Other than alleging non-compliance with Rule 32, and the failure of plaintiff to show reasons for the late filing of the summary judgment application, for the defendant to succeed in its application in terms of Rule 30, the defendant must allege and prove

⁶ *Absa Bank Limited v Fumani Shikwabana* (2370/15) [2016] ZANCHC 3 (10 June 2016) Case No (2370/15) [2016] ZANCHC 3 (10 June 2016) at para [9].

⁷ *Mobile, supra* at para [29].

⁸ *Mobile, supra* at para [31].

⁹ *Melane v Sanlam Insurance Co Ltd* 1962 (4) SA 531 (A) C – F; *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) page 369.

that the irregularity prejudices defendant and that it suffered harm as a result of the non-compliance of the Rule by the plaintiff. In *SA Metropolitan Lewensversekeringsmaatskappy*¹⁰, the court held that where prejudice is absent, a decision to set the irregular proceeding aside will not be sustained and the irregularity may be overlooked¹¹. Consequently, had plaintiff shown its reasons for the condonation in light of the defendant's failure to show prejudice, the irregular step would have been dismissed.

[17] Whilst it is true that the defendant has failed to establish prejudice in its affidavit in support of its Rule 30 application, this does not benefit plaintiff. In the circumstances the absence of an application for condonation duly substantiated, resultantly, the application for summary judgment is fatal¹² and the irregular step is upheld.

[18] Then, plaintiff encounters another hurdle in respect of the relief claimed were summarised in paragraph 1 above. Summary judgments are only available to a plaintiff on very limited grounds¹³. In this case, defendant advanced that the replacement vehicle, the monetary claim for an unspecified amount and the recovery of damages, are not easily ascertainable, which is not capable of being calculated, without further evidence being produced to support the relief as prayed for in the particulars of claim.

[19] The plaintiff formulates his claim for the value of the amount he is liable to SBSA, being the total cost of the vehicle, since the purchase amount and/or the value is undisputable, it is susceptible to prompt ascertainment as stated in *Thaw Trading*¹⁴. Despite plaintiff seeking the Court to indulge the exercise of a discretion built on the

¹⁰ *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* NO 1981 (4) SA 329 (O) at 334A.

¹¹ *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991(1) SA 823 at 824 G-I and *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W).

¹² *First National Bank v MMD Fitment Centre CC and Others* [2023] ZAGPPHC 138; 633/18 (1 March 2023).

¹³ Rule 32(1).

¹⁴ *Thaw Trading v Central Trading 214 (Pty) Ltd* (1422/2012) [2013] ZANWHC 37 (14 March 2023).

finding in *Fattis*¹⁵, that the claim is capable of speedy and prompt ascertainment as a “*debt or liquidated*”, and on, the absence of uniformity¹⁶ in cases as to when a claim “*should be regarded as liquidated*”¹⁷ arguing that it weighs in his favour, notwithstanding the defendant’s reasons for opposing the claim. I am of the view that the dispute raised by the defendant makes it a triable issue.

[20] Defendant has provided its reasons for opposing the summary judgment application, arguing that the plaintiff was attempting to recover unliquidated damages that cannot be calculated without the plaintiff providing evidence in this regard. Furthermore, defendant raises the defence that it disputes the breach since it does not disclose a cause of action establishing that the malperformance caused the loss plaintiff seeks to recover. According to Defendant, who concedes that the repair work was done repeatedly, however, the nature of the repairs were in relation to the software of the vehicle. No material defect had been shown.

[21] Defendant maintains that the summary judgment is unsustainable because it does not comply with the limited grounds set out in Rule 32(1). Despite this plaintiff holds out that defendant is not *bona fide* in its defence. Furthermore, applicant argued that the finding in *Tumileng*¹⁸ as a basis for summary judgment, is capable of being granted on part of the undisputable claim. Upon closer scrutiny I am unable to arrive at the same conclusion as Binns Ward, J in *Tumileng*. Consequently, I am unable to grant partial success to the plaintiff on what the plaintiff alleges to be undisputable and easily ascertainable, without diving into the merits of the plaintiff’s case. I therefore, am unable to shut the door (on part of the prayers) now, on the defendant, given the nature of the relief sought in the face of the defences raised by defendant. It is best for the issues to be properly ventilated at a hearing.

¹⁵ *Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T).

¹⁶ *Ibid* at 739 A – B.

¹⁷ *Ibid*.

¹⁸ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

Conclusion

[22] The foregoing arguments and analysis have led me to conclude that the summary judgment application in its entirety cannot succeed due to the following reasons:

22.1 The *dies non* does not find application for summary judgment applications.

22.2 In terms of Rule 32(2)(a) the summary judgment application is out of time.

22.3 Even if the *dies non* applied, the summary judgment application in terms of the time period shows that the application is in any event out of time.

22.4 As for condonation, the plaintiff fails to set forth sufficient grounds for me to exercise a discretion to condone it.

22.5 It is trite that summary judgment applications are brought on very limited grounds. Since plaintiff claims the return of the motor vehicle alternatively a new vehicle and damages, these types of relief given the facts of the case as pleaded, are not competent in summary judgment applications.

[23] Given that plaintiff is without the use and enjoyment of the motor vehicle for quite some time whilst he remains tied to the indebtedness to SBSA, it is in the interest of justice that this matter be granted a date on the semi-urgent roll for the hearing.

Costs

[24] This was not a complex matter warranting a departure from the norm in respect of costs. I see no reason why costs occasioned by the defendant should be on a scale higher than scale A.

[25] Having considered the submissions made, it is ordered:

- (a) The application in terms of Rule 30 is upheld.
- (b) The summary judgment application is dismissed.
- (c) Plaintiff is liable to defendant for legal costs including costs of counsel where so employed, awarded on Scale A.
- (d) The matter be heard on the semi-urgent roll when so enrolled.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for delivery is deemed to be 30 August 2024 at 13h00.

Appearances:

Counsel for Respondent/ Plaintiff : Adv. D Nyathi

Instructing Attorney : Mathiso Attorneys – Mr C

Counsel for Applicant/ Defendant : Adv. LN Wessels

Instructing Attorney : Smit Jones & Pratt Attorneys
c/o Jeff Gowar Attorneys – Mr S Hamer