

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/26447

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES/NO |

[1]

5/10/2023

[2]

DATE

SIGNATURE

In the matter between:

DB FINE CHEMICALS (PTY) LTD
(1995/004258/07)

FIRST PLAINTIFF/APPLICANT

DB FINE SPECIALITIES (PTY) LTD
(2010/013299/07)

SECOND PLAINTIFF/APPLICANT

and

SPARTA PHARMACEUTICALS CC

DEFENDANT/RESPONDENT

JUDGMENT

SCHOLTZ, AJ:

[1] This is an opposed application by the plaintiffs DB Fine Chemicals (Pty) Ltd and DB Fine Specialities (Pty) Ltd for summary judgment against the defendant, Sparta Pharmaceuticals CC, together with an opposed interlocutory application to compel the defendant's heads of argument in relation to the application for summary judgment. In this judgment, I shall refer to the parties as the plaintiffs and the defendant, rather than the applicants and the respondent, unless the context requires otherwise.

[2] It is common cause that the defendant's heads of argument in the summary judgment application were eventually filed on 14 April 2023. The only issue to be determined in respect of the interlocutory application is therefore that of costs. I shall deal with this aspect first.

The Application to Compel

[3] The relevant timeline regarding the application to compel is as follows:

a. After all pleadings in the application for summary judgment had been filed, the following steps were taken:

- i. On 23 January 2023 the plaintiffs delivered their heads of argument.
- ii. On 3 February 2023 the plaintiffs uploaded a practice note on CaseLines.
- iii. On the same date (i.e. 3 February 2023), the plaintiffs' attorneys wrote to the defendant's attorneys reminding them that their client's heads of argument were due by 6 February 2023, and that failure to deliver them timeously would result in an application to compel.
- iv. On the same day, 3 February 2023, the defendant's attorneys replied stating that:

“[Y]our request for our client's Heads is premature in that you have not yet served on us the index, or your client's Practice Note.”

- v. Replying on the same date, the plaintiffs' attorneys wrote to the defendant's attorneys advising them that:

“The practice note has just been uploaded onto the CaseLines court file, and you are free to access same.

The erstwhile requirement of serving the consolidated index has fallen into disuse upon the event of the CaseLines electronic platform, which electronic platform automatically generates an index upon anyone's request. Should you require such index to be produced, it can be done on the CaseLines platform. ... We therefore await your client's heads of argument on the 6th of February 2023, failing which, the application to compel will be initiated.”

- vi. Still on the same date, the defendant's attorneys replied stating:

“The uploading of documentation to CL [CaseLines] does not constitute service, and similarly it is not incumbent upon us to download an index. When we receive the required documentation, we will file our Heads.”

- vii. On 8 February 2023, the plaintiffs served a practice note and a consolidated index on the defendant. It is stated in the plaintiffs' replying affidavit in the interlocutory application that such service took place *ex abundanti cautela*. On the same day, the plaintiffs launched the application to compel delivery of the defendant's heads of argument.

- viii. Also on 8 February 2023, the defendant's attorneys wrote to the plaintiffs' attorneys in the following terms:

“Since you have now complied with your obligations and furnished us with an index and your PN [practice note], we will now commence the preparation of our client's Heads.

Regarding your interlocutory application, same is defective and does not afford us an opportunity to file a notice to oppose or to file an answer. In the circumstances we are affording you an opportunity to withdraw same, failing which it will be opposed and a punitive cost order will be sought. Should same not be withdrawn by close of business on Monday, the 13th, our notice to oppose will follow.”

- ix. On 18 February 2023, the defendant's attorney wrote to the plaintiffs' attorney stating that:

*“On our calculation and bearing in mind the delayed index and PN, the time for us to file our client's heads would be Thursday of this week.
[23 February 2023]*

On the basis that your application is withdrawn, we will file our heads by close of business on Thursday, which would dispose of the necessity of an opposed interlocutory application. Should you decline this invitation, opposing papers will be filed and this aspect can be debated in due course.

We look forward to hearing from you by no later than close of business on Monday, as to what your client proposes doing and absent a response, we will assume that we are to file our answer.”

- x. On 23 February 2023, the defendant delivered an answering affidavit to the application to compel.
- xi. On 9 March 2023, the plaintiffs filed their replying affidavit.
- xii. On 14 April 2023, the defendant filed its heads of argument in the summary judgment application. In paragraph 32 of those heads, it is stated that:

“In as much as Applicants' demand for Respondent's Heads was premature and Applicant launched an application to compel same, same was opposed. Without conceding the application, these Heads are now filed to further the progression of the matter, and the aspect of costs will be argued relative to such ill-conceived application.”

[4] The enrolment of summary judgment applications as opposed motions in this Division is currently governed by the Judge President's Practice Directive 2 of 2020 (the “Practice Directive”). The relevant provisions thereof for purposes of this matter are paragraphs 2.2 to 2.12, which read as follows:

- “2.2 The procedure to enrol an opposed application commences when a consolidated index is delivered and/or uploaded on the CaseLines Digital Litigation Platform.*
- 2.3 The applicant shall deliver a consolidated index within five (5) days from the date of service of the applicant's replying affidavit or last affidavit that can permissibly be filed and/or uploaded on the CaseLines Digital Litigation Platform.*
- 2.4 Should the applicant not timeously deliver and/or upload the consolidated index, the respondent may do so.*
- 2.5 The consolidated index must prominently indicate on the front page the date when and in what manner it was served on the opposing party.*
- 2.6 The applicant shall deliver and/or upload heads of argument and a practice note within then (10) days from the date of service and/or upload of the consolidated index.*
- 2.7 The respondent shall deliver and/or upload heads of argument and a practice note within 10 days from the date of receipt of the applicant's heads of argument.*
- 2.8 If the applicant fails to deliver and/or upload heads of argument and a practice note within the prescribed period, the respondent shall deliver and/or upload its heads of argument and practice note, within 10 days of the expiration of the period referred to in paragraph 6 above.*
- 2.9 When a party fails to deliver and/or upload heads of argument on the prescribed date, the complying party may apply to the registrar for a provisional enrolment date and simultaneously such party shall initiate the application referred to in paragraph 4.1.12 below.*
- 2.10 The heads of argument and practice notes may be served in accordance with Rule 4A of the Uniform Rules but uploading on the CaseLines system shall be regarded as compliance with the Rule. This directive applies to the service and filing of any pleading and/or notice contemplated in this directive.*
- 2.11 Where a party fails to deliver and/or upload heads of argument and/or a practice note within the stipulated period the complying party may*

provisionally enrol the application for hearing. Such party shall, upon provisional enrolment, simultaneously initiate and/or upload an interlocutory application on notice to the defaulting party that on the date set out therein, (which shall be at least 5 days from such notice), he or she will apply for an order that the defaulting party delivers and/or uploads his or her heads of argument and practice notice within 3 days of such order, failing which the defaulting party's claim or defence will be struck out. Such application shall be enrolled in line with the provisions set out in Practice Directive 2 of 2019 dealing with interlocutory applications.

2.12 No opposed motion will be enrolled on the final roll without the requisite heads of argument being filed and/or uploaded.”

- [5] It was argued on behalf of the plaintiffs that they had complied with the terms of the Practice Directive, save for not having delivered their practice note and index simultaneously with the heads of argument, although they were delivered later.
- [6] The plaintiffs argued, with reference to paragraph 2.7 of the Practice Directive, that the defendant's obligation to file its heads of argument commenced on the date of receipt of the plaintiffs' heads of argument and that such heads had to be delivered and/or uploaded within 10 days from the date of receipt of the plaintiffs' heads, and not after having received the plaintiffs' heads of argument, practice note and index.
- [7] It is also pointed out in the plaintiffs' replying affidavit to the interlocutory application to compel, that paragraph 2.8 of the Practice Directive provides that if the applicant fails to deliver and/or upload its heads of argument and practice note, the respondent shall deliver and/or upload its heads of argument and practice note within 10 days of the period referred to in paragraph 2.6 of the Practice Directive (i.e. the date upon which the applicant should have delivered or uploaded its heads of argument and practice note).
- [8] It was argued on behalf of the plaintiffs that the defendant's obligation to deliver its heads of argument was not, based upon the clear wording of the Practice Directive, dependent upon the defendant having received a practice note and index from the plaintiffs. I agree with these arguments.

- [9] If regard is had to paragraph 2.11 of the Practice Directive, it is also apparent that a defaulting party may be compelled by a complying party to deliver its heads of argument and/or practice note by way of an interlocutory application initiated simultaneously with the application for summary judgment (as in this case).
- [10] Paragraph 2.12 of the Practice Directive provides that no opposed motion will be enrolled on the final roll without the requisite heads of argument being filed and/or uploaded.
- [11] A final provision which is of relevance in the present case is paragraph 2.10 of the Practice Directive, which provides that heads of argument and practice notes may be served in accordance with Rule 4A of the Uniform Rules of Court, but that uploading on the CaseLines system shall be regarded as compliance with the rules.
- [12] From the above, it follows that there is no merit in the defendant's contention that it only became obliged to file its heads of argument once a practice note and index had been served on it by the plaintiffs. Furthermore, the defendant's contention that the uploading of a practice note on CaseLines does not constitute service, is also incorrect having regard to the provisions of paragraph 2.10 of the Practice Directive.
- [13] In the circumstances, the defendant's adopted stance is misguided and unjustified.
- [14] In paragraph 10 of its replying affidavit in the interlocutory application, it is pointed out on behalf of the plaintiffs that it is a nonsensical proposition to suggest that heads of argument, which are due, and which are ready for delivery, would be held back and only be delivered on condition that the application to compel be withdrawn. As is stated by the deponent to the replying affidavit:

“No conscientious litigant would consent to withdrawing an application to which it is entitled prior to receiving that which it is entitled to.”

[15] It is clear from paragraph 2.12 of the Practice Directive that the filing of both parties' heads of argument is a prerequisite for the enrolment of an opposed application. By unjustifiably and unnecessarily withholding its heads of argument, the defendant frustrated the enrolment and hence the progress of this matter. The defendant was forewarned in correspondence and in the replying affidavit in the interlocutory application that a punitive costs order would be sought against it, in the light of its conduct and attitude.

[16] Having regard to all the facts and circumstances, I can find no justification for the dilatory, uncooperative, and obstructive attitude of the defendant regarding the filing of its heads of argument.

[17] They were only filed on 14 April 2023 when it is apparent from the papers that the defendant was in a position to file them on 23 February 2023.

[18] In the circumstances, I am of the view that the defendant should pay the costs of the application to compel delivery of its heads of argument and that costs on a scale as between attorney and client are warranted.

The Application for Summary Judgment

[19] The plaintiffs' claims as set out in the amended particulars of claim are for amounts of R 991 300.00 and R 250 843.75 respectively, together with *mora* interest, in respect of goods sold and delivered at the behest and specific request of the defendant. In respect of both claims, it is alleged that they arose out of verbal agreements for the sale and delivery of certain pharmaceutical goods entered into between the first and second plaintiffs, in both cases represented by Mr Dion Baumann and the defendant, represented by Mr Chris McWilliams.

[20] It is pleaded that the relevant express, alternatively tacit, alternatively implied terms of both agreements were as follows:

- a. The plaintiffs were the sellers and the defendant was the purchaser of certain specified pharmaceutical goods.

- b. The plaintiffs would deliver such pharmaceutical goods to the defendant at its behest and specific request.
- c. Upon such delivery of goods by the plaintiffs, they would render corresponding invoices which reflect the goods delivered and the amount owing by the defendant.
- d. The defendant would settle its account with the plaintiffs within 45 days of date of delivery of such invoice.

[21] It is further alleged that the plaintiffs duly performed in terms of the above agreements by delivering the pharmaceutical goods to the defendant at its behest and specific request and invoicing the defendant therefor on multiple occasions as reflected in various invoices annexed to the particulars of claim.

[22] In its plea, the defendant denies that there is an entity styled Sparta Pharmaceuticals (Pty) Ltd and it is pleaded that notice to defend and a plea were filed only to ensure that no default judgment was obtained against an entity "*which ought to have been cited as Sparta Pharmaceuticals CC*".

[23] Regarding both claims, it is admitted in the plea (at paragraphs 5.3, 6, 7, 12.3 and 13.2) that verbal agreements were concluded "*on terms similar to that pleaded*" and which also included a term that "*after such order had been placed and the CC was notified that such goods had been received, they would be obliged to advise Plaintiff as to what quantities were received and such quantity of goods was to be delivered to the CC, whereafter an invoice was to accompany such goods with payment to follow within 45 days thereof*".

[24] Accordingly, the defendant denies that the agreements had been breached as contended or at all, or that the monies claimed are due, owing and payable and avers that "*such amounts as claimed are premature in that plaintiff unilaterally delivered the entire consignment without waiting for specific instructions relative thereto*".

[25] However, the defendant goes on to plead in paragraphs 8.2 and 14.1 of the plea that "*despite the premature delivery of the goods and premature claim for*

payment, the CC has made payment to such plaintiff in reduction of the amounts claimed ...". Certain payments in reduction of the amounts claimed are then set out.

[26] In respect of both the first and second claims, the plea then continues at paragraphs 8.3 and 14.2 thereof, that "*further payment of not less than R 120 000 per month will follow thereafter monthly until such time as the balance allegedly owed in terms of both claims is settled*".

[27] In his affidavit in support of plaintiffs' application for summary judgment delivered on 11 November 2022, Mr Baumann, on behalf of the first and second plaintiffs, verifies that the defendant is indebted to the first and second plaintiffs in terms of the verbal agreements as pleaded in the particulars of claim and that the plaintiffs are entitled to claim the relief as stated in the combined summons and particulars of claim. Mr Baumann does not engage with the defences raised in the plea and merely states that:

"In my opinion I believe that the Defendant/Respondent has no bona fide defence to the claims as set out in the combined summons and particulars of claim and I humbly opine that the notice of intention to defend and plea have been delivered by the defendant/respondent solely for the purpose of delay".

[28] In his affidavit opposing summary judgment, Mr McWilliams, on behalf of the defendant, once again points out that there is no entity styled Sparta Pharmaceuticals (Pty) Ltd and if there is such entity, it is not associated with the close corporation. Furthermore, Mr McWilliams denies that the CC has given notice to defend for purposes of delaying the matter as contended or at all and reiterates the CC's defence as contained in the plea. He also states that:

"At the outset it will be argued that the affidavit of Baumann does not comply with the provisions of the amended rules pertaining to summary judgment type applications and as such this application ought not to have been launched".

[29] Mr Baumann then continued to expand on the defence set out in the plea as follows:

- “9. *In the Plea payment of the Applicant's claim was denied in that the incorrect entity was cited as Defendant, and as being premature on the basis that the goods in question were to be drawn down and paid for as and when required, after receipt of an invoice. (vide paragraphs 5.3, 6.2, 6.3, 7.2, 8.2, 9.3, 10.3, 11.3, 12, 13, 14.1 of plea).*
10. *The Applicants acquired the goods in quantities far more than that required by the CC and were to hold same so that same was available as and when required by the CC who could draw down on same when the occasion arose, and stock was requested by their customers.*
11. *The CC did not require the entire consignment of the goods in question and did not contract to acquire the entire consignment up front but only a partial delivery as and when required. When the entire consignment was delivered, I remonstrated with Baumann and advised that the entire consignment as delivered was not required and premature and indicated same was to be returned. Baumann indicated that delivery had taken place and he would not accept any returns, and that payment in full was required – this despite our agreement, which he reneged upon.*
12. *The CC has customers who required such goods in moderation and for the CC to have purchased the entire stock would have been both suicidal and non-sensical, hence the draw down as required by the agreement.*
13. *Despite the foregoing and premature delivery of goods not required by the CC, it was decided to nevertheless pay for same in tranches of R30 000 per week, which was conveyed to Baumann, who has accepted payment and no payment has been returned. In the circumstances it will be argued that by acquiescing in such payment, the Applicants have waived their right to proceed.*
14. *The CC has paid for the goods as reflected in the plea in such tranches and despite payment to the Applicants, no payment amount has been acknowledged and no deduction of such payment was given to the CC. I annex hereto as "CM1" proof of such payments. The aspect of payment was dealt with in paragraph 8.2 of the Plea.”*

[30] The affidavit then sets out certain payments that had been made and in both cases states that the claims should accordingly reflect reduced amounts.

[31] In a supplementary affidavit dated 15 August 2023, the defendant details further payments made to the plaintiffs after filing of its affidavit opposing summary judgment. The plaintiff did not object to this affidavit. In this respect, it became common cause that the amounts in respect of which summary judgment was claimed were R 278 100.00 and R 159 562.51, respectively.

[32] In paragraph 18 of the affidavit opposing summary judgment, Mr McWilliams states that:

- a. it will be contended that the proceedings were instituted against a non-existing entity;
- b. the application is defective and does not accord with the amended Rules of Court;
- c. the defendant has set out a triable issue;
- d. the claim is premature; and
- e. the plaintiff has not given credit pertaining to the amounts paid and acquiesced in such payment.

[33] Mr McWilliams also stated, in paragraph 18.7, that:

“Mr Baumann has perjured himself in confirming an erroneous cause of action against a non-existent entity and an erroneous amount bearing in mind such payments that were made prior to the deposing of this affidavit”.

[34] On 6 December 2022, the plaintiffs filed a notice to amend in terms of Rule 28(1). The proposed amendment was not objected to and accordingly the plaintiffs filed an amended combined summons and particulars of claim on 22 December 2022. The effect of the amendments was to delete the letters “(Pty) Ltd” and to replace them with “CC” in the summons and the particulars of claim, and by deleting the words “private company” and inserting the words “close corporation” in the combined summons. Amended paragraph 3 of the particulars of claim read as follows after the amendment:

“The defendant is Sparta Pharmaceuticals CC, with registration number 99/019374/23, a close corporation with limited liability, duly registered and incorporated in terms of the company laws of the Republic of South Africa.”

[35] The agreed effect of the amendment is dealt with as follows in the parties' joint practice note:

“14. It was initially disputed that there exists an entity under the style Sparta Pharmaceuticals (Pty) Ltd, however, it is now common cause that the Respondent/Defendant is Sparta Pharmaceuticals CC, the Applicants/Plaintiffs having amended their papers.

15. The Respondent/Defendant had initially denied the above Honourable Court's jurisdiction in this matter. This ailment is also cured by virtue of the Applicant/Plaintiff's aforesaid amendment and the fact that the above Honourable Court has jurisdiction should be considered common cause.

16. At the time the application for summary judgment was launched, these issues were still apparent and the deponent to the summary judgment application confirmed the defendant was the Pty Co.

17. Following from the aforesaid, it bears mentioning that wherever the Respondent/Defendant's denial of the fact raised by the Applicants/Plaintiffs is based purely upon the non-existence of an entity under the name and style of Sparta Pharmaceuticals (Pty) Ltd, these facts should, following the Plaintiffs' amendment, be construed as now being admitted. The Defendant is of the view that this does not detract from the fact that the application for summary judgment was launched against Sparta Pharmaceuticals (Pty) Ltd whereafter the name was amended.”

[36] In argument, Mr Friedland on behalf of the defendant, attacked the affidavit in support of the application for summary judgment. The first objection was that although the notice of amendment was not objected to, and that it might cure the defects in the citation of the defendant going forward, it did not cure the fact that when the application for summary judgment was launched, the deponent to the affidavit in support of the summary judgment verified the citation of the defendant as cited in the unamended summons and particulars of claim, despite the fact that the defendant had already pointed out in its plea that the

defendant was a close corporation and not a (Pty) Ltd and that it had accordingly been incorrectly cited.

- [37] As the amendment had not yet been effected, the fact remains, so argues the defendant, that a cause of action against a non-existent defendant had been verified, despite the fact that the error had been pointed out in the plea. It was also argued, on behalf of the defendant, that the citation of the defendant was still incorrect in that it is cited as “*duly registered and incorporated in terms of the company laws of the Republic of South Africa*” while it is not a company but a close corporation.
- [38] The last submission is highly technical and has little merit. The term “company laws” in the citation is obviously used in the broad sense of “corporate laws” and there can be little doubt that a close corporation is a corporation. It is also significant that the citation does not refer to the Companies Act, but to company laws in the collective sense. What is also significant is that the defendant's correct registration number as a close corporation has been used.
- [39] The argument that the wrong party had been cited, and that the plaintiffs' cause of action against such party had been verified in the affidavit supporting summary judgment, which was filed before the amendment had taken place, and that the amendment did not affect the affidavit in support of summary judgment, has more substance and deserves closer consideration.
- [40] The situation is not dissimilar to that which arose in the case of *F1 Steel CC v Tbhokisi Lelsimibi Steel Boxes and Tanks (Pty) Ltd*¹. In this matter the defendant raised a point *in limine* in a summary judgment application to the effect that the defendant before court, which was a private company, had been incorrectly cited as a close corporation. That compelled the plaintiff to apply at the commencement of the hearing of the application for summary judgment, for leave to amend the summons and the particulars of claim to correct the citation of the defendant. In that case, the defendant before court had been a close corporation before it was converted to a private company.

¹ (2017/40082) [2018] ZAGPJHC 37 (7 March 2018).

[41] The court, per Adams J, held that it was clear from the opposing affidavit that the defendant was the entity cited as per the intended amendment. The defendant did not object to the proposed amendment, which was granted at the commencement of the hearing. It was argued on behalf of the plaintiff that the court could treat this as being “*merely an error or oversight*” and that the intention was clearly to refer to the defendant, which was the correct one and the one then before the court, and to seek judgment against that entity.

[42] Adams J held as follows at paragraph [6] of the judgment:

“Looking at all the documents in casu, notably the particulars of plaintiff’s claim and the defendant’s affidavit resisting summary judgment, it is abundantly clear that the defendant is Tbhokisi Lelsimbi Steel Boxes and Tanks (Pty) Limited. As I understood the submission, it is that I should treat the reference in the application and the affidavit in support of the application for summary judgment, when referring to a Close Corporation, as being obviously erroneous and intended to refer to the private company defendant. I was urged to do so on the basis that the defendant previously traded as and formerly was a Close Corporation. I find myself in agreement with these submissions on behalf of the plaintiff. The point in limine is of a highly technical nature and, in my view, the incorrect citation of the defendant in no way detracts from the claim being directed against the liable party. One can, in my judgment, simply assume that because the defendant was previously a CC, it must mean that summary judgment is being sought against it. Therefore, the foregoing entitles me to read the application for summary judgment as saying that summary judgment is being applied for against the defendant.”

[43] Although the facts in the *F1 Steel CC* case are distinguishable from the present case in that the defendant, Sparta Pharmaceutical CC, had never been a private limited company, (Pty Ltd), the ratio in the *F1 Steel CC* case applies equally to the present case. This is strengthened by the fact that the plaintiffs had cited the correct registration number of the CC in the original summons, particulars of claim and application for summary judgment. There was no prejudice to the defendant, who was aware of the correct position and pointed it out in its plea.

[44] In his judgment, Adams J referred with approval to the following dictum of Blieden J in *Standard Bank of South Africa Limited v Roestof*²:

*“If the papers are not technically correct due to some obvious and manifest errors which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application ...”*³

[45] I am respectfully in agreement with the approaches of Adams J and Blieden J and accordingly find that there is no merit in this point *in limine* raised by the defendant.

[46] The plaintiffs' failure to deal with the correct citation of the defendant in the affidavit in support of summary judgment, despite it having been pointed out in the defendant's plea, is however indicative of a larger failure by the plaintiff to engage with the plea, which has more far-reaching consequences.

[47] On 1 July 2019 material amendments to Rule 32 came into operation. In terms of Rule 32(1) as amended, the plaintiff may only apply for summary judgment after the defendant has delivered a plea. The amended rule 32 then requires the plaintiff to engage with the plea.

[48] Rule 32(2)(b) now provides as follows:

“The plaintiff shall, in the affidavit referred to in sub-rule (2)(a) [the affidavit in support of the application for summary judgment] verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.”

[49] The defendant has argued that the plaintiffs failed to comply with Rule 32(2)(b) and that the application is accordingly defective and falls to be dismissed with costs.

[50] The learned authors of *Erasmus: Superior Court Practice*⁴ state at D1/402G, that to comply with sub-rule (2)(b) the affidavit must contain:

² 2004 (2) SA 492 (W).

³ *Id* at 496H.

⁴ Van Loggerenberg *Erasmus Superior Court Practice* RS 21 (2023).

- a. a verification of the cause of action and the amount, if any, claimed;
- b. an identification of any point of law relied upon;
- c. an identification of the facts upon which the plaintiffs' claim is based; and
- d. a brief explanation as to why the defence as pleaded does not raise any issue for trial.

[51] The authors submit that a court will have to be satisfied that each of these requirements has been fulfilled before it can hold that there has been proper compliance with sub-rule (2)(b). This view was endorsed in *Absa Bank Limited v Mphahlele N.O*⁵ and more recently by Maier-Frawley J of this Division in *Mpfuni v Segwapa Inc*⁶, as well as *Nissan Finance v Gusha Holdings and Enterprises (Pty) Ltd*⁷.

[52] Referring to the views of the learned authors of Erasmus, that full compliance with each of the requirements in Rule 32(2)(b) is peremptory, Maier-Frawley J stated in footnote 3 of her judgment in *Mpfuni (supra)*, that:

“This view was endorsed in Mphahlele supra, at par 15 and is a view I share. It accords with the established case law under the former rule 32(2) wherein the requirements of such sub-rule were considered to be peremptory. See, for example, the reasoning employed in Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC 2010 (5) SA 112 (KZP) at 122 F-I”.

[53] In the *Shackleton Credit Management*⁸ case at 122I, the court states:

“The proper starting point is the application. If it is defective then cadit quaestio.”

[54] In *Tumileng Trading CC v National Security and Fire Pty Ltd*⁹, Binns-Ward J embarked on a detailed analysis of the amendments to Rule 32 and their purpose. Commenting on the requirement that a plaintiff's supporting affidavit

⁵ (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020) at para 5.

⁶ (2021/6574) [2022] ZAGPJHC 181 (14 March 2022) at paras 5-6, also at n 2-3.

⁷ (2022/9914) [2023] ZAGPJHC 303 (5 April 2023) at paras 12, 25-26.

⁸ 2010 (5) SA 112 (KZP).

⁹ 2020 (6) SA 624 WCC.

should explain briefly why the defence does not raise an issue for trial, the learned judge said the following at paragraph [22]:

“What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a ‘formulaic’ supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.” [my emphasis]

[55] In the recent case of *FirstRand Bank Limited v Linyanyabedi*¹⁰, Madiba AJ said the following at paragraph [9]:

“Summary judgment is intended to afford a plaintiff who has an action against the defendant who does not have a defence to have a relief without resorting to a trial. In terms of Rule 32(2)(b) the plaintiff has to identify any point in law and facts relied upon which his claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any issues for trial. It will not be enough to merely state that the defendant did not have a bona fide defence.” [my emphasis]

[56] Having regard to the plaintiffs' affidavit in support of its application for summary judgment, deposed by Mr Baumann on 10 November 2022, it is apparent that the plaintiffs did not engage with the defendant's plea at all.

[57] Apart from the fact that the deponent does not deal with the fact that the wrong entity had been cited as pointed out in the plea (an aspect with which I have already dealt), it fails entirely to deal with the defence pleaded by the defendant.

[58] All that the deponent says in paragraph 9 of the affidavit in support of summary judgment, is the following:

¹⁰ (57115/2019) [2022] ZAGPPHC 324 (18 May 2022).

“In my opinion I believe that the defendant/respondent has no bona fide defence to the claims as set out in the combined summons and particulars of claim and I humbly opine that the notice of intention to defend and plea have been delivered by the defendant/respondent solely for the purpose of delays.”

[59] While this formula may have been adequate before 1 July 2019, it is clear that the law and practice in this area has developed significantly and that such a cursory approach will no longer suffice. Something more than a formulaic supporting affidavit is now required from a plaintiff, who must engage with the contents of the plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely for the purpose of delay. This the plaintiffs have not done and accordingly the application for summary judgment does not comply with Rule 32(2)(b).

[60] The summary judgment procedure does indeed provide summary justice and is an exceptional remedy. This requires that an applicant must strictly and properly comply with the requirements of the rule that governs it. This cannot be said in the present case and in the words of Wallis J (as he then was) in *Shackleton Credit Management*¹¹, *cadit quaestio*.

[61] In the circumstances, the application for summary judgment falls to be dismissed.

Order

[62] I make the following order:

- a. The Defendant is ordered to pay the costs of the application to compel delivery of its heads of argument in the summary judgment application on the scale as between attorney and client.
- b. The application for summary judgment is dismissed.
- c. The Defendant is granted leave to defend the action.
- d. Costs of the application for summary judgment shall be costs in the cause.

¹¹ *Shackleton* above n 8.

JW SCHOLTZ
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' representatives by e-mail, uploading to CaseLines and release to SAFLLI. The date for hand down is deemed to be 5 October 2023.

APPEARANCES

For the Plaintiff/Applicant:	Adv. L. van Gass
Instructed by:	Van Greunen & Associates Inc.

For the Defendant/Respondent:	Mr. S. Friedland
Instructed by:	Beder-Friedland Inc.

Date of Hearing:	29 August 2023
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Date of Judgment:	5 October 2023
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