

SOUTH AFRICA / JUDGMENT

Mobile Telephone Networks (PTY) LTD v Sugarberry Trading 239 CC (1503/2021) [2023] ZANWHC 3 (19 January 2023)

[2023] ZANWHC 3**COURT**

North West High Court, Mafikeng

BEFORE

K Mongale

CASE / FILE NUMBER

1503/2021

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Source record**IN****THE NORTH WEST HIGH COURT, MAFIKENG****CASE****NUMBER: 1503/2021****Reportable:**

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In

the matter

between:

MOBILE

TELEPHONE

NETWORKS

(PTY)

LTD

Plaintiff/Respondent

TRADING

AS MTN

(Registration

Number: 1993/001436/07)

and

SUGARBERRY

TRADING 239 CC

Defendant/

Applicant

TRADING
AS DEGS CELLULAR
(Registration

Number: 2007/020802/23)
DATE
OF
HEARING
28
October
2022
DATE
OF

JUDGMENT

19 January 2023

JUDGMENT

Mongale AJ

Introduction

[1] The plaintiff served the defendant with the summons on 15 July 2021 and the defendant served its notice to defend on 14 September 2021 and its plea on 13 December 2021.

[2] On 21 January 2022 the plaintiff served the defendant with the application for Summary Judgment in terms of Rule32 of the Uniform Rules of court.

[3] Rule32(2)(a) reads:

"after the date of delivery of the plea, the plaintiff shall deliver a notice of application for Summary Judgment together with an affidavit made by the plaintiff or any other person who can swear positively to the facts".

[4] After receiving the Summary Judgment, the defendant reacted thereto by filing Rule30(2)(b) on 25 January 2022 on the basis that the Summary Judgment constitutes an irregular step as it does not comply with Rule32(2)(b) of Court, in that it was filed outside the timeframe prescribed by the rule.

Issues

to be determined by the court

[5] Whether there is any substance in the application launched in terms of Rule30(1) by the defendant as a result of the alleged late filing of the plaintiff's Summary Judgment;

- [6] Whether dies non, as provided for in Rule6(5)(b)(iii)(aa), is applicable in Summary Judgment applications;
- [7] Whether the plaintiff has complied with the Rules in its condonation application to condone its late filing of the Summary Judgment should the court find that the Summary Judgment has been filed outside the time frame prescribed by the Rules;
- [8] If the Rule does not find application, the court will consider application for condonation, which is the discretion of the court, and whether or not it is in compliance with the Rules.

Submissions

by parties

- [9] That the 15 days in which the plaintiff ought to have filed its application for Summary Judgment lapsed on 5 January 2022 and that by filing the Summary Judgment application on 25 January 2022 the plaintiff was out of time, which amount to an irregular step.
- [10] That the plaintiff's reliance on Rule6(5)(b)(iii)(aa) is misplaced because the provisions of Rule32 are self-contained and functions separately from those provided for in Rule6 and that Rule6(5)(b)(iii)(aa) deals specifically with a notice of intention to oppose and an opposing affidavit only in exclusion of a founding affidavit.
- [11] That Rule6(5)(b)(iii)(aa) deals with a notice of intention to oppose and a subsequent opposing affidavit and that it does not make logic to extend the operation of the Rule to include a founding affidavit.
- [12] That if the plaintiffs argument regarding the applicability of Rule6(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 a Notice of application for Summary Judgment.
- [13] On condonation, the defendant contends that the plaintiff has failed to place a substantive application for condonation before the court.
- [14] The defendant referred the court to an extract in the Practical Guide by SJ van Niekerk et al that deals with condonation and provides that "condonation for the delivery of an application for summary judgment out of time is not automatically granted. A substantive application for condonation is required. As summary judgment is a stringent remedy, the courts will enforce the rules for condonation with the same strictness".
- [15] The defendant further alleges that, when the plaintiff served the defendant with notice of bar on 6 December 2021, the plaintiff ought to have expected a plea from the defendant on 13 December 2021, which was the last day for the dies non on the notice of bar.

[16] On the other hand the plaintiff submits that 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.

[17] The plaintiff further submits that the ordinary Rule of interpretation must be applied in determining the applicability of Rule 6(5)(b)(iii)(aa) to its application for summary judgment.

[18] The plaintiff contends that there is a uniform approach, with regard to 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.

[19] The plaintiff further contends that upon a proper interpretation of Rule 6(5)(b)(iii)(aa), summary

judgment

applications are not excluded from its reach and that the plaintiffs' summary judgment application was made within the 15-day period prescribed by Rule 32, read with Rule 6(5)(b)(iii) (aa).

[20] The plaintiff submits that in the event that the court find that its Summary Judgment application was an irregular step because it was instituted out of time, its application should be condoned because the defendant stands to suffer no prejudice.

Analysis

of the law

[21] Rule 32(2)(a) reads:

"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."

[22] On the other hand, Rule 6(5)(b)(iii)(aa) provides that: "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.

[23] One cannot comprehend and interpret Rule 6(5)(b)(iii)(aa) without making reference to Rule 6(5)(b)(iii)(bb) which reads:

"The provisions of subparagraph (aa) shall not apply to applications brought under sub Rule 6(12) of this Rule and applications brought under Rule 43."

- [24] The question is 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). If this Rule does not cater for summary judgment applications, and if it only applies to affidavits delivered consequent to a notice of intention to oppose, why would the Rules Board only make two exclusions, that is Rules 43 and 6(12) applications.
- [25] The use of the word 'any' cannot be ignored because doing so will be tantamount to applying a restrictive interpretation and ignoring the context of the Rule as a whole and the ordinary rules of grammar. In *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) the Constitutional Court at paragraph [65] held that "this approach to interpretation requires that from the outset one considers the context and the language together, with neither predominating over the other. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this "now settled" approach to interpretation, is a "unitary". This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose".
- [26] The provisions of Rule 6(5)(b)(iii)(aa) are specific and the exclusion of the period between 21 December and 7 January is applicable to the delivery of the notice of intention to oppose or 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 mean any affidavit subsequent to the notice of intention to oppose, and those that are not excluded by this sub-rule, which include summary judgment.
- [27] The argument that this Rule is applicable to applications brought under Rule 6 only and that summary judgment application 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).
- [28] In *ABSA Bank Limited v Fumani Shikwabana* case No 2370/15 at paragraph [9], 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.
- [29] Although this case was decided before the Rule was amended in 2017, it is evident that summary judgment was not meant to be excluded.
- [30] In *South African Airways (Soc) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR271/15) [2018] ZALCJHB 6 (19 January 2018) the Labour Court remarked that "the absence of a Labour Court Rule stipulating dies non during the ordinary annual shutdown period over December and January should be taken into account when delays over this period are being considered".

[31] Even if I find that summary judgment application does not find application under: Rule 6(5)(b)(iii)(aa) and that the plaintiff ought to have filed its application for summary judgment within 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.

[32] In its reasons for having failed to file the summary judgment within the prescribed timeframe, the plaintiff gave an explanation on what led its counsel not to file the summary judgment application timeously. The plea was delivered at the time when the plaintiff's offices were closed for the December-January break, which means that the 15-day period started to run when all, if not most, attorney's firms have closed. The plaintiff's counsel contracted Covid-19 in December 2021 and lost both of her parents to Covid-19 towards the end of the year. This must have been the most traumatic period for the plaintiff's counsel.

[33] Other than alleging non-compliance with Rule 32, for the defendant to succeed in its application in terms of Rule 30, the defendant must allege and prove irregularity and prejudice that it suffered as a result of the non-compliance of the Rule by the plaintiff.

[34] In SA Metropolitan Lewensversekeringsmpy v Louw NO 1981(4) SA 329 (0) at 334A, the court held that in Rule 30(1) application, where prejudice is absent, a decision to set the irregular proceeding aside will not be given and the irregularity may be overlooked. (Cosani Engineering v Anton Steinecker Maschinenfabrik 1991(1) SA 823@ 824G-I and Sasol Industries v Electrical Repair Engineering 1992(4) SA 465)

[35] The defendant has failed to prove prejudice in its affidavit in support of its Rule 30 application.

Conclusion

[36] The defendant has failed to allege and prove prejudice that it will suffer as a result of non-compliance of the rules by the plaintiff.

[37] The plaintiff has complied with the provision of Rule 32 read with Rule 6(5)(b)(iii)(aa) and 6(5)(b)(iii)(bb).

[38] The defendant's application is dismissed with costs and the plaintiff is allowed to proceed with its summary judgment application.

ORDER

[39] Therefore, the following order is made:

(i) The defendant's application in terms of Rule 30 is dismissed with costs.

(ii) The plaintiff is granted leave to pursue its application for summary

judgment.

K MONGALE

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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