

SOUTH AFRICA / JUDGMENT

Risimati Steven Construction CC v University of Venda (1872/2023) [2025] ZALMPPHC 32 (20 February 2025) [2025] ZALMPPHC 32

COURT

Limpopo High Court, Polokwane

BEFORE

Pillay

CASE / FILE NUMBER

1872/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 1872/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

20/02/2025

SIGNATURE:

In

the matter between: RISIMATI
STEVEN CONSTRUCTION CC
(Registration
number: 2002/023245/23)
APPLICANT/DEFENDANT
And
UNIVERSITY
OF VENDA
RESPONDENT/
PLAINTIFF
IN

RE: UNIVERSITY
OF VENDA
PLAINTIFF
And
RISIMATI
STEVEN CONSTRUCTION CC
(Registration
number: 2002/023245/23)
DEFENDANT
Heard
:
16
October 2024
Delivered
:
20 February 2025 by circulation
to the parties' legal
representatives
Coram
: PILLAY
AJ

JUDGEMENT

Pillay AJ

Introduction:

[1] The plaintiff instituted proceedings in the Limpopo High Court Polokwane for payment of funds flowing from latent defects penalties and unlawful extensions of the contract against the defendant. The summons was served on 28 February 2023. The defendant filed a notice in terms of Rule 30A of the uniform rules of court. In terms of this notice the defendant in the application sought the following orders;

[1.1] Setting aside of the plaintiff's combined summons as an irregular step.

[1.2] Costs of the application.

Brief

Background:

- [2] The parties entered into a service agreement in which the defendant was responsible for the construction of a building called Health Sciences. A dispute between the parties arose resulting in the defendant referring the dispute for arbitration. The appointed arbitrator held pre-arbitration meetings with the parties to identify issues in dispute between the parties and the procedure to be followed. At the onset the plaintiff indicated that the issue pertaining to jurisdiction in so far as the authority of the arbitrator needed ventilation, in relation to the disputed issues.
- [3] Parties were directed to file written heads of argument in respect of the issue of jurisdiction and the arbitrator's ruling was received on the 26 January 2023 wherein the arbitrator ruled:
- [3.1] The defendant's (plaintiff in these proceedings) jurisdictional objection is dismissed.
- [3.2] The parties are directed to attend a further pre-arbitration meeting to be held on a date and time to be agreed with the parties and failing agreement on a date and time as directed by the arbitrator.
- [3.3] The defendant is ordered to pay the claimant's (defendant) costs relating to the defendant's jurisdictional objection (recording that this does not include any cost of the arbitrator who was acting pro bono in this matter).
- [4] At paragraph 61[1] the arbitrator indicated, "in the present case, applying the aforementioned dicta, it seems to me that I have not yet "entered upon the reference" and consequently the four-month period prescribed by section 23 of the arbitration act has not yet commenced. The inquiry into the merits of the dispute referred to this arbitration has not yet commenced(my underlining). All that has occurred is a hearing of the jurisdictional objection to obtaining a ruling as contemplated by article 24(1) of the rules of the Association of arbitrators."
- [5] The plaintiff issued summons against the defendant on 28 February 2023 wherein various claims for breach of contract and damages were sought. The summons was served on the defendant on 1 March 2023. The defendant filed noticed of intention to defend on 14 March 2023. The defendant thereafter brought an application in terms of rule 30 A of the uniform rules of court, which was dated 29 March 2023, served on the plaintiff on the 29 March 2023 and date stamped the 3 April 2023 by the registrar.
- [6] The defendant served and filed the Rule 30 A (2) interlocutory application on the 9 May 2023. The defendant relying on the arbitrator's ruling, as being binding on the parties, indicated that the combined summons constituted an irregular step, which stood to be set aside. In support of this argument the defendant highlighted that the plaintiff had not instituted a judicial review in relation to the arbitrators ruling which was binding on the parties. The defendant noted that the ambit of the dispute as contained in the combined summons was

identical to the dispute that was to be determined in the arbitration and therefore stood to be determined by the arbitrator, in the arbitration proceedings. Therefore, the defendant sought that the summons be set aside on the basis that it constituted an irregular step.

[7] The application was opposed and the plaintiff in its answering affidavit filed two points in limine;

[7.1] That the defendant failed to comply with the provisions of Rule 30 of the uniform rules of court in light of the allegation that the issuing of the summons constituted an irregular or improper step. The notice was brought in terms of Rule 30(A), and the subsequent application in terms of Rule 30 (A) (2) of the uniform rules of court. The relief sought by the defendant does not fall within the ambit of Rule 30 (A). Amidst the allegations pertaining to an irregular step which is dealt with under the provisions of Rule 30 the defendant was obliged to comply with the rules applicable to the provisions of Rule 30(1) in respect of notice prior to approaching the court. On this basis the application should be dismissed with costs.

[7.2] That the application in terms of Rule 30(A)(2) was brought out of time without the required application for condonation in terms of the rules. The defendant served the notice in terms of Rule 30(A) on or about the 30 March 2023. The contents of both the notice and the application seek relief provided for in terms of Rule 30. Under Rule 30, the defendant ought to have brought the application to set aside the summons on the grounds of irregular step within 15 days after the expiry of the 10 days reserved for the plaintiff. The relief sought is in terms of Rule 30 and as such the defendant was obliged to comply with the rule. Therefore, the application should be dismissed with costs.

[8] In respect of the merits of the application, the plaintiff indicated that the issuing summons is the institution of proceedings. Prior the summons there was no proceedings. Therefore, the irregular step as alleged by the defendant, could not be sustained if proceedings had not yet been instituted. The reliance on an irregular step, under the

provisions of Rule 30(A) is confusing and not clear, as to what process and which rule the defendant sought to rely upon, in respect

of the application and same should be dismissed with cost.

[9] In respect of the arbitration proceedings, the plaintiff indicated that the arbitrator had made a ruling in respect to jurisdiction only. That the allegation by the defendant that there was a pending arbitration was an overstatement of the facts as a period of more than a year has lapsed, since the referral by the defendant for arbitration, and to date a statement of claim in the arbitration proceedings, had not yet been filed. The plaintiff took note that the defendant conceded, that this court had jurisdiction, to entertain this matter amidst the arbitration proceedings, however the defendant sought that this court relinquish its jurisdiction, in favour of the arbitration process, which was unsustainable. The circumstances of the plaintiff's case included claims for damages flowing from the poor

workmanship by the defendant which resulted in the contract

being terminated. The plaintiff had to employ other contractors to complete the work, resulting in the issuing of the summons. The plaintiff indicated that nothing barred the defendant from pursuing the arbitration proceedings especially as the time frame of six weeks for the review process had lapsed and that after March 2023 there was no possibility to institute review proceedings as it was out of time.

- [10] The plaintiff indicated that the date of the termination of the contract was 4 March 2020. That summons was issued shortly before the lapse of the three-year period applicable for a claim to prescribe. There was no statement of claim that had the potential to interrupt prescription and there was no claim for payment of damages on account of latent defects, before any arbitrator for determination.
- [11] The plaintiff noted that the contents of the written contract did not contain an agreement between the parties that disputes pertaining to a claim for damages, after the conclusion of the agreement, is to be the subject of arbitration. Clause 40.1 of the agreement under the description of a disagreement, was not capable of including the complaint by the plaintiff in respect of the various issues. This provision is not a bar to the jurisdiction of this court and as such, the arbitration process cannot supersede this litigation before this court.
- [12] The plaintiff cited various case law in their heads of argument [2] supporting the point that this court's jurisdiction was not barred from entertaining the matter and that the process of arbitration did not oust this court of its jurisdiction. The plaintiff indicated that a notice is not a pleading and as such the plaintiff was not prevented from serving a notice of bar on the defendant, as a notice in terms of Rule 30A did not constitute a pleading as contemplated in terms of Rule 22(1). The plaintiff cited various cases in support of this argument.
- [13] The plaintiff highlighted that the defendant failed to comply with Rule 30(2)(b). If the defendant was relying upon the alleged irregular step, then when the summons was served on the defendant on 1 March 2023, the defendant in compliance with Rule 30 had 10 days in which to serve the notice on the plaintiff on or about 15 March 2023. The notice in terms of Rule 30 A was served on or about the 29 March
23. This was out of time and not in compliance with the Rule 30. The defendant's admission of the mistake seeking to blame the plaintiff for placing form above substance is misguided, the defendant lost sight of the fact that in terms of our law and practice, the parties are held strictly to the pleaded case. There was no application to

amend nor was there any application for condonation in respect of the non-compliance with the rules, in respect of the time frames

applicable to Rule 30, various cases were cited in motivation of this argument [3]. It is for the above-mentioned reasons that the application sought by the defendant should be dismissed with costs.

[14] In reply the defendant conceded that it had mistakenly referenced Rule(30)(A) and Rule(30)(A)(2) of the uniform rules of court in its notice to remove the cause of complaint, and subsequent irregular step application. The defendant submitted that at all material times, the substance of the defendant's complaint was clear and unambiguous. The defendant indicated that it was impermissible to place form over substance, and that the technical argument raised by the plaintiff was baseless. The defendant drew the courts attention to the various case law pertaining to the fact that litigation was not a game [4], and that the plaintiff was well aware of the nature of the complaint, and the case that the plaintiff had to meet. The plaintiff was not

prejudiced by the incorrect reference to Rule 30(A) instead of Rule

30. This point in limine should be rejected as it has no merit.

[15] The defendant highlighted that it complied with the timelines provided for in an application for an irregular step. On or about 29 March 2023 the defendant served and filed its notice to remove cause of complaint which was within time and thus the defendant need not seek condonation. The defendant indicated that because of the public holiday on the 21 March 2023, the notice was filed within the court timelines and this point should also be dismissed.

[16] The defendant indicated that the issue was whether this court should proceed to consider this matter in light of, the ongoing arbitration proceedings between the parties, and the award made by the arbitrator, which was binding on the parties, unless it is set aside in review proceedings. The defendant sought that this court decline to exercise its inherent jurisdiction to entertain this matter.

[17] According to the defendant the plaintiff had sought to institute a judicial review in relation to the arbitration ruling, and that the arbitration proceedings were stayed, pending the finalisation of this ruling, and therefore the defendant had not filed a statement of case.

[18] The defendant drew the courts attention to the various case law [5] concerning the sanctity of contracts and the arbitration process, and why this court should be reluctant to interfere, in light of the fact that, the parties had agreed to the arbitration route, as a means of resolving their dispute. The plaintiff had only one option and that was to institute review proceeding, if the plaintiff wished to challenge the jurisdictional ruling of the arbitrator. The plaintiff's election to institute this proceeding, constituted an irregular step, by ignoring the very agreement to resolve the disputes by arbitration proceedings. In the premise the plaintiff's combined summons stands to be set aside as an irregular step, and the defendant be awarded costs in respect of this application.

The Issues to be considered:

[19.1] Whether the plaintiff summons served on the defendant constituted an irregular step or proceedings under Rule 30A of the uniform rules of court.

[19.2] Whether the arbitration proceedings, and the agreement by the parties to refer the proceedings to arbitration, oust the jurisdiction of this court.

[19.3] Whether the defendant correctly applied Rule 30 A for the relief sought under Rule 30 and whether these two rules are interchangeable,

and whether the procedural requirements for Rule 30A and or Rule 30 were complied with.

[19.4] Whether the plaintiff's claim should be struck off based on the provisions of Rule 30A.

Legal Principles and its Applicability:

[20] Rule 30A of the Uniform Rules of Court: Non-compliance with Rules and Court Orders

- (1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order-
 - (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

[21] Rule 30 of the Uniform Rules of Court: Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity.
 - (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days.
 - (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph(b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

[22] In *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and*

Others [6], the Constitutional Court placed the purport of Rule 30 in context where it said:

"(26) Rule 30(3) contemplates a two-stage process. A court must first satisfy itself that the proceeding or step is irregular or improper. If it is so satisfied, it has the wide power to set the proceeding aside in its entirety or in part, grant leave to amend or make any order as it deems fit. These are, no doubt, wide powers. Following its conclusion that a step or proceeding is irregular or improper, a court however, is required to make an order.

[23] As noted above, this court must first determine when considering the application sought by the defendant, that the proceedings or step was irregular or improper in terms of Rule 30(3). Before this court can ventilate this issue it needs to have regard to the said notice. Both Rule 30 and Rule 30A makes provision for various steps and dies to be complied with before the consequential orders will follow. The defendant correctly concedes that its notice was in terms of Rule 30 A, although the procedure as contained in Rule 30 A was not complied with. The defendant indicates that it sought to proceed in terms of Rule 30 utilising the procedure as contained in Rule 30. It is clear from the concession made, that the defendant interchanged the two

processes with the heading of one and the procedure of another. Instead of seeking an amendment to fix the conundrum, in so far as which rule was being sought to be relied upon, the defendant required this court to disregard the points in limine as raised by the plaintiff, as being inconsequential, and to consider substance above form. This unfortunately is not the circumstances when dealing with Rule 30 proceedings.

[24] In *Bloem and Another v NWK Limited* [7] The court noted the following:

"The Uniform Rules seek to regulate procedure (form) and not substance. Any complaint raised in terms of Rule 30 therefore speaks to an alleged procedural irregularity in the conduct of the litigation. It therefore follows axiomatically that if a court finds that the procedural steps taken by a party were irregular, a court is vested with wide powers to either set aside the proceeding in its entirety or in part or make any other order the Court may deem fit. The order which will generally follow in applications of this nature, if a court finds a particular step to be irregular, is to afford the party against whom the complaint is raised an opportunity to remove the cause of complaint."

[25] The defendant fails to consider the fact that a party stands or falls by their papers, and curing of the application and founding affidavit, cannot be done in reply especially as both these rules refer to specific time frames, to be complied with. Rule 30A (2) speaks of 10 days whilst Rule 30(2) speaks of three different time frames to be complied with before the

irregular proceedings complained of, will be ventilated by court. The court took note of the discrepancies in respect of the dies, with specific reference to when notice of the irregular step, was to be brought to the attention of the opponent. I align myself with the plaintiff's argument that the defendant had received the summons, which is alleged to be the irregular step, on the 1 March 2023. The Rule 30(1) ten-day period was due on the 15 March 2023, same was only issued on the 29 March 2023,

in noncompliance with the Rule 30 procedure. The application was defective without an application to amend as well as an application

for condonation. On this basis alone this application stands to fail.

[26] In respects of the merits of this application regard was had to the record of proceedings in the arbitration. The arbitrator had to adjudicate an ancillary issue concerning jurisdiction. At paragraph 61[1] the arbitrator indicated, "in the present case, applying the aforementioned dicta, it seems to me that I have not yet "entered upon the reference" and consequently the four-month period prescribed by section 23 of the arbitration act has not yet commenced. The inquiry into the merits of the dispute referred to this arbitration has not yet commenced (my underlying). All that has occurred is a hearing of the jurisdictional objection to obtaining a ruling as contemplated by article 24(1) of the rules of the Association of arbitrators."

[27] From the plain reading of this ruling the merits of the dispute were not entertained and any rulings made thereon. Moreover, the defendant conceded that it had not filed its statement of case yet, and blamed the plaintiff for this delay, as it was accommodating the plaintiff's review application. This argument cannot hold weight, as the six-week time frame had long lapsed, with nothing being done by the plaintiff, allowing the defendant to approach the arbitrator, for another pre arbitration date to be set. This was not done. Moreover, as indicated the arbitration proceedings was still in the early stages and there is nothing preventing the parties from pursuing this route. However, had the plaintiff not instituted the combined summons, the claim for damages would most likely have prescribed, and because of the early stages of this arbitration proceedings no protection could be afforded the plaintiff for the alleged damages claim.

[28] In *Aveng (Africa)Ltd formally Grinaker-LTA Ltd t/a Grinakar-LTA Building East v Midros Inverstments (Pty)Ltd* [BJ the court held as

follows;

"It is now well-established that an arbitration agreement does not oust the jurisdiction of the courts.[1] Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to s 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case

to be made out."

[29] The court takes note of the argument raised by the plaintiff in respect to the entitlement of the defendant to file a special plea wherein this issue of the Jurisdiction of this court could be ventilated in so far as the pleadings is concerned. The defendant there would also be afforded the opportunity to plead to the merits as well as to pray that these proceedings, be stayed pending the outcome of the arbitration process.

[30] From the papers before this court, the irregular step process that was sought by the defendant in this application, were riddled with too many errors which were unable to be cured and were not technical. It is for those above-mentioned reasons that this application sought by the defendant in respect of having the plaintiff's combined summons set aside as an irregular step must fail.

Costs

[31] It is by normal course that costs follow the successful party, and there is no reason to order differently. During arguments the defendant sought costs on high court scale C if successful in having its application granted. The plaintiff in response sought costs for the two counsel on high court scale C and argued that the matter was intricate, to justify the services of two counsel. It is for the above reason that cost will be awarded to the successful party as sought in both parties address to court.

Order:

[32.1] The Application sought by the Defendant to set aside the Plaintiff's Combined Summons as an irregular step is dismissed.

[32.2] The Defendant is ordered to pay the cost of the Application which includes costs of two counsel on High Court scale C.

PILLAY K L

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT/ DEFENDANT: Adv AJ Glendinning

INSTRUCTED BY

: E Taylor Attorneys

FOR THE RESPONDENT/ PLAINTIFF: Adv MM Mojapelo SC and Adv R Sibara

INSTRUCTED BY

: Mphaphuli Mudzunga Tshinetsise

Attorneys

DATE OF HEARING : 16 October 2024

DATE OF JUDGEMENT : 20 February 2024

- [1] See page 115 of the documents attached to the founding affidavit.
- [2] See page 12 to 14: Aveng(Africa) Ltd formerly Grinaker-LTA ltd t/a Grinaker-LTA Building East v Midros Investments (Pty)Ltd 2011(3)SA 631 (KZD; Transnet Durban(pty)ltd v eThekweni Municipality and Another 2024JDR 0087 (KZD).
- [3] See page 20 to 21: Mand M Quantity Surveyors (C v Oval Corporate Designs (Pty)Ltd (84202119) [2021]ZAGPPHC 343; Bester N.O and Others v Target Brand Orchards (Pty)Ltd and Others {2020}ZAWCHC183.
- [4] See page 11 and 12 of HOA of Defendant: Nieuwoudt v Joubert 1988(3) SA 84; Cadac (PTY)LTD v Weber -Stephen Products Co and Others [2010]ZASCA 10; ABSA Limited v Cromet[2020]JOL 53247.
- [5] See pages 14 to 22 of heads of argument of the defendant.
- [6]
- [2023] ZACC 2
- [7] (750/2021) {2024} ZANWHC 83 (20 March 2024)
- [8] 2011 (3) SA 631(KZD)
- [1] The Rhodesian Railways Limited v Mackintosh 1932 AD 359 at 375.

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