

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
23/02/12
DATE SIGNATURE
In the matter between:

CASE NO. 70189/2010

Date heard: 3/02/2012

23/2/2012

MICHAEL MEYER N.O.

First Applicant/Plaintiff

MICHAEL MEYER (JNR) N.O.

Second Applicant/Plaintiff

and

ABSA BANK LIMITED

Respondent/Defendant

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

(1.1) This is an application in terms of Rule 30.

- (1.2) The parties will be referred to as either "Applicant" or "Plaintiff" and as "Respondent" or "Defendant".
- (1.3) The Plaintiffs' application is for an order that the security given by the Defendant in terms of Rule 32(3)(a) of the Uniform Rules of Court, and which was delivered on 19 April 2011 (and not 18 April 2011 as stated by the Applicants) be set aside as an irregular step.
- (1.4) Various references are made to the heads of the parties which are herewith acknowledged.

[2] BACKGROUND / RELEVANT FACTS:

- (2.1) A handy summary of the facts appears from the Applicants' heads which can be referred to as stated hereinafter.
- (2.2) The First and Second Applicants are the Trustees of the Sophia Trust.

- (2.3) The Trust conducts a bank account with the Respondent, more specifically a savings account at the Paarl branch of the Respondent.
- (2.4) On 22 February 2010, debit inscriptions in the amount of R33 000,00 appeared on the account. The Plaintiffs say they did not authorise the said inscriptions. The Respondent had no authority so the Plaintiffs' say to effect the inscriptions on the account, which the Respondent refuses to rectify on the account.
- (2.5) The Applicant then issues summons, the Respondent entered a notice to defend whereupon the Applicants applied for summary judgment.
- (2.6) The Defendant elected to furnish security (instead of filing an opposing affidavit) which it did on 16 February 2011. The security was not to the satisfaction of the Registrar, and the Registrar issued a decision/ruling to that effect, i.e. not accepting the security.

- (2.7) After the said security was ruled on 12 April 2011 as being insufficient, the Defendant delivered further security on 19 April 2011.
- (2.8) On 20 April 2011 the summary judgment application was postponed to 6 June 2011.
- (2.9) On 20 April 2011, the Plaintiffs delivered a notice in terms of Rule 30(2).
- (2.10) **The Plaintiffs stance in the aforesaid notice was that the Defendant had acted irregularly in delivering the further security of 18 April 2011, in that such delivery of further security was not in accordance with the Rules.**
- (2.11) *The question to be decided in this matter is thus whether or not the delivery of the **second security** by the Defendant constitutes an irregular step.*

[3] COMMON CAUSE BETWEEN THE PARTIES:

It is common cause between the parties that:

- (3.1) Defendant elected to give security instead of filing an opposing affidavit (first security);
- (3.2) The first security was rejected by the Registrar;
- (3.3) The Defendant then furnished a second security.

[4] APPLICANTS/PLAINTIFFS CASE:

- (4.1) The gist is that the second security constitutes an irregular step as no provision is made in the rules for such as step.
- (4.2) From the heads of argument of the Applicants it is argued as set out hereinafter.
- (4.3) Ad paragraph 12 thereof:

"12. If the Defendant is granted a multiple and unlimited number of opportunities to furnish security to the satisfaction of the Registrar, it will entail a mockery of the process. The Defendant very clearly on 16 February 2011 exercised its election in terms of the Rule to furnish security (albeit not to the satisfaction of the Registrar)."

(4.4) Ad paragraph 17.2 thereof:

"17.2 It is submitted that this Court cannot adjudicate the summary judgment and that this Court ought not to be influenced by the Defendant setting out a defence in the Rule 30 papers."

(4.5) Ad paragraph 25 thereof:

"The Honourable Court's attention is drawn to Section 4(2)(b) of the above Act, which reads :

"The Tribunal or Court as the case may be, must

- (i) promote the spirit and purposes of this Act; and*
- (ii) make appropriate order to give practical effect to the consumer's right of access to redress including but not limited to*
 - (aa) any order provided for in this Act; and*
 - (bb) any innovative order the debtor advances, protects, promotes and assures the realization by consumer's of their rights in terms of the Act."*

The procedure followed by the Defendant is in total conflict with the principle as set out in this Section and the Court is urged to apply the said section and Section (b) in the preamble to the Act, namely :

- "(b) protect the interest of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place."*

It is respectfully submitted that the actions of the Respondent in this matter ought to be viewed against the background of the aforesaid provisions."

[5] **ARGUMENT ON BEHALF OF THE RESPONDENT:**

- (5.1) The Respondent filed heads and further heads of argument.
- (5.2) The gist of its defence is that the second security is not an irregular step and that cognisance must be taken of the defence set out by it (opposing summary judgment) **in the Rule 30 proceedings.**
- (5.3) The Respondent further submits in paragraphs 2 to 12 of its further heads of argument:

2.

The registrar has not considered the second security, delivered by the defendant on 19 April 2011, in order to determine whether such security is to the registrar's satisfaction or not.

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3.

The plaintiffs, with their application in terms of rule 30, in effect requires the court to perform the function expressly reserved for the registrar by rule 32(3)(a).

4.

Once the registrar has considered the second security, a party that is not satisfied with the registrar's decision in that regard, may take the decision on review.

5.

What the plaintiffs should do in this instance is to enrol the application for summary judgment in the event of the plaintiffs being of the opinion that they are, in the circumstances of this case, entitled to summary judgment.

6.

In such event the defendant will have to satisfy the court, upon the hearing of the application for summary judgment, that the defendant has properly

given security in terms of rule 32(3)(a) (in the event of the defendant wishing to fend off the application for summary judgment by giving security).

7.

If the defendant does not find security or satisfy the court by affidavit or with leave of the court by oral evidence, that the defendant has a bona fide defence to the action, the court may enter summary judgment for the plaintiffs.

See: Rule 32(5)

8.

Rule 30 applies only to irregularities of form and not matters of substance.

**See: Erasmus, Superior Court Practice, Main Binder, B1-191 [Service 37, 2011];
Singh v Vorkel 1947 (3) SA 400 (C) at 406;
Odendaal v De Jager 1961 (4) SA 307 (O) at 310F-G**

9.

The plaintiffs' case is that the delivery of the second security on 19 April 2011 constitutes an irregular step.

**See: Notice in terms of rule 30(2), p 2;
Founding affidavit, para 5, p 14**

10.

Whether or not the second security is, as a matter of substance, defective as alleged by the plaintiffs is, accordingly, irrelevant for purposes of this application.

**See: Notice in terms of rule 30(2), p 2;
Founding affidavit, para 7, pp 14-15**

11.

There is no indication (expressly or impliedly) in rule 32(3)(a) that a party is prohibited from giving a second (or further) security in accordance with the rule where the registrar has ruled that the security initially provided by such party is not to his satisfaction.

12.

Considering the extraordinary and very stringent nature of the summary judgment remedy, it would be inappropriate to limit rule 32(3)(a) to only affording a defendant one opportunity to give security as provided for in the rule.”

[6] **THE LAW:**

(6.1) A Defendant who is faced with a summary judgment application can do one of two things :

“(a) give security to the Plaintiff to the satisfaction of the Registrar for any judgment including costs which may be given, or

(b) satisfy the Court by affidavit (which shall be delivered before noon on the Court day but one preceding the day on which the application is to be heard) ... that he has a bona fide defence to the action; ...”

[Rule 32(3)]

- (6.2) The commentary in this regard [Superior Court practice – Erasmus] reads as follows:

“Subrule (3)(a): ‘Give security’. *The words ‘give security’ in this subrule mean that the security must be sufficient to meet the demands set out in the summons.*

The Defendant must also give security for costs-costs being included in ‘any judgment... which may be given’ against the Defendant in the action.”

- (6.3) As to an irregular step the following is *inter alia* said (Erasmus):

“An irregular step has been taken’. *The irregular step contemplated by the subrule must be a step which advances that proceedings one stage nearer completion. The annexure of an unsworn statement to an affidavit is not an irregular proceeding under this rule, nor is a notice in respect of furnishing security. The rule has found application where, for example –*

(a) *Proper service of a summons has not been effect;*

(b)

[My emphasis]

7] DISCUSSION:

(7.1) The Respondent submits that it is entitled to raise its defence (opposing summary judgement) in the Rule 30 proceedings. Without deciding this point, I am of the view that it cannot be done in that the Rule 30 proceedings are independent and are not the Rule 32 proceedings.

(7.2) As indicated above (par 6.3), a notice in respect of furnishing security is not an irregular step. This being the case, it is difficult to see how a second security (rectifying the first which was not to the satisfaction of the Registrar) can be an irregular proceeding.

- (7.3) The Rule [R32(3)] is clear. The security must be to the satisfaction of the Registrar. It is clearly not a function of the Court.
- (7.4) It is clearly implied in the rule that if the Registrar is not satisfied with the security, the party furnishing the security may rectify same.
- (7.5) The argument of Mr Vlok (on behalf of the Applicants) that this May lead to an abuse in that a Defendant may on numerous occasions (and wilfully) in order to prolong the proceedings, furnish security which is not to the satisfaction of the Registrar, is not completely without substance. However, in such an instance a Plaintiff will be entitled to proceed with summary judgment, sailing under the flag that such a Defendant abused/endeavour to abuse the Rules of Court.


[8] CONCLUSION:

- (8.1) In view of the aforesaid, the application must fail.

(8.2) Since a novel point was raised by the Applicant and costs are in my discretion, I am of opinion that the cost in the Rule 30 proceedings should be costs in the summary judgment proceedings.

(8.3) Consequently, I make the following order:

1. The application is dismissed;
2. Costs to be costs in the summary judgment proceedings.



GOODEY AJ

Date heard: 3/02/2012

Date of judgment: 23/02/12

On behalf of the Applicants:

ADVOCATE VLOK (PRETORIA)
LOUW ATTORNEYS

On behalf of the Defendant:

ADVOCATE MALAN (PRETORIA)
SAVAGE JOOSTE & ADAMS (PRETORIA)