

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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 31/03/2022


A Maier-Frawley



CASE NO: 2021/6574

In the matter between:

LUTENDO CYNTHIA MPFUNI

Plaintiff

and

SEGWAPA INC

First Defendant

NOZWAKAZI MDLANKOMO

Second Defendant

J U D G M E N T

MAIER-FRAWLEY J:

1. The Plaintiff applied for summary judgment to be entered against the first and second defendants in respect of a claim for cancellation of a written sale agreement and return of the purchase price and transfer costs paid by the plaintiff under the agreement, and ancillary relief.
2. The following order is sought in the application for summary judgment:

- “1. That the late filing of the notice for (sic) application for summary judgment be condoned;
 2. The Sale Agreement between the parties which was signed and dated 30 June 2020 be cancelled;
 3. The First and Second Defendants be ordered to pay to the Applicant the amount of R547 223.00...which is made up of the purchase price of R530 000.00 and R17 223.00 for transfer costs within 14 (fourteen) days of granting of this order, jointly and severally, the one paying the other to be absolved;
 4. The first and second defendants be jointly and severally liable for the transfer costs of transferring the property back to (sic) the name of the seller;
 5. Interest rate at 10.25% from the date of transfer and registration of the property;
 6. The First and Second Defendants be ordered to pay the costs of suit, including costs of counsel, jointly and severally, the one paying the other to be absolved, on an attorney and client scale; and
 7. Further and/or alternative relief.”
3. It bears mention that the second defendant did not oppose the action itself, nor the application for summary judgment. No notice of intention to defend was delivered pursuant to service of the summons. As such, the Plaintiff is entitled to pursue her procedural right to seek default judgment against the second defendant. No plea having been delivered by the second defendant, it is axiomatic that summary judgment cannot be sought or granted against the second defendant in terms of the provisions of the amended uniform Rule 32.¹
4. The plaintiff seeks condonation for the late filing of the summary judgment application. The condonation application was not opposed by the first defendant. The delay in filing the summary judgment application was less than 10 days and no prejudice resulted therefrom. As the delay was

¹ The delivery of a plea is now a prerequisite to an application for summary judgment under Rule 32(1) in its amended form. See: *Absa Bank Limited v Mphahlele N.O and Others* (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020), par 14. (*'Mphahlele'*)

satisfactorily explained by the plaintiff, it is in the interests of justice that condonation be granted.

5. In terms of Rule 32(2)(b), a plaintiff is required to 'verify the cause of action...identify any point of law relied upon and the facts upon which the plaintiff's claim is based...explain briefly why the defence as pleaded does not raise any issue for trial'. Thus, in order to comply with subrule 2(b), the affidavit filed in support of the application must contain:²

- (1) A verification of the cause of action and the amount, if any, claimed;
- (2) An identification of any point of law relied upon;
- (3) An identification of the facts upon which the plaintiff's claim is based upon; and
- (4) A brief explanation as to why the defence as pleaded does not raise any issue for trial.

6. The learned authors in *Erasmus* 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).³ What must be verified are the facts as alleged in the summons.⁴ Further, the deponent to the affidavit in support of the application for summary judgment must verify what has been referred to as a complete or perfected cause of action.⁵ As pointed out in *Mphahlele*,⁶ 'From the foregoing, it is clear that this requirement of the sub-rule does not provide for a verification of evidence or the supplementing of a cause of action with evidence. It is confined solely to those facts which are already present and as pleaded in the plaintiff's

² See: Erasmus, 'Superior Court Practice' (2nd edition) at D1-401

³ 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 122F-I

⁴ See *Erasmus* at D1-402H and read with authorities cited in fn 183 thereof.

⁵ See *Erasmus* at D1-402H and read with authorities cited in fn 184 thereof;

⁶ *Id Mphahlele*, par 17.

summons (it being trite that a plaintiff in summary judgment proceedings is prohibited from taking a further procedural step in the proceedings by, for example, amending the particulars of claim and then seeking to claim summary judgment).’

7. The first defendant argues that a claim for cancellation does not fall within the purview of rule 32. In the view I take of the matter, it is not necessary to decide this point in these proceedings. In the present case, the plaintiff failed to verify the facts alleged in the summons. The plaintiff further failed to verify the cause of action, which *ex facie* the allegations in the particulars of claim, does not in any event constitute a complete cause of action. I say so for the following reasons:
8. The plaintiff (as buyer) seeks cancellation of a written sale agreement concluded with the second defendant (as seller). The buyer’s written offer of purchase, which was signed by her, was accepted by the seller who signed same.⁷ In the result, a binding sale agreement came into being as between the plaintiff and the second defendant.⁸ In terms of the agreement, the seller sold an immovable property to the buyer. The buyer was to pay the purchase price and any transfer costs associated with registration of transfer of the property into her name. As averred in the particulars of claim, the second defendant appointed the first defendant as the conveyancer to ‘facilitate the transfer and registration of the property.’
9. On 6 July 2020 the plaintiff paid the purchase price of R530 000.00 and the transfer costs of R17 223.00 into the conveyancer’s trust account and on 18

⁷ Page 6 of the sale agreement appears in annexure ‘SJ1’ to the founding affidavit filed in support of the summary judgment application. The agreement uploaded to caselines as annexure ‘A’ to the particulars of claim, does not contain page 6 thereof. It remains unclear whether the completed agreement (containing all pages, i.e., including page 6) was actually served upon the defendants at the relevant time.

⁸ See para 5 of the particulars of claim where it is averred that on 30 June 2020 a written sale agreement was entered into by the plaintiff and the second defendant.

August 2020, transfer of the property was registered into the plaintiff's name in the Deeds office. The purchase price was paid by the conveyancer (first defendant) to the seller (second defendant) upon registration of transfer and before vacant possession was given to the buyer.

10. In terms of clause 1.2 of the agreement, the purchase price of R530 000.00 was payable to the seller upon registration of transfer. In terms of clause 3, occupation 'shall be given to and taken by the purchaser within seven (7) days of registration'. No occupational rent was payable if occupation took place within such period. If occupation did not take place within the 7 day period, occupational rent, calculated from date of registration, at the rate of 1% of the purchase price was payable to the conveyancer.
11. Clause 15.1 contains a manuscript insertion, stating that 'The conveyancer should not pay any proceeds to the seller before vacant occupation is given to the purchaser.'
12. In terms of the breach clause provided for in clause 5:
 "Should either party breach any provision of this agreement and fail to remedy such breach within 10 days after despatch of written notice requiring such breach to be remedied, the aggrieved party shall be entitled, without prejudice to any other rights in law, to cancel this agreement forthwith, or claim specific performance..."
13. In paragraphs 10, 11 and 13 of the particulars of claim, the plaintiff avers as follows:
 - " 10 On...25 September 2020, the Plaintiff sent the First Defendant a letter of demand (a copy is attached...marked as annesure 'D'). The Plaintiff demanded that the sale agreement be cancelled and that the purchase price be paid back into her account...
 - 11 The First Defendant is in breach of clause 15.1 of the sale agreement, which states that *'the conveyancer should not pay any proceeds to the seller before vacant occupation is given to the purchaser.* The first defendant paid the proceeds to the

second defendant before the property was vacant and made available to the plaintiff. Despite the plaintiff's plea for both the defendants to remedy the breach of contract, the plaintiff has neither received right of occupation, the occupational rent or the purchase price back.

[The provisions of clause 5 are quoted in para 12]

- 13 The First and Second Defendants have failed to remedy their breach of the provisions in the sale agreement. The Plaintiff has not been afforded the right to move into the property even though the First Defendant went ahead and paid the purchase price to the Second Defendant. The Plaintiff is thus entitled to cancel this agreement and demand her money back."
14. It is immediately apparent from a reading of the plaintiff's pleading, that the particulars of claim lack any allegation to the effect that the First Defendant was or became a party to the agreement or that it consented to be bound to clause 15.1 thereof.
15. The first defendant specifically denied that it was a party to the agreement or that it was incurred any obligation in terms of clause 15.1 thereof and stated that once the property was registered in the name of the plaintiff, the first defendant had no legal right to hold over the proceeds of the sale.
16. The plaintiff appears to have entirely overlooked the nature and import of the first defendant's defence or the fact that the doctrine of privity of contract still forms part of our law. The courts have applied the rule that a litigant has no contractual cause of action against another person who is an outsider to the contract.⁹ Since a contract is a matter between the parties thereto, no one other than the contracting parties can incur any liability or

⁹ See: Van Huyssteen *Contract Law in South Africa* (2017) 146; *Cullinan v Noordkaaplandse Aartappelkenmoerkwekers Kooperasie Bpk* 1972 (1) SA 761; *Barclays National Bank Ltd v HJ de Vos Boerdery Ondememings (Edms) Bpk* 1980 (4) SA 475 (A); *Minister of Public works and Land Affairs v Group Five Building Ltd* 1999 (4) SA 12 (SCA).

derive any benefit from its terms. The case of *Gugu*¹⁰ illustrates how the privity doctrine has been operating and has been applied in our law. Known exceptions to the rule are agency and *stipulation alteri*,¹¹ neither of which appear to be applicable in *casu*.

17. From the way in which the plaintiff formulated her claim for cancellation in the particulars of claim, it is also clear that the plaintiff entirely overlooked that fact that she was obliged, in terms of clause 5 thereof, to afford the defaulting party 10 days written notice to remedy any alleged breach before acquiring an entitlement to cancel the agreement. The plaintiff's claim lacks averments that such a breach notice was given prior to her demand, in annexure 'D' to the particulars of claim, for cancellation and restitution of the purchase price paid by her.
18. Clause 5 of the agreement constitutes a classic *lex commissoria*. It affords the innocent party the right to cancel in the event of default on the part of the other party after the latter has been given written notice to remedy the default within 10 days, and has failed to do so.
19. Christie¹² provides the following useful synopsis in regard to a *lex commissoria*:

"The contract may explicitly state that if one party fails to perform a particular obligation by a specified time the other party is entitled to cancel the contract. In a lease where the landlord is given the right to cancel for non-payment of rent, such a provision it is usually called a forfeiture clause, and in a contract of sale where the seller is given the right to cancel for non-payment of the purchase price, a lex commissoria, but either description may be used in respect of any type of contract. Such clauses are valid and enforceable strictly

¹⁰ *Gugu v Zongwana* 2014 (1) All SA 203 (ECM). There a sale of property formed the subject matter of the dispute,. The court concluded that the first respondent had not intended to sell, and the appellants had not intended to buy, the first respondent's undivided share in the property, but rather the actual property itself. The second respondent had not consented to the sale of the property to the appellants on the terms in the sale agreement.

¹¹ These are discussed by Hutchison et al *The Law of Contract in South Africa* 3rd ed (2018) 227.

¹² GB Bradfield *Christie's Law of Contract in South Africa* (7th ed) at 599.

according to their terms, and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such a clause. (own emphasis)

20. Thus, where an agreement lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.¹³
21. For all the reasons given, not least of all, the plaintiff's failure to comply with the provisions of rule 32(2)(b), including her failure to make out a cause of action that is cognisable in law, she not entitled to summary judgment.
22. The general rule is that costs follow the result. I see no reason to depart therefrom.
23. In the circumstances, the following order is granted:

ORDER:

1. Condonation for the late filing of the application for summary judgment is granted.
2. The application for summary judgment is dismissed with costs.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing:	14 March 2022
Judgment delivered	31 March 2022

¹³ *Standard Bank of SA Ltd v Koekemoer* (70014/2011) [2012] ZAGPPHC 300 (20 November 2012), para 5.

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 31 March 2022.

APPEARANCES:

Counsel for Plaintiff:	Ms P Muthige
Attorneys for Plaintiff:	Mukwveho R Attorneys
Counsel for First Defendant:	Mr BT Moeletsi
Attorneys for First Defendant:	K Mokale Attorneys
Counsel for Second Defendant:	No appearance
Attorneys for Second Defendant:	No appearance