IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 17865/2020

In the matter between:

R DATA (PTY) LTD **Plaintiff/respondent**

and

NORDIC LIGHT PROPERTIES (PTY) LTD **Defendant/applicant**

JUDGMENT DELIVERED ON 6 JUNE 2022

VAN ZYL AJ:

Introduction

1. This is an application in terms of Rule 30 instituted by the defendant, to set aside as an irregular step an application brought by the plaintiff in an action previously instituted under the same case number. I shall refer to the parties as they are in the action.

2. The issue is, in essence, whether it is competent for the plaintiff, by way of an application separately instituted after the close of pleadings n the action, to seek declaratory relief in respect of the Court's jurisdiction to hear the action where the defendant had already delivered a special plea in reliance upon an arbitration clause.

The action

3. In November 2020 the plaintiff instituted action against the defendant on the basis of a lease agreement concluded between the parties during 2016, and which expired on 31 October 2019. The defendant was the landlord, and the plaintiff the tenant.

4. On signature of the agreement, the plaintiff had paid to the defendant the sum of R400 000,00, which sum the defendant was, in terms of the agreement, entitled to apply towards arrear rental or any other amount owing pursuant to the lease agreement. In the action, the plaintiff claims the deposit of R400 000,00 which, so the plaintiff alleges, the defendant failed to refund to the plaintiff upon the expiry of the lease. It appears from the particulars of claim that the defendant indicated that it is withholding the deposit so as to attend to reinstating the premises to the state they were in prior to the plaintiff's occupation thereof.

5. The further details of the lease agreement are not relevant except for the fact that it contains a dispute resolution clause (clause 19) which provides for the resolution of disputes via negotiation, mediation, or arbitration. Clause 19.1 provides as follows: "*Should any dispute, disagreement or claim arise between the parties other than for payment of any amounts due in terms of this lease ('the dispute') concerning this Lease the parties shall endeavour to resolve the dispute by negotiation.*"

6. The clause proceeds to provide for the manner in which negotiation and, if unsuccessful, mediation should take place. Clause 19.5 provides, as a final resort, that the dispute shall be submitted for arbitration in accordance with the rules of the Arbitration Foundation of South Africa ("AFSA").

7. The defendant defended the action and, in February 2021, delivered a special plea reading as follows:

> "1. *The plaintiff's claim arises from a written lease agreement between the*

parties ('the lease agreement').

2. Clause 19 of the lease agreement provides that should any dispute, disagreement or claim arise between the parties other than for payment of any amounts due in terms of the lease, the parties shall endeavour to resolve the dispute by negotiation, and failing that, mediation to be administered by … [AFSA] upon agreed terms, and failing that, arbitration conducted by an arbitrator or arbitrators appointed by AFSA.

3. In its particulars of claim the plaintiff alleges that the defendant was not entitled to apply the deposit of R400 000,00 towards rental or any other amount, and that the deposit falls to be repaid.

4. Since the defendant disputes this and, prior to the institution of action, informed the plaintiff of such dispute, the plaintiff's claim is in dispute as envisaged in clause 19 of the lease agreement.

5. Despite conceding that clause 19 applies to the dispute, the plaintiff has not referred the dispute to negotiation, mediation or arbitration."

8. The defendant accordingly asks that the plaintiff's action be stayed pending the final determination of the dispute in terms of clause 19 of the lease agreement.

9. Apart from such dilatory plea (or declinatory plea, if it is regarded (as the plaintiff seems to do) as one disputing the Court's jurisdiction), the defendant did not plead over the merits of the plaintiff's claim.

The plaintiff's application and the resultant Rule 30 application

10. On 12 October 2021, seven months after delivery of the special plea, the plaintiff brought a substantive application in which it seeks relief of a two-fold nature.

11. First, it seeks a declaratory order confirming the Court's jurisdiction to adjudicate the action. The plaintiff's case in the application is that the arbitration clause is not applicable because the dispute between the parties is about the payment of money (with reference to the wording of clause 19.1 of the lease agreement). It interprets the defendant's special plea as one of want of jurisdiction, and says that the defendant's interpretation of clause 19 is wrong.

12. Secondly, the plaintiff contends that, as a result of the defendant's failure to plead to the merits of the plaintiff's claim, the main action is effectively unchallenged apart from the special plea. It accordingly seeks judgment against the defendant as sought in the combined summons.

13. The plaintiff's application elicited the defendant's notice and subsequent application in terms of Rule 30.

The failure to plead over

14. The effect of a failure to plead over seemed to be a bone of contention between the parties in the plaintiff's application and in the heads of argument, although the issue was not really pressed in oral argument. In the plaintiff's application, the failure to plead over is described as a "*fatal error*" that "*cannot be cured*". I do not agree with this contention.

15. The practice relating to pleading over has not been uniform. It has been accepted in a number of cases that where a defendant raises a special plea of, for example, arbitration as a condition precedent to the right of action, he is not required to plead over on the merits (see Cilliers *et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5ed) Vol. 1 at p 603). If the special plea fails to achieve its objective, the court will allow the defendant an opportunity of delivering a plea on the merits. Although this approach has not always been followed in other jurisdictions, in the Western Cape pleading over on the merits has usually not been insisted upon, especially when a defence such as want of jurisdiction or *lis pendens* has been raised.

16. In *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) this Court held as follows at 674A-F:

> "*In this Division the practice as regards pleading over has differed somewhat from that in some other Divisions. In the Cape, especially where a defence such as want of jurisdiction or lis pendens has been raised by way of a*

special plea, pleading over on the merits has usually not been insisted on. …. In such a case, where the special defence has failed, the Court entertains an application by the defendant to plead over on the merits. In David Beckett Construction (Pty) Ltd v Bristow 1987 (3) SA 275 (W) Flemming J, after referring at 278G to 'a differing Cape view of a plea in bar', pointed out at 279G - H that there is no provision made in the Rules of Court for such a procedure. He held at 280C - D that the intended effect of the Rules is that 'every defence must be raised as part and parcel of the plea required by Rule 22'. See also Pretorius v Fourie NO en 'n Ander 1962 (2) SA 280 (O) at 283C - D.

It is unnecessary for me to comment on these decisions because, in my view, whether applicant's application to amend his plea is regarded as an application in anticipando, as it were, under the Cape practice, for leave to plead over on the merits or simply as an application brought in the normal course to amend the plea by introducing further defences on the merits … applicant is not precluded from approaching the Court by reason simply of having elected initially not to plead over on the merits of the claim." (My emphasis.)

17. I have not found judgments in this Division deviating from the approach taken in *Meyerson*, and I am not inclined to disagree with it. In the circumstances, the defendant cannot be faulted for delivering a special plea without a plea on the merits. Should its special plea be unsuccessful in due course, it is entitled to approach the court for leave to plead over.

The Arbitration Act

18. In the plaintiff's application, the plaintiff alleges that the defendant failed to launch an application in terms of section 6 of the Arbitration Act 42 of 1965 to stay the action. This failure, together with the failure to plead over, "*are fatal errors that cannot be cured*", thus entitling the plaintiff to the relief sought in the application. Again, I do not agree that the failure to launch an application in terms of section 6 of the Arbitration Act is fatal for the defendant's case.

19. Section 6 of the Arbitration Act provides as follows:

> ***Stay of legal proceedings where there is an arbitration agreement***
> *(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.*
> *(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.* (My emphasis.)

20. A litigant such as the defendant has a choice whether to raise arbitration as a condition precedent to a civil claim by way of an application under section 6 of the Arbitration Act or by the delivery of a special plea under the common law. The Arbitration Act does not compel a litigant to institute application and has not ousted the common law in this respect (*PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at para [7]).

21. In the present case, the defendant exercised its choice by the delivery of its special plea. Pleadings have closed. The plaintiff did not replicate to the special plea, except to it, or claim that it was an irregular step under Rule 30. The plaintiff did not seek summary judgment against the defendant. The question is whether the plaintiff is entitled, at this stage, effectively to circumvent the ordinary course of the trial by the launch of its application.

22. The plaintiff argues that it is not precluded under the Rules of Court from bringing an application such as the present one. It has been brought as a substantive application under Rule 6 and there is no procedural rule that would prevent the institution of the application. There is no impediment to the Court entertaining the application as it has an inherent jurisdiction to regulate its own procedure, and the "*prerogative … to adjudicate upon an application wherein it must*

decide upon whether it has the requisite jurisdiction to adjudicate a matter or not".

23. The plaintiff argues further that the perceived irregularity raised by the defendant constitute a basis of opposition to the plaintiff's application. The defendant should thus rather have opposed the application than objected to it under Rule 30.

24. This does not, however, answer the real question, which is whether the application (although duly compliant with Rule 6 as far as applications go) was properly brought within the context of the case as a whole. The fact remains that the plaintiff is taking a shortcut across the trial procedure so as to have the special plea decided on motion rather than wait for the special plea to be dealt with by a trial court in due course. Should the plaintiff be allowed to bypass the trial by the institution of an application midway, dealing (or intending to deal) with the very question raised by the special plea? I do not think so.

25. It seems to me that when the defendant chose to deliver a special plea in response to the summons and the plaintiff failed to take any step available to it in relation thereto, the forum was chosen in which the question as to the applicability of the arbitration clause fell to be determined.

26. I asked counsel at the hearing of the application whether the plaintiff's application could not be regarded as one under section 3(2)(b) of the Arbitration Act. That section provides that the "*court may at any time on the application of any party to an arbitration agreement, on good cause shown … order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration*".

27. Neither counsel had considered the issue, and I provided the parties with an opportunity of submitting a note on the issue should they wish to do so. The defendant elected not to make additional submissions, indicating that the plaintiff's application had not been framed as an application under section 3(2)(b), and had clearly not been intended as such.

28. The plaintiff, on the other hand, urged me in its additional submissions to regard the application as one under section 3(2)(b) of the Arbitration Act, and

emphasised the fact that such application could be brought at "*any time*". The plaintiff submitted that the application would have to be brought within a reasonable time and should not be to the prejudice of any party. Accordingly, section 3 of the Arbitration Act would not only permit the plaintiff to have brought the application but would allow it to have brought it at any time. There is therefore nothing irregular about the plaintiff's application.

29. I have to agree with the defendant's submissions in this respect. Whatever the correct interpretation of "*any time*" in section 3(2)(b) (and leaving aside the question whether a period of seven months after delivery of the special plea can be regarded as a reasonable time within which to launch such application), the plaintiff's application was clearly not brought under the Arbitration Act, as it seeks an order declaring that the Court has the necessary jurisdiction to hear the action. But, as the plaintiff itself concedes, a court does not lose its jurisdiction by virtue of an arbitration clause in an agreement (*Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at para [21]). What the court has to decide under section 3(2)(b) of the Arbitration Act is whether it should exercise such jurisdiction in the face of the arbitration clause. These are different issues. The plaintiff did not have section 3(2)(b) in mind when launching the application; it was looking to have the issues raised in the special plea decided on motion, and circumvent the hearing of the special plea in due course.

Prejudice

30. The defendant has not alleged in its founding affidavit that it would suffer any prejudice in the event of the plaintiff's application proceeding. It chose to address the issue in argument. Whether the issue of prejudice had to be expressly dealt with in the founding affidavit was hotly debated.

31. The plaintiff referred me to several authorities from which the principle is clear that, in the absence of prejudice, a Rule 30 application will not be granted. It argued that, for this reason, the issue of prejudice should expressly be raised in the founding affidavit.

32. A Rule 30 application is an interlocutory application and it has been held that in such applications affidavits are not necessarily required (*Chelsea Estates & Contractors CC v Speed-O-Rama* 1993 (1) SA 198 (SE) at 202C; and see Harms Civil Procedure *Superior Court* at para B30.5). In *M & M Quantity Surveyors v CC v Orvall Corporate Designs (Pty) Ltd* 2021 JDR 1059 (GP) the Court held, however, with reference to the relevant commentary in Erasmus *Superior Court Practice*, that proof of prejudice is required on affidavit.

33. That is no doubt the case where prejudice cannot be inferred from the circumstances in which the alleged irregular step has been taken, and where specific factual issues give rise to prejudice. In such a case the respondent in the Rule 30 application would have to be given an opportunity of disputing the facts alleged to raise issues of prejudice in its answering affidavit. A consideration of relevant case law, including the case law to which the plaintiff referred me (including *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 427F-I and *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333G-334D), shows that prejudice is a necessary requirement that must be present. Such case law however is not authority for the statement that it should in all cases be expressly pleaded. Prejudice can be argued if it is apparent from the papers and the context (see *De Klerk supra* at 425).

34. The defendant contends that its prejudice lies in the fact that its entitlement to lead oral evidence would be taken away should the matter be decided on the plaintiff's application. The plaintiff submits that no evidence would be necessary to decide the issue, as the applicability of the arbitration clause is "*purely a legal/procedural one*". The special plea raises a "*crisp point of law*". It is not a question that a trial court would need to determine. The plaintiff submits that the defendant relies purely on the provisions of clause 19 of the lease agreement in support of its special plea and has not pleaded any other facts as to why the plaintiff's action should be stayed.

35. The plaintiff argues further that, should it in due course appear that factual disputes exist on the papers and oral evidence would be necessary to decide the issues, application could be made to have oral evidence led on those issues (as in

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 389H-390E).

36. The plaintiff's argument does not sit comfortably. It is not correct that the defendant relies solely on the provisions of clause 19 and has not pleaded any other facts as to why the plaintiff's action should be stayed. The defendant pleads, in its special plea, that the plaintiff alleges that the defendant was not entitled to apply the deposit of R400 000,00 towards rental or any other amount, and that the deposit falls to be repaid. The defendant pleads that it expressly disputes this allegation and has, prior to the institution of action, informed the plaintiff of such dispute.

37. There is therefore clearly a dispute as to what the defendant was entitled to use the deposit for, how it was in fact used, and whether repayment of the entire amount is due. The question posed by the special plea, namely the applicability of the clause 19, so it seems to me, is not only dependent upon an interpretation of the agreement in a vacuum. Evidence might well have to be led as to what the defendant used the deposit for and whether it was entitled to do so under the lease, and on the basis of those facts a decision would have to be made whether clause 19 is applicable in the circumstances. In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) it was held as follows:

> *"[39] In the recent decision of* University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*, the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended. In a passage of some importance, the Constitutional Court sought to clarify the position as follows:*
>
> > *'Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that*

evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.'

[40] This seeks to give a very wide remit to the admissibility of extrinsic evidence of context and purpose. Even if there is a reasonable disagreement as to whether the evidence is relevant to context, courts should incline to admit such evidence, not least because context is everything. The courts may then weigh this evidence when they undertake the interpretative exercise of considering text, context and purpose." (My emphasis.)

38. Determining the special plea might therefore very well entail the hearing of evidence and the right to cross-examination that goes with it, as it appears likely that the evidence will raise factual disputes. Allowing the plaintiff's application to stand will curtail that right, and prejudice the defendant. Stating that the referral of factual disputes that arise in the application could be referred for oral evidence does not address the prejudice, who would then, in addition to delivering affidavits setting out the evidence in opposition to the plaintiff's application and the delays to be caused in the process, in any event have to go through the process of oral evidence as it would have done had the special plea been determined. Further delays would have been caused, and additional costs would have been incurred.

39. The trial is underway, and should not be hijacked by an application seeking to achieve the same outcome.

40. Although the defendant has not raised this as an instance of prejudice in its affidavit, it is clear that, should the plaintiff's application be successful, the defendant might be deprived of an opportunity to plead over the merits of the claim, because the plaintiff also seeks judgment in accordance with its summons. The defendant would therefore have to launch a counter-application at this stage already for leave to plead over in the event that the plaintiff's application is dismissed. This entails further additional time and costs which would perhaps not be necessary if the special plea is dealt with separately in due course.

41. In all of these circumstances I am satisfied that the defendant has shown prejudice as required contemplated by Rule 30.

Conclusion

42. I accept that "*objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits*" (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F).

43. I have indicated above that I am of the view that the defendant would in fact be prejudiced should the plaintiff's application be permitted to proceed.

44. I agree, too, with the submission made by the defendant's counsel that it is not permissible for the plaintiff to craft its own rules of procedure in the matter that it attempts to do by way of its application. In *Centre for Child Law v Hoërskool Fochville and another* 2016 (2) SA 121 (SCA) the Supreme Court of Appeal stated at para [17]: "*In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the 'inexpensive and expeditious completion of litigation before the courts' and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules."*

45. In conclusion, the plaintiff's application is clearly an irregularity of form, and the defendant will suffer prejudice if such application is not set aside.

Costs

46. The defendant is the successful party in the Rule 30 application. There is no reason to depart from the general rule that costs should follow the event.

Order

47. In the circumstances, the following order is granted:

1. **The plaintiff's application dated 12 October 2021 is set aside in terms of Rule 30(1).**

2. **The plaintiff shall pay the defendant's costs.**

P. S. VAN ZYL
Acting judge of the High Court

Hearing date: **24 May 2022**

Appearances:

For the defendant/applicant: B. L. Studti, instructed by Guthrie Colananni Attorneys

For the plaintiff/respondent: L. Zazeraj, instructed by Di Siena Attorneys