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

Case number: 9845/2022

In the matter between:

INGENUITY PROPERTY INVESTMENTS (PTY) LTD Plaintiff

and

IGNITE FITNESS (PTY) LTD Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL, 15 AUGUST 2023
(delivered electronically via email)

VAN ZYL AJ:

Introduction

1. On 29 May 2023, this Court dismissed the defendant's application to set aside the plaintiff's application for summary judgment as an irregular step pursuant to an application in terms of Rule 30. The defendant applies for leave to appeal against that order.

2. The reasons for the order are set out comprehensively in the main judgment. I shall not repeat them. In the application for leave to appeal, the defendant suggests that one must think away the fact that the findings the Court made as regards the interpretation of Rule 32 were made in the context of the Rule 30 application, and that it found against the defendant *inter alia* on the basis that it could not find that the

defendant had been prejudiced specifically as required by Rule 30. The defendant's focus is therefore solely on the issue of interpretation. As indicated below, I do not agree with this approach, because the context in which the dispute was determined remains an important consideration.

3. The plaintiff opposes the application for leave to appeal on the basis that the appeal would not have a reasonable prospect of success (as contemplated in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013),[1] and that there is no other compelling reason why the appeal should be heard (in terms of section 19(7)(2)(a)(ii) of the Superior Courts Act).

4. Both parties have provided the Court with helpful written and oral submissions, for which I am grateful. I have considered all of the submissions and, again, do not intend to traverse them in detail.

<u>The interpretation of Rule 32 in the present matter</u>

5. As regards the merits of the case in relation to the interpretation of Rule 32, I agree with the plaintiff that all of the defendant's arguments were considered in the course of the main judgment. I have not read, or heard, anything in the defendant's submissions during argument of the application for leave to appeal that I think would persuade another Court to come to a different conclusion.

6. One of the reasons why the Rule 30 context cannot be ignored is that this case does not concern matters of public policy. It concerns a matter of procedural law, namely whether the delivery of an application for summary judgment simultaneously with a replication to a plea renders the application for summary judgment an irregular step as contemplated in Rule 30. The purpose of Rule 30 is to remove steps in proceedings that prevent a proper ventilation of the dispute, thus undermining the right to the proper administration of justice, and resulting in unnecessary delays and increased costs.[2]

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1 As discussed in *S v Smith* 2012 (1) SACR 569 (SCA) at para [7].

2 *SASOL South Africa t/a SASOL Chemicals v Gavin J Penkin* [2023] ZAGPJHC 329 (14 April 2023) at para [46].

7. In deciding whether a procedural step constitutes an irregular step, the Court exercises a broad discretion. The Court may overlook any alleged irregularity which does not cause any substantial prejudice to the other party. This discretion must be exercised judicially, bearing in mind that the yardstick for the Court's discretion is the interests of justice.[3] When a Court *a quo* gives a decision on a matter in which the Court exercises a discretion, a court of appeal will interfere only if a judicial discretion was not exercised. This will be the case if (1) the Court did not bring its unbiased judgment to bear on the question or failed to act for substantial reasons; (2) the discretion was exercised capriciously or upon a wrong principle; the decision is vitiated by misdirection or irregularity, or is one to which no Court could reasonably have come.[4]

8. The defendant submits, firstly, that this Court erred in finding that the wording of Rule 32 does not preclude a plaintiff from making application for summary judgment at the same time as the delivery of its replication and that the plaintiff may incorporate by reference into its application for summary judgment the allegations made in its replication. The defendant contends that, inherent in those findings, is the fact that the Court had by necessary implication read certain words into Rule 32(2)(a) and (4). The "*reading in*" is *"expressly prohibited"* and *"precluded as a matter of law"* when regard is had to the wording of Rule 32(2)(a) and (4). Effect has to be given to Rule 32 as it stands.

9. As explained extensively in the main judgment, however, Rules 32(2)(a) and 32(4) do not include any express limitation excluding the delivery of a replication simultaneously with an application for summary judgment. The limitation advocated for by the defendant can, ironically, only exist if the words *"only if the plaintiff has not taken a further step in the cause"*, or "*without taking any other step in the cause*" are read into Rule 32(2)(a) after the words *"apply to court for summary judgment"* and before the words *"on each of such claims in the summons as is only"*. The defendant, therefore, complains about the very thing it seeks the Court to do, namely to read into Rule 32 that further procedural steps are prohibited.

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3 *SASOL supra* at paras 4, [11]-[12], [14], and [17]-[31].

4 See, for example, *Ex parte Neethling* 1951 (4) SA 331 (A) at 335A-E; *S v Kearney* 1964 (2) SA 495 (A) at 504B-C.

10. The defendant asserts, secondly, that the findings that the wording of Rule 32 does not preclude a plaintiff from making application for summary judgment at the same time as the delivery of its replication, and that the plaintiff may incorporate by reference into its application for summary judgment the allegations made in its replication, resulted in the Court vesting the summary judgment court with jurisdiction to determine the plaintiff's application for summary judgment in circumstances where, given the defendant's interpretation of Rule 32, the summary judgment court enjoys no such jurisdiction. In clothing the summary judgment court with such jurisdiction, the main judgment constitutes a "*misdirection of law*".

11. For the reasons set out in the main judgment, there is nothing in Rule 32 that precludes the plaintiff from delivering a replication. The allegations in the replication can obviously not be different from the allegations contained in the Rule 32(2)(a) affidavit. The reasons advanced in the Rule 32(2)(a) affidavit why the defences in the plea do not disclose triable issues will be no more than an elaboration of the allegations pleaded in the replication (in addition to any other reasons advanced in the affidavit that may not have been pertinently raised in the replication). The summary judgment court will accordingly not be called upon to consider facts or evidence not already contained in the Rule 32(2)(a) affidavit. The scope of the jurisdiction of the summary judgment court will therefore not be widened.

12. Jurisdiction is, in any event, an issue of substantive law.[5] The Uniform Rules regulate matters of procedure, and cannot make or alter substantive law.[6] The delivery of a replication simultaneously with an application for summary judgment cannot divest the summary judgment court of jurisdiction to hear the application for summary judgment, especially given that there is no express prohibition in Rule 32 as regards the plaintiff taking further procedural steps.

13. The defendant contends, thirdly, that the Court erred in placing reliance on the Task Team's recommendations in interpreting Rules 32 and 25. What the Court did was, however, and as pointed out by the plaintiff's counsel, by no means unprecedented.

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5 Section 21 of the Superior Courts Act; and see section 10(2) of the Interpretation Act 33 of 1957.

6 *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd* 2014 (2) SA 119 (WCC) at para [11].

14. In the first reported judgment delivered after the amendment of Rule 32, the Gauteng High Court in *First Rand Bank Ltd v Shabangu*[7] relied on the Task Team's report in determining whether the amendments to Rule 32 applied retrospectively. The Court regarded the concerns raised by the Rules Committee and the reasons underlying the amendment as recorded in the Task Team's report, which formed the basis for amending Rule 32, as *"unassailable"*.

15. The Gauteng High Court in *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd*[8] referred with approval to these passages in *Shabangu*.

16. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*,[9] the first reported judgment of this Court on the amended summary judgment procedure, the Task Team's memorandum was extensively considered to determine the purpose of the amendments to Rule 32, and to determine what should be contained in an affidavit in support of summary judgment under the amended Rule.

17. Reliance was also placed on the Task Team's report by this Court in *Belrex 95 CC v Barclay*[10] with reference to the *lacuna* that exists in relation to the way in which amendments to a plea in terms of Rule 28 should be dealt with at summary judgment stage.

18. In *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd*[11] the Gauteng High Court also undertook an evaluation of the Task Team's memorandum to arrive at its conclusions regarding the interplay between Rules 28 and 32, concluding that it was *"clear from the memorandum that the main purpose of the amendment to rule 32 was to avoid the formulaic approach of the old rule to the affidavit supporting a summary judgment application and to allow for proper*

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[7] 2020 (1) SA 155 (GJ) at para [31].
[8] [2020] ZAGPPHC 397 (5 August 2020) at paras [13]-[14].
[9] 2020 (6) SA 624 (WCC) at paras [6] and [8].
[10] 2021 (3) SA 178 (WCC) at para [31].
[11] 2022 (3) SA 458 (GJ) at paras [22]-[28].

engagement by the parties with the pleadings".

19. Given the doctrine of precedent, this Court's consideration of the Task Team's recommendations did not constitute a misdirection.

20. The defendant argues, fourthly, that the delivery of a replication is an indication of the waiver of the plaintiff's right to apply for summary judgment. Its reliance is based upon *Arum Transport CC v Mkhwenkwe Construction CC*.[12] The issue has been dealt with in detail in the main judgment. There is direct precedent in this Court for the conclusion that the simultaneous delivery of a replication does not justify an inference of waiver. *Arum Transport* is, moreover, distinguishable on the facts.

21. I agree with the plaintiff that it can in any event not be said that the simultaneous delivery of a replication together with an application for summary judgment connotes an intention to abandon the right it has to apply for summary judgment. This is because *"there is nothing whatsoever inconsistent between a plaintiff's applying for summary judgment on the one hand and on the other hand, and in case his application might prove to be unsuccessful, expediting the closure of pleadings in the main action itself… I cannot conceive of such conduct being inconsistent with an intention to endeavour to bring the proceedings to an expeditious end by making use of summary judgment proceedings."*[13]

22. I accordingly do not consider there to be any misdirection in the main judgment as regards the issues raised by the defendant.

Are there conflicting judgments that require the intervention of a court of appeal?

23. In this context too I am unable to agree with the defendant that the issue of interpretation must be (or can be) divorced from the context in which such issue arose.

24. The defendant argues that there is a conflict between the judgments in *Arum*

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[12] 2022 (2) SA 503 (KZP).

[13] *Paul v Peter* 1985 (4) SA 227 (N) at 230E-G.

Transport, *Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops*,[14] and this Court's main judgment. This conflict needs to be resolved on appeal as it involves a question of law that will impact on the practice and procedure underlying all actions in the High Court.

25. As the plaintiff points out, however, the mere existence of conflicting judgments is not sufficient for leave to appeal to be granted. Where, as here, the conflicting judgments are distinguishable from or in conflict with authority binding on this Court, leave to appeal should not be granted unless some other compelling reason exists.[15] Even if an issue determined by the Court is an issue of public importance, it does not follow that leave to appeal must be granted.[16]

26. I have set out in the main judgment why *Arum Transport* is distinguishable from *Quattro Citrus* and from the present case. Of note is the fact that *Arum Transport* was not decided pursuant to an application in terms of Rule 30. I have also discussed the fact that the Court in *Arum Transport* relied on case law that were not decisions of the Supreme Court of Appeal or of this Court. All of those cases, except *The Standard Bank of South Africa Ltd v Trumpie*,[17] deal with applications for summary judgment in terms of Rule 32 prior to its amendment. *Arum Transport* is moreover in conflict with decisions of this Court[18] that found that the taking of a further procedural step would not preclude a plaintiff from applying for summary judgment.

27. For these reasons, read with what is set out in the main judgment, the existence of a conflict between *Arum Transport*, *Quattro Citrus* and the present matter, and a difference in practice between this Court and the High Court in Kwa-Zulu Natal is more apparent than real. It is not sufficiently compelling overcome the test for the granting leave to appeal.

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14 [2021] JOL 49833 (WCC).

15 *Muhanelwa v Gcingca* [2018] ZAGPJHC 718 (27 February 2018) at para [16] (a subsequent application for leave to appeal to the Constitutional Court was dismissed ([2019] ZACC 21 (17 May 2019)).

16 *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA) at para [24].

17 [2021] ZAGPPHC 247 (11 May 2021).

18 *BW Kuttle & Association Inc v O'Connell Manthe & Partners Inc* 1984 (2) SA 665 (C); *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C), *Quattro Citrus supra*, and *Belrex supra*.

Conclusion

28. In all of these circumstances, I am not persuaded that another Court would reasonably come to a different conclusion, or that there are some other compelling reason why the appeal should be heard.

Costs

29. There is no reason to depart from the general approach as to costs in the present matter. The plaintiff has been represented by two counsel throughout this matter and it is not unreasonable that both counsel should have been involved in the preparation for and handling of the application for leave to appeal.

Order

30. In the premises, the application for leave to appeal is refused, with costs, including the costs of two counsel.

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

Appearances:

For the defendant (applicant in application for leave to appeal):
Mr R. J. Howie, instructed by M A Hurwitz Attorneys

For the plaintiff (respondent in the application for leave to appeal):
Mr J. Muller SC (with him Ms H. Beviss-Challinor), instructed by Bernadt Vukic Potash & Getz