

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 368/2022

In the matter between:

LEON HOWARD COHEN N O

FIRST APPELLANT

G[...] W[....] D[...] N O

SECOND APPELLANT

JONATHAN SHAWN RABIE N O

THIRD APPELLANT

**JONATHAN ALFRED LEONARD
CHAPMAN N O**

FOURTH APPELLANT

COLLIN WILLIAM GREEN N O

FIFTH APPELLANT

COLIN ANDERSON N O

SIXTH APPELLANT

**(Appellants cited in their capacities as
trustees for the time being of the Century
City Property Investment Trust)**

And

M[...] **L[...]** **D[...]**

RESPONDENT

Neutral citation: *Cohen N O & Others v D[...]* (Case no 368/2022) [2023]
ZASCA 56 (20 April 2023)

Coram: SALDULKER, MOCUMIE and NICHOLLS JJA and MALI
and SIWENDU AJJA

Heard: 17 March 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 20 April 2023.

Summary: Summary judgment - particulars of claim based upon incorrect trust deed - plaintiff verified an incorrect cause of action - defendants disclosed a *bona fide* defence - summary judgment refused.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town
(Allie J, sitting as court of first instance):

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and substituted with the following order:

- ‘1 Summary judgment is refused.
2 The defendants are granted leave to defend the main action.
3 Costs shall be costs in the cause.’

JUDGMENT

Nicholls JA (Saldulker and Mocumie JJA and Mali and Siwendu AJJA concurring)

[1] The appellants, the defendants in the high court, are the trustees of the Century City Property Investment Trust (the Trust), a trading trust run as a commercial enterprise. There are 23 beneficiaries of the Trust consisting of the trustees, their wives, children and their respective family trusts. The respondent, M[...] L[...] D[...] (Ms D[...]), the plaintiff in the high court, is the ex-wife of the second appellant, G[...] W[...] D[...] (Mr D[...]), one of the trustees. During the course of their marriage, Ms D[...] was a beneficiary of the Trust by virtue of her marriage to Mr D[...] until the date of their divorce on 8 February 2019.

[2] As a result of the sale of certain properties to a third party in 2013 and 2014, the Trust earned substantial capital gains. During the 2014 and 2015 tax years the trustees resolved to allocate the net income of the capital gains to the 23 beneficiaries of the Trust. This resulted in a net allocation of

R184 179 657 to the beneficiaries, of which two amounts of R6 050 895 and R279 044.00, totalling R6 329 939, were allocated to Ms D[...]. The amounts owing to the beneficiaries is reflected as a vested liability in the 2017 Annual Financial Statements of the Trust.

[3] On the basis of this allocation, Ms D[...] issued summons in July 2021 against the Trust for payment of the amount of R6 329 939. The matter was defended and after the Trust filed its plea, Ms D[...] applied for summary judgment. On 7 March 2022, the Western Cape Division of the High Court (the high court) granted summary judgment in favour of Ms D[...] for an alternative amount. Because no alternative amount had been claimed, an application for variation of the order was brought by the trustees, deleting any reference to the alternative amount. The variation order was granted on 27 June 2022, the net effect of which was to reduce the amount by deducting the tax paid by the Trust on behalf of Ms D[...], in respect of her allocations. Leave to appeal to this Court was granted by the high court on the basis that an important issue was raised, namely whether ‘a court seized with summary judgment may consider the common cause facts that are at variance with the pleadings’.

[4] The trustees advanced six grounds of appeal, but only three of these were seriously argued. The first was that there was non-compliance with the peremptory requirements of rule 32(2)(b) of the amended rule 32. This sub-rule sets out what is required of a plaintiff’s affidavit filed in support of an

application for summary judgment.¹ The second ground is that the summary judgment was granted on a cause of action which differed materially from what was pleaded, or advanced in the particulars of claim. Thirdly, it is contended that a *bona fide* defence was disclosed.

[5] Ms D[...]’ particulars of claim were premised on an amended trust deed dated 11 May 2015 (the amended trust deed). It was pleaded that during the period 1 March 2015 to 28 February 2017, on a date peculiarly within the knowledge of the trustees, they resolved to pay, apply or appoint the realised capital gain for the benefit of the beneficiaries. In terms of clause 5.1 and 5.2 of the amended trust deed, the trustees were entitled to pay the whole or any portion of the capital to any of the beneficiaries, subject to an aggregate sum of R50 million ‘. . . in such manner and upon such terms and subject to such conditions, limitations and restrictions in all respect as the trustees may from time to time in their sole and absolute discretion determine . . .’. Ms D[...] attached the signed Annual Financial Statements of the Trust for the period ending 28 February 2017, which showed a liability for vested amounts in the sum of R184 179 657 in favour of the 23 beneficiaries, including an amount of R6 329 939 for Ms Deans.

[6] The various family members and family trusts were divided into Groups A to G, with the Deans Family being Group D beneficiaries. Ms D[...]’ entitlement to the monies was as a Group D beneficiary. Her claim was thus grounded in the provisions of the amended trust deed, and the amount thereof confirmed by the 2017 Annual Financial Statements.

¹ From 1 July 2019 rule 32 was amended to provide that an application for summary judgment could only be made after the defendant had filed a plea. The rule also provides that a plaintiff’s affidavit in a summary judgment application may explain why the defence as pleaded does not raise any issue for trial.

[7] In response to the particulars of claim, the trustees raised a special plea of prescription. In this Court, the special plea was abandoned. As a result, it is unnecessary to deal with the question of prescription.

[8] In their plea on the merits, the trustees admitted the relevant clauses of the trust deed as pleaded by Ms D[...]. They also admitted that the first allocation of R6 050 895 was made to Ms D[...] during the tax year ended 28 February 2014, and the second allocation of R279 044 during the tax year ended 28 February 2015. The first allocation attracted income tax of R727 576, which the Trust paid on Ms D[...]’ behalf. The second allocation did not attract a tax liability.

[9] The trustees, in their plea, relied on clause 5.6 of the amended trust deed to withhold payment to Ms D[...]. The clause provides:

‘ . . .the Trustees shall be entitled . . . to withhold actual payment of the whole of any part of the nett income and/or capital gain applied or appointed to any Beneficiary for such period and otherwise upon such terms and subject to such conditions as the Trustees may from time to time in their sole and absolute discretion determine . . . ’

[10] The clause also makes provision for payment of any assessed taxes, for which the beneficiaries may be liable, to be paid by the Trustees. This amount should be deducted from the sum payable to the beneficiaries. Actual payment of the amounts withheld is to be made on the ‘vesting date or the date of death of the [b]eneficiary concerned (whichever first occurs) . .

. '. The vesting date is defined in the amended trust deed as the date which the trustees 'may at any time in writing appoint to be the [v]esting [d]ate'.

[11] The nub of the Trustees' case is set out in their plea as follows: 'In the premises, the Plaintiff's claim, if any, would only arise upon the vesting date as defined or the death of the Plaintiff, whichever occurs first, alternatively by the exercise of the trustees' discretion to effect payment, none of which have occurred to date.'

[12] In her founding affidavit in support of the application for summary judgment, Ms D[...] verified the cause of action as set out in her particulars of claim. She then dealt with the defences put up by the trustees, as was required of her in terms of rule 32(2)(b). Apart from denying that her claim had prescribed, she stated that the trustees had not disclosed on what dates they had exercised their absolute discretion to withhold the actual payment of the capital gains applied to the beneficiaries. In any event, stated Ms D[...], this provision only pertained to beneficiaries, and it was common cause that with effect from 8 February 2019, she was no longer a beneficiary as a result of her divorce. Therefore, this clause could not be invoked as a pretext for withholding payment to her as an acknowledged creditor of the Trust. Because of the above, she submitted that there was no defence to her claim and the plea and special plea had been raised purely for the purposes of delay.

[13] The trustees in the affidavit opposing summary judgment, while admitting the allocation to Ms D[...], and relying on clause 5.6 of the amended trust deed, denied that she was entitled to payment of the amount claimed until the vesting date or her death. In any event, because the amount

had to be reduced by the payment made by the trustees in respect of the tax liability, they contended that the quantum was in dispute. The Trustees admitted that Ms D[...] ceased to be a beneficiary on 8 February 2019, the date of her divorce, but stated that this did not change any rights which may have accrued to her during the period in which she was a beneficiary. Nor did it have any bearing on their absolute discretion to withhold actual payment, which the amended trust deed conferred on them.

[14] It appears that it was only at the hearing of the application for summary judgment that both parties realised that it was not the amended trust deed dated 11 May 2015 that was applicable, but rather the original trust deed dated 13 June 2006 (the original trust deed). This was because the allocations had taken place in the 2013 and 2014 tax years, respectively, before the amended trust deed had come into effect in 2015. On the face of it, the fact that the particulars of claim were premised on an incorrect trust deed, should have necessitated an amendment of the particulars of claim.

[15] Notwithstanding the above, and despite acknowledging that the particulars of claim were drafted on the basis of the amended trust deed and not the original trust deed, the high court found this to be of ‘no particular moment’. Ultimately, said the high court, although not pleaded by Ms D [...], it was common cause that the payment had been withheld in terms of clause 15 of the original trust deed. And despite the pleading being defective as a result thereof, the parties argued the matter as though clause 15.2 of the original trust deed was applicable.

[16] Clause 15.2 provided that:

‘Until the vesting date, the trustees shall have the power from time to time and at any time, to accumulate any part of the income of the Trust for periods continuous or discontinuous as the trustees shall think fit and shall hold any accumulations so made as part of the capital of the Trust for all the purposes hereof, but so that the trustees may at any time and from time to time pay, apply, or appoint in their sole discretion, the whole or any part/parts of the said accumulations as if the same were income arising in the current year.’

The vesting date in the original trust deed was defined as 1 June 2056 or the date which the trustees may at any time in writing appoint to be the vesting date.²

[17] The high court found that the defence put up by the trustees was ‘incredibly peculiar’, because they had admitted the allocation and had even made payment of tax in relation to the allocations. While the high court accepted that the trustees had the power to make allocations and also to withhold payment, it found that the trustees had not sufficiently pleaded the basis on which they withheld payment. Clause 15, although granting absolute discretion to the trustees to withhold payment, had more expansive provisions than simply authorising the trustees to withhold payment and this absolute discretion was subject to certain limitations in terms of the provision, so the high court found. It is these conditions and restrictions that the trustees did not deem necessary to explain to the court.

[18] Further, the high court was of the view that by relying on the amended trust deed as pleaded in the particulars of claim, the trustees were attempting to ‘dupe’ Ms D[...], the court or both. This finding was made on the basis that the trustees were well aware that the incorrect trust deed was relied on

² Clause 1.17.1 of the Original trust deed, dated 13 June 2006.

by Ms D[...], but nonetheless went along with the incorrect allegations, presumably to gain some tactical advantage. The court criticised the trustees for not interacting with Ms D[...], presumably to inform her before the hearing of the summary judgment application that the original trust deed was applicable. As such their defence was not brought on reasonable grounds. Nor did they plead their reasons for withholding payment.

[19] Accordingly, the high court granted summary judgment in Ms D[...]' favour. It did so on the basis that the trustees had failed to advance a reasonable and *bona fide* defence.

[20] The first question is whether Ms D[...] had failed to comply with the peremptory requirements of rule 32(2)(b) by advancing a case which was not pleaded and was thus unverified. Rule 32(2)(b) provides that:

‘The plaintiff shall, in the affidavit referred to in sub-rule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.’

[21] The issue of Ms D[...]' non-compliance with rule 32(2)(b) is inextricably bound up with whether summary judgment was granted on a case that was materially different from that which was pleaded in her particulars of claim and that which she advanced in her affidavit in the support of her application for summary judgment. The cause of action which Ms D[...] verified was that in terms of clause 5 of the provisions of the amended trust deed, the trustees applied capital gains in the sum of R6 329 939 to which she was entitled as a Group D beneficiary.

[22] Insofar as it was argued that the cause of action which Ms D[...] verified was that payment of R6 329 939 was due to her by the trustees, this is misconceived. A cause of action is generally defined as a set of facts which give rise to a claim enforceable in law. The set of facts which gave rise to her action was not the non-payment of R6 329 939, as contended, but her entitlement to payment in terms of the relevant trust deed. It is common cause that the incorrect trust deed was relied on in the particulars of claim. She therefore verified a defective cause of action. Given the errors contained on the particulars of claim, Ms D[...] was neither able to correctly verify the cause of action nor the facts upon which she relied.

[23] It was also contended on behalf of Ms D[...] that the trustees were not obliged to rely on the amended trust deed, merely because it had been incorrectly pleaded by her. Instead, they knew very well that Ms D[...] placed reliance on the 2017 financials of the Trust and these were peculiarly in their knowledge. Because both parties finally argued the summary judgment application on the basis that clause 15 of the original trust deed was applicable, it was suggested that her non-compliance with rule 32(2)(b) should be overlooked. This submission, too, does not bear scrutiny. It matters not whether the correct cause of action was argued by both parties at the hearing.

[24] In *Standard Bank of South Africa Ltd v Roestof (Roestof)*,³ it was held that a technical defect due to some obvious and manifest error which causes

³ *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 496F-H, followed in *Coetzee and Others v Nassimov* 2010 (4) SA 400 (WCC) (*Coetzee*).

no prejudice to the defendants, can be overlooked.⁴ Wallis J did not follow this decision in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another (Shackleton)*.⁵ Also dealing with the old rule 32(2), he stated that the suggestion that a defective summary judgment application could be cured if the defence dealt with the merits of the claim, was incorrect. The fact that a defence has been set out and argued, does not cure the defect in the particulars of claim or the summary judgment application. Such a view, he stated, would amount to saying that defects would be overlooked if the defence deals with the merits of the claim. This was not tenable.

[25] Paragraph 25 of *Shackleton* sets out why the approach in *Roestof* should not be adopted:

‘Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point with the concomitant risk that if the technical point is rejected they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective then *cadit*

⁴ *Coetzee* at 402B-403A.

⁵ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) para 25.

quaestio. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.’

[26] It is noteworthy that the learned authors in Erasmus Superior Court Practice preferred the *Shackleton* decision over the *Roesetof* decision. They suggested that the principles in *Shackleton* should be applied when dealing with the amended rule 32(2)(b).⁶

[27] In the present matter, it is immaterial whether one follows the *Roestoff* or the *Shackleton* approach. The defect in the particulars of claim is not merely some technical defect. The reliance on the incorrect trust deed, and therefore on the incorrect clauses, goes to the heart of Ms D[...]’ claim. There is no evidence that the trustees were aware of this defect in the particulars of claim until the day of the hearing. But even if they had been, it was not incumbent on them to ‘interact’ with Ms D[...] in this regard, as found by the high court. Nor does it assist Ms D[...] that both parties may have argued on the basis that clause 15 of the original trust deed was applicable. This was not the case that the trustees came to court to meet.

[28] I am not convinced on the facts of this matter that one even has to determine what is required to verify a cause of action under the amended rule 32 or what should be contained in the affidavits of a plaintiff and a defendant, respectively. Nor is the question whether reliance can be placed on facts not pleaded but which emerged during argument. Whether under the old rule 32 or the amended rule 32, what has not changed is that a defendant,

⁶ D E van Loggerenberg and E Bertelsmann, *Erasmus Superior Court Practice* 2 ed 2015 at D1-404.

to successfully oppose a summary judgment application, has to disclose a *bona fide* defence.

[29] The only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd (Tumileng)*.⁷ As observed by Binns-Ward J in *Tumileng*, most of the old authorities still apply in determining whether a defendant has disclosed a *bona fide* defence. All the defendant is required to do is disclose a genuine defence, as opposed to ‘a sham’ defence.⁸ Prospects of success are irrelevant and as long as the defence is legally cognisable in the sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail.

[30] Be it the original trust deed or the amended trust deed which is applicable, both require a court to interpret the extent of the trustees’ discretion and when vesting takes place. The defence of the trustees that, prior to the date of vesting, their discretion when to make actual payment is absolute and unfettered, cannot be considered as unreasonable and *male fides*. It is certainly not a ‘sham defence’ in any sense of the word.

[31] The high court failed to consider the test to be applied in deciding whether to grant summary judgment. This was, and remains, whether the facts put up by the defendants raise a triable issue and a sustainable defence

⁷ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd* (3670/2019; 3671/2019) [2020] ZAWCHC 52 (15 June 2020)

⁸ *Ibid* para12.

in the law, deserving of their day in court.⁹ The defendants must fully disclose the nature and grounds of their defence and the material facts on which it is founded. All a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim.¹⁰

[32] On the facts so disclosed, the trustees have put up a sustainable defence which is *bona fide*, namely that until vesting occurs the decision to make payment is solely within their discretion. In the context of summary judgment, all the trustees are asking for is their day in court. They have met this threshold and summary judgment should accordingly be refused.

[33] As far as costs are concerned, both parties asked for the costs of two counsel in respect of this appeal. The appellants sought a punitive costs order against the respondent. This is unjustified and there is no reason why the usual costs order should not be appropriate.

[34] In the result I make the following order:

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and substituted with the following order:
 - ‘1 Summary judgment is refused.
 - 2 The defendants are granted leave to defend the main action.
 - 3 Costs shall be costs in the cause.’

⁹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Joint Venture Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA); [2009] 3 All SA 407 (SCA) para 32.

¹⁰ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 418H-419A.

C H NICHOLLS
JUDGE OF APPEAL

Appearances

For appellant: H Loots SC (with him, M A McChesney)

Instructed by: BDP Attorneys, Cape Town
Phatshoane Henney Attorneys, Bloemfontein

For respondent: F J Gordon-Turner (with her, A J Brouwer)

Instructed by: Mandy Simpson Attorneys, Cape Town
Webbers Attorneys, Bloemfontein