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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 8255/19

- | | |
|-----|---|
| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED. YES</u> |

.....
DATE

.....
SIGNATURE

In the matter between:

DAVID JOHN BRUNI N.O
IAN ROBERT MCLAREN

First Plaintiff
Second Plaintiff

and

GOLD REEF CITY MINT (PTY) LTD
GLEN SCHOEMAN

First Defendant
Second Defendant

J U D G M E N T

SKIBI AJ

[1]. This is an application by the plaintiffs for summary judgment against the defendants. The plaintiffs seek an order in the following terms:

- a. that summary judgment be granted against the first and second defendant jointly and severally, the one paying the other to be absolved, for payment in the amount of R650, 000.00;
- b. interest on the amount mentioned in prayer 1 above a tempore morae at the rate of 20% per annum from 5 August 2014 until the date of final payment
- c. costs of suit

- [2] The first plaintiff is David John Bruni, an adult male person with full legal capacity, a proprietor of Bruni & McLaren with offices at First Floor, Hidas Centre, Klein Windhoek, Windhoek and with the power to litigate in Namibia and South Africa. The second plaintiff is Ian McLaren, an adult male person with full capacity, a proprietor of Bruni & McLaren with offices situated at First Floor, Hidas Centre, Klein Windhoek, Windhoek and with power to litigate in Namibia and South Africa.
- [3] The first defendant is Gold Reef City Mint (Pty) Ltd (registration Number: 2016/358706/07), a private company with limited liability duly registered under registration number in terms of the applicable company laws of the Republic of South Africa with its address at Rand Refinery Complex, 1 Rand Refinery Road, Germiston, Gauteng. The second defendant is Glen Schoeman, an adult male businessman with residential address at [...], Glenvista, Gauteng Province.
- [4] In their particulars of claim the plaintiffs base their case on *condictio indebiti* and on the *lex aquilia*. The plaintiffs allege that on 5 August 2014 an amount of R650, 000.00 was paid to the defendants on behalf of the Small and Medium Enterprises (hereinafter referred as “SME”) Bank Limited, in Windhoek, Namibia on the *bona*

fide and reasonable, but mistaken belief that the amount was due, owing and payable to the defendants, while it was in fact not the case and the defendants nevertheless appropriated the monies.

[5] The plaintiffs aver that the defendants were money remitters as envisaged in the Financial Intelligence Centre Act¹ (FICA) and owed the SME bank a duty of care to report the payments made into their bank account directly from SME bank's account. It is alleged further that the defendants unlawfully and in breach of sections 21, 21A 21B and 21C of FICA, failed to report receipt of the money from the SME bank as required in terms of FICA and that had the defendants exercised their reasonable care, they would have foreseen the risk of harm to the SME bank and taken steps to guard against that harm.

[7] On 11 July 2017, SME bank was placed under provisional liquidation by the order of the Namibia High Court. Both plaintiffs were duly appointed as provisional liquidators by virtue of the letters of appointment number W19/2017 which was issued under the signature of the Master of the High Court in Namibia. By virtue of the order granted by this court on 16 June 2018 under case number 19193/218, both first and second plaintiffs were duly recognised as joint provisional liquidator of the SME bank. On 6 March 2019 summons was served on the first and the second defendant. On 19 March 2019, the defendants filed notice of intention to defend. On 9 April 2019, the plaintiffs instituted this application for summary judgment.

¹ 30 of 2001

[8] Miss Tania Pearson, Legal Advisor at SME bank deposed to an affidavit in support of this application. She avers that she was mandated by the first and second plaintiff to have access to all the records and information whether electronic or hard copies within the SME bank. She avers further that she can swear positively and verify the causes of action together with the amounts claimed in the particulars of claim and that she is of the opinion that the defendants do not have a *bona fide* defence and have entered an appearance to defend solely for the purpose of delay.

[9] The payment process at SME bank as set out in brief below has never been placed in dispute:

[9.1] all preparation for payment would go through the Finance department;

[9.2] once the Finance Department has checked, verified and authorised the CEO must approve the payment;

[9.3] once the CEO has approved the payment a document called a "Payment Instruction" will be forwarded to the Treasury Back Office to effect payment;

[9.4] At the Treasury Back Office, the payment instruction will be dealt with by three persons, namely:

[9.4.1] the Treasury Inputter-being the person who physically loads the payment onto the system for

payment to be effected;

[9.4.2] the Treasury Verifier- being the person who checks

whether sufficient funds are available in the SME

bank's bank account to meet the payment; and

[9.4.3] the Treasury Authoriser- the person who physically

makes the payment by pressing of a button on the

system to effect the actual payment ("the Authorizer")

[9.5] the person operating in the Treasury Department will only receive a

payment instruction indicating only to whom the payment must be

made, the bank account number of the payee, the reason for the

payment, all of which is confirmed by the signature of the CEO of the

SME bank on in his absence the acting CEO.

[10] The main issue is whether the plaintiffs succeeded to establish the essential elements for granting summary judgment as set out in Rule 32. The defendants have raised a number of technical objections, namely the admissibility of the plaintiffs' affidavit, deposed to by Miss Tania Pearson, whether or not the deponent to the summary judgment has personal knowledge of the facts; the plaintiffs' *locus standi* as appointed liquidators of the SME bank; whether or not the particulars of claim lack a cause of action and are excipiable .

[11] As pointed out by the author, Erasmus: Superior Court Practice, Uniform Rule of Court 32(3)(b) requires the defendants to satisfy the court by affidavit that they have a *bona fide* defence to the plaintiff's claim. '*Satisfy*' does not mean '*prove*'. What the rule requires is that the defendants set out in their affidavit facts which,

if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

[12] While it is not incumbent upon the defendants to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiffs claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*.

[13] If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendants *bona fides* but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable.

[14] All that the court enquires, in deciding whether the defendants have set out a *bona fide* defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed by the defendants appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[15] The defendants are not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be *bona fide*. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[16] In terms of subrule (5): '*The court may enter summary judgment.*' The word '*may*' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[17] Applying these principles *in casu*, I am not satisfied that in its resisting affidavit the first defendant has demonstrated a *bona fide* defence on the merits of the plaintiff's claim. The defendants all what they raised is a myriad of technical objections they do not deny that money was transferred from SME bank to the first defendant's account where the second defendant is the director. I deem it necessary to deal with each of these technical objections raised by the defendants in turns below.

[18] The first defence raised by the defendants was that the affidavit of Miss Pearson was taken in a foreign nation and it was not authenticated in terms of Rule 63 of the Uniform Rules of Court and therefore is inadmissible. Section 8 of the Justices of the Peace Act and Commissioners of Oaths Act² provides for the powers of oaths outside the Republic³.

[18.1] The Namibian Justice of the Peace and the Commissioners of Oaths, which states that:

"Justices of the Peace and Commissioners of Oaths Act⁴ (RSA GG 456) brought into force in South Africa on 1 December 1964 by RSA Proclamation R.316/1964 (RSA) 958); came into force in West Africa on 21 July 1972 when the amendments made by Act 55 of 1970, including the insertion of section 11A, came into force APPLICABILITY TO SOUTH WEST AFRICA: Section 1, as amended by section 55 of 1970, defines "Republic" to include the "territory of South West Africa".

² 16 of 1963

³ "(1)(a) The Minister may, by notice in the Gazette, declare that the holder of any office in any country outside the Republic shall in the country in which or at the place at which he holds such office, have the powers conferred by section seven upon a commissioner of oaths, and may in like manner withdraw or amend such notice."

⁴ 16 of 1963

[18.2] The Government Gazette 1872 of 12 September 1980 states that :

“by virtue of the powers vested in me by section 8(1) (a) of the Justices of the Peace and Commissioners of Oaths Act, 1963...any person who exercises in a state to which independent has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic. This notice is issued with the consent of the Administrator General for the Territory of South West-West Africa and shall also apply in the Territory. Article 140 (The Law in Force at the Date of Independence) of the Constitution of the Republic of Namibia⁵. Based on the above I find that there is no merit on this objection raised.

[19] The second objection raised by the defendants is the lack of personal of the knowledge of the deponent (Miss Pearson) who deposed to an affidavit in support of the application for summary judgment. This is based on two grounds, namely that Miss Pearson didn't make payment and she can't have personal knowledge to verify the facts supporting cause of action⁶ and that the second defendant never met Miss Pearson. Miss Pearson confirms that she has been an employee of SME bank since 2012⁷, she had the electronic documents relating to SME bank. Her knowledge that payment was made from the SME bank is as a result of her having had access to the documents. Miss Pearson's knowledge from the documents she had militates against the first defendant that it received the money.

⁵ *Subject to the provisions of this Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.*

⁶ Affidavit resisting summary judgment page 31 para 6

⁷ Affidavit resisting summary judgment page 4 par 2

[20] The case of *Kurz v Ainhirn*⁸ is the case where Howard JP articulated the way to deal with the allegation similar to the one by the defendants in the instant case where the remarks as follows:

“In his opposing affidavit the deponent takes one point only: that as much as the alleged causes of action arose out of events which occurred during the period 1990-1991 and the plaintiff had nothing to do with the affairs of the close corporation prior to his appointment as liquidator on 12 January 1994, he is not a person as required by Rule 32 (2). He says that under these circumstances he is not obliged to satisfy the court that he has a bona fide defence to the action, and he indeed makes no attempt to do so. He does not deny the allegation that he misappropriated and stole the amount of R440,000.00

...In his opposing affidavit the defendant states that the obvious, that the plaintiff was not a witness to transactions involving the close corporation before liquidation, and draws from the fact alone the inference that the plaintiff cannot swear positively to the relevant facts. He thus excludes the possible source of knowledge which was never open to the plaintiff anyway, but does not even mention, let alone attempt to exclude, the obvious source from which the plaintiff as liquidator could acquire sufficient knowledge to enable him to swear positively to the facts. This disingenuous affidavit does not serve to cast doubt on the plaintiff's averment that he can swear positively to the facts or his opinion that there is no bona fide defence”.

[21] From the facts of the instant case Miss Pearson was an employee of SME bank about five years before SME bank was placed under provisional liquidation and she had access to all the information in her disposal. There is no substance on this technical objection as well.

[22] The defendants other technical objection is the alleged lack of *locus standi* in that the plaintiffs have failed to produce document in the summons from Namibia to

⁸ 1995 (2) SA 408 (D)

show that SME bank was indeed liquidated, or an order liquidating SME bank and/or letters of their appointments as such from Namibia and South Africa or the Court Order recognising them as provisional liquidators and or that they have the powers to litigate in South Africa⁹.

[22.1] The plaintiffs aver that, after SME bank was provisionally liquidated on 11 July 2017 they were appointed as provisionally liquidators pursuant to the Court order granted by Namibian High Court which was confirmed by Namibia High Court on 29 November 2017¹⁰; the appointment of the plaintiffs as liquidators and their capacity to litigate was recognised by this Court through an order granted on 16 June 2018 under case number 19193/2018¹¹ and this order was made final by Dipenaar J on 4 February 2019. The defendants contention was that the plaintiffs failed to attach the court orders or letters of appointments in the particulars of claim.

[22.2] The defendants contention is that in the absence of the letters of appointment as provisional liquidators there must be doubt that SME bank was liquidated. They also contend that even if one accepts that they are provisional liquidators but still they do not have locus to litigate on behalf of SME bank. They rely on the decision of *Rossouw v FirstRand Bank Ltd*¹² where it was held that there is absolute prohibition to the admission of further evidence and plaintiff must stand or fall by the verifying affidavit delivered in terms of rule 32(2). I disagree with the contention by the

⁹ Resisting affidavit par 8 and 9

¹⁰ Page 10 par 3

¹¹ Page 10 par 5

¹² 2010 (6) SA 439 (SCA at 451A-453B)

defendants. The defendants have failed to request to inspect the respective Namibian and South African Court judgment in terms of rule 35(12) & (14). See also *Shell Zimbabwe (Pty) Ltd v Webb*¹³.

[23] The production of the court order in judgment is not a new evidence. In *Rossouw* case SCA held that it was impermissible to produce supporting documents at the hearing of summary judgment where proof of service of notices were produced at the hearing and the SCA held that it was inadmissible. In the instant case, the defendants were informed in the affidavit in support of summary judgment application that the court orders recognising the plaintiffs in South Africa will be produced at the hearing. I disagree with the submission by the defendants that there was no obligation in their part to utilise Rules 35(12) and (14). Therefore, the defendants' objection on this ground also fails.

[24] The defendants also raised a defence that each of the causes of action are excipiable and they are vague and embarrassing. In the particulars of claim the plaintiffs set out the facts, which lead to the conclusion based on the facts as to whether the cause of action *condictio indebiti & lex aquilia*.

[25] The defendants allege that plaintiff's failed to prove the cause of action on the *condictio indebiti*¹⁴. The defendants' contention is that the plaintiffs failed to prove three essential requirements of *condictio indebiti*, namely that the plaintiffs have been impoverished¹⁵; the defendants were enriched¹⁶ and the defendants'

¹³ 1981 (4) SA 752H-753A

¹⁴ Affidavit resisting summary judgment page 36 par 21

¹⁵ Affidavit resisting summary judgment page 36 par 21.1

¹⁶ Affidavit resisting summary judgment page 36 par 21.2

enrichment was at the expense of the plaintiff¹⁷. The defendants overlook the fact that the plaintiffs claim is one for payment of money allegedly unduly paid to the first defendant. The plaintiffs allege in their particulars of claim that:

[25.1] an amount of R650, 000.00 was paid to the first defendant¹⁸;

[25.2] the payment was made from the SME bank's account¹⁹;

[25.3] the payment was made *bona fide* and reasonable but mistaken belief that the amount was owing²⁰;

[25.4] the payment was in fact, not owing and payable to the defendants²¹;

[25.5] the defendants appropriated the money.

[26] From the facts set out above which are undisputed lead to one conclusion that the first defendant was enriched, the plaintiffs were impoverished; the first defendant's enrichment was at the expense of the plaintiffs and such enrichment is *sine causa* and unjustified. The defendants contention that the essential elements of the cause of action based on a *condictio indebiti* is rejected and there is no substance on the argument that no cause of action was established under the *condictio indebiti*. The first defendant has not denied the allegations set out above. The requirements for *condictio indebiti* as was set out in the Supreme Court of Appeal case of *Absa Bank Ltd v Leech*²² have been proven by the plaintiffs.

¹⁷ Affidavit resisting summary judgment page 37 par 21.3

¹⁸ PoC page 13 par 13

¹⁹ PoC page 14 para 12

²⁰ PoC page 14 par 16

²¹ PoC page 14

²² 2001(4) SA 132 (SCA)

[27] The defendants aver that the claim based on *lex acquilia* is bad in law. The defendants contend that *lex acquilia* was not relied upon by the plaintiffs as an alternative to *condictio indebiti* and by doing so the plaintiffs rely on two different causes of action. They contend that the other problem with this cause of action is a delictual claim which cannot form the basis of a summary judgment application²³.

[28] The contention by the defendants is incorrect in law as the cause of action has no bearing on the liquidity of the amount claimed. In the decision by this Division in the case of *Colrod Motors (Pty) Ltd v Bhula*²⁴ is a case where an amount of money was stolen from the plaintiff. The defendant resisting the application for summary judgment raised a defence that the amount was a damages claim and it was not liquidated. Eloff J referring to the dictum in the case of *Kleynhans v Van Der Merwe, N.O*²⁵

“In my opinion the present claim has been formulated as a liquidated one. It is for a specific amount allegedly taken from the plaintiff... If A hands B R100 as a loan and B refuses to repay it, A’s claim for repayment would be liquidated, but if B snatches R100 from A and refuses to hand it back, A’s claim would be unliquidated. I think the opposition to the claim fails”.

[29] The plaintiffs found the basis of their claim on *lex aquilia* on the provisions of the Financial Intelligence Centre Act²⁶ (FICA) in that the defendants were money remitters and they owed SME bank a duty of care in that they were supposed to report payments into their bank accounts directly from the SME bank’s account.

²³ Affidavit resisting summary judgment page 41 par 34

²⁴ 1976 (3) SA 836 (W)

²⁵ 1970(1) 565 (O) at page 565 (O)

²⁶

The defendants contend that this is absurd to expect that they report this transaction to SME bank²⁷. Although FICA does not define a money remitter but it has a deeming provision in the form of Item 19 of Schedule 1 which deems “ a person who carries on the business of a money remitter” as an accountable institution in terms of the Act. However, this ground has not been persisted with during the argument I will reserve expressing my opinion about it.

[30] In addition to the defendants’ grounds of objection or opposition of granting summary judgment contend that the plaintiffs’ particulars of claim lack cause of action and argue that the particulars of claim are excipiable. The defendants contend that the plaintiffs lack the knowledge as to which defendant did what. They advance their argument that the plaintiffs’ particulars of claim refer to generic word “defendants”, in that paragraph 14 of the particulars of claim allege that an amount of R650, 000.00 was paid into the account of defendants²⁸. The defendants also contend that the document relied upon as proof of the trail of the movement of the money from SME bank account ie document marked “POC1” makes no reference to *Gold Reef City Mint (Pty) Ltd*, first defendant or Glen Schoeman, the second defendant, instead the name of the beneficiary recorded as “*Mamempe Capital Asset Managers*” and “*Gold Reef Limited*” is record in the column with the name of the “Actual Bank Account Holder”. The contention by the defendants is that neither of the defendants is the account holder of the account mentioned in the transaction.

²⁷ Affidavit resisting summary judgment page 42 par 36

²⁸ Page 14 par 14

[31] A more pertinent decision is that of *Standard Bank of South Africa Ltd v Roestof*²⁹, where Blieden J dealt with an affidavit couched in the plural in a case where there was only one defendant. The learned judge held that a reading of the summons and mortgage bond, together with the affidavit (he did not mention the notice of motion in the application for summary judgment), left no doubt that what was being verified was a cause of action against the defendant alone.

[31] The defendants contend that it is trite that if the identity of the defendant is uncertain, for example in cases where there is more than one defendant and the plaintiff does not know which one concluded a certain contract with, that uncertainty would operate to defeat the plaintiff's right to sue any particular one of them for summary judgment. The court is referred to the Western Cape Division case of *Cape Business Bureau (Pty) Ltd v Van Wyk and another*³⁰. I agree with the defendants that the legal position as set out in *Van Wyk* case is well-recognised one. However, in the instant case there is no uncertainty as to which company received the money. The defendants are creating some doubt by relying on the multiplicity of the companies in Johannesburg whose trading names have Gold Reef. The plaintiffs show the flow of money from SME bank to Gold Reef Limited who is the account holder. The worse for the first defendants it never denied that the account where money was paid was not the first defendant's account.

[32] The defendants managed to get a Johannesburg telephone directory and found out that about six companies trading under the precursor name of Gold Reef City.

²⁹ 2004 (2) SA 492 (W)

³⁰ 1981 (4) SA 433 (C) at 439

Their contention is that their name is Gold Reef City Mint (Pty) Ltd, a private company, not a public company not Gold Reef City which is alleged to have been unduly paid by SME bank³¹. The defendants contend further that the second defendant, Glen Schoeman, does not feature anywhere in the documents marked annexure "POC1" where the money the money flow is shown. In the particulars of claim the plaintiffs pray for an order against both defendants, jointly and severally, the one paying the other to be absolved in the amount of R650, 000.00³². In the affidavit resisting summary judgment the second defendant says the following:

"37. "The first defendant is a trader in coins. I am the director of the first defendant. The first defendant trades from Johannesburg"³³..." (my underlining).

[33] The first defendant is hiding behind the ambiguity or multiplicity of names similar to the one of the first defendant and what it does not disclose is essential issue that it did not receive money.

[34] From the passage quoted above it is clear that the defendants were sued jointly and severally one paying the other to be absolved. The second defendant by virtue of being a director of the first defendant, has been cited on that basis.

However, I am unable to grant summary judgment against the second defendant as that would be tantamount to finding the second defendant personal liable for company's (first defendant's) keeping of the money under *vindictio indebiti*. There is no authority presented by the plaintiffs for me to make such an order. The second defendant's name does not appear on the document (POC1) relied upon by the plaintiffs. There is only one transaction which is reflected on the document (POC1) relied upon by the plaintiffs ie *Gold Reef City Limited*. If the plaintiffs were

³¹ Affidavit resisting summary judgment page 40 par 32 & 33

³² PoC page 17

³³ Affidavit resisting summary judgment

to proceed against the second defendant based on *lex aquilia*, still I am reluctant to grant summary judgment as he may raise a legal defence in the main action. I am inclined to grant the second defendant leave to defend the action. The first defendant failed to do a simple thing, ie denial of receipt of the money from SME bank into its account and making a full disclosure of its banking books to refute any allegation that it received payment which was not due to it. There is not a single paragraph where it denies receipt of payment. The first defendant failed to meet the test or the legal principle set out by Corbett JA, as he then was, in the case of *Maharaj v Barclays National Bank*³⁴ where the following was held:

“All that the Court enquires into is : (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part as the case may be. The word, ‘fully’, as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.” (my underlining)

[35] In *Breitenbatch v Fiat SA (Edms) Bpk*³⁵ Mr Justice Colman issued a warning to defendants in a summary judgment application where he made the following remark:

“...no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff’s claim. What I would add, however, is that the defence is averred in a manner, which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides...”

A dishonest deponent, if he is wise, will present as narrow a front as possible, and (if it is practicable) a blurred one. What I have set out in that regard is not a demand for, or encouragement to present, lengthy and prolix affidavits in summary judgment cases. All that is required is that the defendant’s defence be not set out baldly, vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the

³⁴ 1976 (1) SA 418 (A)

³⁵ 1976 (2) SA 226 (T)

defendant has, or may have, dishonestly sought to avoid the dangers in inherent in the presentation of a fuller or clearer version of the defence which he claims to have”.

[36] In *Joob Joob Investment (Pty) Ltd v Stocks Mvunda Zek Venture*³⁶ the Supreme Court of Appeal held that... *“summary judgment proceedings only hold terrors and are “drastic” for a defendant who has no defence. Perhaps the time has come to disregard these labels and to concentrate rather on the proper application of the Rule, as set out with customary clarity and elegance by Colbert JA in the Maharaj case at 425G-426E”.*

[37] In the absence of a denial of receiving the payment from SME bank coupled with their non-disclosure of a *bona fide* defence lead to the irresistible conclusion that the first defendant entered an appearance to defend for the purpose of delay. In the circumstances, there is no reason why summary should cannot be granted.

[38] Counsel for the plaintiffs’ indicated that the interest of 20% as set out in the summons was incorrectly recorded and at the time the interest rates was at 15.5% and in the event summary judgment being granted he ask the court to grant summary judgment for the amount claimed at 15.5% instead.

[39] The plaintiffs are therefore entitled to summary judgment.

[40] Accordingly, I make the following order:

[40.1] Summary Judgment is granted in favour of the plaintiffs against the first defendant for:

³⁶ 2009 (3) SA 409 (SCA) at 228G-229A

- [40.1.1] Payment of R650, 000.00 together with interest thereon a *tempora morae* at the rate of 15.5% per annum from 5 August 2014 until the final date of payment;
- [40.1.2] The second defendant is granted leave to defend the action.
- [40.1.3] the defendants are to pay the plaintiffs' costs of suit for one counsel.

N. SKIBI

Acting Judge of the High Court,

Gauteng Local Division,

Johannesburg

HEARD ON : 17 October 2019

JUDGMENT ON : 31 October 2019

FOR THE PLAINTIFF : Adv. Cooke

INSTRUCTED BY : Webber Wentzel Attorneys

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Ref: T. Verveld/D Wright/K van Vuurent

3025501

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