

IN THE HIGH COURT OF SOUTH AFRICA

(IN THE NORTH GAUTENG HIGH COURT, PRETORIA)

05/05/2011
Case No: 12749/09

In the matter between:

MILANDA DE BEER APPLICANT

And

DELETE WHEN FILED	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
05/05/2011 DATE	 SIGNATURE

LE ROUX DE BEER N.O. 1ST RESPONDENT

(in his capacity as trustee of
Renandi Investment Trust, IT 6864/01 IT)

MILANDA DE BEER N.O. 2ND RESPONDENT

in his capacity as trustee of
Renandi Investment Trust, IT 6864/01 IT)

JACQUEE JANSE VAN VUUREN N.O. 3RD RESPONDENT

in his capacity as trustee of
Renandi Investment Trust, IT 6864/01 IT)

JUDGMENT

MAVUNDLA, J.

- [1] This is an opposed application for summary judgment against the respondents in their capacity as trustees of the Renandi Investments. The applicant's claim, with ancillary relief, arises from a verbal agreement in terms of which the plaintiff lent and advanced to the trust an amount of R1, 090 000, 00.
- [2] The plaintiff alleges in the particulars of claims that the aforesaid amount was payable on demand. She further alleged that demand was done on the 20 February 2009. In this regard she has attached annexure "A1" and "A2".
- [3] It is trite that in summary judgments the defendant must by way of an affidavit or by way of oral evidence satisfy the court that he has a *bona fide* defence to the action. In his affidavit or oral evidence he must disclose fully the nature and the grounds of

his defence and the material facts upon which he relies. *Vide Maharaj v Barclays National Bank Ltd*¹ where Corbett JA said that:

"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona vide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined 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 or the other party. All 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. (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 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 . . . 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 the 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. (See generally, *Herb Dyers (Pty) Ltd v Mahommed & another*

¹ 1976 (1) SA 418 (A) where at 426A–C.

1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb & another* 1965 (2) SA 914 (N); *Arend and another v Astra Furnishers (Pty) Ltd* [1974 (1) SA 289 (C)] at 303–4; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467E–H.)

At the same time defendant is not required to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading (see *Estate Potgier v Elliot* 1948 (1) SA 1084; *Herb Dyers case supra* at 32)" (*vide also Tesven CC & another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275H–276D).

- [4] In the matter of *Evelyn Haddon & Co Ltd v Leo Janko (Pty) Ltd*² the court cited with approval the matter of *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd*³ where Marias J said that:

"The proper approach appears to me to be one which keeps important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant (see the case of *Symon & Co, supra*). That can only be done if there is no doubt but that the plaintiff has an unanswerable case."

² 1967 (1) SA 662 (O) at 666A.

³ 1959 (3) SA 362 (W) at 366.

[5] The defendants had already filed their plea. In opposing the summary judgment, the second respondent filed an opposing affidavit, which the third respondent confirms the averments therein. The second respondent refers to the plea filed and request that the contents therein be incorporated in his affidavit by reference. He denies that there was any money lent and advanced to the trust. In the plea, inter alia, it is denied that the second defendant is a trustee of the trust. He further denied that the trust does not have a *bona fide* defence to the action.

[6] The second respondent further avers that he was the owner of certain immovable property situated at Nelspruit. At the time he was married to the plaintiff. On legal advice, he registered the immovable property in the name of the plaintiff. It is further averred that at the time of registration of the property in the name of the plaintiff, she knew that she has in no way contributed financially towards the purchase of the said immovable property, notwithstanding the registration thereof in her name, there were no rights accruing to her. According to the second respondent, during April /May 2005, in his personal

capacity, he sold the relevant property for an amount of R1, 090 000, 00, which he lent to the trust for it to purchase shares in a Stampvrug Investments (Pty) Ltd.

[7] In the matter of *Breitenach v Fiat SA (Edms) Bpk*⁴ the Court referred to the matter of *Mowschenson* as well as *Shepstone v Shepstone*⁵. In the *Shepstone* case⁶ Miller J said that:

'But even if there is substance in the contention that the applicant's affidavit is incomplete, it does not follow that her opposition must necessarily fail. While there is a great deal to be said for the view that the word 'fully' in the context of Rule 32(3)(b) should not be given its strictly literal meaning and that it is not required of the defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence, it is clear, I think there ought to be a sufficient disclosure of material facts to enable the court to decide whether the defendant, if those facts are true, would have a defence to the claim',

And at 467E–H Miller J said that:

'The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case'

⁴ 1976 (2) SA 226 at 229.

⁵ 1974 (2) SA 462 (N) at 467E–H.

⁶ *Supra* at 466H–467A.

[8] In the matter of *Breitenbach v Fiat SA (Adms) Bpk*⁷ Colman J commenting about Rule 32(3)(b) said: "It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it require the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

[9] The grant of summary judgment is a matter of the discretion of the court, which must be exercised judicially. The version of the second respondent is confirmed by the third respondent. At trial, the respective parties would be subjected to cross examination. At this stage, I need not interrogate the probabilities and improbabilities in the respective versions of the parties. If I am of the view that the applicant does not have an unassailable case, as I am, then, I must not close the door of the court in the face of the respondents and grant the summary judgment. I should however lean towards the respondents and refuse the application for summary judgment.

⁷ 1976 (2) SA 226 (T), at 228B-C.

[10] The matter of costs is generally governed by the principle that they follow the event. *In casu*, the parties would have a second bite of the cherry when they lock horns in the main trial. I am of the view that the costs of this application can be determined at the end of the main trial, where the defences of the applicants would be exhaustively canvassed. In the premises I shall refrain from disposing of the costs aspect and defer it to the main trial.

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

1. The summary judgment is dismissed;
2. That leave to defend is granted;
3. That the costs of this application are reserved for determination at the main trial.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 05/05/2011

APPLICANT'S ATT : KRUGER MOELETSI INC

APPLICANT'S ADV : ADV J S STONE

RESPONDANTS' ATT : COUZYN, HERTZOG & HORAK

RESPONDANTS ADV : ADV M M SNYMAN