

IN THE HIGH COURT OF SOUTH AFRICA**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)****CASE NO : 2280/2017**

Date heard : 29 August 2017

Date delivered : 26 October 2017

In the matter between :

McCAR MOTORS**Plaintiff**

and

NICK COENRAAD FOURIE N.O.**First Defendant****KYLA JEAN FOURIE N.O.****Second Defendant****JOHAN ABRAHAM VAN HUYSTEEN N.O.****Third Defendant**

JUDGMENT

RUGUNANAN, AJ :

[1] This is an opposed application for summary judgment. The plaintiff, a close corporation styled as 'McCar Motors CC' as more fully described in the particulars of claim instituted action with a combined summons against the first, second and third defendants in their respective capacities as trustees of the CC *Business Trust*. Although no specific detail is proffered in the particulars of claim, it appears from the papers before me that the trust conducts business in the name of 'Algoa Bay Auto' ('Algoa').¹

¹ Opposing affidavit, paragraph 5 as read with Annexure C thereto

[2] The plaintiff's claim is based on the *rei vindicatio* and is founded on the allegation that it is the owner of two Toyota land cruiser motor vehicles. A full description of these vehicles appears in paragraph 5 of the particulars of claim. The plaintiff claims delivery of the vehicles which, it is alleged, are in the possession of the defendants.

[3] In launching this application, the plaintiff has complied with the procedural requirements under rule 32(2) of the uniform rules of court. The defendants have given notice to oppose these proceedings and have filed an opposing affidavit made in the name of the first defendant. Simultaneously with delivery of their notice of intention to defend the action but before filing notice to oppose the application for summary judgment, the defendants delivered their plea. There is nothing extraordinary about this since a plaintiff may nonetheless apply for summary judgement, despite delivery of a plea. See in this regard ***Steeledale Reinforcing v Ho Hip Corporation 2010 (2) SA 580 (ECP) at 583H***. Nonetheless the defendants are of the view that the plaintiff's persistence with the application notwithstanding their defence being disclosed beforehand affects the question of costs. More about this later.

[4] The standard summary judgement supporting affidavit on behalf of the plaintiff has been deposed to by Mr Riaan Mostert in his capacity as sole member and in which affidavit he verifies the plaintiff's cause of action and alleges that the defendants have no *bona fide* defence having entered an appearance to defend for purposes of delay.

[5] The content of the defendants' opposing affidavit discloses that the application is resisted essentially on the ground that ownership of both vehicles is vested in Algoa, it having acquired them, together with 'the necessary paperwork', and taken delivery from one Burger on payment of their full purchase price to him. Pending the vehicles being subjected to a roadworthy inspection, and unbeknown to the defendants, it is alleged that Burger fraudulently procured roadworthy certificates and sold the vehicles to the plaintiff without delivery being effected. In addition, the opposing affidavit reveals that the vehicles, prior their acquisition by Algoa, were sold to Burger

by one Engelbrecht. These averments stem from the content of a letter dated 26 May 2017 from the defendants' attorneys to the plaintiff's attorneys. This letter is attached to the opposing affidavit as 'Annexure C' and its content is reproduced, cut and paste, in the opposing affidavit. Regarding the initial sale of the vehicles by Engelbrecht to Burger, the defendants seek reliance on an undated and unattested statement from Engelbrecht. This statement is attached to the opposing affidavit as 'Annexure G'.

[6] Over the years the interpretation of rule 32(3)(b) by the courts has culminated in the design of several principles. It is considered useful to articulate some of these before determining whether the content of the opposing affidavit is sufficient to overcome the application for summary judgment. The rule requires a defendant who opposes an application for summary judgment to satisfy the court by affidavit that it has a *bona fide* defence to the action and further, that such affidavit shall disclose *fully* the nature and grounds of the defence and the material facts relied upon therefor. The word *fully* in this context means no more than that a defendant need not deal extensively with the facts and the evidence relied upon to substantiate them, but should at least disclose its defence and the material facts on which the defence is founded with sufficient particularity to enable the court to decide whether a *bona fide* defence is disclosed.² It is not required of a defendant to prove a defence on a balance of probabilities.³ Rather, what is required is that a defendant sets out in its affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim (***Marsh v Standard Bank of South Africa Ltd 2000 (4) SA 947 (W) at 949C***). The additional requirement of *bona fides* is not anything judged *in vacuo*.⁴ Nor is it given a literal meaning; it will suffice, seemingly, if the defendant swears to a defence valid in law in a manner which is not inherently and seriously unconvincing (see ***Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (TPD) at 227G-228B***). Stated otherwise, the presentation by the defendant of material facts with sufficient particularity for

² see ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 AD at 426 C***

³ see ***Marsh v Standard Bank of South Africa Ltd 2000 (4) SA 947 (W) at 949 C-D***; and ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 A***

⁴ Van Niekerk et al ***Summary Judgment, A Practical Guide***, Issue 1 at page 11-16

the court to determine that they constitute a defence, is the gist of the requirement of *bona fides* in the context of summary judgment proceedings.⁵

[7] Incorporating the contents of 'Annexure C', the deponent to the opposing affidavit alleges that Algoa is vested with ownership of the two vehicles, having paid Burger and taken delivery thereof. Although accepting that these allegations are hearsay, our law recognises that possession of movable property raises a presumption of ownership (see **Ebrahim v Deputy Sheriff, Durban & Another**⁶). The converse of the presumption is that in a vindicatory action a plaintiff who claims movable property by right of ownership from someone in possession has the burden of proving his (i.e. the plaintiff's) title.⁷ With this analysis undertaken of the opposing affidavit, I am satisfied as to the existence of a *bona fide* defence to the action, that is to say, the opposing affidavit has set out material facts, which if established at the trial of the action, may constitute a defence to the plaintiff's action.

[8] Although having disclosed facts on which their defence relies, the question is, may the defendants rely on allegations which constitute hearsay, or in order to render those allegations admissible at the summary judgment stage should the defendants have introduced a confirmatory affidavit by each of the persons mentioned in the opposing affidavit who will presumably eventually testify to those facts at the trial? As will appear from what follows hereunder the case law appears not to have satisfactorily addressed this question.

[9] Mr Gibbs who appeared for the plaintiff contended that the opposing affidavit, unconfirmed by confirmatory affidavits from Burger and Engelbrecht, incorporates hearsay matter which is inadmissible and argued that the opposition to the application for summary judgment must fail. In support of his contention, Mr Gibbs placed reliance on the proposition that the opposing

⁵ Van Niekerk *op cit* at page 9-14(1)

⁶ 1961 (4) SA 265 (D&CLD) at 267C

⁷ See **Ruskin N.O. v Thiergen** 1962 (3) SA 737 (AD) at 744A; **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993 (1) SA 77 (AD) at page 82A; and Hoffmann & Zeffert, *The South African Law of Evidence*, 4th ed at page 594

affidavit ought to have been supported by admissible evidence. In this regard he relied on the following cases, namely; **Standard Merchant Bank Ltd v Rowe**;⁸ **Mayibuye Centre - CD Rom Publications v Workgroup Holdings (Pty) Ltd**;⁹ and **Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk** ¹⁰. In **Mayibuye**, evidence which sought to resolve an alleged ambiguity in a written agreement was introduced on affidavit; but the court having concluded that there was no ambiguity held that the evidence was inadmissible not only because it was hearsay but more specifically because it offended the parole evidence rule - accordingly the defendant was not granted leave to defend. **Rowe** involved an application for summary judgment and concerned a failure by the defendants to have attached an alleged novated agreement to their opposing affidavits. For that reason the court held, (on the strength of the best evidence rule which provides that, except in exceptional circumstances, the only admissible evidence of the contents of a document is the document itself), that the terms of the novated agreement could not be proved other than by the production of the agreement itself. On this basis the secondary evidence, of a hearsay nature, which the defendants sought to rely on to prove the terms of the novated agreement was held to be inadmissible. In **Chairperson, Independent Electoral Commission** the defendant's opposing affidavit was based on hearsay, the deponent having alleged that she was advised of certain facts by other employees of the defendant. From the brief summation of these cases I need only mention that they accord with a strict approach which precludes a defendant from adducing inadmissible evidence at the summary judgment stage despite having disclosed facts on which a defence may be founded.

[10] A permissive approach was adopted by the courts in **Herbert v Steele**¹¹, **Mans v Kennedy**¹² and **Cronje v Cooper**¹³. In **Herbert v Steele** hearsay evidence was accepted on the premise that "a defendant is not obliged to disclose its

⁸ 1982 (4) SA 671 (W)

⁹ [1998] 2 All SA 105 (AD)

¹⁰ 1997 (1) SA 244 (T)

¹¹ 1953 (3) SA 271 (TPD)

¹² 1961(3) SA (GWPA)

¹³ 1978 (1) SA 268 (NPD)

evidence.”¹⁴ A reading of the judgment comprehends, in my respectful view, that a defendant is not required to qualify its evidence in the sense of meeting the requirements for admissibility nor is a court required to evaluate the evidence as it does during trial proceedings. This springs from the trite principle that proof of a defence on a balance of probabilities is not the standard at the summary judgment stage.¹⁵ Recognising this principle in its acceptance of hearsay evidence, the court in **Mans v Kennedy**¹⁶ stated: “Die verweerder hoef nie op hierdie stadium sy verweer te bewys nie. Al wat hy moet doen is om **voldoende feite te beweer wat, as dit bewys sou word, 'n goeie verweer is**” (my own emphasis in bold). Rule 32(3)(b) essentially requires disclosure of **material facts** setting out the nature and grounds of the defence. My sense is that this is no different from the general approach that a litigant when pleading a cause of action or defence is required to set out material facts without pleading evidence to prove those facts.¹⁷ By parity of reason, and in the context of summary judgment proceedings, material facts mean nothing other than that the *facta probanda* (facts that must be proven) required for a particular defence must be set out but not necessarily the *facta probantia* (evidence to prove the material facts). In my view, the rule should be understood with this distinction in mind and so should **Herbert v Steele** and **Mans v Kennedy**.

[11] That a court may grant leave to defend on the basis of hearsay in a defendant's opposing affidavit is also evident from the judgment in **Cronje v Cooper**¹⁸. In that case the court conceded the contention that allegations made by the defendant constituted hearsay matter, but decided that it could refuse summary judgment since no machinery was available in summary judgment proceedings to enable the defendant to compel a person to put up a confirmatory affidavit.¹⁹ It is understood that the court adopted this approach in the exercise of its discretion to refuse summary judgment.²⁰

¹⁴ 1953 (3) SA 271 (TPD)

¹⁵ see **Marsh v Standard Bank of South Africa Ltd 2000 (4) SA 947 (W) at 949 C-D**; and **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 A**

¹⁶ 1961(3) SA (GWPA) at page 120 C-E

¹⁷ See **Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838 D-H**; **Makgae v Sentraboer (koöperatief) Bpk 1981 (4) SA 239 (T) at 245D** and **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 at 913F - G**

¹⁸ 1978 (1) SA 268 (NPD)

¹⁹ at page 275 E

²⁰ at page 275 E

[12] In none of the cases referred to by Mr Gibbs is there any indication that the courts were referred to the permissive approach adopted in **Herbert v Steele**, **Mans v Kennedy** and **Cronje v Cooper**; and without intending criticism, nor did Mr Gibbs mention these in argument.

[13] In deciding the matter, the permissive approach adopted in the abovementioned cases is endorsed. I do so in recognition of: the principle that a defendant is not required to prove a defence on a balance of probabilities; the requirement in the rule that material facts be disclosed - and in this sense being mindful of the distinction between *facta probanda* and *facta probantia* which presupposes the allegation of facts and not the evidence with which such facts will be proved at the trial; and the discretion afforded to a court (**Cronje v Cooper** *supra*).

[14] This brings me to the question of costs. Citing **Mahomed Adam (Pty) Ltd v Barrett 1958 (4) SA 507 (TPD)**, Ms Rossi who appeared for the defendants contended for a punitive costs order against the plaintiff on the premise that the plaintiff should not have employed summary judgment proceedings where its claim is disputed and it had knowledge of the nature and grounds of the defence. In this matter, two considerations are relevant to the question of costs. The first is that the defendants' plea was delivered before the application for summary judgment was launched. The issue formulated in the plea is a denial of the plaintiff's allegation of ownership of the vehicles. Tritely, in a vindicatory action, a defendant is not required to do anything more than to deny the plaintiff's allegation of ownership and the consequence of such a denial is that the plaintiff has the onus of proving title.²¹ Ms Rossi argued that the significance of having filed the plea, with disclosure of a denial beforehand, is that the plaintiff ought to have reconsidered its position regarding the application for summary judgment. She contended that the plaintiff was presented with a further opportunity to reconsider its stance upon delivery of the defendants' opposing affidavit disclosing material facts, which if established at the trial of

²¹ see Harms, Amler's Precedents of Pleadings, 6th ed at page 350, **Ruskin N.O. v Thiergen** in fn 7

the action, may constitute a defence to the plaintiff's action. In the aggregate, the plaintiff was presented with two opportunities when it should have made a strategic assessment to desist from proceeding with summary judgment.

[15] Although accepting that the plea incorporates a denial, Mr Gibbs argued that the formulation of the issue in the defendants' plea assumes relevance for the dominant question of *onus* which affects the plaintiff in the action. The argument meant that, in this specific case, summary judgment proceedings ought not to be concerned with the dominant question of *onus* since the rule obliges a defendant to disclose the nature and grounds of the defence and the material facts relied upon therefor. The logical conclusion of the argument by Mr Gibbs is that the costs issue bears no relation to the formulation of the defendants' plea and falls to be determined with reference to the matter contained in the opposing affidavit. Reiterating that the opposing affidavit contained hearsay matter, Mr Gibbs' summation was that the plaintiff's persistence with the application for summary judgment was eminently reasonable in the light of its reliance on the cases supporting the strict approach. I agree. Ms Rossi has not asked the court to stay the action until the plaintiff has paid the defendants' costs.

[16] In the circumstances, I make the following order:

[16.1] the application for summary judgement is refused;

[16.2] the defendants are granted leave to defend the action instituted by the plaintiff; and

[16.3] the plaintiff shall pay the defendants' costs on a scale as between party and party.



S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv. W Gibbs

Instructed: Van Stadens Attorneys c/o Goldberg & De Villiers Inc. Port
Elizabeth

For Defendants: Adv. T Rossi

Instructed: Friedman Scheckter Attorneys, Port Elizabeth