



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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DATE

SIGNATURE

Case no: 22/22035

In the application between:

METCASH TRADING AFRICA (PTY) LTD

Applicant/ Plaintiff

and

SHARIF MOHAMED WEHLIYE

Respondent/ Defendant

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 1 February 2024.

GOODMAN, AJ:

FACTUAL BACKGROUND AND PROCEDURAL CHRONOLOGY

1. During November 2022, the plaintiff, Metcash, sued the defendant for an amount of R1 600 000.00, which it claims is the balance outstanding under a sale of business agreement concluded between it and the defendant on about 20 July 2020, in respect of a business trading as Tayo Coke Warehouse. The sale agreement – signed by Ismail Ahmed on behalf of the plaintiff, and by the defendant personally – is attached to the particulars of claim.
2. According to the plaintiff's particulars of claim:
 - 2.1. The plaintiff sold, and the defendant purchased, the business for a purchase price of R3 450 000.00.
 - 2.2. In terms of the terms of the sale agreement, the defendant was required to pay a deposit of R1 million rand upon execution of the agreement, and a further R50 000 by 3 August 2020. Thereafter, it was required to pay the balance in equal monthly instalments of R150 000 per month.
 - 2.3. The plaintiff fulfilled its terms of the agreement and transferred ownership in the business to the defendant.
 - 2.4. The defendant paid an amount of R1 050 000 by 3 August 2020, and thereafter made irregular payments between 3 October 2020 and 15 March 2022. In total, the defendant paid an amount of R1 850 000 – leaving a balance of R1 600 000 outstanding. It has failed to pay that amount, despite demand.
3. The particulars of claim consequently seek payment of R1 600 000, plus interest, a *temporae morae* to date of final payment.
4. The defendant filed a notice of intention to defend and – after receipt of a notice of bar – a plea. Apart from a series of denials, the plea positively avers that:

- 4.1. The defendant entered into the written agreement attached to the particulars of claim, but “*under the impression it was a draft agreement and not the final agreement as it did not reflect the intention that the parties had*”. It further alleges that the defendant struggles to read and understand English and that the plaintiff’s representative, Mr. Ismail Ahmed, “*used [this fact] to his advantage to get the Defendant to sign the agreement*”;
 - 4.2. The plaintiff is not the owner of the business and consequently could not transfer ownership thereof; and
 - 4.3. The defendant made sporadic payments – but in respect of stock in the store, not to pay for the purchase of the business.
5. The defendant’s position thus appeared to be that, despite his signature of the written agreement, no valid contract of sale was concluded between the parties, and no payments were made by it in respect of the alleged sale.
 6. The plaintiff subsequently applied for summary judgment, which application was opposed by the defendant. It now comes before me for determination.

THE SUMMARY JUDGMENT APPLICATION

7. Summary judgment provides a mechanism for a plaintiff with an unimpeachable claim for a liquidated amount in money, to procure a final order in respect thereof without undergoing a full trial.¹ Its aim is to prevent abuses of the court process by depriving defendants who lack a *bona fide* defence of the opportunity to delay payment, but allowing real, potentially meritorious disputes to proceed to trial.²
8. A plaintiff seeking summary judgment must put up an application in which its deponent, who can swear positively to the facts, (a) verifies the cause of action and the amount claimed, and (b) confirms that, in his opinion, the defendant has no *bona fide* defence to the action and that it has been defended solely for the purposes of delay. Now that Rule 32 provides for summary judgment to be sought after a plea

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275H.

² *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 32-33.

has been delivered, a plaintiff is able to engage, in its application for summary judgment, with the defences pleaded by the defendant.

9. In this case, the plaintiff's operations manager, Mr. Ismail Ahmed, deposed to the affidavit in support of summary judgment. As set out above, he is also the person who signed the sale agreement and who is identified in the defendant's plea as having procured the defendant's signature of that agreement – facts which support his claim to personal knowledge of the facts in issue. He has verified the cause of action and expressly alleged that:
 - 9.1. The terms of the sale of business agreement were explained to the defendant before signature and he signed the agreement with full knowledge and understanding of its contents;
 - 9.2. Upon signature of the agreement, the Defendant took beneficial ownership of the store and commenced business thereafter. The payments made by him were in lieu of the deposit and purchase price for the business;
 - 9.3. On receipt of the summons, the defendant "*proceeded to empty the store and has ceased all business operations*"; and
 - 9.4. In his view, the defendant lacks a *bona fide* defence and has failed to raise a triable issue in his plea, and opposes the matter only for the purposes of delay.
10. On its face, Mr. Ahmed's affidavit complies with the formal requirements of the Rule. Indeed,
11. Once a compliant application for summary judgment is brought, the defendant must satisfy the court that he indeed has a *bona fide* defence to the action, by filing an affidavit which "*shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*".³

³ See Rule 32(3)(b). In terms of Rule 32(3)(a), the defendant may elect instead to give security to the plaintiff for any potential judgment against him. That did not occur in this case.

12. There is substantial case law dealing with the degree of disclosure and the standard of proof that the defendant must meet in that regard. It confirms that a defendant in summary judgment proceedings need do no more than set out facts which, if proved at trial, would constitute an answer to the plaintiff's claim.⁴ The defendant is not required exhaustively to set out the facts and evidence available to him, or to persuade the Court on a balance of probabilities that he will succeed in the action.⁵ He must, however, set out sufficient facts, and provide enough particularity, to satisfy a Court that he defends the matter in good faith and on sound grounds. Bald, vague, ambiguous or contradictory allegations may tell against him on this score. As the Court summarized in *Fiat v Breytenbach*,⁶

"All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the court, with due regard to all the circumstances, receives the impression that the defendant has, or may have dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have. Where the statements of fact are equivocal or ambiguous or contradictory or fail to canvas matters essential to the defence raised, then the affidavit does not comply with the Rule. See Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304A-B."

13. In this instance, the defendant personally deposed to the affidavit resisting summary judgment. For ease of reference, I reproduce the material sections of his affidavit. It states:

"2. I am an adult male refugee and the Respondent in the matter. I am duly authorised to depose to this affidavit of which contents have been properly explained to me by my son MOHAMED SHARIF MOHAMED as I do not speak and understand English very well. A confirmatory affidavit of my son is also attached hereto marked as Annexure "SMW1".

3. The affidavit of ISMAEL AHMED was read and explained to me by my son. I deny that I do not have a bona fide defence to the Applicant/Plaintiff's claim, and I deny that the Plea entered constitutes a bare denial.

4. I state that I do have various legally valid and bona fide defences to the Applicant/Plaintiffs claim. I shall now proceed to set out the nature and grounds of some of those defences.

⁴ *Visser and Another v Kotze* [2013] JOL 29985 (SCA), (519/2011) [2012] ZASCA 73 (25 May 2012) para 11.

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G, 426A-E; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 24.

⁶ 1976 (2) SA 226 (T).

...

9. *To the best of my knowledge the Plaintiff in this matter is cited METCASH TRADING (PTY) LTD in this matter. DEVLAND CC is the party that I was doing business with in the past and with the business TAYO CASH & CARRY CC of which I and two other members held the member interest equally.*
10. *It is my submission that TAYO CASH AND CARRY CC was the owner of the business and that DEVLAND CC did not own the business and therefore it is not possible to sell the business that is not owned by yourself. No proof had been provided that the Plaintiff/Applicant was the owner of the business. It is my submission that verbal evidence should be lead at trial to explain how the businesses operated.*
11. *The description of the Seller and Buyer is incorrectly cited in the agreement and the intention as well.*
12. *Therefor the incorrect parties are represented before the Honourable Court and the Plaintiff/Applicant is misleading the court to rely on a invalid written agreement.*
13. *It is my submission that METCASH TRADING (PTY) LTD is not the lawful owner of the business known as Tayo Chicken Depot of DEVLAND CC and therefor cannot concluded an agreement of sale without the relevant locus standi. No proof of ownership has been provided and even if METCASH TRADING (PTY) LTD had entered the agreement as a representative, no power of attorney or any other authority had been provided to prove that they had the authority to act and were indeed acting in this instance. I also did not have the power of attorney to act from the other two members.*
14. *I inadvertently signed the original of the document of which Annexure "M1" is purportedly a copy as I was under the impression that it was a draft agreement and I signed it to acknowledge receipt. It is my submission that the business that was supposedly being bought by me was not the correct and a final agreement was still to be provided to me.*
15. *I deny that I am liable to pay the amount of R1 600 000.00 or any other amount to the Applicant/ Plaintiff on its claim as is set out under its Particulars of Claim. It is denied that the amount claimed is a liquidated amount and no particulars are set out to indicate how the amount is computed.*
16. *The document attached to the Particulars of Claim as Annexure "M1" does not constitute a valid purchase and sale agreement of a business.*
17. *The said document is not signed by the real owner of the business or a representative of the of the owner at the space indicated on the said document for the Seller's signature. My signature appears at the spaces indicated for the signature of the Buyer. I did not have the intention to*

bind myself in my personal capacity to an agreement that was not yet the final draft and merely signed as acknowledgement of receipt of the document. The agreement was to be concluded between the two business entities and not myself. I therefore also did not have authority to act on behalf of the business.

18. *The document is thus not signed by the correct owner as seller and the correct owner as buyer and therefore cannot constitute a valid written agreement.*
 19. *I signed the said document without properly perusing it and without it being properly explained to me as I struggle to understand and read English and the certain Mr Ismael Ahmed pressurised me to sign the document. The said document does not reflect the true intention and the agreement that was to be concluded between the parties.*
 20. *Where any payment was made, it was sporadic payments that were paid in lieu of stock that was already in the premises where I was trading and were not payments and/or installments as listed in the written agreement on which the Plaintiff's/Applicant's claim is based.*
 21. *I state that no binding agreement, as alleged, came into being through Annexure "M 1" and deny that I am indebted to the Applicant / Plaintiff as alleged nor am I indebted to the Plaintiff/Applicant for any other amount. I also did not have the relevant authority to act.*
 22. *In the Alternative, should the Court find that a valid written agreement came into being, which is denied, I submit that the agreement does not reflect the true intentions of the actual parties and it should be rectified to reflect the correct parties and the true agreement between the parties."*
 23. *FURTHERMORE, I deny that I am liable as surety to pay the amount of R1 600 000.00 or any other amount to the Applicant/ Plaintiff on its claim as is set out under the Particulars of Claim on the grounds, inter alia, as set out hereunder."*
14. Mr. Alli for the plaintiff criticized the affidavit resisting summary judgment as vague in the extreme, internally contradictory and void of facts which disclose a triable issue or a competent, *bona fide* defence. He highlighted three separate issues:
- 14.1. First, the plea states, and the defendant avers in his affidavit, that the plaintiff did not own the business at issue and consequently could not competently sell it. He alleges, in paragraph 10 of the affidavit, that the business was in fact owned by Tayo Cash and Carry CC, a close corporation in which the defendant claims to have held the interests equally with two other members.

No evidence is proffered in support of that claim. The names of those members are not disclosed nor have confirmatory affidavits been put up on their behalf. Mr. Alli submitted that this rendered the defendant's version so vague and laconic as to give rise to an inference that the defendant cannot "*play open cards*" with the Court, and falls short of the requirements for resisting summary judgment.

14.2. Second, the defendant also claims to have lacked the competence and intention to have concluded a valid contract. Mr. Alli argued that the grounds of which he makes those claims are far-fetched and, in any event, mutually exclusive:

14.2.1. On the one hand, the defendant says, in paragraphs 14 and 17 of his affidavit, that he signed the sale agreement in error, operating under the mistaken understanding that it was merely a working draft and that he was signing for receipt of it. Mr. Alli submitted that it was inherently implausible that a person would acknowledge receipt of a document by signing on the very space allocated for signature by the buyer to confirm his acquiescence to its terms.

14.2.2. The defendant claims in paragraphs 13 and 17 that "*the agreement was to be concluded between the two business entities*", that he did not intend to bind himself in his personal capacity, and that he lacked authority to "*act on behalf of the business*". Mr. Alli points out that not only are the relevant juristic persons unnamed in the affidavit, but the claim is also at odds with the plea, in which the defendant admits that he entered into the written agreement and does not raise any issue with his authority to do so.

14.2.3. Moreover, paragraph 19 of the affidavit states that "*Mr Ismael Ahmed pressurised me [the defendant] to sign the document*". Mr Alli argued that a claim that the defendant signed the agreement pursuant to undue pressure is at odds with his claim that he signed it on the mistaken belief that he was merely acknowledging receipt, and did not understand himself to be signing a binding agreement at all.

- 14.3. Third, Mr. Alli criticized the defendant's failure to provide any facts or particularity regarding the payments made, allegedly in respect of stock. To show that the version proffered is *bona fide*, he submitted, the defendant ought at least to have disclosed who payments were made to, when and for what purpose.
15. He consequently submitted that, at best, the defendant had failed to put up sufficient facts to disclose a *bona fide* defence and, at worst, had been evasive and dishonest with the Court.
16. Mr. Smith for the defendant chose not to deal with these criticisms or their implications (despite my query in this regard). On the contrary, he accepted that the affidavit resisting summary judgment was internally inconsistent. In particular, he stated that the facts put up in paragraphs 9 and 10 contradicted one another.
17. He argued that the defendant had nevertheless disclosed a defence in the plea by denying the plaintiff's ownership of the business sold. That entitled the defendant, in the summary judgment application, also to impugn the plaintiff's standing to bring the claim, as well as Mr. Ahmed's ability to verify its cause of action (since Mr. Ahmed cannot verify a cause of action for the plaintiff if the plaintiff does not in fact have a claim). He submitted, relying on the authority of *Pillay v Krishna*,⁷ that since the plaintiff bore the onus to show that it is the owner of the business at issue, the defendant was required to do not more than deny ownership to place that matter in dispute. In turn, that obliged the plaintiff to put up some evidence of ownership in its application for summary judgment and, similarly, required the plaintiff to prove ownership at trial. Until it has done so, he argued, there is a triable issue and a potential defence to the plaintiff's claim.
18. In further elaboration of that argument, Mr. Smith referred to the following aspects of the sale agreement, and to the defendant's affidavit resisting summary judgment:⁸

⁷ 1946 AD 946 at 951-2.

⁸ Mr Smith initially indicated he would also rely on the replying affidavit filed by the plaintiff. That affidavit was not permitted under Rule 32 and was improperly filed by the plaintiff who placed no reliance on it. I consequently ruled that I would not have regard to it unless Mr Smith sought to have it admitted. He elected not to do so.

- 18.1. He pointed out that the sale agreement defines the seller as “*Metcash Trading (Pty) Ltd (doing business as tayo coke depot) of Devland CC*”, and that clause 6(b) records that, as a condition to the agreement, the buyer must relinquish “*any previous interest and/or shareholding in the entire business viz. Tayo cash and carry at 8 carriage close, crown mines to DEVLAND cash and carry*”. Clause 6(d) also records that “*the buyer, on signing this agreement, shall have no claims whatsoever against Devland or its representative company Metcash trading africa*”.
- 18.2. Clause 1(a) provided for the deposit to be paid to Devland Cash and Carry, account number 1089887809.
- 18.3. Consistent with that, in paragraph 9 of the affidavit resisting summary judgment, the defendant stated that “*DEVLAND CC is the party that I was doing business with in the past and with the business TAYO CASH & CARRY CC of which I and two other members held the member interest equally*”. Paragraph 13 expressly denied that the plaintiff is the owner of the business, records that no proof of ownership has been provided, and consequently denies that the plaintiff has the necessary *locus standi* to pursue the claim.
19. Mr Smith submitted that, taken together, these provisions created uncertainty as to whether the true owner of the business was the plaintiff or Devland CC (with the plaintiff merely operating as Devland’s representative). The plaintiff was obliged in those circumstances, but had failed, to put up evidence to establish its ownership of the business.
20. Mr. Smith consequently submitted that the defendant had done enough to disclose a triable issue that, if determined in the defendant’s favour, disclosed a *bona fide* defence – i.e., a real dispute as to the ownership of the business.
21. I accept that the defendant denied, in his plea, that the plaintiff was the owner of the business, and put the plaintiff to the proof thereof at trial. If he had claimed ignorance as to who the true owner of the business was, that could conceivably have entitled him to invoke reliance on the dictum in *Pillay*. But, as Mr Alli correctly pointed out, the defendant did not do so. Instead, he positively averred that Tayo Cash and Carry

CC was the owner of the business and that he, together with two others, was a member in that CC. In other words, his version is that neither the plaintiff nor Devland CC could be the owner of the business because his closed corporation is. I cannot, as Mr Smith suggested, simply disregard those averments and look to the underlying dispute. As this Court held in *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe t/a Van der Merwe's Transport*:⁹

“The Court must guard against speculation and conjecture and be astute not to substitute these for the actual information which has been placed before it.”

22. Once the defendant had pleaded this positive version, he was required to put up facts and particularity to support that claim. He failed to do so. His allegations are vague and unsubstantiated – not only in relation to the ownership issue, but also as regards the circumstances in which he signed the sale agreement, and in which he made payment of certain amounts (including, significantly, of an amount equalling the deposit provided for in the sale agreement, by the very date on which the deposit was due).
23. In short, insofar as the ownership issue is concerned, I find that the defendant has *“provided the skeleton of a defence but has failed to flesh it out so that it can be held to sustain an independent existence”*.¹⁰ That is also true of his allegations that the agreement was signed mistakenly and/or without authority (particularly where the defendant does not deny Mr. Ahmed’s express claim that the terms of the agreement were explained to him). The position is made worse, on that score, by his contradictory claim that the agreement was signed pursuant to undue pressure. It makes no sense for the defendant to claim that he was pressurised into signing an acknowledgement of receipt. His versions on the reason for his signature of the agreement are irreconcilable.
24. I consequently find that the defendant has failed to show that he has a *bona fide* defence to the claim, and he has therefore not made out a basis for properly resisting summary judgment.
25. In those circumstances, the plaintiff is entitled to its costs of the application. Despite Mr. Alli’s urging, I do not think there is adequate basis for the award of punitive costs.

⁹ 1986 (3) SA 654 (C) at 659C.
¹⁰ *Pansera Builders* at 659F.

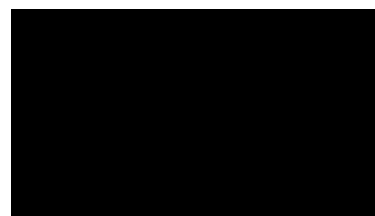
ORDER

26. I accordingly grant summary judgment in favour of the plaintiff against the defendant, in the following terms:

26.1. Payment in the amount of R1 600 000, 00 (one million six hundred thousand Rand);

26.2. Interest on the aforesaid amount at the prescribed rate of interest per annum, from the date of demand to the date of payment; and

26.3. Costs of suit.



I GOODMAN, AJ
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

Hearing date: 25 January 2024

Judgment date: 1 February 2024

Appearances:

Counsel for the plaintiff: Y Alli
Instructing attorneys: Soomar & Malik Inc.

Counsel for the defendant: R Smith
Instructing attorneys: Cummings Attorneys