

REPUBLIC OF SOUTH AFRICA



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

Case Number: 006468-2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>7/03/2024</u> [Redacted Signature]	
DATE	SIGNATURE

In the matter between:

BC FUNDING SOLUTION (PTY) LIMITED

Applicant

and

ESTATE AGENCY AFFAIRS BOARD

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 07 March 2024.

JUDGMENT

CARRIM AJ

Introduction

- [1] This is an application for summary judgment. The parties will be referred to as they are in the main action proceedings for ease of reference.
- [2] The plaintiff has instituted an application for summary judgment in terms of which the plaintiff seeks payment in the amount of R938 051.96. The plaintiff claims that it has suffered the aforesaid monetary loss as a result of theft by an estate agent in 2019.
- [3] The claim is brought in terms of section 18 of the Estate Agency Affairs Act¹ ("the Act"), in circumstances where the defendant has a legal obligation to reimburse the plaintiff, given that the plaintiff suffered pecuniary loss by reason of the theft of trust money by person/s holding fidelity fund certificates and practising as estate agents under the Act.
- [4] The defendant denies indebtedness to the plaintiff and that it is liable for the monies appropriated by the estate agent in question, and thus has a *bona fide* defence to the plaintiff's claim.

Background

- [5] Fortress and Liebenberg were in possession of valid fidelity fund certificates issued by the defendant.
- [6] Liebenberg provided the plaintiff with minutes of general meetings, special resolutions purportedly pertaining to Drimar BC, a signed loan agreement bearing the signatures of Johanna Zeitsman ("Zeitsman") and Elizabeth Nel ("Nel"), a document instructing the plaintiff to release the funds and a debit order instruction bearing the names and apparent signatures of Zeitsman and Nel. The plaintiff released the funds and paid the first tranche of the loan being R1 million into the trust account of Fortress allegedly for the benefit of Drimar BC.

¹ 112 of 1976. The Act was repealed in February 2022 and has been replaced by the Property Practitioners Act, 22 of 2019 ("PPA"). The Plaintiff's claim arose in terms of the Act prior to its repeal. In accordance with section 75(1) of the PPA the claim is required to be determined in accordance with the Act.

- [7] Only two monthly repayments were made to the plaintiff by Liebenberg, whereafter no further payments were made and Liebenberg could not be located.
- [8] During October 2020 the plaintiff approached Zeitsman and Nel and discovered that neither had signed any of the documents presented to it by Liebenberg.
- [9] On 20 November 2020 the plaintiff received a letter from Drimar's attorney informing it that the signatures on all the documents supplied to the plaintiff by Liebenberg had been forged and that Drimar BC had no knowledge of the purported loan and that no funds were ever received by it in respect of the forged loan agreement. A copy of this letter has not been attached to the pleadings or to the application for summary judgment.
- [10] The plaintiff alleges that it has exhausted all rights of action and legal remedies against Liebenberg and Fortress, and accordingly seeks to recover its pecuniary losses of R938 051.96 from the defendant.
- [11] In its plea, the defendant admits that Liebenberg and Fortress had been issued with Fidelity Fund Certificates on 11 February and 11 March 2019 respectively but denies knowledge of the loan and the embezzlement and puts the plaintiff to the proof of its claim. In addition, it raises two special pleas:
- a. Special Plea 1: Failure to exhaust all remedies; and
 - b. Special Plea 2: Entrustment
- [12] The plaintiff has now brought this summary judgment application ("the application") on the basis that the defences raised by the defendant are not *bona fide* and have been raised merely to cause delay.
- [13] The defendant opposes the application and relies in the main on the two special pleas raised in its plea.
- [14] Before turning to consider the provisions of the Act, it is important to set out the approach of our courts to Uniform Rule 32.

[15] Rule 32 was amended with effect from 1 July 2019 by Government Notice R842 of 31 May 2019. Rule 32(1) to (4) now reads as follows:

“(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (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.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may-

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action;

such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.”

[16] Since 1 July 2019, summary judgment is now applied for after the delivery of a plea, and not after entry of appearance to defend as in the past.

[17] Under the new rule the plea comes first, and the plaintiff is required in its affidavit to explain briefly why the defence as pleaded does not raise any issue for trial.

[18] Under the old rule, the defendant was required to put its defence up in an affidavit while the plaintiff was arguably not similarly burdened.² Under the old rule all that the plaintiff was required was to verify the cause of action.

[19] The amended rule 32(2)(b) requires that:

“The plaintiff shall, in the affidavit referred to in subrule (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.”

[20] Recent judgments have considered some of the implications of the amendments. These debates have focused on the contents of the affidavits and what evidence or documents, if any, are required to be attached in the applicant's affidavits under the heading “briefly explain”.³

[21] In *Absa Bank Limited v Mphahlele N.O.*, under the heading, “Is a plaintiff in a summary judgment application entitled to introduce evidence in the affidavit in

² J Moorcroft “The ‘New Look’ Summary Judgment Procedure in Rule 32” (3 June 2021) available at <https://www.johanmoorcroft.co.za/the-new-look-summary-judgment-procedure-in-rule-32/>.

³ See *Absa Bank Limited v Mphahlele N.O* 2020 JDR 1180 (GP); *FirstRand Bank Limited v Badenhorst NO and Others* (2022/5936) [2023] ZAGPJHC 779 (10 July 2023) at para 23.

support of summary judgment in order to rebut a defence pleaded by a defendant?", the court held that⁴:

"[A]s a general proposition, a plaintiff should not be entitled to introduce evidence or facts which do not appear in a plaintiff's particulars of claim or declaration."

...

"As to the 'brief explanation as to why the defence as pleaded does not raise any issue for trial', this must be confined solely thereto. This brief explanation does not open the door to entitle a plaintiff to introduce new evidence as to why, at summary judgment stage, a defendant should not be given leave to defend an action and to attempt to show that a plaintiff has an unanswerable case."

[22] In other words, while the amended rule 32(2)(b) requires the plaintiff to explain briefly why the defence as pleaded does not raise any issue for trial, it does not entitle the plaintiff to raise new facts which do not appear in its particulars of claim.

[23] In *FirstRand Bank Limited v Badenhorst NO and Others* the court helpfully discusses the prevailing jurisprudence on what a plaintiff is required to set out in its supporting affidavit and what extra material might be permitted. There are conflicting judgments but the court after reviewing them found that:

"Our courts have nevertheless accepted in a number of judgments that evidence is permissible under the requirement to explain briefly why the defence as pleaded does not raise any issues for trial. In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*, in the context of an application for amendment, a triable issue was described as an issue that has a foundation. In other words, an issue for which there is supporting evidence, where evidence is required, and is not excipiable. In *Cohen supra*, the Supreme Court of Appeal held that defendants are required to disclose a defence that is "legally cognisable in the sense that it amounts to a valid defence if proven at trial", and the test is "whether the facts

⁴ *Absa Bank Limited v Mphahlele N.O* id at paras 32 – 33.

put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court.” (In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*, “triable issue or a sustainable defence”, was used.) These authorities indicate that an issue for trial is an issue that entails the assessment of evidence. In my view, plaintiffs cannot meaningfully explain the absence of a triable issue, in the sense that the defence is unsustainable on the evidence, by referring to the disputes of fact in the pleadings. A denial in a plea *prima facie* raises an issue for trial which is *bona fide*. The very purpose of a denial is to signal that available evidence will be presented at trial to disprove the allegation. The plaintiffs can only explain that the defence is not *bona fide* by referencing evidence. The dictionary meanings are capable of sustaining that interpretation. In the absence of evidence, the explanation will be nothing more than an unsubstantiated opinion.”⁵

[24] Notwithstanding the amendments, it is trite that the remedy is extraordinary and stringent because it makes inroads on a defendant’s procedural right to have his case heard in the ordinary course of events. Courts are accordingly reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case; but even then, there is a discretion to refuse it.

[25] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁶ the court confirmed:

“[T]he summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action.”

[26] In *Maharaj v Barclays National Bank Ltd*⁷ the court held that in determining whether the defendant has established a *bona fide* defence to the plaintiff’s claim, the court has to enquire into whether or not the defendant has, with sufficient particularity, disclosed the nature and grounds of its defence, as well as the material facts upon which his defence is based. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which

⁵ *FirstRand Bank Limited v Badenhorst NO and Others* above n 4 at para 15.

⁶ 2009 (5) SA 1 (SCA) at para 31.

⁷ 1976 (1) SA 418 (A).

is satisfied that this threshold has been crossed is then bound to refuse summary judgment.⁸

[27] In *Barclays National Bank Ltd v Smith*⁹ the court stated that the respondent has to satisfy the court that it has a *bona fide* defence to the plaintiff's claim and that the respondent need not prove its defence for purposes of the summary judgment application.¹⁰

[28] Insofar as the court's discretion regarding summary judgment is concerned, where there is no defence, the discretion should not be exercised against a plaintiff to deprive it of the relief to which it is entitled. However, the procedure is not designed to provide a plaintiff with a tactical advantage or to provide a preview of the defendant's evidence, and also not to limit his defences to those disclosed in the affidavit. It does not effect a shift in onus and does not replace the exception procedure as a test of legal contentions.

Defences: Special Plea 1 – Other remedies

[29] In relation to Special Plea 1, the defendant relies on section 19 of the Act. Section 19 provides that, in order to succeed with a claim against the agency (a party must have satisfied all remedies available to such party, prior to lodging a claim with the agency).

[30] The defendant alleges that the plaintiff, has not instituted criminal proceedings against the alleged perpetrator, Liebenberg, for fraud and has accordingly, failed to exhaust all of the remedies available to it.

[31] In paragraph 19 of the particulars of claim it is stated that "The plaintiff has exhausted all rights of action and legal remedies against Liebenberg and Fortress Properties".

[32] In the supporting affidavit, the plaintiff states that it reported the criminal conduct in terms of section 34 of the Prevention and Combating of Corrupt Activities Act¹¹

⁸ Id at 426A-E.

⁹ 1975 (4) SA 675 (D).

¹⁰ Id at 683A and 684A.

¹¹ 12 of 2004.

("PRECCA") on 14 December 2020. A copy of the PRECCA Report is attached as annexure FDP to the supporting affidavit. This report was made available to the defendant in response to its rule 35(12) and (14) notices. In addition, it instituted action against Liebenberg and Fortress Properties and duly obtained default judgment against them on 11 June 2021. The plaintiff proceeded to execute on this judgment by attaching the bank accounts of Liebenberg and Fortress and managed to recover a mere R12 448.04. The documents confirming the above have been made available to the defendant in terms of rule 35(12) and (14).

- [33] During argument, Ms Themane on behalf of the defendant did not persist with this special plea. Accordingly, nothing more is said about this.

Defences: Special Plea 1 – Entrustment

- [34] In relation to the Special Plea 2 the defendant pleads that the plaintiff is a money lender who lends money to schemes. Liebenberg (the purported agent) was in fact not acting on behalf of Drimar, nor did he possess any mandate and/or instruction from Drimar to apply for and/or secure any such loan. Drimar never received any money from the (plaintiff) nor did it commission the agent to act on its behalf in accepting any money. The loss incurred by the plaintiff as a result of the alleged fraudulent conduct of the agent, is a consequence of the plaintiff failing to conduct proper due diligence, prior to advancing any such monies to the agent.
- [35] The defendant denies that Liebenberg at all material times was acting for a body corporate, or that he was instructed and/or mandated to do so. On this basis it argues that the moneys advanced by the plaintiff, to the agent are therefore not trust money, as envisaged by the Act, but rather a loan which was fraudulently sought and obtained by the agent. The funds in question which the agent received from the plaintiff thus could never have been trust money, even if the plaintiff was under the impression that such funds were held in trust.
- [36] The defendant argues that the plaintiff is thus not a trust creditor as envisaged in the Act or otherwise is not empowered institute a claim against the as it does not enjoy the protection afforded to trust creditors as defined in the Act.

[37] In section 1 of the Act “estate agent” is defined:

“(a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person- (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or (ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or (iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette.”

[38] “Trust money” means:

“a) money or other property entrusted to an estate agent in his or her capacity as an estate agent; b) money collected or received by an estate agent and payable in respect of or on account of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent'; c) any other monies, including insurance premiums, collected or received by an estate agent and payable in respect of any immovable property, business undertaking or contract for the building or erection of any improvements on immovable property.”

[39] Mr Mostert on behalf of the plaintiff pointed out that “trust creditor” is not a defined term in the Act. The plaintiff submits that managing agents as referred to in the Regulations to Sectional Title Schemes Management Act¹² read with the Community Schemes Ombud Service Act¹³ were included in the definition of estate agent by virtue of section 2 of the Government Notice Regulation 1485/1981 published on 17 July 1981 in Government Gazette 7663 RG 3233, which included the services of collecting and receiving money payable by any

¹² Act 8 of 2011.

¹³ Act 9 of 2011.

person to a body corporate in terms of the Sectional Titles Act¹⁴, in respect of a unit, as being those performed by an estate agent.

[40] Hence Liebenberg by virtue of being a managing agent of Drimar was deemed to be an estate agent under the Act and money paid to his trust account was that contemplated in the definition being money or other property entrusted to an estate agent in his or her capacity as an estate agent.

[41] During argument Mr Mostert submitted that there was evidence before me to support this because in paragraph 6 of the particulars of claim the plaintiff alleges that Liebenberg was the duly appointed managing agent for the Drimar Body Corporate.¹⁵ Further at paragraph 8 of the supporting affidavit in this application, it is alleged under oath that Liebenberg, alternatively Fortress Properties was the duly appointed managing agent for Drimar Court.

[42] The defendant on the other hand has placed this in dispute and puts the plaintiff to the proof thereof - see paragraph 6 of the defendant's plea¹⁶ and paragraph 6 of the opposing affidavit.¹⁷

[43] In Mr Mostert's view the SCA judgment *Industrial & Commercial Factors (Pty) Limited v Attorneys Fidelity Fund Board of Control*¹⁸ is applicable to this matter on whether the monies paid to Liebenberg were trust money. In that case, the SCA held that on the facts of that case it was clear that the appellant's intention was that the money should be entrusted i.e. paid into an attorney's trust account (on the basis of fraud and later stolen by the attorney) on behalf of a third party.

[44] However, the court in *Industrial & Commercial Factors* relying on *Paramount Suppliers (Merchandise) (Pty) Ltd v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control 1957(4) SA 618(W) at 625F-G* noted that where money is paid into the trust account of an attorney it does not follow that such money is in fact trust money.

¹⁴ 95 of 1986.

¹⁵ 01-6.

¹⁶ 08-10.

¹⁷ 10-19.

¹⁸ 1997 (1) SA 136 (A).

[45] If money is simply handed over to an attorney by a debtor who thereby wishes to discharge a debt, and the attorney has a mandate to receive it on behalf of the creditor, it may be difficult to establish an entrustment.¹⁹

[46] The enquiry is thus a factual one and it cannot be assumed that because the plaintiff alleges, without more, that it intended the money to be entrusted it is indeed so. Thus, this is a triable issue. There is no suggestion that the defence has been raised merely to cause delay. (*FirstRand Bank Limited v Badenhorst NO and Others supra*).

[47] In the circumstances, I find that the defendant's defence is both *bona fide* and good in law.

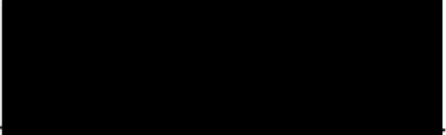
Order

Accordingly, I make the following order –

[48] The application for summary judgment is refused.

[49] The defendant is granted leave to defend.

[50] The costs of the summary judgment application shall be costs in the action.


Y. CARRIM
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 08 February 2024

Date of judgment: 07 March 2024

¹⁹ Id at 144A.

For the Plaintiff:

Adv M Mostert instructed by
Sutherland Kruger Incorporated

For the Defendant:

Adv J Themane instructed by Sithole
Mokomane Attorney