



IN THE HIGH COURT OF SOUTH AFRICA

(1) REPORTABLE : YES / ~~NO~~ LIMPOPO DIVISION, POLOKWANE

(2) INTEREST TO THE JUDGES : YES / ~~NO~~

(3) REVISED

25/02/2020 *Ms. Phatudi*
DATE SIGNATURE

CASE NO: 5836/2019

In the matter between:

FIRSTSTRANDBANK LIMITED

T/A WESTBANK

PLAINTIFF

And

RAESETSA GENERAL TRADING

CC T/A RA MOTORS

DEFENDANT

JUDGMENT

MG PHATUDI J

Headnote: Civil procedure – resisting Summary judgment application – rule 33 (3) (b) – amended Uniform rules of court – delivery of opposing affidavit even though directory is conditio sine quo non to ward off summary

judgment. Mere delivery of a plea not constituting evidence as opposed to an affidavit.

Evidence: *purpose of affidavit opposing summary judgment unlike plea delivery, is for respondent to satisfy court (not to prove) that it has a bona fide defence to the action, set out nature of defence and grounds therefore - such defence can be explicitly set out in opposing affidavit or with leave of the court permitting oral evidence – failure to deliver opposing affidavit or lead oral evidence if permitted, is fatal to resisting summary judgment – held, summary judgment is granted with costs.*

[1] The applicant in this matter caused combined summons to be issued in this court on 05/09/2019, against the respondent (defendant in the main action) - for repossession of the goods sold and delivered to the respondent namely a motor vehicle a Isuzu FRT 850, 2018 model, with details better described in paragraph 5 of the particulars of claim, and also sought costs of suit on a punitive scale.

[2] The action being defended, coupled with a plea and a special plea having been delivered, the applicant proceeded to apply on **20.11.2019** for summary judgment against the respondent in the manner set out both in the particulars of claim and as in the present application.

[3] The summary judgment application conforms to Rule 32 (1) and 32 (2) of the amended Uniform Rules of court in as much as it brought application after the plea was delivered in terms Rule 32(3) of the said rules which took effect on 01/07/2019.

[4] I must remark this early in the judgment that although Adv Mouton, Counsel for the respondent appeared to oppose the summary judgment application on the strength only of the plea delivered on 30/10/2019, (pages 31 – 39 paginated index) the respondent's attorneys failed to deliver an opposing affidavit on the day of the hearing (13/02/2020) nor file of record such an affidavit of the proceedings in the court file. As required by rule 32(3) of the Uniform rules of court.

[5] The foregoing observation finds approval from A reading of the relevant rule which sounds as follows;-

Rule 32 (3) (b):

“The Defendant may –

(b) satisfy the court by affidavit which shall be delivered five (5) days before the day on which application is to be heard, or with the leave of 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 therefore.”

[6] What, however, Mr Mouton has done, and without the leave of court nor condonation being sought or granted, purported to argue the matter from the bar and placed before court arguments raised in the special plea and the main plea. The special plea the respondent raised would have been relevant for consideration if leave to defend the summary judgment application were granted. For the sake of completeness, the special plea relied upon is one in terms of the provisions of section 133 (1) read with section 134 (1) (c) of the new Companies Act, 2008 (Act 71/2008).

[7] In the main plea, the defendant admitted the existence of the instalment sale agreement concluded by and between the parties, but surprisingly in the same plea, placed at issue the originality of the very same contract whose existence it does not dispute nor challenge. This, in my views is a dichotomy, to say the least.

[8] Assuming for a moment that the authenticity of the instalment sale agreement is in issue, the respondent (defendant) in paragraph 5.1 of its plea, however unequivocally admits that it purchased the truck sought to be re-possessed from the applicant. I am unable to conceive, how else could the respondent have managed to acquire the said truck without the conclusion of the sale agreement, whether it be original or by copy thereof being in esse or (existence). I find this part of the plea not only blatantly illogical, but also spurious, to sum it up.

[9] Furthermore, the respondent in its plea, (paragraph 6) regarding delivery the of the truck to it, this fact is in itself readily admitted. How then does defendant/respondent admit possession/delivery of the merx, and by the same token, deny the existence of the instalment sale agreement. Again, I find the defence raised to be predicated on narrow and shallow grounds. These mutually contradictory defences can only be better described as devoid of genuine *bona fides* required in Rule 32(3) (b), as amended.

[10] The non-compliance with the rule itself, with or without the required affidavit setting out explicitly the nature of defence and the grounds thereof, is in my view, fatal to the respondent's resistance to the summary judgment application sought by applicant.

[11] Upon the hearing of the summary judgment application the respondent failed to draw to the attention of the court the existence of the opposing affidavit, if any, to enable the court to assess if a *bona fide* defence to the action is brought to bear sufficient to raise any issue for trial. Furthermore, no condonation for non-compliance with the sub rule had been sought, either,

[12] The delivery of an affidavit even though directory, but raising a *bona fide* defence and the grounds of the defence is a necessary *conditio sine quo non*, to resist a summary judgment application. This the respondent

had failed to do in as much as it failed to seek leave to lead oral evidence to establish a *bona fide* defence.

[13] Failure to do so had manifestly divested the court of an opportunity to satisfy itself from the body of the opposing affidavit, of the particulars of the defence, the nature and the grounds therefor. I find therefore that mere delivery of a plea does not constitute evidence necessary to be adduced in an affidavit resisting summary judgment application.

13.1 I must point out that although Rule 32(3) appears to be directory, I am unable to appreciate how a litigant desirous to ward off a summary judgment application can successfully do so without first satisfying a court by way of an affidavit, whose purpose is to set out a defence, its nature and grounds upon which it is predicated, not of course, excluding its evidential value. See also ***Cinemark (Pty) Ltd v AL feta Tune-up centre 1979 (4) SA 802 (W)***.

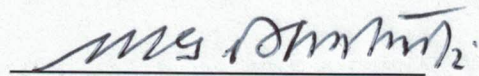
13.2 In principle, the Respondent in the present instance was required to have set out in its affidavit, if available facts, which if proved, at the trial, will constitute an answer to the applicant's claim. See also, ***Marsh v Standard bank of South Africa Limited 2004 (4) SA 947 (w) at 949 (C)***.

[14] In the premises, and upon consideration of the submissions made during argument, and having considered the merits, I am much more

inclined to grant the summary judgment sought. In the result, I pronounce the following order:-

(a) Summary judgment is granted against the Respondent for re-possession by the applicant of a Motor vehicle Isuzu FTR 850 F/C C/C with engine NO: **6HK1206013**, chassis NO: **ACVFTR34H8G003545**

(b) The respondent to pay the costs of application on attorney and client scale.



MG PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

Appearances:

1. For the Applicant/Plaintiff	: Adv F. Du Toit
Instructed by	: Rossouw Lesie Inc

2. For the Respondent/Defendant : Adv J.P. Morton

Instructed by : DDKK Attorneys

Polokwane

3. Date for hearing : 13 February 2020

4. Date to delivered : 14 February 2020