


23/05/19



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2653/18

In the matter between:

INTERGRAL NETWORKING (PTY) LTD

Plaintiff / Applicant

and

EFKON SOUTH AFRICA (PTY) LTD

Defendant / Respondent

JUDGMENT

MAKHUVELE J

Introduction and brief background facts

[1] This is an application for summary judgment. I will refer to the Plaintiff / applicant as '*Integral or applicant*' and the Defendant / respondent as '*Efkon or respondent*'.

[2] Intergral instuted an application against Efkon and sought amongst others an order for payment of an amount of Two Million Sixty Thousand Three Hundred and Sixty Three Rand Ninety Seven Rand (R2 060 363. 97).

[3] The relief sought was based on allegations of breach of a written Maintenance Agreement.

[4] Opposing and replying affidavits as well as heads of argument were subsequently filed and the matter was enrolled for hearing in the opposed motion court.

[5] The matter came before Kuny AJ on 19 October 2018. There is no written judgment or record of proceedings, however, it is common cause between the parties that there were factual disputes that were not capable of resolution in motion proceedings, and in this regard, the matter was referred to trial. The court order in the following terms was issued;

1. *The disputes between the parties are referred to trial;*
2. *The applicant's founding affidavit would stand as a simple summons;*
3. *The respondent's answering affidavit would stand as a notice of intention to oppose.*
4. *The applicant Intergral shall file a declaration within 15 days of the order; and*
5. *Thereafter, the rules of court relating to trial actions will apply to the conduct of the matter.*
6. *The costs of this application shall be costs in the cause.*

The simultaneous filing of the declaration and application for summary judgment

[6] Intergral delivered the declaration on 9 November 2019 and later on the same day it delivered the summary judgment application that is before me.

[7] The declaration is in excess of 100 pages. The terms of the agreement were pleaded in full and copies of invoices and other documents were attached.

[8] It is not necessary for me to outline the nature of the claims and the terms of the agreement because the summary judgment application turns on the point in limine that were raised in the affidavit resisting the application.

The affidavit resisting summary judgment

[9] To say that Efkon was annoyed by Intergral's filing of the application for summary judgment under the circumstances where the matter was referred for trial would be an understatement. The summary judgment application was labelled as an abuse and Intergral was reminded of the circumstances under which the matter was referred to trial. It was further submitted that Intergral was looking for a '*proverbial second bite at the cherry. The reason being that it now, for the second time, wants this court (but an alternative presiding officer) to again entertain its alleged claim on application*'.

[10] Efkon further submitted that the circumstances under which this summary judgment application was filed deserve an order against Intergral as contemplated in Rule 32(9).

[11] It was further submitted that Efkon has *bona fide* defences to the claims which are known to Intergral.

[12] The defences raised are as follows;

[12.1] The application is fatally flawed because the motion court has already '*considered, adjudicated and pronounced upon the issue as to whether a triable issue of fact exists regarding the claim that Intergral attempts to enforce against Efkon*'

[12.2] With reference to Rule 32, Efkon argued that the summary judgment application was fatally flawed on two grounds; the first being that it was filed late because Rule 32 provides that it should be filed within 15 days of filing of the notice of intention to defend. In the second place, an application for summary judgment cannot be made

after filing of a declaration because rule 32(4) provides that no additional evidence may be adduced.

[12.3] The application for summary judgment is out of time when one has regard to the dates on which the documents in the application were filed.

[12.4] The cause of action verified in the application for summary judgment refers to the declaration. This is incorrect. It should have referred to the simple summons, being the founding affidavit, the contents of which have already been declared to constitute factual disputes, thus rendering it impossible for Efkon to obtain the relief on summary judgment application.

[12.5] There are no '*jurisdictional pillars*' to support the application for summary judgment, these being an instituted action and a notice of intention to oppose.

[12.6] On the merits, it was submitted on behalf of Efkon that the court should take into account the defences that it has raised in the answering affidavit that has been converted into a notice of intention to defend.

Issues for decision

[13] From a procedural point of view, the issue for decision is whether summary judgment proceedings are competent after delivery of a declaration. In the second place, whether summary judgment was competent after a matter was referred to trial due to factual disputes that could not be adjudicated on affidavits.

[14] On the merits, the question is whether the issues raised in the answering affidavit (which has been converted to a notice of intention to defend), but not specifically pleaded in the affidavit to resist summary judgment should be taken into account when considering whether Efkon has raised bona fide defences.

[15] The other issue on the merits is whether the disputes in the motion application would constitute bona fide defences in a summary judgment application.

Filing of supplementary heads of argument

[16] Summary judgment applications in this division are enrolled in the unopposed motion roll with amongst others, Rule 43, default judgments and many other applications, which by nature, even though not opposed, require much attention due to the intricacies of the issues under consideration. Opposed summary judgments and Rule 43 applications are often heard late in the day, and if there are two or three of them, it is impossible to finalize them in one day. This means a postponement or rolling over to the next court date, where they also stand in a long queue.

[17] I heard this matter on 11 February in the late afternoon and again in the afternoon of 13 February 2019. On the last mentioned date, counsel for the applicant, Mr Van der Merwe, handed up the judgment of Kemp AJ in the matter of Nursing Services of South Africa v The MEC for the Department of Health-Eastern Cape 2009 JDR 0710 (ECB) (Nursing Services judgment) as authority to counter one the respondent's points in limine to the effect that the applicant was not entitled to bring the summary judgment application after filing a declaration. The judgment is marked 'reportable'.

[17.1] The plaintiff in the matter before Kemp AJ had sued on a simple summons. After notice to defend was filed, the plaintiff filed a summary judgment application. The defendant did not file an affidavit to resist the application, but instead filed a counter-application to declare the summary judgment as an irregular step on the basis that the plaintiff should have filed a declaration within 15 days of receipt of the notice to defend. The plaintiff's apprehension was that filing a declaration was not allowed as it would constitute taking of a further step, which was not allowed according to earlier authority in the matter of Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemicals Co (Pty) Ltd 1972 (2) SA 81 (o). Kemp AJ was of the view that this matter was

incorrectly decided and held that the plaintiff would not have waived its right to file for summary judgment.

[18] I am taking an issue with the sudden handing up of the Nursing Services judgment because until then, the applicant appeared not to seriously contend the respondent's submissions to the effect that in terms of Rules 32(2) and (4) it was not entitled to file a declaration and thereafter apply for summary judgment.

[19] In fact, in response to this particular ground of defence, Mr Van der Merwe made the following submissions in paragraph 45 of the applicant's heads of argument dated 8 February 2018;

"Without conceding that this submission is correct, on the Respondent's version of the application for summary judgment should then be considered on the founding affidavit and the answering affidavit in the motion proceedings only"

[20] In paragraph 46 he made the following submission;

"Should the Honourable Court accept the submissions of the Respondent in this regard the Respondent is invited to indicate to the Honourable Court where on its answering affidavit in the motion proceedings, bona fides defence is disclosed"

[21] Under protest and agitation due to Integral's reliance on a judgment and point of law that was not timeously disclosed, counsel for the respondent, Mr Lourens, also handed up and referred to the judgment of Froneman J in the matter of **Steeldale Reinforcing (Cape) v HO HU Corporation 2012 (2) SA 580** (Steeldale judgment) to support the submission that filing a summary judgment application after a declaration amounts to amplification of the simple summons, which is prohibited by Rule 32.

[21.1] In this matter, the plaintiff had sued by simple summons that were issued on 20 April 2009. The defendant entered appearance to defend on 11 May 2009, whereafter the plaintiff delivered a declaration on 22 May 2009 and a summary judgment application on 26 May 2009.

[21.2] The defendant did not file an affidavit to resist the summary judgment application but simply handed up a notice of intention to oppose on the date of hearing and raised issues relating to legal standing and other defects in the confirmatory affidavit.

[21.3] Froneman J made a finding that in a case where the action was instituted by a simple summons, after appearance to defend has been entered, the plaintiff had a choice to either deliver a declaration or to apply for summary judgment. If he chooses to file a declaration, the defendant must file a plea within 20 days. If the plaintiff chooses to file a summary judgment application, the defendant may resist the order by giving security or filing an affidavit in terms of Rule 32(3) (b).

[21.4] He went on to state the following at 583I-584B :

"It appears to me that the normal an unexceptional process envisaged by the rule is for summary judgment to be applied for by the plaintiff within 15 days of delivery of the defendant's notice of intention to defend, whether the action was commenced by way of simple or combined summons. The application must be accompanied by an affidavit that must verify the cause of action and the amount claimed, nothing more, or less, in respect of those aspects. The rule itself does not provide for 'amplification' of the cause of action as set out in the summons, be it a simple or combined summons, in the verifying affidavit (see Maharaj v Barclays National Bank Ltd 1976 (1) SA 418(A) at 422A-D; Forlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 346B-C; Harms Civil Procedure in the Superior Courts para B32.6,pB212-213), nor does it envisage any amplification of either form of the summons in some other way (compare Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd 1972 (2) SA 81 (O) at 83A-B; Jacobs v FPJ Finans (Edms) Bpk 1975 (3) SA 345 (O)."

[21.5] He went on to discuss cases where courts have allowed amplification of original summons for various reasons. One of the judgments is that of Tebbut J in the matter of BW Kuttle & Association

Inc v O'Connel Manthe and Partners Inc 1984 (2) SA 665 © at 668F where the judge had said ;

" I cannot see no reason why a plaintiff who wishes to obtain summary judgment on a simple summons cannot, after appearance to defend has been entered, file a declaration in amplification of his cause of action. If he can amplify his cause of action in his verifying affidavit, and does not thereby waive his right to claim summary judgment, I find it difficult to see how he can be said to have waived that right if he amplifies his simple summons by filing a declaration."

[21.6] He disagreed with the cases where amplification of the cause of action was allowed because, according to him, that is 'contrary to the express wording of rule 32(2) and (4), as well as the binding authority of the Maharaj and Furlanel cases (referred to in [9] above). O'Connel Manthe, above, was of course decided after these cases, but it seems to me that its reasoning and outcome cannot survive them.' (at 585A-B)

[21.7] At paragraph 585C-D he stated the following;

'The present matter deals with a simple summons. Setting out a cause of action in concise form in a simple summons is not an onerous task. Without doing so it is difficult to envisage a plaintiff being granted judgment in any kind of proceedings. If the case the defendant has to meet cannot be gleaned from the particulars in the summons, that fact would, on its own, probably be sufficient to constitute a bona fide defence for a defendant faced with an application for summary judgment (compare Maharaj, above, at 427E-G). it appears to me, with respect that the past underlying justification for allowing amplification of the summons [either in the verifying affidavit, or by delivering a declaration, or by delivering further particulars for the purpose of pleading], namely that it allows for a more comprehensive exposition of the case the defendant has to meet, and thus leads to a better assessment of whether defendant has disclosed a bona fide defence, is countenance neither by the wording of rule 32(2) and (4), nor by present binding authority. Summary

judgment has repeatedly been described as an extraordinary and stringent remedy, (see Maharaj, above, at 425H; Tesven CC and Another v South African Bank of Athens 2000(1) SA 268 (SCA) and there seems to me to be little remaining reason for extending its scope by allowing 'amplification', in whatever form, of the cause of action as set out in either form of summons.
(Highlighted for emphasis)

[22] The manner in which the Nursing Services judgment was presented was not only an ambush on the respondent, but also to me. The purpose of heads of argument and particularly reference to law and authorities is to enable the Judge to anticipate the nature of the disputes and to read the authorities in time.

[23] I allowed filing of further heads of argument because I was told that there are no judgments on the exact question relating to whether filing of a summary judgment after delivery of a declaration constituted amplification of the cause of action and that my decision in this regard may be reportable.

[24] Well, as it will appear hereunder, our courts have already considered this issue. Each case comes with its own unique facts. The common thread in all the matters being procedure for applying summary judgment. Most of the earlier authorities that Mr Van der Merwe has attached in his heads of argument deal with furnishing of further particulars, and whether this constitute a further step that would disentitle an applicant from applying for summary judgment. This procedure (request of further particulars for purposes of pleading) is no longer available in the High courts. Where relevant, these were held to be part of the summons and not next step.

The issues that requires consideration are whether summary judgment is competent on a matter that has been referred to trial due to disputes of fact that cannot be resolved on affidavits.

[25] Both Nursing Services and Steeldale judgments are from the same division and were issued almost at the same time.

The arguments before me centred around which one is correct and which one was followed in subsequent decisions and is authority on the correct interpretation of the rules 32(2) and (4). None of the counsel had immediate answers to the questions. I then adjourned the proceedings and requested the parties to submit further heads of argument to address the lingering question relating to competency of summary judgment after filing of a declaration. This question must be answered in the context of the order of referral to trial.

[26] I received the supplementary heads of argument about two weeks later. I do not intend to burden this judgment with an analysis of the fifteen (15) judgments (including Nursing Services and Steeldale) that were attached to Mr Van Der Merwe's supplementary heads of argument, which, in the main, are cases where the authorities in the Nursing Services judgment were referred to. They are all not helpful.

[27] Perhaps the most disturbing part of the supplementary heads of argument filed on behalf of the applicant is the submission that seeks to minimize the importance of the Steeldale judgment.

[28] In paragraph 18, Mr Van der Merwe made amongst others, a submission that the Steeldale judgment, though reported in 2010, "*has never even been referred to by any other court*"

[29] In paragraph 19 of the heads of argument he went on to submit as follows;

"It is respectfully submitted that the reason why there has been no referral to the aforesaid matter speaks for itself and it can hardly be said that the aforesaid matter is the locus classicus on the point".

[30] I conducted my own research and I came across may judgments that have referenced the Steeldale judgment on the very issue before me.

[30.1] In this division, Msimeki J , in the matter of Business Venture Investments NO 1360 (Pty) Ltd v Soft Coffee (Pty) Ltd t/a Hard Rock Café and Others (57868/17) [2018] SAGPPHC 776 (23 February 2018).

This was a summary judgment application and one of the issues under consideration was whether a subsequent amendment of the particulars of claim rendered the application incompetent and thereby entitling the defendant to leave to defend the action. He referred to paragraph [15] p.585C-D of the judgment of Froneman to come to a conclusion that the amendment was not permissible as it would constitute amplification of the summons.

[30.2] In the Namibian High Court, Case No 11762/2011, Corbet JA had to deal with an application to strike out certain parts of the verifying affidavit for non-compliance with Rule 32(4) as it was amplifying the summons.

[31] The context may be different but the principle is the same. The cause of action must appear in the summons, be it simple or combined. Once a litigant makes an election to file a declaration, the next step in terms of the Rules of Court is filing of the plea.

[32] It is not necessary for me to refer to the many cases attached to the supplementary heads of argument because most of the issues arising from there were dealt with in the judgment of Froneman J. The applicant's contentions was that this judgment has not dealt with certain issues and has not considered certain judgments referred to in the Nursing Services judgment. This is simply incorrect.

The relevant Rules of Court and their application in this matter

[33] Rule 6 (5) (g) reads as follows

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate

directions as to pleadings or definition of issues, or otherwise.
'(Highlighted for emphasis)

[34] The order of Kuny AJ did not define the issues that were referred to trial. This is possibly the reason behind the controversies in this matter.

[35] One can accept that the issues in dispute were too wide-ranging for resolution by way of referral to oral evidence, hence they were referred to trial. Erasmus 'Superior Court Practice', Service 4, 2017 at D1-79- , referring to authorities cited therein, states that

'It is essential that the issues be defined. It is an alternative procedure to dismissal of the application in such circumstances, and is appropriate where the applicant when launching his application could not reasonably have foreseen that a serious dispute of fact, incapable of resolution on the papers, was bound to develop'

[36] Rule 20: Declaration

(1) In all actions in which the plaintiff's claim is for a debt or liquidated demand and the defendant has delivered notice of intention to defend, the plaintiff shall, except in the case of a combined summons, within fifteen days after his receipt thereof, deliver a declaration.

(2) The declaration shall set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed.

(3) Where the plaintiff seeks relief in respect of several distinct claims founded upon separate and distinct facts, such claims and facts shall be separately and distinctly stated.

[37] Rule 22: Plea

(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.

(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies"

[38] Following the sequence and consequences of the rules, it is clear, as Froneman J has stated, that the step that follows a declaration is a plea. This is also logical, when reading the order of Kuny AJ.

[39] Rule 30(1) reads as follows: Irregular Proceedings

'(1) a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside. '

[40] The order of Kuny AJ did not define the issues that were being referred to trial as contemplated in Rule 6(5) (g), but only indicated conversion of the documents filed and filing of further pleadings.

[41] The simultaneous filing of the declaration (Rule 20) and summary judgment application (Rule 32) created the current controversy in my view. However, this not being an appeal, I am not at liberty to question the manner in which the order was drafted. The parties are happy and between the themselves, they are satisfied that it is what it is.

A relevant question to be asked though is whether this simultaneous service of the notices was regular and whether Efkon has responded in a proper manner as contemplated in the Rules.

[42] In principle, one notice does not suspend operation of the other as there are different sanctions and remedies attached to each. (**Potpale Investments (Pty) Ltd v Mkhize (1711/2014) ZAKZPHC 55; 2016 (5) SA 96 (KZP) (15 December 2015)**). A party confronted with a pleading must exercise

a choice afforded in terms thereof. A declaration requires a defendant to file a plea. A summary judgment application requires the respondent (defendant) to file an affidavit to resist the application.

[43] The outcome would probably have been the same because the irregular step notice (rule 30) and summary judgment (Rule 32) applications would have been heard together.

[44] Rule 32: Summary Judgment

(1) Where the defendant has delivered notice of intention to defend, the plaintiff may 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) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. 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 10 days from the date of the delivery thereof.

(3) Upon the hearing of an application for summary judgment the defendant may-

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

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he 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 viva voce 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.

(5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff.

(6) If on the hearing of an application made under this rule it appears-

(a) that any defendant is entitled to defend and any other defendant is not so entitled; or

(b) that the defendant is entitled to defend as to part of the claim,

the court shall-

(i) give leave to defend to a defendant so entitled thereto and give judgment against the defendant not so entitled; or

(ii) give leave to defend to the defendant as to part of the claim and enter judgment against him as to the balance of the claim, unless such balance has been paid to the plaintiff; or

(iii) make both orders mentioned in sub-paragraphs (i) and (ii).

(7) If the defendant finds security or satisfies the court as provided in subrule (3), the court shall give leave to defend, and the action shall proceed as if no application for summary judgment had been made.

(8) Leave to defend may be given unconditionally or subject to such terms as to security, time for delivery of pleadings, or otherwise, as the court deems fit.

(8A) Where delivery of a declaration is required by these Rules and the court, when giving leave to defend in terms of this rule, has not made an order for the delivery of such declaration within a specified time, such declaration shall be delivered within 20 days of the date leave to defend has been given.

(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if-

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client.

Conclusion

[45] The authorities are clear with regard to the first question. The applicant was not entitled to file a summary judgment application after delivery of the declaration. This fact is clear from an ordinary reading of the rules of court.

[46] Even if I am wrong on the first question, the respondent is entitled to rely on the reasons for referral of the matter to trial, which was a mechanism to assist the applicant to convert the application to action proceedings.

[47] The existence of disputes of fact is indicative of the fact that there are some triable issues.

[48] Efkon submitted that the motion court has already adjudicated the matter and found that there are disputes of fact that cannot be properly decided on affidavit. Whilst agreeing with this submission, counsel for Intergral submitted that the court did not decide whether those disputes would constitute defences to ward off a summary judgment application. The latter's attitude is disingenuous. The opposed motion court could not have made rulings as if it was considering an application for summary judgment. It is inconceivable that a factual dispute on the issues that have been pleaded would not constitute a defence as contemplated in Rule 32.

[49] The last issue for consideration is whether there is any defence raised on the merits in the affidavit to resist summary judgment. The respondent has simply stated that its answering affidavit (notice of intention to defend) must be taken into account.

[50] In the context of the totality of the circumstances, and in view of the findings above, this issue will not make a difference, even if I were to address it.

[51] In the matter of **Di Savino v Nedbank Namibia Ltd**¹, the appeal court, per Ngcobo AJA considered the principles of summary judgment, in particular the issue of whether the failure of the affidavit to measure up to the requirements of the Rule would result in the granting of summary judgment.

Principles governing summary judgment

23. *One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3) (b) the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or*

¹ (SA 24/2010) [2012] NASC 3 (21 June 2012)

where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

24. The enquiry that the court must conduct is foreshadowed in Rule 32(3) (b) and it is this: first, has the defendant "fully" disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.² If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

25. While the defendant is not required to deal "exhaustively with the facts and the evidence relied upon to substantiate them", the defendant must at least disclose the defence to be raised 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."³ Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.⁴

26. Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law.⁵ Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.

27. But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the

² *Maharaj v Barclays National Bank Ltd*, 1976(1) SA 418 (A) at 426A-C

³ *Maharaj v Barclays National Bank*, *supra*, at 426C-D

⁴ *Arend and Another v Astra Furnishers (Pty) Ltd*, 1974(1) SA 298(C) at 304A-B

⁵ *Shingadia v Shingadia*, 1966(3) SA 24(R) at 26A-B; *Tesven CC and Another v South African Bank of Athens*, 2000(1) SA 268 (SCA) at para 26; *Shepstone v Shepstone*, 1974(2) SA 462(N) at 467A; *Marsh and Another v Standard Bank of SA Ltd*, 2000(4) SA 947(W) at 949 para 3

*proceedings that are properly before the court.*⁶ In *Sand and Co. Ltd v Kollias* the court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter "at the end of the day" on all the documents that are properly before the court.⁷

Costs

[52] I have already discussed the manner in which the Nursing Services judgment was introduced and argued, even to an extent of not presenting the correct legal position in view of obvious case references that are available, including a sequential reading of the rules of court.

[53] The applicant was rescued by the motion court as it faced a dismissal of the application by conversion of the application to a trial, however, it decided to take a detour by taking a procedural step that in terms of trite principles it should not have taken.

[54] Furthermore, the applicant was aware that the issues as determined in the opposed motion hearing are disputes of fact, which, even if the legal point was good, would have entitled me, in the exercise of my discretion, taking into account where the matter was coming from, to grant the respondent leave to defend the action.

[55] In the matter of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**⁸, **Navsa JA**⁹ restated the origin and principles of summary judgment and cautioned about the labelling of summary judgment as "extraordinary".

"[29] A summary judgment procedure was first introduced into our practice by

⁶ *Sand and Co. Ltd v Kollias*, **1962 (2) SA 162** (W) at 165; *Maharaj v Barclays National Bank Ltd*, *supra*, at 423H

⁷ *Sand and Co. Ltd v Kollias*, *supra*, id.

⁸ (161/08) **[2009] ZASCA 23** (27 March 2009)

⁹ Harms DP, Brand, Mhlanta JJA and Bosielo AJA concurring

the Magistrate's Court Act of 1917. It was based upon a procedure introduced in England by Order XIV under the Judicature Acts whereby a plaintiff was able, by means of a summary proceeding, to obtain a final judgment when there was no bona fide defence to an action.¹⁶

[30] In *John Wallingford v The Directors &c. of The Mutual Society* (1880) 5 AC 685 (HL) at 699-700, Lord Hatherley referred to the objects of the new English procedure as follows:

'I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.'

[31] So too in South Africa, the 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. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.¹⁷

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings

can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor. (Highlighted for emphasis)

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E.

[56] The opposition of this summary judgment in my view is not one of those that have been described as a simple delaying tactic. The motion court has already ruled that there are dispute that must be tested at the trial court. The respondent was surprised by the applicant's stance of pursuing a summary judgment application after the parties were directed to proceed to trial on the basis of factual disputes. According to counsel for the respondent, the applicant was requested, on numerous occasions to withdraw this application. The invitation was also made on record during the hearing of this application.

[57] Counsel for the respondent has urged me to grant an order of costs against the applicant on a scale as between attorney and own client and also to exercise my discretion in terms of Rule 32(9) and direct that the matter be stayed until such costs, which are to be taxed, have been paid.

[58] The cause of action in the motion proceedings was the same agreement that Intergral relies on for the relief sought in the summary judgment application before me. The fact that in the declaration more details were pleaded, because of the nature of action proceedings do not make it different. The matter was referred to trial because the motion court could not decide on the disputes arising from the papers filed, founding, answering and replying affidavit, even after a full oral argument.

[59] Instead of taking the route to trial, as indicated in the court order, Intergral decided to utilize a technicality that the rules do not specifically exclude filing of an application for summary judgment. This despite the ruling made by the motion court that the disputes must be properly ventilated.

[60] I am of the view that the conduct of the applicant fall in the category referred to in the matter of Ward v Sulzer¹⁰, where the following was stated *"for example vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs"*.

[61] The purpose of attorney client cost order was explained as follows in the matter of Nel v LandBouwers Ko-Operative Vereeniging 1946 AD 597

"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in a party and party bill."

[62] Having considered all the relevant facts, I am of the view that the applicant should not only pay costs on a punitive scale, but that the matter as

¹⁰ 1973 (3) SA 701 (AD) at 706H

referred to trial by the order of Kuny AJ be stayed, until the applicant has paid the costs of this application, which must be taxed.

Order

[63] Under the circumstances, I make the following order;

[63.1] The application is dismissed.

[63.2] The applicant is ordered to pay costs on a scale as between attorney and own client.

[[63.3] The matter as referred to trial by order of Kuny AJ dated 19 October 2018 is stayed until the applicant has paid the respondent's taxed costs.



TAN Makhuvele

Judge of the High Court

APPEARANCES

Applicant:

Adv. AR Van der Merwe

Instructed by:

Senekal Steyn Inc

Nieuw Muckleneuk

Pretoria

Respondent:

Adv. P. Lourens

Adams & Adams

Lynwood Manor

Pretoria

Heard on: 11 & 13 February 2019

Heads of argument: 27 February 2019.

Judgment delivered on: 24 May 2019.