



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no. 5964/2017

In the matter between:

CARL JACOBUS VAN HEERDEN

Plaintiff

and

SCOIN TRADING (PTY) LTD

Defendant

CORAM:

I VAN RHYN AJ

JUDGMENT BY:

I VAN RHYN AJ

DELIVERED:

21 JUNE 2018

[1] This is an application for summary judgment. On 17 November 2017 the Plaintiff issued summons against the Defendant for payment of the sum of R713,560.00 with interest and costs on an attorney and client scale.

- [2] The Plaintiff and the Defendant entered into an oral agreement in terms whereof the Defendant sold to the Plaintiff certain collectable coins as set out and described in a so-called "*final portfolio*" appended to the Plaintiff's particulars of claim as annexure "CVH3". The Plaintiff has made eight separate payments from 17 June 2016 to 12 May 2017 in the total amount of R713,560.00.
- [3] During August 2016, the date of which is uncertain, the Plaintiff received one 1 Ounce Kruger Queen coin with the value of R61,500.00 together with a tax invoice reflecting the abovementioned coin and the purchase price thereof. Plaintiff avers that he has not received delivery of any of the other coins so purchased from the Defendant and that he therefore cancels the agreement and tenders the return of the one 1 Ounce Kruger Queen coin and demands payment of the amount of R713,560.00.
- [4] On 22 November 2017 the Defendant entered an appearance to defend the action. On 2 February 2018, more than two (2) months later, the Plaintiff gave notice of his intention to apply for summary judgment to be heard on 22 February 2018. In the usual supporting affidavit the Plaintiff stated:

"I hereby confirm the facts on which the cause of action and the amount claimed are based as set out in the Summons, which I respectfully request be read together herewith as if incorporated in this affidavit. I further confirm that an amount of R713 560,00 together with interest at 15.5% "a tempore morae" is due and owing to plaintiff on the grounds set out in the said Summons"

And further:

"I respectfully submit that the Defendant has no bona fide defence against this action and that the notice of appearance to defend was given solely with the intention to delay these proceedings."

- [5] On 21 February 2018, being the day prior to the date of hearing of the application for summary judgment, the Defendant filed an affirmation, opposing the application for summary judgment. On 22 February 2018 it was ordered by Gcabashe AJ that the summary judgment application is postponed until the 10th May 2018, the Respondent to file an application for condonation for the late filing of its opposing affidavit on or before the 22nd March 2018

and the Defendant to pay the cost of the postponement on a party and party scale.

[6] The application for condonation supported by an affirmation by Mr Gary Segal, the attorney practising in Johannesburg and acting on behalf of the Defendant, was filed on 19 March 2018. It is stated that the reason for the late delivery and filing of the opposing affidavit was due to the incorrect information received from Bloemfontein correspondents that same needs to reach the Bloemfontein firm of attorneys prior to 10 o'clock on the 21st February 2018. It is contended by the Applicant in its application for condonation that it was not wilfully in default and has a defence as set out in the opposing affidavit.

[7] The application for condonation is opposed and voluminous opposing papers amounting to 38 pages including several annexures were filed. For convenience the Applicant in the condonation application is hereinafter referred to as the Defendant and the Respondent in the condonation application as the Plaintiff. The Plaintiff denies the validity of Mr Segal's affirmation and secondly states that the opposing affidavit contains mostly hearsay. During the hearing of the application, Mr Heymans on

behalf of the Plaintiff abandoned the first point regarding the validity of the affirmation and rather relied on the hearsay argument.

[8] In the replying affidavit it was stated that Plaintiff's election to contest the merits of the application for summary judgment in the condonation application is not appropriate as the Defendant has set out a *bona fide* defence in its opposing affidavit.

[9] There are two main considerations in an application for condonation. A reasonable explanation for the default and the disclosure of a *bona fide* defence.¹The test for a *bona fide* defence in the condonation application is identical to that in a summary judgment application, that is, the Defendant must allege facts which, if proved at the trial, will constitute a defence. If the Defendant has an adequate explanation for the lateness, be it a few days, due to a mistake of his legal representative he should be given an opportunity to be in the position to oppose the application for summary judgment.²

¹ Van Aswegen v Kruger 1974 (3) SA 204 (O) at 205 C

² Klipton Industries Ltd v Kersten and Another 1995 (1) SA 182 (WLD)

[10] Rule 27(1) of the Rules of Court provides that the Court may extend any time prescribed by the rules on good cause shown. It has been accepted by the Courts that good cause will not exist if there is no *bona fide* defence. Therefore the defence should at least be set out with sufficient particularity to enable the Court to decide whether the defence is *bona fide* or not.³

[11] In the Heads of Argument filed on behalf of the Defendant a point *in limine* was raised that the affidavit of the Plaintiff did not comply with Rule 32(2) of the Rules of Court in that it did not contain a statement by the deponent that in his opinion there was no *bona fide* defence to the claim.

[12] At the hearing of the application Mr Williams, on behalf of the Defendant indicated that he is not concerned with the exact words to be used as provided for in Rule 32(2) and continued with his argument pertaining to the condonation application as well as the merits of the matter.

³ South African Breweries Ltd v Reigerpark Props (Pty) Ltd and Others 1992 (3) SA 829 at 832 E - G

[13] It was however held by the Full Court in Van den Bergh v Weiner⁴ that Rule 32 gives a Court power to grant judgment without trial even though notice of intention to defend the claim had been given by the Defendant. The power to grant summary judgment must be exercised with great care which is achieved, *inter alia*, by ensuring that the Plaintiff brings his case within the scope of the Rule.

[14] In Standard Bank of SA Ltd v Carports for Africa CC and Others⁵ the Respondents had raised a point *in limine* that the verifying affidavit in support of the application filed by the Applicant was fatally defective as it had not followed the wording of Rule 32(2) of the Uniform Rules of Court. The deponent to the affidavit had used the words “*I verily believe*” instead of “*in his opinion*” as stipulated by the Rule. With reference to H K Gokal (Pty) Ltd v Muthambi⁶, AFCOL Manufacturing Ltd v Pillay; AFCOL Manufacturing Ltd v Bio⁷, Wonder Flooring v North West Development Corporation Ltd⁸, the Full Court held that common

⁴ 1976 (2) SA 297 (T)

⁵ 1998 (4) SA 811

⁶ 1976 (3) SA 89 (T) at 90 F – G

⁷ [1996] 1 B All SA 426 (SE)

⁸ 1997 (1) SA 476 (B)

sense and basic principles of logic dictates that “*in his belief*” should be taken as the equivalent of “*in his opinion*”.

- [15] The Oxford English Dictionary contains the following entry of the word “*opinion*”: “*What one thinks or how one thinks about something; judgment resting on grounds insufficient for complete demonstration; belief of something as probable; or as seeming to one’s own mind to be true, though not certain or established.*”⁹

- [16] In the matter of **Visser v De La Rey**¹⁰ the Plaintiff applied for summary judgment and in his affidavit he stated as follows:

“Ek doen met eerbied aan die hand dat die Verweerder nie ‘n bona fide verweer ... het nie ...”

- [17] It was held that, with reference to the judgment by Galgut J in **Group Areas Development Board v Hassim and Others**¹¹ it would have been the simplest to adhere to the Rule by following the wording thereof. The difference between the words “*I verily believe*” or “*in my opinion*” is not material. They have essentially

⁹ 2nd ed (1991)

¹⁰ 1980 (3) SA 147 (T)

¹¹ 1964 (2) SA 327 (T)

the same meaning. However should the deponent state that he is “*under the impression*” that the Defendant has no *bona fide* defence, this statement would not pass muster.¹² The Plaintiff used the word “*submit*” which means to “*put forward for opinion, discussion, decision or to refer or present to another for judgment or consideration*”.¹³

[18] What is required is that the deponent express his own opinion and not that of another person. To ‘put forward for opinion or decision or to refer to another for judgment’ does not have the same meaning as required in Rule 32(2) and therefore the statement would not pass muster and I find that the point taken in the Heads of Argument is sound.

[19] Rule 32(2) also requires that:

(a) The affidavit must be made by the Plaintiff or by any other person who can swear positively to the facts;

¹² Jeffrey v Andries Zietsman (Edms) Bpk 1976 (2) SA 870 (T) 871 E - G
¹³ Oxford Advanced Learners Dictionary of current English (1981) p862

- (b) The deponent to the affidavit must verify the cause of action and the amount, if any, claimed. The Court will have to be satisfied that each of these requirements have been fulfilled before it can hold that there has been proper compliance with the provisions of Rule 32.¹⁴

[20] In Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC¹⁵ it was held that:

"In so far as the Learned Judge suggested that a defective application can be cured because the Defendant or Defendants have dealt in detail with their defence to the claim set out in the summons that is not in my view correct. That amounts to saying that defects will be overlooked if the Defendant deals with the merits of the defence. It requires a Defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected they have not dealt with the merits. It will be a bold Defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that

¹⁴ Fischereigesellschaft F Busse & Co Kommandit Gesellschaft v African Frozen Products (Pty) Ltd 1967 (4) SA 105 (C) at 108

¹⁵ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 422 - 423
2010 (5) SA 112 (KZP) at 122 F - I

they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the Defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective then cadit quaestio. Its defects do not disappear because the Respondent deals with the merits of the claim set out in the summons.”

[21] In the judgment by Daffue R in **Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality**¹⁶ it was held that in the event of the deponent using the word “confirm” instead of “verify” and it was the plaintiff’s only obstacle, he would have probably condoned the mistake but due to the plaintiff’s failure to verify (or confirm) the cause of action the application for summary judgment was dismissed with costs.

[22] Corbett JA explained the reliance on verification or “verifying” in the **Maharaj**-judgment from **422 B** and I quote from **422 E – H**:

¹⁶ (A260/2015) [2016] ZAFSHC 157 [2016] 4 All SA 894 (FB (22 September 2016))

“Moreover, the word ‘verifying’ cannot be taken to qualify the word ‘facts’ and to be part of the definition of the ‘any other person’ who may make the affidavit ... since this would run counter to the meaning of the word ‘verifying’ and the grammatical construction of the sentence in which these words occur. The relevant meanings of ‘verify’ in the Short Oxford English Dictionary are:

‘to testify or affirm formally or upon oath; ... to testify to, to assert as true or certain.’

Clearly facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the affidavit verifies the facts. In addition, the words ‘and stating’, appearing later in the same sentence as ‘verifying’, qualify the same subject-matter. Were this not so the word ‘and’ linking the two participles would be inappropriate and redundant. It can hardly be suggested that the word ‘stating’, and what follows thereon as to what must be stated, can have reference to anything but the content of the affidavit. It is, therefore, plain that the words ‘verifying the cause of action and the amount, if any, claimed ...’ also refer to the content of the affidavit.”

- [23] The Plaintiff elected to use the word “*confirm*” instead of “*verify*”. The Plaintiff merely confirmed the facts on which the cause of action and the amount claimed are based and failed to verify the cause of action, nor the amount claimed.¹⁷

THE MERITS OF PLAINTIFF’S CLAIM:

- [24] The Plaintiff alleges that he and the Defendant, represented by Mr Kruger entered into negotiations during May 2016 in terms of which the Plaintiff would buy certain collectable coins. The date on which the agreement between the parties was reached is not stated in the particulars of claim. What is puzzling in the statement made by the Plaintiff is that “... *between May 2017 up to June 2017, Plaintiff informed the Defendant as to his selection of specific coins.*” Prior to May 2017 the Plaintiff had however already made 6 of the 8 payments to the Defendant. The first payment was on 17 June 2016 and the last payment on 12 May 2017. From the above it is clear that the Plaintiff, on his version, made payments to the Defendant prior to his selection of coins so purchased.

¹⁷ Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd 1999 (4) SA 229 (C)

[25] It is not disputed that the Plaintiff paid an amount of R713,560.00 and that R61,500.00 was for the one 1 Ounce Kruger Queen coin delivered per courier during August 2016. In the particulars of claim it is alleged that annexure “**CVH3**”, the “*final portfolio*” together with photographs of certain documentation pertaining to the coins purchased were handed to the Plaintiff on the 6th June 2017 at a restaurant in Welkom. However in the application for summary judgment it was contended that the “*final portfolio*” indicating the selected coins were annexed to an e-mail received from Mr Kruger on the 2nd June 2017.

[26] The Defendant alleges that the initial agreement was not for the coins listed in annexure “**CVH3**” but for the coins listed in three invoices annexed to the Defendant’s opposing papers. One of the invoices, annexure “**C**” was mistakenly appended to the opposing affidavit as it does not concern this matter and the correct invoice was appended to the condonation application. According to the Defendant the Plaintiff failed to make the agreed payment and only paid a total amount of R652,060.00 (excluding the coin paid for and delivered to the Plaintiff).

[27] The initial agreement was then cancelled and the Plaintiff selected the coins reflected in annexures “H” and “I” to the total value of R652,060.00. The Defendant tendered delivery of the coins purchased in terms of annexures “H” and “I”.

[28] The Defendant furthermore alleges that the Plaintiff is further indebted to the Defendant in the amount of R73,186.83 for interest and has a counterclaim against the Plaintiff in the said amount. From the invoices it is apparent that a “safe custody annual fee” was also collected from the Plaintiff and it is stated that the Plaintiff was entitled to the coins purchased in terms of annexure “H” and “I” subject to him complying with the usual and reasonable security requirements.

[29] Plaintiff also indicated that an amount of R58,760.00 was overpaid as the payments made on 17 June 2016 to 12 May 2017 were more than the amounts owed to the Defendant for the coins purchased in terms of annexure “CVH3”. No explanation is given why the amount paid to the Defendant exceeds the purchase price of the coins selected by the Plaintiff. The Defendant’s version however makes more sense. The amount paid by the Plaintiff is not disputed but the coins purchased are in dispute. Mr Sham, the

deponent to the opposing affidavit is the general sales manager at the Defendant and states that although Mr Kruger was acting on behalf of the Defendant and dealt with the Plaintiff, he has left the employment of the Defendant. Mr Sham states that as a general sales manager he is aware of all the transactions pertaining to this case. It is stated that due to the Plaintiff's failure to make payment timeously he was released from the transactions and received coins for the amount already paid. Three credit notes, all dated 20 June 2017 were issued and eventually, subsequent to an agreement on the selected coins, two further invoices "H" and "I" were issued to the value of R652,060.00.

- [30] From the facts disclosed it would be inappropriate to come to a finding that the proposed defence is false. The Defendant's allegation that the total payments contended by the Plaintiff were indeed received by the Defendant, albeit for different coins, though some seem to be the same, is credible, and if proved would support a defence that is good in law. Stated differently the Defendant need not prove his defence on a preponderance of probabilities and avoids summary judgment when he advances a reasonable arguable and triable defence.

[31] The test for a *bona fide* defence in the condonation application is identical to that in the summary judgment application. In the result the reasonable prospect of success the Defendant is required to show relates to the summary judgment proceedings. Furthermore, the defects in the application for summary judgment amounts to the non-compliance of the provisions of Rule 32(2) and it would be an injustice to grant judgment in favour of the Plaintiff.

[32] Counsel were in agreement that, if I do grant condonation, I should also dispose of the summary judgment application.

In the result the following order is made:

1. The late delivery of the opposing affidavit to the summary judgment application is condoned.
 2. Defendant is given leave to defend the said action, the cost of the summary judgment application being reserved for determination by the Trial Court.
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I VAN RHYN AJ

On behalf of the Plaintiff:
Instructed by:

Adv P HEYMANS
ROSENDORFF REITZ BARRY

On behalf of the Defendant:
Instructed by:

Adv. A WILLIAMS
LOVIUS BLOCK ATTORNEYS