THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A214/16
& A213/16

In the matter between:

5/5/2017

PARISAN EXPRESS TRADING 101 INC Lesedi Trading 102 CC	Appellant
and	
MONTE VILLAS BODY CORPORATE	Respondent

JUDGMENT

MAKHUBELE AJ

Introduction

[1] This is an appeal against the judgment of Magistrate Von Reiche in the Magistrate's Court Pretoria on 23 February 2016 in terms of which summary judgment was granted in favour of the respondent for payment of an amount of R96 214.46 with interest at the rate of 15% per annum and costs on a scale of attorney and client,

[2] The issue arising from this appeal is whether the Magistrate was correct in his findings that the affidavit that was filed by the appellant to resist summary judgment application did not disclose a *bona fide* defence.

[2.1] This appeal was heard together with the appeal in **case number A213/2016** in the matter between Lesedi **Trading 102 CC and Monte Villas's Body Corporate.** The respondent (Plaintiff in the main action in both appeals) is one and the same entity. Except for the identity of the appellants (Defendants in the main action), and the Unit number in the Sectional Title Scheme, the cause of action and the amount of the debt is the same. The opposing affidavit and defences raised in both matters is actually a duplicate of the one filed in the other matter. The matter came before the same Magistrate and the judgments are the same, word by word.

The same attorneys in both this appeal and at the Magistrate's Court hearing represented the appellants.

Both counsel conceded during argument that these matters should have long been consolidated. They also agreed that the judgment in one matter would hold for the other matter.

[3] The appeal was not prosecuted timeously and in terms of the Rules of Court. An application for condonation in this regard was subsequently filed and heard together with the merits of the appeal. The application for condonation was apparently filed as result of an application by the respondent to declare the appeal as having lapsed. The latter application was not placed before us, and was only mentioned during argument for a cost order.

[4] It is common cause that the respondent is body corporate as contemplated in the Sectional Titles Act, No.95 of 1986, as amended ("the Act "). It is responsible for management of the affairs of the Sectional Title Scheme known as Monte Villas, situated at 2 Rooihuiskraal Street, Amberfield, Rooihuiskraal Ext. 17, Pretoria, Gauteng Province.

The appellant is the registered owner of Unit Number 2 in that Sectional Title Scheme.

[5] It is also common cause that the registered owners of the Units are bound by the Conduct Rules that have been duly adopted in terms of Section 35 of the Act. As a registered owner, the appellant is obliged to pay all levies raised by the respondent on a monthly basis together with charges relating to electricity.

In terms of Conduct Rule 30, levies are payable on the first day of each and every month and failure to pay the amount due timeously or at all may result in the matter being handed over to an attorney for collection.

In terms of Conduct Rule 31(2), the respondent is entitled to raise and collect levies from the registered owners and on failure to pay the levies, to cause letters of demand to be sent to defaulters. If the amount is not paid, the matter is referred to attorneys for collection.

[6] The amount payable by each registered owner is determined on an annual basis and recorded in the approved budget schedule and levy schedule. These documents are provided to registered owners as and when the schedules are revised. The budget and levy schedules are approved or ratified by owners at the annual general meetings.

[7] The amount of the levy payable by each unit owner is determined by taking into account the extent of the unit, the replacement value as well as the percentage participation quota.

The schedules for the years 2012/2013, 2014/2015 and 2015/2016 were attached to the summons as annexures "D3", "D6" and "D9" respectively.

In terms of these schedules, the monthly levy that was determined for Unit 2 is as follows;

(a) R1 823.21 in 2012,

(b) R2042.35 in 2013,

(c) R2214.34 in 2014,

(d) R2 214.34 in 2015 and;

(e) R2 2543.77 in 2016.

[7] The levies raised and imposed against the appellant between September 2012 and September 2015 totaled R96 214.46. This amount was debited to the appellant's account as set out and computed on the reconciliation of account that was attached to the summons as Annexure "F".

[8] In the summons, the respondent claimed payment of this amount that it alleged was due and payable and that despite demand, the appellant has refused to pay .

[9] The appellant filed a notice of intention to defend the action; whereafter the respondent filed an application for summary judgment. The appellant filed an affidavit to oppose the summary judgment application and raised certain defences that I will revert to later in this judgment.

[10] Rule 14(3)(b) of the Magistrate's Court Rules reads as follows;

"(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 or clerk of the court for any judgment including costs that 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 herself or of any other person who can swear positively to the fact that defendant has a bona fide defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.* □"

[11] This Rule is a mirror of the High Court 's Rule 32(3) of the Uniform Rules of Court.

The opposing affidavit filed and defences raised by the appellant to resist summary judgment.

[12] The affidavit filed by the appellant to resist summary judgment and the defences raised therein should be considered in accordance with the general principles on summary judgment that I will discuss later on in this judgment.

[13] In the opposing affidavit, the appellant denied that it was indebted to the respondent in the amount claimed, or any amount at all was . It also denied that it had no bona fide defence to the claim.

In paragraph 4 thereof, reference was made to what is alleged to be various court applications and actions that were instituted by the respondent against the appellant between 2009 and 2013. These actions/ applications were alleged to be *"pendent lite"*

They are;

[13.1] Summons were issued in 2009 for payment of a sum of money. Default judgment that was obtained was later rescinded because the appellant did not receive the summons. The action has not been withdrawn.

No further details were provided about this matter despite an undertaking in the affidavit that the court papers would be discovered for purposes of trial.

[13.2] The respondent brought an application to liquidate the appellant in the High Court Pretoria under case number 24725/2012 on the grounds of its inability to pay its debts in the normal course of business. The application is being opposed and the respondent has taken no further steps, nor has the application been withdrawn.

[13.3] Another liquidation application was launched under case number 6175/2013 on the same grounds as the previous one. It is also being opposed and the respondent has not taken further steps, nor has the application been withdrawn.

[13.4] There is an ongoing dispute between the parties with regard to the amount charged by the respondent and other management issues. The respondent has refused to entertain the complaints raised by the appellant but has opted to intimidate and harass the appellant. Furthermore, the respondent has abused the due process of law , thereby causing the appellant to incur unnecessary legal costs.

[13.5] In paragraph 6 of the Opposing affidavit , the appellant;

(a) disputes the amount that is allegedly owed.

(b) alleges that it has been paying rates and taxes to the municipality and the respondent is making the same charges.

(c) alleges that the respondent has refused to provide annual financial statements for the period 2008 to 2009 and does not inform it of its annual general meetings.

(d) alleges that the respondent does not provide certain services like cutting of grass, fixing the roof, dustbin, repairing of broken pillars.

(e) alleges that it is unable to determine its liability to the respondent because the latter is refusing to resolve the dispute between the parties.

The findings of the Magistrate

[14] The Magistrate gave reasons in response to a request for written reasons in terms of Rule 51(1) and stated the following;

[14.1] No relevance could be found on the previous matters between the parties that were listed in paragraph 4 of the affidavit opposing summary judgment.

[14.2] The amount claimed by the respondent for arrear levies is not specifically disputed but generally denied on the basis that certain services have not been properly rendered to the appellant and that the appellant has paid rates and taxes directly to the municipality.

[14.3] The appellant has failed to satisfy the court that it has a bona fide defence . Reference was made to the case of Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) . The relevance of this case is that a defence raised must not be needlessly bald, vague or sketchy.

[14.5] None of the grounds raised in the opposing affidavit constitute a bona fide defence.

The Magistrate interrogated some of the issues raised in the affidavit in this regard. For example, lack of proof that the alleged disputes were raised with the Body Corporate and payments made to the municipality as alleged .

Legal principles on summary judgments

[15] In the matter of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**[1] , **Navsa JA**[2] restated the origin and principles of summary judgment and cautioned about the labeling of summary judgment as "extraordinary" .

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

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[1] (161/08) **[2009] ZASCA 23** (27 March 2009)

[2] Harms DP, Brand, Mhlanta JJA and Bosielo AJA concurring

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.

[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.

[16] In the matter of **Di Savino v Nedbank Namibia Ltd** [3], 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

> . *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*

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

nature and grounds of the defence and the material facts relied upontherefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or 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.[4] *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."[5] *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.*[6]

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

[5] *Maharaj v Barclays National Bank, supra,* at 426C-D

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

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.[7]*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 proceedings that are properly before the court.[8]*In Sand and Co. Ltd v Kolliasthe 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.*[9]

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[7] *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

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

[9] *Sand and Co. Ltd v Kollias, supra,* id.

Oral submissions

<u>The appellant</u>

[17] Counsel for the appellant addressed the court firstly on the application for condonation for non-compliance with the time periods of this court for prosecuting of an appeal. The appellant's attorney of record, Mr. Abdul Wahab Jaffer filed an affidavit to explain that the default was caused by a personal crisis that he was going through at about the time when summary judgment was granted. He apparently became a target of some scam to extract money from him and his law practice by some unknown persons. It affected his performance at work and resulted in him falling behind with work that he had undertaken.

The respondent's contention is that the appeal should have been noted 20 days from the date on which written reasons in terms of Rule 51(1) were supplied. This period expired on 1 April 2016.

The extent of the delay is not clear from the affidavit of Mt Jaffer. He simply states that the "slight delay". On the respondent's version the appeal was noted on 07 August 2016. Security was tendered on 18 August 2016.

Having considered the reasons for the delay, there is no reason why condonation should not be granted.

[18] On the merits of the appeal, Ms. Green, appearing on behalf of the appellant was at pains to explain that the appellant used wrong words in the opposing affidavit to refer to the status of the previous applications / actions between the parties. The words *"pendente lite"* were actually meant to be *"lis pendens"*.

She argued that the appellant has discharged the onus on it to prove the elements of "*lis pendens*", namely;

(a) that there is litigation that was instituted before the current action,

(b) The litigation is pending between the same parties ; and

(c) It is based on the same cause of action; and

(d) It is in respect of the same subject matter.

<u>The respondent</u>

[19] Counsel for the respondent, Mr. Halstead, argued that the defence of *lis pendens* was not raised in the opposing affidavit and that if a concession is made that it is what was intended, then there is no merit in the appellant's argument when one has regard to the dates and nature of the previous applications / actions.

The 2009 matter was with regard to the 2009 outstanding levies. The cause of action in this matter is 2012 levies.

Furthermore, the cause of action in the 2009 matter is complete because on the appellant's version, rescission of the judgment was granted.

He argued further that liquidation is a different form of action and it is based on specific acts of insolvency.

If *lis pendens* was raised, the argument before the Magistrate would have been to stay proceedings pending finalization of the alleged pending litigation.

He also submitted that the discretion of the Magistrate could only be interfered with if the court finds that it was not exercised properly. If *lis pendens* were raised, the discretion would have been to either stay or proceed with the summary judgment application.

The Magistrate analyzed the defences raised and concluded that there was no bona fide defence . The appellant does not attack the manner in which the discretion was exercised.

Summary judgment is no longer viewed as an archaic measure,. It is a process that gives an applicant an entitlement to his claim if there is no defence to it.

The appeal should therefore be dismissed with costs on an ordinary scale, including the reserved costs in the application to declare the appeal as having lapsed.

Has the appellant disclosed a bona fide defence?

[20] The opposing affidavit makes bald vague allegations that are not supported by facts. In some cases, conclusions of law that are not justified by the facts. I am mindful of the fact that I do not have to adjudicate the correctness of the defences, but to consider whether on the facts placed before me , that would still need to be proven at trial

stage, the defendants have a defence that is good in law and made in good faith.

[21] I have, as stated in the Maharaj case, taken into account all documents properly placed before me and not just the opposing affidavit in an attempt to have a complete view at the end of the day. These documents form the basis of the respondent's claim as already discussed above.

The appellant alleges payment to the municipality and disputes about his indebtedness to the respondent. I was however, not able to find prima facie evidence relating to the alleged payment direct payment to the municipality or disputes raised about the lawfulness of the charges raised and levied.

[22] The respondent has attached to its summons documents relating to approval of the Sectional Title Scheme and how levies are determined. These are approved or ratified in the annual general meetings. Minutes of annual general meetings reflecting issues discussed were also attached.

[23] The least that the appellant could have done would be to raise a defence relating to the annexures that were attached to the summons in terms of which the amount claimed is justified.

Instead, the opposing affidavit deals with irrelevant matters.

As the Magistrate has correctly stated, the previous cases between the parties are irrelevant. In addition, if I may add, some of the alleged pending cases are based on debt that was due in 2009.

In this case, the respondent relies on levies that were raised from September 2012 to September 2015. Even if the request for financial statements was a defence, it is clear from the appellant's own version that he requested financial statements for the period 2008 and 2009. The cause of action in this matter was based on levies raised and levied from 2012 to 2015.
The defence of *lis pendens* is not applicable here for reasons that I have already discussed above.

Orders

[23] Consequently the following orders are made:

(a) Condonation is granted to the appellant for its non-compliance with the Uniform Rules of Court with regard to timeous prosecution of the appeal.

(b) The appellant is ordered to pay the costs of the application for condonation on an unopposed basis. □

(c) The appeal is dismissed with costs on a party and party scale.

MAKHUBELE AJ

ACTING JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

I agree; and it is so ordered

DE VOS J

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

APPEARANCES:

APPELLANT: **ADVOCATE SS GREEN**

Instructed by Jaffer Inc.

Pretoria West

RESPONDENT: **ADVOCATE M HALSTEAD**

Instructed by Rooseboom Attorneys

C/O PDR Attorneys