

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

Appeal No. : A203/2013

In the matter between:-

PATRICK THABANG KGOTLAGOMANG

Appellant

and

PETRUS JOHANNES JOUBERT

Respondent

CORAM: RAMPAL, AJP *et* MOTLOUNG, AJ

HEARD ON: 14 AUGUST 2014

JUDGMENT BY: RAMPAL, AJP

DELIVERED ON: 4 SEPTEMBER 2014

[1] The matter came to this court by way of an appeal. The appellant was aggrieved by the judgment of the district court, which was delivered by his worship Mr L.B.J. Moeng in Bloemfontein on 31 May 2013. On that day the court *a quo* granted summary judgment in favour of the respondent against the appellant in the amount of R55 264.23 plus ancillary relief. The respondent opposed the appeal.

[2] The respondent, as the plaintiff, caused the summons to be issued on 7 February 2013 against the appellant, as the

defendant. In his particulars of claim he alleged that he and the appellant concluded an agreement in Bloemfontein on 1 August 2006:

- that the appellant leased from him a residential unit known as 3 Altro Court, c/o Link Street and Breë Street, Navalsig, Bloemfontein;
- that the appellant was obliged to pay R1 500.00 per month as rental from 1 September 2006;
- that in addition to the rental the appellant also undertook to pay for the municipal supply of water as well as the municipal supply of electricity to the leased property; and
- that the applicable general terms and conditions of the lease were attached to the lease agreement – see clause 7 anx “a”.

[3] As regards the supply of water the respondent alleged that the appellant owed the respondent the sum of R48 622.74 – anx “b” particulars of claim. This first component of the respondent’s claim was contained in a computer generated document apparently issued by the Mangaung Local Municipality in response to a request for clearance information.

[4] As regards the supply of electricity the respondent alleged that the appellant owed the respondent the sum of R6 641.49. This second component of the respondent’s claim was contained in a computer generated document apparently issued by Centlec (Pty) Ltd in response to a request for a clearance certificate – anx “c” particulars of claim.

- [5] It was the respondent's case that each of those amounts had become due and payable. Notwithstanding lawful demand – anx “d” – the appellant wrongfully neglected to pay the respondent's claim in the total sum of R55 264.23.
- [6] The sheriff duly served the respondent's summons upon the appellant at the Bloemfontein District Court on 25 February 2013. The appellant entered an appearance to defend on 8 March 2013. On 15 March 2013 the respondent applied for summary judgment against the appellant. In his supporting affidavit he verified:
- that the appellant was indebted to him in the sum of R55 264.23 on the ground as set out in the summons;
 - that the appellant had no *bona fide* defence to his claim; and
 - that the appellant had entered appearance to defend for the sole purpose of delaying the finalisation of the action.
- [7] On 26 March 2013 the appellant filed a notice of his intention to oppose the respondent's application for summary judgment. in his opposing affidavit he stated:
- that he was not contractually indebted to the respondent as alleged or at all;
 - that after receipt of the letter of demand – anx “d” – he visited the respondent's attorney and informed him that he did not sign the lease agreement as anx “a” purported he did;

- that he had no knowledge of the alleged agreement and that after receipt of the respondent's summons, he once again visited the respondent's attorney and again informed him that the signature appended to the lease agreement by the alleged tenant was not his.
- He asserted, therefore, that he had a *bona fide* defence to the respondent's claim.

[8] The respondent's application for summary judgment was presented on 16 May 2013. The application was argued by the legal representatives and adjudicated by the district magistrate, who then reserved judgment. Two weeks later the district magistrate granted summary judgment in favour of the respondent against the appellant.

[9] The appellant was aggrieved - hence this appeal. On 26 June 2013 the appellant filed his notice of appeal. He relied on a few grounds of appeal. Among others, he contended that the court *a quo* erred in finding that he had no *bona fide* defence to the respondent's claim.

[10] In granting summary judgment, the magistrate described the appellant's version as a classical example of a bare denial. He then came to the conclusion that such a denial did not constitute a *bona fide* defence as contemplated in the applicable rule.

[11] On behalf of the appellant, Mr Khang, attorney for the applicant, argued that the appellant's defence had to be

adjudicated in accordance with the manner in which the respondent's cause of action had been formulated and the appellant's ability to deal with the facts as set out by the respondent. Applying such an approach to the instant matter revealed, according to Mr Khang, that not only did the appellant disclose the nature of his defence and the grounds of such defence, but also the material facts on which he relied for his defence. Therefore, the appellant's attorney submitted that the court *a quo* misdirected itself. Accordingly Mr Khang urged us to uphold the appeal, set aside the summary judgment granted by the court *a quo* and grant the appellant leave to defend the action.

- [12] On behalf of the respondent Mr Visser, attorney for the respondent, argued that the appellant had failed to fully disclose the nature and the grounds of his defence, as well as the material facts upon which his defence was founded. He contended that the appellant's affidavit was very vague and that the respondent could not have been fairly expected to content himself with such vague generalities and conclusory allegations that were not substantiated by solid facts. He submitted that the appellant's affidavit did not contain adequate disclosure bearing in mind the circumstances of this particular matter. The appellant's simple denial of the signature was very inadequate, he argued. Therefore, Mr Visser submitted that the court *a quo* committed no misdirection in concluding that the appellant's bare denial disclosed no *bona fide* defence to the respondent's claim. Accordingly, attorney for the respondent urged us to dismiss

the appeal with costs and to confirm the summary judgment order granted by the court *a quo* in favour of the respondent against the appellant.

[13] The remedy of summary judgment is governed by Rule 14(3)(b) of the Magistrate Court Act 32 of 1944, as amended. To successfully resist the grant of a summary judgment, the respondent confronted with such an application must, in his opposing affidavit, fully disclose, firstly, the nature of his defence, secondly the grounds of such a defence and thirdly, the material facts upon which such defence is founded.

[14] The opposing affidavit, therefore, has to contain a sufficient exposition of the facts which, if they were later to be proven and accepted by the trial court as true, would constitute a good defence in law – **Breytenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) at 227.

[15] The leading case in this regard is **Maharaj v Barclays National Bank** 1976 (1) SA 418 (A) at 426C where Corbett JA had this to say about the ambit of the rule of disclosure as it applies to the remedy of summary judgment:

“The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence 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.”

The principle generally requires that details of the defence, the grounds thereof and the underlying material facts must be disclosed with sufficient particularity and completeness in the defendant’s opposing affidavit.

- [16] Although the general principle strongly militates against bare denial in affidavits used to resist summary judgment, in certain circumstances, however, a simple denial may be perfectly adequate. That will be the case in circumstances where, on a proper consideration of all the information before the court, it appears that there is substantive merits in a specific denial, though bare it may be – **Webb v Shell Zimbabwe (Pty) Ltd** 1982 (2) SA 263 (ZHC) at 768A; **District Bank Ltd v Hoosain and Others** 1984 (4) SA 544 (C); **Maharaj**, *supra*, at 425G – 426E.

- [17] This court has held over the years, as did many other courts elsewhere in our land, that a simple denial in an opposing affidavit is insufficient to avoid summary judgment – **Van Zyl v Wheeler** 1964 (3) SA 758 (O) at 760A. In the case of **Nichas and Son (Pty) Ltd v Papenfus** 1969 (2) SA 494 (O) at 496D Erasmus J said:

“Die blote ontkenning onder die eerste grond is niksseggend met die oog op die vereistes van die Reël, want hy sê nie waarop die ontkenning berus nie.”

In the case of **Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies** 1974 (2) SA 584 (O) at 587D the court per Erasmus J stressed that Uniform Rule 32(3)(b) requires the defendant's opposing affidavit to disclose fully the nature of the defence, the grounds of such a defence and the material facts relied upon so that the court can be reasonably satisfied that the defendant has a *bona fide* defence, and not be merely satisfied that he "appears" to have to a *bona fide* defence.

See also **Arend & Another v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C) at 303 – 304.

[18] In summary judgment proceedings, it is insufficient for a defendant to merely allege that he has no knowledge of the plaintiff's allegation or that he regards those allegations with suspicion – **Hendricks v Saacks and Another** 1945 CPD 270 – 272.

[19] The question in the appeal before us was whether the appellant has, with sufficient particularity and completeness, disclosed the material facts on which he relied for his defence. His defence, it will be recalled, was that he did not sign the lease agreement on which the respondent's cause of action was based. Put differently, the crux of his defence was that he had no knowledge of the respondent's claim. Therefore, the matter revolved around the question of *bona fides* to a great extent. To that aspect I shall return later.

- [20] As regards the respondent's claim, the following important facts were undisputed: Firstly, the respondent had in his possession a written contract – annex "a". The contract was signed in Bloemfontein on 1 August 2006. The contract concerned the lease of a residential property. The lessee was described as "P.T. Kgotlagomang". The effective date of the lease agreement was 1 September 2006. The lessee's primary contractual obligations were to pay for the occupation of the property, the supply of water and the supply of electricity. The respondent's cause of action was restricted to only two of those three amenities. Therefore, the respondent implicitly acknowledged or averred that the lessee had paid the agreed rental in full before these action proceedings were initiated.
- [21] Secondly, the record revealed that on 27 July 2006, some four days before the lease agreement was signed, the respondent's estate agent caused a lease application form to be completed by someone who was looking for a place. Such a person identified himself as Patrick Thabang Kgotlagomang. It was common cause that all the personal particulars given in the lease application form precisely corresponded with the appellant's correct personal particulars. The respondent was in possession of the lease application form and attached it to the lease agreement relied upon. The surname on the lease application and the surname on the lease agreement precisely tallied. The initials on those two documents also completely tallied.

[22] Thirdly, the respondent's papers, particulars of claim to be precise, also included a copy of an identity document. Again it was an undisputed fact that the photograph as well as all the personal particulars of the identity document precisely corresponded with those of the appellant.

[23] Fourthly, also included in the respondent's particulars of claim was a copy of a salary advice. Again there was no dispute that virtually all the details appearing on the document accurately corresponded with those of the appellant's salary advice. In fact, the document was representative of the appellant's true salary advice.

[24] It was the respondent's case that his estate agent received all the aforesaid documents from the appellant and that the lease application and the lease agreement were signed by the appellant himself and no other person.

[25] As regards the appellant's response to the respondent's detailed claim, the following simple sentence was his answer:

“2.6 I have a *bona fide* defence to the Applicant's claim in that the signature relied upon is not mine;”

[26] The appellant contended that he, on two occasions, explained to the respondent's attorney that the signature relied upon was not his genuine signature. On 25 March 2013 the appellant signed his opposing affidavit in Bloemfontein – *vide* page 39 of the record. One does not have to be a handwriting expert to

come to the conclusion *ex facie* the relevant documents that the lease application signed on 27 July 2006, as well as the lease agreement signed on 1 August 2006 on the one hand and the opposing affidavit signed 25 March 2013 were all signed by one and the same person. The similarities of the three substantially compel that conclusion. If it is accepted, and I cannot see how it can be denied, that the signature on the opposing affidavit was that of the appellant, then I find it very difficult to say the signature on the lease application and the lease agreement were forged by some faceless person.

[27] The other thing was this: The appellant's opposing affidavit is more important for what he did not say than what he actually said. The appellant made no attempt whatsoever to explain how his very personal document, such as his salary advice and identity document, landed in the wrong hands of the respondent. The lease application form contained very confidential information such as the appellant's banking details, his brother's name, his brother's residential address at Edenville far from Bloemfontein, his brother's telephone number, the name of his employer in Bloemfontein, his occupation and his previous residential address in Bloemfontein. How on earth would the respondent have known about such a great variety of details not only concerning the appellant alone, but his brother as well?

[28] Moreover, we were in the dark, as was the court *a quo*, as to precisely where the appellant, a prosecutor in Bloemfontein, was actually staying at the time the respondent alleged he was

occupying his property. The respondent's cause of action was that the appellant was in actual occupation of his property. That allegation was the heart of the respondent's cause of action. According to the respondent, during his occupation, so the respondent alleged, the appellant consumed water and electricity supplied to him as the respondent's lessee. The respondent verified those allegations on oath. However, the appellant did not, on oath, pertinently deny such averments. The omission was telling against the appellant's *bona fides*. It substantially strengthened the respondent's version. The appellant's omission to deal with the incriminating paper trail also materially bolstered the contention that the appellant really had no triable defence.

- [29] Mr Khang spent a great deal of time arguing that the respondent's attorney did not investigate the appellant's complaint or contention that he did not sign the lease agreement. The argument failed to impress me. The appellant did not expressly say precisely what information he gave to the respondent's attorney to warrant such an investigation. By the look of things the appellant merely and orally made a bold and unsubstantiated allegation that the signature was not his to the attorney as he did in his opposing affidavit. There was nothing worth investigating in my view. It was not his case that he gave the respondent's documentary proof, such as a different lease agreement or bond agreement or habitat certificate or any affidavit by the landlord or owner of the place where he was staying at the time material to this dispute or any other credible and reliable information

whatsoever of where he was staying at the time material to these proceedings.

[30] In my view, on the facts, the appellant was required to do more than his simple denial. He dismally failed to disclose fully the material facts on which the nature of his implied defence of fraud was crafted. Any suggestion that the respondent, an attorney, acted fraudulently, had no substance at all. In the instant appeal an objective examination of the two versions showed that there has been no sufficient disclosure by the appellant of the nature and the ground of such defence and the facts upon which it was founded. This is the one crucial consideration. The other equally crucial consideration was that the alleged defence of fraud was, besides the finding that it was not fully disclosed, further not *bona fide* and not good in law. The court *a quo* found that the appellant did not succeed to cross the second threshold as well. Such a finding is one which I, on appeal, cannot hold to be wrong – **Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture** 2009 (5) SA 1 (SCA).

[31] Certainly this appeal was not one of those exceptionally rare cases where a simple denial may be adequate to successfully repel an attack by way of summary judgment – **Webb's** case, *supra*. The hard facts of the matter justified the magistrate's conclusion that the appellant simply had no meritoriously sustainable defence. Since the appellant had no proven triable issue, the court *a quo* correctly shut him out.

- [32] The idea underlying the rule is to grant speedy relief to a plaintiff with a strong and unanswerable claim against a defendant with no sound and triable defence. Such a defendant has to be locked out as early as possible unless (s)he can show as early as possible that (s)he honestly has an arguable and triable defence and not a hopelessly unsustainable and disingenuous defence.
- [33] It is not every person who enters an appearance to defend who is, without more, guaranteed a free passage to trial. Only a defendant with a triable issue, in other words, an honest and sustainable defence, is allowed to proceed – **Joob Joob**, *supra*. The important check-point, where defences are closely scrutinised to determine whether a defence is triable or not, is located in the summary judgment centre.
- [34] The appellant opposed the respondent's application for summary judgment. Because he did, he was necessarily obliged to fully disclose his defence. He was entitled to dispute the respondent's claim. However, a bold denial did not suffice. He was obliged to advance a *bona fide* denial of the respondent's cause of action – **Herbst**, *supra*. It was not sufficient to merely deny the signature. Such a simple denial did not satisfy the rule. By so doing, he failed to honestly and factually elaborate on his simple denial.
- [35] The respondent's case, as pleaded, demanded much more disclosure than the appellant disclosed to make his defence meaningful. His mere denial meant nothing at all, because he

did not say on which ground such denial was founded – Nichas, *supra*.

[36] The appellant was obliged in terms of the rule to satisfy the court *a quo* that he had a defence, which was *bona fide* and good in law. A defendant who does not fully, honestly and factually demonstrate the substance of his or her defence in the opposing affidavit breaches the rule. In order to successfully resist summary judgment, it is incumbent upon a defendant to frankly demonstrate the underlying honesty of his defence. He must show that he has a *bona fide* defence, but not merely that his defence appears to be so – Jacobsen, *supra*.

[37] The appellant wanted the court *a quo* to believe that some mischievous individual stole his very private documents, fooled the respondent's estate agent, and falsely represented to such agent:

- that such fraudster was the appellant;
- that a fraudster fraudulently signed the lease agreement;
- that a fraudster occupied the premises and paid rental in the name of the appellant for months; and
- that a fraudster did all those things in order to get free supply of water and electricity at the expense of the respondent.

Alternatively, the appellant insinuated that there was a foul play on the part of the respondent's estate agent. What we have here is nothing more than subjective suspicion. The appellant merely tried to cast some unfounded cloud of

suspicion about the respondent's averments. His mere unexplained suspicion concerning the respondent's averments was insufficient to justify refusing summary judgment and granting him leave to defend – **Hendricks**, *supra*.

[38] In my view the court *a quo* was quite correct in granting summary judgment against the appellant. If I had heard the matter as a court of first instance, I would not have come to a different conclusion. The appellant has failed to make out a *prima facie* case that he has a triable defence. That being the case, he was not entitled to leave to defend.

[39] It is very easy to deny one's signature. If such simple denials, unexplained defences, and vague suspicions were to be glorified as triable issues or *bona fide* defences – then the commercial world would be absolutely paralysed with catastrophic economic repercussions. The courts would not cope with the resultant endless tide of commercial litigation. We have to adjudicate disputes responsibly lest we open floodgates for undeserving litigants. That, in my view, would sound the death knell for the efficacy of the sifting procedure designed to afford a deserving plaintiff inexpensive and speedy relief against an undeserving defendant.

[40] A trial court has of course a discretion to refuse summary judgment and to afford a defendant an opportunity of having his day in court. However, such a discretion always has to be judiciously and not arbitrarily exercised. Where, as in this appeal, the defence is not only materially deficient, but also

substantially lacks *bona fides*, no legitimate ground exists for generously exercising the residual discretion the court has in favour of the defendant *in casu* the appellant. On the facts I am satisfied that the respondent's case, as pleaded, was substantively unanswerable. He was, accordingly entitled to have summary judgment granted in his favour. See **Maulgue Roan v Futurevista CC** (2013/32037) [2014] ZAGPJ 64 (28.03.2014) at [6] per Van Oosten J. The purpose of the rule is to accelerate the progress of our civil justice system and not to retard it for flimsy reasons.

[41] In the result:

41.1 The appeal is dismissed with costs.

41.2 The order of the court *a quo* whereby summary judgment was granted in favour of the respondent as the plaintiff, against the appellant as the defendant, is confirmed.

M. H. RAMPAL, AJP

I concur.

I.M.M. MOTLOUNG, AJ

On behalf of appellant: Attorney M. Khang
Instructed by:
Mphafi Khang Inc
BLOEMFONTEIN

On behalf of respondent: Attorney L. Visser
Instructed by:
Kramer Weihmann & Joubert Inc
BLOEMFONTEIN

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