



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

**Reportable / Not
reportable**

Case no: A45/2024

In the matter between

**THE TRUSTEES FOR THE TIME BEING OF THE
PIETER VAN DER MERWE TRUST**

APPELLANT

and

412 BRANDFORDT CC

RESPONDENT

Neutral citation: *The Trustees for the Time Being of the Pieter Van der Merwe Trust v 412 Brandfordt CC*, Case number: A45/2024

Coram: Mhlambi, J et Chesiwe, J et Molitsoane, J

Heard: 2 August 2024

Delivered: This judgment was handed down in open court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 14 February 2025.

Summary: whether the court *a quo* erred in granting summary judgment against the defendant trust- whether the defendant trust raised a bona fide defence to resist summary judgment- principles in an application for summary judgment restated- held that the court *a quo* erred in finding that the defendant trust failed to raise a triable

issue or defence to resist summary judgment- order of the court *a quo* set aside and the appeal upheld.

ORDER

1. The appeal is upheld and the order of the court *a quo* is set aside and replaced with the following:

- “ 1. The application for summary judgment is dismissed.
2. The defendants are granted leave to defend the action.
3. The costs of the application shall be costs in the cause.”
2. Each party shall bear its costs of the appeal.

JUDGMENT

Molitssoane, J (with Mhlambi, J et Chesiwe, J concurring)

[1] This appeal emanates from the order of a single judge of this Division. The respondent, 412 Brandfort CC, a close corporation duly registered in terms of the Close Corporations Act 69 of 1984, and plaintiff in the court *a quo*, instituted an action against the appellant, the trustees for the time being of the Pieter van der Merwe Familie Trust, defendant in the court *a quo*. For convenience, the parties shall be referred to as in the court *a quo*.

[2] The plaintiff, as the registered owner of the farm Franz Hoek 412 entered into a written long-term lease agreement (the agreement) with the defendant in terms of which the plaintiff leased the farm aforementioned to the trust. The late Evert de Beer signed the agreement on behalf of the plaintiff while Pieter Nicolaas van der Merwe, signed on behalf of the defendant, as one of its trustees. This agreement was later registered in the Deeds Registry against the title deed of the plaintiff.

[3] The plaintiff's case is based on an alleged breach of the lease agreement. The case of the plaintiff is that: first, the defendant trust has failed to make monthly rental payments as agreed. According to the plaintiff's particulars of claim, the defendant trust is

indebted to the plaintiff in the amount of R593 696.26 (five hundred ninety-three thousand six hundred ninety-six rand twenty-six cents) being the arrears of rental; second, that defendant trust also failed to make payments to the plaintiff in respect of the net income of the pecan nuts harvested on the farm; third, that the defendant also breached the agreement in respect of other obligations imposed by the agreement. The said obligations, however, do not play a part in the application for summary judgment. I will consequently make no reference to them.

[4] The plaintiff thus claims, inter alia, cancellation of the notarial long-term lease; the payment of R593 696.26 26 (five hundred ninety-three thousand six hundred ninety-six rand twenty-six cents) and ejectment of the defendant trust from the farm.

[5] The defendant trust raised a number of defences which were pleaded in the alternative to the main defence. The nub of the defendant trust's main defence is that the lease agreement was amended in 2018 by way of a resolution by the trustees of the De Beers Trust passed on 9 April 2018 (annexure P1) and accepted by the defendant trust per resolution on 29 April 2018 (annexure P2). The role of De Beers Trust will become clearer later in this judgment. The defendant trust also pleaded that an amount of R203 130.88 (two hundred three thousand one hundred thirty rand eighty-eight cents) of the claimed amount of R593 696.26 (five hundred ninety-three thousand six hundred ninety-six rand twenty-six cents) had prescribed. The plaintiff conceded that in respect of this plea of prescription, summary judgment could not be sustained. The court *a quo* thus granted leave to the defendant trust to defend the balance of the claim of R203 130. 88 (two hundred three thousand one hundred thirty rand eighty-eight cents).

[6] In order to appreciate the defendant trust's defence, it is necessary to reproduce the following as pleaded:

"4.3 [...] the First to Third Defendants plead that when annexure POC2 was concluded on 2 March 2018, the late Mr. Evan de Beer was in terms of Section 29(1A) of Act 69 of 1984 the sole member of the Plaintiff in his capacity as a trustee and the appointed representative of the De Beers Trust [IT/001154/2015(B)] and represented the Plaintiff in the aforesaid capacities.

4.4. On or about 9 April 2018 at Welkom, the trustees of the De Beers Trust passed a resolution, a true copy of which is appended hereto marked annexure "P1".

4.5. On 29 April 2018 at Welkom, the First to Third Defendants accepted the written terms of annexure "P1", as per the resolution appended hereto as annexure "P2".

4.6. In the premises, the annexure POC2 was validly amended by replacing clause 2.1.1 (2.1.1.1 – 2.1.1.3) thereof with the following relevant and express terms:

4.6.1. Monthly rental payments for the property (excluding the pecan nut orchid) would be made by means of:

4.6.1. cession of the Discovery policy with policy number 5131016203 of Mr. Pieter Nicolaas van de Merwe for the insured value of R6 000 000 to the De Beers Trust;

4.6.1.2. payment by the First to Third Defendants of the monthly policy premiums in the sum of R11 481 (ELEVEN THOUSAND FOUR HUNDRED AND EIGHTY-ONE RAND) per month until expiry of the lease period on 30 June 2037;

4.6.2. Should Pieter Nicolaas van der Merwe pass away prior to the expiry of the lease period on 30 June 2037, the rental would be regarded as having been fully paid until 30 June 2037.

4.7. The First to Third Defendants plead that they have complied with the terms of the amendment above in that the policy was ceded to the De Beers Trust and policy premiums are paid in full."

[7] The deponent of the plaintiff's founding affidavit supporting the application for summary judgment verified the cause of action, the claims, the amounts alleged to be owed to the plaintiff, and the grounds relied upon. She further dealt with the defences raised by the defendant trust as rule 32(2)(b) required. She attacks the defence of the defendant trust relating to the variation of the agreement on the basis that annexures P1 and P2 do not evince an amendment of the contractual agreement between the plaintiff and the Trust. Simply put, she denies that the annexures constitute an offer and acceptance to bring into being an amendment to the agreement. She contends that "...the asserted variation is not embodied in 'a written agreement signed by both parties' as required by clause 16.1 of the lease agreement".

[8] The procedure of summary judgment serves to grant a plaintiff speedy relief by way of a judgment without the necessity of a trial. In this regard, the plaintiff must demonstrate that the defendant has no defence to the claim and has only entered an

appearance to defend to delay the finalization of the trial. Where the defendant raises a defence valid in law, he or she must be given the opportunity to defend the case. In an application for summary judgment, what is expected of a defendant in resisting judgment is simply that "defendant must make factual averments under oath which, if they are proved, would constitute a defence in law and must be set out in such a manner as to satisfy the court that the defendant *bona fide* intends to rely thereon."¹ It thus stands to reason that the defendant must only make allegations which he relies upon in defence of the claim against him/her. At this stage of the proceedings, he/she need not prove the allegations. That task of adjudicating proof of the allegations lies with the trial court. In an application for summary judgment, the court does not delve into the merits or demerits of the case. *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*² explained it as follows:

"This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case."

[9] The court in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*³ held that the "...procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court." It is against these principles that this application has to be adjudicated upon.

[10] The issue for determination in this appeal is whether the defendant trust has raised a *bona fide* defence in the application for summary judgment, if proved on trial, would constitute a valid defence in law.

[11] In rejecting the defence of the defendant, the court *a quo* based its decision on two findings: First, the court *a quo* found that 'neither the resolution nor the minutes of the meeting relied on by the respondents evince a contractual agreement between the applicant and the Trust; second, the court went further to say that "...the resolution is not an offer to the Trust made by the applicant with the intention that, by its mere acceptance, a contract should be formed. Even if it was to be accepted that the resolution was an offer

¹ *Malherbe v Absa Bank Ltd* (A202/2013) [2014] ZAFSHC 200(30 October 2014) par 4.

² [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) para 23.

³ 2009(5) SA 1 at 11G-12D.

by the applicant to the Trust, the minutes dated 29 April 2018 relied on by the respondents do not constitute an acceptance of such an offer if regard is to the contents of the resolution.”⁴

[12] In my view, the court *a quo* failed to appreciate what is expected from the defendant in resisting summary judgment. It is not expected of a defendant to prove the merits of his defence or the allegations he raises. Whether the resolution and the minutes ‘evince a contractual agreement’ revolves around a factual and/or interpretational issue which raises a dispute of fact best left to the trial court to adjudicate. The trial court would be able to delve into and make findings on issues like the parties’ intention about the resolution and the minutes and whether the resolution was intended to be an offer and the minutes an acceptance.

[13] The trust defendant pertinently pleaded that the agreement was amended, and importantly, it averred that the defendant had “complied with the terms of the amendment...in that, the policy was ceded to the De Beers Trust and policy premiums are paid in full.” (My emphasis)

[14] In as much as this court is not delving into the intention of the parties in the resolution and the minutes, one cannot help but wonder why the defendant trust took this Discovery policy and paid its premiums. Will that aspect not be an issue when the trial court interrogates the parties’ intention and, ultimately, whether the agreement was varied? That question can only be resolved during the trial. The court *a quo*, in my view, erred in deciding the intention of the parties on papers when it was evident in the affidavits that the parties held divergent views. On this point alone, summary judgment should not have been granted. It is unnecessary to consider the alternative defences raised as the main defence is dispositive of this application.

[15] The issue of costs lies in the discretion of the court. On the papers before us, it cannot be said that the plaintiff was not entitled to resist the appeal. While there are merits in the case of the defendant, there are also merits in the case of the plaintiff. The issues raised would best be dealt with during the trial. I accordingly make this order:

⁴ See paras 17 and 18 of the judgment of the court *a quo*.

ORDER

1. The appeal is upheld, and the order of the court *a quo* is set aside and replaced with the following:
 - "1.The application for summary judgment is dismissed.
 - 2.The defendants are granted leave to defend the action.
 - 3.The costs of the application shall be costs in the cause."
2. Each party shall bear its costs of the appeal.


P.E. MOLITSOANE, J

I concur


J.J. MHLAMBI, J

I concur


S CHESIWE, J

Appearances

For the Applicant: Adv. HJ Van der Merwe
Instructed by: Bezuidenhouts Inc. Attorneys
BLOEMFONTEIN

For the Respondent: Adv. WA Van Aswegen
Instructed by: Peyper Attorneys
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