REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

29/08/2019

DATE SIGNATURE

CASE NO: A3020/19

In the matter between:

FIDELITY CORPORATE SERVICES (PTY) LTD Appellant

and

ROGER DAVID PROPERTY (PTY) LTD Respondent

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] This is an appeal against the whole of the judgment delivered by acting Magistrate Motsoeli on 18 October 2018 at Roodepoort, in terms of which summary judgment was granted in favour of the respondent.

[2] The appellant filed its plea to the respondent's particulars of claim prior to the delivery of its affidavit resisting summary judgment (*'the affidavit'*). The plea was not attached to the affidavit. The following appears at para 12 of the affidavit:

> 'As stated above, the original Plea was already served on the Applicant's Attorneys of Record on 16 July 2018 and filed at Court on the 17th of July 2018 under the above case number and to which I respectively (sic) refer the above Honourable Court. I confirm the correctness of the facts as pleaded by the Respondent in its Plea, and also confirm that the Plea correctly sets out the defence of the Respondent. To the extent necessary for purposes of opposing the Application for Summary Judgement, **I repeat herewith the contents of the Plea.** In particular paragraphs 2 and 3 thereof, as if specifically stated by myself herein.' (emphasis provided)

[3] The court *a quo* rejected the appellant's reliance on the contents of the plea and found that consideration of the plea, in the circumstances, would be irregular.

FAILURE TO HAVE REGARD TO THE CONTENT OF THE PLEA

[4] The court *a quo* found that *'the Plea is not before Court and to consider it would be irregular. There is thus no defence before Court.'*

[5] The court *a quo*, in assessing the content of para 12 of the affidavit[1] adopted a narrow interpretation of the contents of Rule 14(3)(b). The Magistrate, erroneously so, interpreted the provision as to require a defendant to verbatim set out the nature

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[1] Paragraph 2 hereof

and grounds of the defence within the affidavit resisting summary judgment irrespective of whether the deponent, under oath, had incorporated such facts by reference.

[6] Although dealing with a rescission of judgment application, the principle as enunciated in *Kruger*[2] is pertinent to the present facts. The court stated that:

> "Waar, soos in die onderhawige saak, die appellant verwys na stukke wat deel van daardie saak uitmaak en wat alreeds op die respondent of sy prokureur bestel is, die inhoud daarvan bevestig en daarop staatmaak vir sy bewering dat hy 'n *bona fide* verweer het, is dit na my mening voldoende nakoming van die bepalings van Reël 49(2) van die Landdroshofreëls - dit wil sê solank 'n *bona fide* verweer inderdaad in die stukke waarna verwys word uiteengesit word."[3]

[7] In *Shell Zimbabwe*[4], Macnally AJ, in similar circumstances, commented as follows:

> "The plea was filed on 15 July 1981 and the defendant's affidavit on 22 July 1981, but strangely no reference is made in the affidavit to this point, nor is the plea incorporated by reference. The plea is therefore not before the Court in the sense that the allegations in it are supported by oath, whereas the allegations in the declaration and its annexures are (if only by necessary inference) supported by the oath of the applicant."

[8] The content of the appellant's plea in the present matter has expressly been incorporated into the affidavit resisting summary judgment.

[9] The plea and its contents ought to have been taken into account by the Court *a quo* to determine whether the appellant has a *bona fide* defence to the respondent's claim.

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[2] *Kruger v Standard Krediet Korporasie BPK* 1988 (1) SA 570 (T);
[3] Ibid. 573;
[4] *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 (4) SA 749 (Z) 755;

GENERAL PRINCIPLES

[10] A defendant in summary judgment proceedings is required to:

> "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."[5]

[11] In *Joob Joob*[6], Navsa JA stated the following:

> "[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."

[12] In *Maharaj*[7], Corbett. JA, said the following:

> "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt

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[5] Magistrate's Court Rule 14(3)(b)
[6] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA);
[7] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A;

to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. 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. (See generally, Herb Dyers (Pty.) Ltd. v Mohamed and Another, 1965 (1) SA 31 (T); Caltex Oil (SA) Ltd. v. Webb and Another, 1965 (2) SA 914 (N); Arend and Another v. Astra Furnishers (Pty.) Ltd., supra at pp. 303 - 4; Shepstone v. Shepstone, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See Estate Potgieter v. Elliott, 1948 (1) SA 1084 (C) at p. 1087; Herb Dyers case, supra at p. 32.)."

[13] Madondo DJP, in *Nedbank*[8], stated the following pertaining to the words "*bona fide* defence" with reference to Rule 32(3)(b):

"[21] *'Bona fide'* relates to the defendant's subjective state of mind — that it believes its factual statement to be true. Actually, *'bona fide'* means to allege facts which, if proved at a trial, would constitute a good defence to the claim made against him. All this, shows that *'bona fide'* has to do with the belief on the part of the defendant as to the truth or falsity of his factual statements. However, it does not end there, the defence in question must also be good in law."

[8] *Nedbank Ltd v Zevoli 208 (Pty) Ltd and Others* 2017 (6) SA 318 (KZP)

DOES THE APPELLANT HAVE A *BONA FIDE* DEFENCE?

[14] The respondent's claim is for a refund in respect of *inter alia*, rates and taxes paid by the respondent after the date of transfer of a property to the appellant.

[15] The respondent relies on clause 6.2 of the sale of property agreement ('*the agreement*') which reads as follows:

> "The purchaser [appellant] shall refund to the seller [respondent] any amounts paid as rates and taxes, costs and other outgoings with regard to the property prepaid by the seller beyond the transfer date, **provided that such apportionment and refund** is not attended to directly by the local authority concerned. Such payment shall be effected within 30 (thirty) days of the transfer date." (emphasis provided)

[16] Annexure "1" to the plea is a rates statement addressed to the respondent. The respondent's account has been credited in the sum of R59 882.45 ('*the amount*'). The statement is dated after the date of registration of transfer and the appellant contends the amount is that which was prepaid by the respondent beyond the transfer date. Properly construed, so the appellant contends, such credit is to be considered an '*apportionment and refund*' as contemplated in clause 6.2 of the agreement.

[17] The appellant, premised upon the aforesaid, coupled with the reliance upon a breach of the agreement on the respondent's part, denied a legal liability to pay the respondent any sum.

[18] The breach contention is premised upon, *inter alia*, the failure of the respondent to take steps, inclusive of the signing of documents, in order to obtain the refund directly from the Local Authority. Having regard to the judgment of *Atlantis*[9], the prospects of success of this defence seems limited. However, from an interpretational perspective, the credit given to the respondent may well be found to constitute an '*apportionment and refund*' attended to directly by the local authority.

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[9] *Atlantis Property Holdings CC v Atlantis Exel Service Station CC*, 2019 (3) ALL 441 (GJ)

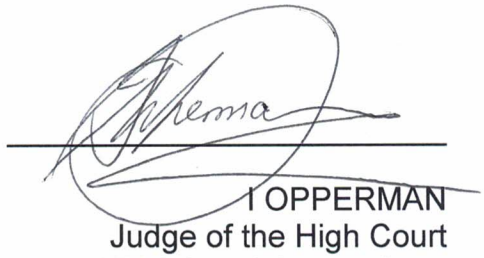
[19] The facts underpinning this interpretation must of course still be shown to exist but in our view, sufficient facts have been placed before us to conclude that there exists a triable issue worthy of the attention of the trial court. This is particularly so as interpretation is now a unitary exercise and context is paramount[10].

[20] We accordingly make the following order:

20.1. The appeal is upheld with costs.

20.2. The order granted on 18 October 2018 is set aside and replaced with the following:

'The application for summary judgment is dismissed and costs are in the cause.'



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

H.E MKHAWANE
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 5 August 2019
Judgment delivered: 29 August 2019
Appearances:
For Appellant: Adv WA de Beer
Instructed by: Blake Bester De Wet & Jordaan Inc
For Respondent: Adv S McTurk (heads of argument) – Adv Garvey – appeal hearing.
Instructed by: Otto Krause Inc

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Novartis v Maphil* [2015] ZASCA 111