



Signature: N/ADAM

ADAM AJ

Introduction

- [1] In this matter the Plaintiff seeks summary judgment against the Defendants, jointly and severally, the one paying the other to be absolved for return of certain equipment rented to the 1st Defendant in terms of a Master Rental Agreement, payment of outstanding rentals, interest and costs as between an attorney and client.
- [2] The Defendants do not deny the conclusion of the agreement but contend that they have *bona fide* defences to the Plaintiff's claim and thus submit that the Plaintiff's summary judgment application should be dismissed, with costs.

Leave to file a supplementary affidavit

- [3] The Defendants filed their affidavit opposing summary judgment on 25 August 2021 and a supplementary affidavit on 15 November 2021. The 68-page supplementary affidavit was filed 4 court days before the set down date of 22 November 2021.
- [4] The Plaintiff naturally objected to the supplementary papers which were filed at such a late stage and without obtaining the leave of the court. The Defendants submitted that there was no prejudice to the Plaintiff as the supplementary affidavit did not include any new issues. The Plaintiff's counsel submitted that he had to analyse the 68-page supplementary affidavit to determine whether any new issues had been raised and the exercise was time consuming.
- [5] In view of the Defendants' request that the court allow them to use the

information contained in the supplementary affidavit as it “*is in the interests of justice and the fair adjudication of the matter*”, the prejudice to the Plaintiff can be cured by an appropriate cost order in their favour.

- [6] In the circumstances, the Defendants’ request to admit their supplementary affidavit is granted. However, the Defendants are to pay the additional costs occasioned by the filing of the supplementary papers.

The Defendants’ defences

- [7] The Defendants abandoned the special plea of jurisdiction.
- [8] The Defendants raised an issue with respect to the deponent to the Plaintiff’s founding affidavit. The said deponent’s personal knowledge of the facts relevant to this matter, particularly in respect of the Defendants’ defences, and his ability to swear positively to the required facts have been denied. Furthermore, the Defendants submitted that the Plaintiff has failed to set out facts sufficient to support the contention that the said deponent has the requisite knowledge to depose to such an affidavit in the circumstances.
- [9] The Supreme Court of Appeal in *Rees & another v Investec Bank Ltd* held that:
- “As stated in Maharaj, ‘undue formalism in procedural matters is always to be eschewed’ and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. Firsthand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial*

institution or large corporation. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.”

[10] In the circumstances, the defendants’ issue with regard to the deponent to the Plaintiff’s affidavit does not assist in their defence to the summary judgment application.

[11] On the Rental Agreement, the Defendants stated that the said agreement was negotiated in a manner that was unfair, unreasonable, unjust, and unconscionable towards the First Defendant, particularly if regard is had to the fact that:

11.1 the relevant terms of the agreement and the nature and effect of these terms were not drawn to the First Defendant’s attention prior to entering into the agreement in circumstances where they should have been;

11.2 the First Defendant was not given an adequate opportunity to peruse and comprehend the nature and effect of the said relevant terms thereof prior to being required to sign the said agreement;

11.3 the terms of the said agreement are unfair, unreasonable, unjust, and unconscionable as towards the First Defendant, are excessively one-sided in favour of the Third Party and so adverse to the First Defendant as to be inequitable.

[12] The Defendants submit that consensus was not reached in respect of the

Rental Agreement and that the agreement is void *ab initio* and not binding upon the First Defendant. At the very least, it is submitted that the First Defendant had the election to cancel the said agreement, which it has done.

[13] It is alleged that not all of the equipment, as set out in the Rental Agreement, was delivered to the First Defendant, particularly in that one of the copiers delivered to the First Defendant did not accord with the description and specifications contained in the Rental Agreement.

[14] Furthermore, the Defendants state that the equipment that was delivered:-

14.1 was not installed correctly;

14.2 was not fit for the purpose for which it was purchased;

14.3 was of poor quality and low value;

14.4 was not in good working order and was defective;

14.5 was not useable and durable for the entire duration of the agreement;

14.6 did not operate at all, alternatively, did not operate optimally, efficiently and/or properly;

14.7 was unsuitable and/or incompatible for the First Defendant's business.

[15] In light of the foregoing, the Defendants state that all of the equipment related to this matter was returned to the Third Party.

[16] The Defendants have joined the Third Party to the action and have instituted a Claim-in-Reconvention against the Plaintiff and the Third Party, for payment of the sum of R294 572.50, which Claim-in-Reconvention is based

on the contentions set out above.

The law

[17] In terms of uniform rule 32(2), in order to successfully oppose the present summary judgment application, the Defendants must satisfy the court that they have a *bona fide* defence to the action upon which this application is based.

[18] “Satisfy” in this context does not mean “prove”, as what rule 32 requires is that the Defendants set out in their opposing affidavit facts which, if proved at the trial, will constitute an answer to the Plaintiff’s claim, (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Standard Bank of SA v Friedman* 1999 (2) SA 456 (C) and *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W).)

[19] The Defendants are not required to disclose the whole of their defence, it is sufficient if they disclose the nature and grounds of a *bona fide* defence and the material facts relied upon therefore, (*Venter v Cassimjee* 1956 (2) SA 242 (N); *Venter v Kruger* 1971 (3) SA 848 (N) and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426.)

[20] The rule does not require the Defendants to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence. It is not the intention of the subrule to provide the Plaintiff with the unilateral advantage of a preview of the Defendants’ evidence, *Edwards v*

Menezes 1973 (1) SA 299 (NC) 304.

- [21] In fact, affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence (*Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) 678) and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purposes of the rule, *Von Zahn v Credit Corporation of SA Ltd* 1963 (3) SA 554 (T).
- [22] The Defendants are not at this stage required to persuade the court of the correctness of the facts stated by them or, where the facts are disputed, that there is a preponderance of probabilities in their favour, (*Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) 303-304) nor does the court at this stage endeavour to weigh up or decide disputed factual issues or to determine whether or not there is a balance of probability in favour of the one party or another, *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426. See also *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) 366; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) 303 and *Venter v Kruger* 1971 (3) SA 848 (N) 852.
- [23] Furthermore, the court is not called upon to consider whether the defence is likely or unlikely to succeed, *Davis v Terry* 1967 (4) SA 98 (SR).
- [24] The court merely has to consider whether the facts alleged by the Defendants constitute a good defence in law and whether that defence appears to be *bona fide*, *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418

(A); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) and *Cronje v Cooper* 1978 (1) SA 268 (N).

[25] It will be sufficient if a defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing, *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

[26] Even where an opposing affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable, *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (A).

Analysis of the facts

[27] The Defendants supplementary affidavit was an attempt to provide as much evidence as they could in support of their defences. On a reading of the supplementary affidavit, it is clear that sufficient facts exist to disclose a defence to the Plaintiff's case. Clearly, given sufficient time and the processes afforded to a litigant in terms of the rules of court such as, *inter alia*, discovery, the Defendants may successfully defend the action.

[28] Furthermore, the Defendants sent through correspondence to cancel the Rental Agreement in March 2020 and as far back as that date, set out the basis of the cancellation and termination of the Rental Agreement on similar grounds. This reinforces the view that the Defendants' submissions are *bona*

fide and not contrived.

[29] The rule does not require the court to scrutinize the Defendants' defences at this stage and to decide the matter on a balance of probabilities in favour of the Plaintiff or the Defendants.

[30] Suffice to say that as the court has a doubt whether the Plaintiff's case is unanswerable, the court may exercise its discretion in favour of the Defendants and grant them leave to defend.

Costs

[31] The Defendants submitted that costs should be awarded against the Plaintiff as the application for summary judgment by the Plaintiff constitutes an abuse of process and/or unnecessary and unreasonable litigation on its part.

[32] I do not agree with the Defendants in this regard as the Plaintiff was simply exercising its rights afforded to it in terms of the rules of court.

Order

[33] I accordingly grant the following order:

(1) The application for summary judgment is refused.

(2) The Defendants are granted leave to defend the action.

(3) Costs in the summary judgment application are to be costs in the cause, subject to prayer (4) below.

(4) The Defendants are to pay the additional costs occasioned by the filing of the supplementary affidavit.

A handwritten signature in black ink, appearing to read 'N Adam', is positioned above a horizontal line.

N ADAM

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg
