

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA


GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 48763/2021

DELETE WHICHEVER IS NOT APPLICABLE

- | | | |
|-----|-----------------------------|----|
| (1) | REPORTABLE | NO |
| (2) | OF INTEREST TO OTHER JUDGES | NO |
| (3) | REVISED | |

24/10/2022
DATE


SIGNATURE

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Plaintiff

and

MLONYENI MAKO

Defendant

J U D G M E N T

VAN DER BERG AJ

- [1] This is an application for summary judgment.
- [2] After the plaintiff had delivered its summary judgment application the defendant filed an amended plea which introduced a new defence. The plaintiff did not thereafter file a supplementary affidavit to deal with this new defence. The question is whether summary judgment can be granted under these circumstances.

PLEADINGS AND SUMMARY JUDGMENT APPLICATION

- [3] During or about October 2021 the plaintiff issued summons against the defendant. The relevant allegations in the particulars of claim are:
1. A company referred to as Potpale concluded a written agreement with the defendant in terms of which Potpale sold a vehicle (duly described in the particulars of claim, and hereinafter referred to as "*the vehicle*") to the defendant.
 2. The defendant had to pay an initial deposit and thereafter 71 equal instalments in the amounts specified in the particulars of claim.
 3. Ownership of the vehicle will remain vested in Potpale until all amounts outstanding in terms of the agreement had been paid by the defendant.

4. The vehicle was duly delivered to the defendant.
5. Should the defendant fail to pay any instalment on due date or fail to satisfy any of his other obligations in terms of the agreement, Potpale would be entitled to:
 - 5.1 terminate the agreement;
 - 5.2 repossess the vehicle.
6. Potpale ceded to the plaintiff all of its former rights, title and interest in and to the agreement.
7. The defendant breached the agreement by failing to pay instalments.
8. There was due compliance with the provisions of section 129 of the National Credit Act (“NCA”).
9. The plaintiff *inter alia* claimed for confirmation of termination of the agreement and return of the vehicle.

[4] On 25 January 2022 the defendant filed his plea.¹ The defendant raised the following defences:

1. The defendant denied that the plaintiff or Potpale were registered

¹ In this judgment the dates of filing of documents refer to the dates when the documents were uploaded on CaseLines.

credit providers.

2. The defendant denied that he signed the credit agreement.
3. The defendant denied the cession between Potpale and the plaintiff.
4. The defendant denied that he had breached the terms of the credit agreement.
5. The defendant denied that the plaintiff had delivered a notice as required in terms of section 129 of the NCA.
6. The defendant denied that the plaintiff had terminated the agreement.

[5] On 3 February 2022 the plaintiff filed an application for summary judgment and in its supporting affidavit dealt with the defendant's defences raised in his plea and complied with the provisions of rule 32(2) of the Uniform Rules of Court (to which I return below).

[6] On 8 March 2022 the defendant filed a notice of intention to amend his plea in terms of rule 28. There was no objection to the proposed amendment, and the amended plea was filed on 24 March 2022. The amended plea introduced the following new defence (*"the impossibility defence"*):

"11.3 In further amplification of the denial, the Defendant pleads that the Defendant was excused from payments under the agreement due to supervening impossibility of performance brought about by vis major and in particular the Covid 19 pandemic, which resulted in the South African national

lockdown from March 2020 until, during or about February 2022. The scheme for the purchase of the vehicle, a minibus vehicle was intended for the Plaintiff to create the business of a minibus taxi, which vehicle was designed for such purpose and in fact used by the Defendant for such purpose. The countrywide lockdown made the contractual performance objectively impossible as a continuation by the Defendant of his taxi business utilising the minibus taxi, which is the object of the agreement would render such illegal due to contraventions of the lockdown regulations² applicable to the Defendant's taxi business and his resultant ability to earn an income and to pay from the proceeds of that business, his obligations in terms of the purported agreement.

- [7] On 15 June 2022 the defendant's affidavit opposing the summary judgment was filed. In this affidavit the defendant does not deal with any of the defences raised in his original plea before the amendment thereof. The impossibility defence is hardly dealt with. The main point taken by the defendant was that the plaintiff had not dealt with the impossibility defence in its affidavit in support of summary judgment (which had been filed before the impossibility defence was introduced by way of amendment).
- [8] On 15 June 2022 the application for summary judgment was postponed and the defendant was ordered to pay the wasted cost. The matter was then re-

² In the defendant's amended plea, in all documents filed thereafter and in argument, the parties loosely referred to "the lockdown regulations" for the "the Covid regulations". This is clearly a reference to the regulations issued in terms of the Disaster Management Act after the President declared the Covid 19 pandemic to be a national disaster.² See: *Trustees, Bymyam Trust v Butcher Shop and Grill CC* 2022 (2) SA 99 (WCC), paragraph 2.

enrolled for 17 October 2022 and argued.

PLAINTIFF'S FAILURE TO DEAL WITH IMPOSSIBILITY DEFENCE

[9] Rule 32(3)(b) requires a defendant to “*satisfy the Court by affidavit... that he has a bona fide defence to the action; such affidavit... shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.*” The statement of material facts must “*be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim.*”³

[10] The defendant has failed to do so. The defendant did not canvass any of the defences he had raised prior to the filing of amended plea. He only baldly set out his impossibility defence. It was submitted on behalf of the defendant that the defendant had no obligation to set out his defence in the absence of the plaintiff having dealt with it in his affidavit in support of summary judgment.

[11] Rule 32 (2) reads in relevant part:

“(2)(a) *Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.*

(b) *The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's*

³ Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)

claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) ...”

- [12] Rule 32(4) precludes the tendering of evidence other than in the founding affidavit. Rule 32(4) reads as follows in relevant part:

“No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2)”

- [13] The position where a defendant has amended its plea after an application for summary judgment had been delivered is not novel and is discussed in Erasmus⁴ and in two reported judgments.

- [14] In *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) the court found that a defendant was not precluded from amending its pleading after the delivery of an application for summary judgment. The court granted the plaintiff leave to bring a fresh application on the amended plea, should such an application for amendment be allowed (the amendment had not yet been effected in terms of rule 28).

- [15] In this division in *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another* 2022 (3) SA 458 (GJ) Fisher J held that the plaintiff was entitled to make a consequential adjustment to the “*documents filed by him*” as contemplated in rule 28(8), which would include a

⁴ Erasmus: Superior Court Practice, 2022, D1-416D.

supplementary affidavit that deals with the defense raised in the amended plea.⁵ The learned judge continued:

"[20] To my mind, it stands to reason that, if the pleaded defence changes, the affidavit filed may need to be adjusted to deal with the new defence. The fact that a further affidavit is necessary for the purpose of this adjustment does not change the nature and characterisation of the founding application. Indeed, the adjustment may not be evidence-dependent at all and may require only the setting-out of a legal point. Such an adjustment would not, on any interpretation, be hit by the prohibition in subrule (4) which applies only to 'evidence'."

[16] These cases find that a plaintiff is *permitted* to bring a fresh summary judgment application or to file a supplementary affidavit under these circumstances. In my view the plaintiff was also (at least on the facts in this matter) *compelled* to do so.

[17] Erasmus' view that the court will have to be satisfied that each of the requirements in rule 32(2)(b) has been fulfilled before it can hold there has been proper compliance with the sub-rule has been confirmed in this Division.⁶ It is also implied in *Belrex* that the plaintiff will have to deal with the defendant's amended defence.⁷

[18] The reason why it is necessary for the plaintiff to deal with all the defences

⁵ At paragraphs 16-29.

⁶ *Mpfuni v Segwapa Inc and Another* 2022 JDR 0617 (GJ) at paragraphs 5 and 6 (per Maier-Frawley J).

⁷ See paragraph 35.

(including a new defence introduced in an amended plea) is illustrated in this matter. The plaintiff in its heads of argument made the following submission:

“The lock-down was largely lifted by August 2020 and taxis could operate. The respondent failed to pay the full instalments due even when there was no lock-down.”

[19] There is no factual statement in the record for which months the defendant failed to pay his instalments, or when he fell into arrears for the first time. There is merely an allegation that as at 20 August 2021 he was in arrears in a certain sum. The statement that taxis could operate after August 2020 is also not to be found in the record, and the court cannot take judicial notice of it.⁸ This type of factual averments ought to have been placed before the court by way of affidavit. The defendant could then have dealt with these allegations. The same applies to the legal submissions made by the plaintiff on the impossibility defence.

[20] Accordingly, application for summary judgment is defective in the absence of a supplementary affidavit as contemplated in the *City Square Trading* matter.

COSTS AND CONCLUSION

[21] In terms of rule 32(9) the court at the hearing of a summary judgment application may “*make such order as to costs as to it may seem just*”. In my view, even though the plaintiff’s application was defective, costs should be

⁸ The court can take judicial notice of the regulations, but not when taxis could operate or not.

reserved for the following reasons:

1. The purpose of a summary judgment process is to weed out sham defences. The defendant has still not disclosed any defence on affidavit. His initial defences were contradictory and it seems that these defence have been abandoned. As pointed out by the plaintiff's counsel, the impossibility defence was not properly motivated in the defendant's opposing affidavit. It is possible that the court at the hearing of the action may find that the impossibility defence was nothing but a delaying tactic.
2. The impossibility defence was raised at a stage when the plaintiff had already incurred costs in launching the summary judgment application.

[22] Accordingly the following order is made:

1. The application for summary judgment is dismissed and the defendant is granted leave to defend the action.
2. The costs of the summary judgment application are costs in the cause.

A handwritten signature in black ink, appearing to read 'Van der Berg', is written over a horizontal line.

VAN DER BERG AJ

APPEARANCES

For the plaintiff :

Adv R. Stevenson
Instructed by:
Marie-Lou Bester Inc.

For the respondent:

Adv S Vukeya
Instructed by:
Nemakanga Attorneys

Date of hearing: 17 October 2022

Date of judgment: 24 October 2022