IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

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

24.11.2014
DATE

SIGNATURE

CASE NO: A20/2012

DATE: 26/11/2014

In the matter between:

SPENCER WALTER ZAMILE MABO **FIRST APPELLANT**

THOKOZILE MASENTLE TIKINCA **SECOND APPELLANT**

AND

PIET RETIEF GRAIN & MALT (PTY) LTD t/a MALATI MILLS **RESPONDENT**

JUDGMENT

RAULINGA, J

Introduction

1. This is an appeal against the judgment of Magistrate Pretorius sitting at Klerksdorp, in which she ordered summary judgment in the sums of R211,321.05, R698, R698,664.91,

R 68, 623. 45 and R17 238.65 respectively together with interest and costs, against the appellants (defendants in the court a quo at the instance of the respondent (plaintiff in the court a quo)) initially. The appeal served before two judges of this division on the 18 October 2012 and was subsequently referred to the full bench of this count. ("This Court"). For convenience I shall refer to the parties as appellants and respondent.

2. The appeal raises the following issues:

2.1 Whether the appellants complied with the provisions of Magistrates' Courts Rule 14 (3) (b);

2.2 Whether the appellants were entitled to rely on an inadmissible hearsay evidence in their answering affidavit.

2.3 Whether the answering affidavit contained a bona fide defence; and

2.4 Whether the magistrate should, in the exercise of her discretion, have refused summary judgment.

APPLICATION FOR SUMMARY JUDGMENT

3. The respondent issued summons against the appellants, who it averred, had bound themselves as sureties and co- principal debtors with Unbridled Trading 137cc t/a Papa Super Maize Meal. The latter was indebted to the respondent in various amounts in respect of goods sold and delivered.

4. The appellants entered an appearance to defend and the respondent accordingly brought an application for summary judgment.

5. The affidavit resisting the application for summary judgment was deposed to by the erstwhile attorney of the appellants, one Van Heerden, duly authorised by the appellants.

6. The crux of their defence is contained in paragraph 5 of his affidavit wherein he states that:

6.1 The appellants admitted that they had been requested to sign certain documents including the application for credit facilities, i.e. Annexure "A" to the particulars of claim;

6.2 The document was signed without having been completed- "in blanko";

6.3 They were not aware of the contents of the document;

6.4 They had no intention of binding themselves as sureties in favour of the respondent or any other company; and

6.5 They accordingly dispute the validity of the document.

THE JUDGMENT OF THE COURT A QUO

7. It seems to me that the court a quo, after considering all the evidence cumulatively, found that Van Heerden gave evidence in respect of aspects and events of which he had no knowledge and he did not disclose to the court where he had obtained the information that he presented to the court. As a consequence, she accordingly held that the opposing affidavit did not comply with the provisions of Rule 14(3) (b). She also found that the appellants had not persuaded the court that they had a bona fide defence. She ultimately granted summary judgment.

8. My considered view is that the court a quo's decision cannot be faulted as illustrated by the reasons set out herein below.

NON COMPLIANCE WITH MAGISTRATES' COURTS RULE 14(3)(b).

9. Magistrates' Courts Rules 14(2),14(3)(b) and14(5) provide as follows:

"(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver 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

verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof.

(3) Upon the hearing of an application for summary judgment the defendant may.....

(a).....

(b) 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 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.

4. .....

5. If the defendant does not find security or satisfy the court as provided in subrule (3) the court may enter summary judgment in favour of the plaintiff".

10. The phrase "any other person who can swear positively to the fact" is similar to the phrase used in Magistrates' Courts Rule 14(2) above, dealing with the requirements of the plaintiff's affidavit in support of summary judgment.

11. Magistrates' Courts Rule 14(3) (b) can be dissected into the following cardinal requirements.

" (i) satisfy the court by affidavit.....

(ii) 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.....

(iii) and such affidavit or evidence shall disclose fully the nature and grounds of the defence.....And the material facts relied upon therefor....."

12. A practice has been developed and adopted by our Courts requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself/herself should state, at least , that the facts are within his /her personal knowledge (or make some averment to that effect) unless such direct knowledge appears from other facts stated. Similarly, the same standard applies to a defendant. The mere assertion by a deponent that "he can swear positively to the facts" is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. The word "fully" in Uniform Rule of Court 32(3) which is identical to Magistrates' Courts Rule 14(3)(b) connotes that while the deponent need not deal exhaustively with the facts and evidence relied upon to substantiate them, he/she 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. 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 - *Maharaj vs Barclays National Bank LTD*[1].

13. The following phrases or statements are noteworthy under Magistrates' Courts Rule 14(2), ... "an affidavit made by [the] plaintiff or by any person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no bona fide defence". Also under Magistrates' Courts Rule 14(3)(b), "any other person who can swear positively to the fact that defendant had 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". The use of words "positively" "shall" and "fully" is an emphasis that there must be strict adherence to all the cardinal requirements mentioned above, although the emphasis is more pronounced in those parts where those words appear.

14. Something worth mentioning is that: extrinsic evidence which is "properly before court" is admissible as an aid to the resolution of a summary judgment application. For an example, where an affidavit fails to measure up to these requirements, the defects may, nevertheless, be cured by reference to other documents relating to the

[1] *1976(1) SA 419 (AD).*

proceedings which are properly before court - Maharaj (supra) at 423H. Although in Maharaj the court laid emphasis verifying the affidavit of the plaintiff, I am of the view that this practise applies to the defendant as well. In casu, nothing was raised by the appellants which may apply in their case.

15. The Court in Maharaj (supra) analysed both Rules 32(2) and 32(3)(b) i.e both plaintiff and defendant or their respective representatives as deponents. The decision encapsulates the obligations of both a plaintiff and a defendant pertaining to the manner in which evidence is to be adduced in summary judgment applications, whereas the court in *First Rand Bank V Beyer* [2] only considered Uniform Rule of Court no 32(2). Much as the decision in First Rand Bank is important, it however does not assist much in the current scenario. However, the principle applied is the same. A deponent's ability to swear positively to the facts is a sine qua non to the effectiveness, for purposes of a summary judgment, of any deposition he may make - *Barclays National Bank Ltd v Love.*[3]

16. The principle applied in Maharaj (supra) was earlier followed in *Altona Furnishers v Nel 1970 1 PH F.9 at 21.* In that case the answering affidavit was also deposed to by the defendant's attorney and the court holding that :

> "Rule 32(3)(b) makes it quite clear that the opposing affidavit must be made by the defendant himself or any person who can swear positively to the fact that he has a bona fide defence to the action. The facts to which the attorney refers relate to a partnership agreement of sale both of which were entered into on the 29th August 1967. The defendant's attorney was not party to either of these agreements and he does not state that he was present at the conclusion either. I think Mrs Blum's submission that the attorney's allegation that he is fully conversant with the facts does not mean that he has personal knowledge of the facts, is sound. The defendant has therefore not complied with the provisions of Rule 32(3)(b) and the affidavit is rejected".

[2] *2011 (1) SA 196 (GNP).*
[3] *1975(2) S.A (D+CLd).*

17. One is compelled to revert to an old adage when parties were advised, as deponents, to use the words such as "own", "personal" or "direct" to emphasise that they can swear positively to the facts as required by the Rule - *Sand and Co Ltd v Kollias.*[4]

18. The opening paragraphs in Van Heerden's (the deponent's) affidavit reads as follows.

1

"Ek is volwasse manlike person en werksaam by die Prokureurs firma, Oosthuizen du Plooy, en tree op names beide verweerders. Ek is behoorlik daartoe gemagtig om die verklaring names hulle te maak.

2

Ek het die beedigde verklaring van Pieter Nortje deurgelees wat hy liasseer het ter ondersteunming van die Aansoek om Summiere Vonnis.

3

Beide die verweerders maak beswaar teen die bewerings in die verklaring vervat aangesien dit nie alles korrek is nie. Die inhoud van die dagvaarding, waarna in paragraaf 2 van die verklaring verwys word synde die gronde van Eiser se eis, is nie korrek nie".

19. Nowhere in his affidavit does Van Heerden tell us where he obtained the knowledge from, nor does he say that he has personal knowledge of the facts. It is therefore not possible for the court to make a factual finding from the verifying affidavit, that 'the person who deposed to the affidavit was able to swear positively to the facts so alleged'. Moreover, the finding by the court a quo that Van Heerden did not have any personal knowledge of the allegations in the answering affidavit was not attacked in either the notice of appeal or the appellants' heads of argument.

20. While it is accepted that a summary judgment becomes a final judgment and it is an extremely extraordinary and drastic remedy, one cannot allow the Rule 14(3)(b) procedure to be flouted. There are already safeguards built into the rule for the benefit of the defendants. There is no need to build further safeguards for non-compliance. Accordingly, my conclusion is that the court a quo was correct in ruling that the appellants' answering affidavit does not comply with the provisions of the Magistrates' Courts Rule 14(3)(b).

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[4] *1962(2) SA 162 (WLD).*

HEARSAY EVIDENCE IN SUMMARY JUDGMENT

21. The appellants submit that the "permissive" approach which allows a defendant to adduce hearsay evidence at the summary judgment stage, rather than the "strict" approach which precludes such evidence must be applied in this appeal. This contention is not supported by Magistrates' Courts Rule 14(3)(b) and the decided cases. The "strict" approach must apply - *Nedbank Ltd v Van der Berg and another.* [5]

22. The principle that applies in Magistrates' Courts Rule 14(2) (in the instance of the plaintiff) mutatis mutandis applies in Rule 14(3) (b) (in the instance of the defendant). On a proper interpretation of the two sub-rules the approach is the same. It follows that a verifying affidavit by Van Heerden that is based on information given to him by the appellants which is based on hearsay does not comply with Rule 14(3)(b) - Shackleton *Credit Management (Pty) Ltd v Microzone Trading 88 C and Another.*[6]

23. Although a defendant must at least disclose his defence and need not deal extensively with the facts and the evidence supporting it, this does not mean that the requirements of the rule have been diluted to the extent that no personal knowledge whatever of the underlying facts is required - Shackleton (supra).

24. Only facts which a court can take account of must be alleged in an answering affidavit in summary judgment proceedings. Hearsay evidence is inadmissible. This was clearly articulated in *Chairperson Independent Electoral Commission v Krans Ontspannigsoord (Edms) Bpk* [7] in which the court held: inter alia that:

> "2. Die toelaatbaarheid van daardie getuienis kan myns insiens nie via die bepalings van art 3(1)(c) [van die Wysiginswet op die Bewysreg, 1988 Wet 45 van 1988] geskied nie, want die appellant het geen rede verstrek waarom die getuienis nie afgele word deur die person van wie se geloofwardigheid die getuienis van daardie getuienis afhang nie.....daar is ook geen andere faktor, sy het drigendheid of andersins, aangevoer waarom hoorsêgetuienis aanvaar moet word nie.
>
> 3. Daar is direkte Suid Afrikaans gesag dat 'n verweeder in summiere vonnis verrigtinge nie gerigtig is om op ontoelaatbare getuienis te steun nie....

[5] *1987(3) SA 449(WLD).*
[6] *2010(5)SA112 (KZP).*
[7] *1997 (1) SA 244 (T)*

4. Ek meen met eerbied dat die Suid Afrikanse gesag waarna ek verwys het, korrek is, nie slegs wat die toelaatbaarheid van getuiens betref nie maar omdat dit strook met die ratio agter Reël 14(3)(c) en Reël 32 van die Hoofgeregshofreels. Die verwere moet by wyse van beëdige verklaring voorgelê word. Dit presumeer getuienis en nie slegs die formulering van dispute soos in 'n verweerskrif nie. Dit word verder van die verweerder verwag om nie slegs die aard van sy verweer uiteen te sit nie maar die gronde daarvan..... ."

25. Van Heerden, in his affidavit, does not give reasons why the affidavit was not deposed to by the appellants. He does not mention any other factors which prevented the appellants from adducing evidence. I support the decision in Chairperson, IEC, that defendant in summary judgment proceedings is not allowed to rely on inadmissible hearsay evidence. The evidence of Van Heerden is not covered by Section 3 of the Law of Evidence Amendment Act, No 45 of 1988.

26. The decisions in *Herbert v Steele 1953 (3) SA 271 (T) Mans v Kennedy 1961 (34) SA 119 (GW)* and *Cronje v Cooper 1978 (1) SA 268 (N)* are distinguishable from *Chairperson, Independent Electoral Commission* (supra) .In all the three decisions the defendants themselves deposed to the answering affidavits, which implies that the defendants had complied with the provisions of the relevant rule of court. Whereas in *Chairperson, Independent Electoral Commission* (supra), the deponent to the answering affidavit had no knowledge of any of the facts mentioned in the answering affidavits and she was, accordingly, clearly not a person who could swear positively to the facts that the defendant had a bona fide defence to the action. The findings in *Herbert* and *Mans*, (supra) were rejected by Swart J in *Chairperson, Independent Electoral Commission* (supra). *Cronje* is clearly not authority for the argument that hearsay evidence is in all instances admissible in summary judgment proceedings, as the respondent has correctly submitted.

27. I agree with the submission of the respondent that, although a court may, in the exercise of its discretion and in appropriate circumstances, allow hearsay evidence on some elements of the defendant's defence, the court is not entitled to disregard Magistrates' Courts Rule 14(3)(b) and allow a defendant to rely solely on hearsay

evidence in his answering affidavit, especially where no explanation is provided why the defendant did not depose to the answering affidavit about issues within his personal knowledge. The court could for instance exercise its discretion in favour of a defendant where he indicates that "he has reason to believe that he is able to obtain admissible evidence for the trial", which essentially happened in *Herbert* and *Cronje* referred to above.

28. I consider Van Heerden's evidence to be inadmissible hearsay evidence and as such the appellants cannot be allowed to rely on such evidence.

BONA FIDE DEFENCE

29. At the heart of this appeal, there is also an argument that the appellant had no knowledge of the content of the form and had no intention of binding themselves as sureties.

30. In *Brink v Humphries & Jewel (Pty) Ltd.* [8], the defence of *iustus error* was upheld where a personal suretyship was included in an application for credit signed on behalf of a company. However, it is important to note that this contention was upheld because "the form was a trap to the unwary and the appellant was misled by it". In casu, the appellants do not disclose if the form was a trap and indeed they were misled and if so, how.

31. On the issue of suretyship, Van Heerden's evidence reads as follows:

> " Beide die verweerders erken dat hulle versoek was om sekere dokumente te teken deur die Eiser. Die dokumente het, onder andere die kredietaansoek, wat as Bylae "A" tot die Aahangsel van die dagvaarding geheg was, ingesgluit. Die dokumente was in "blanko" geteken, die inhoud is nie aan die verweerders bekend nie en hulle het nooit en op geen stadium enige instansie of die Eieser toegestaan nie. Die geldigheid van hierdie dokumentasie word betwis en die Verweerders plaas die eiser, tot die teendeel die korrekheid daarvan in disput."

[8] *2005 (2) SA 419 (SCA),*

32. The argument is that the agreement does not comply with section 6 of the General Law Amendment Act 50 of 1956. In *Jurgens and others v Volkskas Bank Ltd* [9], it was held: "that section 6 of the General Law Amendment Act was silent as to when the surety's signatures had to be affixed to the document, and it was immaterial whether the surety signed the document only after all the material/terms had been written therein, or, as in the instant case, the surety signed the document first and thereafter by his own hand or that of his agent, completed the document by filling in the material terms in either case the surety's signature served to authenticate the document".

33. It is evident from paragraph 4 of Van Heerden's affidavit that the appellants admit having done business with the respondent, on behalf of Papa Super Maize Meal - in fact there were transactions done between Papa Super Maize Meal and the respondents. However, they deny any knowledge of the transactions which are indicated in paragraph 3 of annexure PN1- the Credit Application Form. What is surprising is that they don't deny that they signed the form. The only conclusion one can arrive at is that they were aware of these transactions. The defence of iustus error must be dismissed. The appellants have failed to establish a bona fide defence.

34. Even in the event where the appellants' contention was to be countenanced, it would be plagued by the fact that the hearsay evidence of Van Heerden has been declared inadmissible.

EXERCISE OF THE COURT A QUO'S DISCRETION.

35. The appellants submit that the court a quo erred in the exercise of her discretion in failing to afford due weight to the injustice that they would suffer in the event that their opposing affidavit was rejected and summary judgment granted. They argue that since summary judgment is a drastic remedy, even where the plaintiff complies with all the requirements of the Rule and the defendant has not discharged the onus resting upon him, the court may consider the injustice that may be suffered by the defendant and refuse to grant summary judgment.

36. The court can exercise discretion in summary judgment proceedings. However, the exercise of the court's discretion to refuse summary judgment where the defendant has failed to comply with the requirements of Magistrates' Courts Rule 14(3) (b) has been

[9] *2005 (2) SA 419 (SCA).*

described by the SCA as "exceptional". The discretion could be exercised in the defendant's favour if there was doubt as to whether the plaintiff's case was unanswerable and there was a reasonable possibility that the defendant's defence was a good one - *Tesven CC and another v South African Bank of Athens* .[10] Such discretion should moreover only be exercised by the court if asked to do so. The discretion should not be exercised against a plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before the court. *Breitenbach v Fiat SA (EDMS) BPK* [11].

37. In the instant case the court a quo was not asked to exercise its discretion. There are no exceptional circumstances raised by the appellants. There exists no reasonable possibility that the appellants defence is a good one.

38. This principle was properly distilled in *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* [12] that:

"The discretion must be exercised judicially and upon the information which is before the Court. The Court must guard against speculation and conjecture and be astute not to substitute these for the actual information which has been placed before it. Where the facts before the Court raise a doubt as to whether the plaintiff's case is what has been described as 'unanswerable', summary judgment should be refused.

.....Where there is an absence of the necessary allegations upon which a defence can be founded, it would be contrary to a judicial approach to exercise discretion against the plaintiff and in favour of the defendant"

39. The appellants' submissions that the court a quo should mero motu have postponed the application in order for the appellants to "personally confirm the defence" are without any merit. The court a quo has no business to advise the parties to postpone the application. The appellants were the authors of their own misfortune.

40. This court would not be justified in interfering with the decision of the court a quo in the matter where the parties had every facility for placing all the facts surrounding their dispute before the court and he failed to do so.

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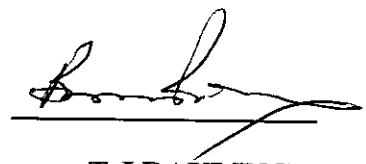
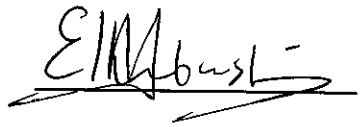
[10] *2000(1) SA 268 SCA (para [26] at 277H-278 A/B.*
[11] *1976 (2) SA 226 (TPD)*
[12] *1986 (3) SA 654 (CPD)at 659 H.*

41. In the circumstances the appeal is dismissed with costs.



T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



EM KUBUSHI
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

G BOFILATOS
ACITNG JUDGE OF THE NORTH GAUTENG HIGH COURT