IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO 4481/09

In the matter between

FIRSTRAND BANK LIMITED trading as
WESBANK and as
BARLOWORLD EQUIPMENT FINANCE
(Registration Number 1929/01225/06) Plaintiff

and

DAVIDSON: ALEXANDER JOHN
(Identity Number:) Defendant

J U D G M E N T

Del. 2 December 2009

STEWART A. J.

[1] The principles applicable to applications for summary judgment in terms of Uniform Rule 32(1), and in particular what is required by a defendant to successfully resist summary judgment under Uniform Rule 32(3), are dealt with in countless judgments over the years. Most recently in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 33 at 12D it was said that courts should 'concentrate … on the proper application of the Rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.' That is a reference to *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) where, *inter alia*, the following is stated in the passage referred to:

> '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 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.'

[2] It is also well established, and this appears also from that part of *Maharaj's* case referred in *Joob Joob,* that if the defendant fails to satisfy the court with regard to the *bona fides* of its defence the court retains a discretion as to whether to grant summary judgment or not. I am guided by these rules in what follows.

[3] In the present case the plaintiff claims as cessionary of the claims of Barloworld Capital (Pty) Ltd which purchased five pieces of heavy duty earth-moving or excavating equipment from Barloworld Equipment (Pty)

Ltd and supplied them to Zed Quarrying (Pty) Ltd ('Zed') under five separate rental agreements. It is alleged that at some stage Zed defaulted under the agreements with the result that the plaintiff cancelled the agreements, reclaimed the items of equipment and sold them. Five separate claims are asserted, one under each agreement. In each case the quantum of the claim is calculated by taking the balance outstanding at the date of cancellation and subtracting from that 'the proceeds of the sale' of the equipment plus interest on the total from the date of cancellation. In each case the equipment was sold quite some time after the date of cancellation.

[4] Each rental agreement is in substantially the same terms. Clause 8(a) of the agreement provides that should the hirer default in the punctual payment of any rental then the lessor shall be entitled to, *inter alia*:

> '(ii) cancel this Agreement whereupon the Hirer shall forthwith return the Goods to the Lessor and the Lessor shall be entitled to claim as liquidated damages payment of all rentals and other amounts then due in respect of such Goods, and in addition the rentals for the unexpired term of the hiring of such Goods all of which shall be deemed to be due and payable forthwith, less the market value of the Goods, plus the amount by which the Residual Value exceeds the Current Market Value of the Goods.'

[5] Clause 8(b) then goes on to provide as follows:

> 'Whenever it is necessary in terms of this Agreement to determine the market value of the Goods, such value shall at the expense of the Hirer be determined by an appraiser appointed by

> the Lessor, whose evaluation shall be final and binding on the Hirer. Should the Lessor thereafter sell, lease or hire the Goods on such terms and condition as the Lessor in his sole discretion deems reasonable, at an amount exceeding the value determined, the price at which the goods are sold or leased shall be deemed to be the value.'

[6] The result is that the hirer, or debtor, in such a case is entitled to be credited with the appraised value of the equipment or the amount for which it is sold, whichever is the higher. In the present case the plaintiff has not pleaded that it appointed an appraiser to value the equipment, or what the appraised value is. It has merely credited Zed with the amount realised for the sale of each item of equipment. It also put up a certificate of indebtedness, as it is entitled to do under the agreements, which credits the debtor with the same amounts.

[7] I should mention at this stage that the defendant executed a suretyship in favour of Barloworld Capital (Pty) Ltd in respect of the debts of Zed, and the benefits of that suretyship were also ceded to the plaintiff. In the result, the defendant is liable to the plaintiff for the debts of Zed under the rental agreements.

[8] In his affidavit opposing summary judgment the defendant set out four payments that he alleges that he made to the plaintiff subsequent to

the dates of cancellation of the agreements which were not credited by the plaintiff to the rental accounts. Those payments total the sum of R342,000.00. He then stated as follows:

> 'I therefore dispute the alleged outstanding balances as appear from [the certificate of indebtedness]. In this regard neither I, nor the principal debtor, have received any proper accounting from the plaintiff, after the equipment was allegedly sold. No documentation has been supplied regarding the alleged values placed on the equipment.
>
> I therefore submit that the alleged outstanding balances, claimed by the plaintiff, cannot be correct. No details are in any event supplied of interest rebates credited to the accounts.'

[9] In argument before me Mr Pretorius, for the defendant, submitted that on the basis of those allegations taken together with the failure by the plaintiff to deal with the question of appraised values in the particulars of claim, it is not safe to grant summary judgment, even in a reduced amount which accommodates the payments which the defendant alleges were not credited to the accounts. He submitted that the plaintiff does not have an 'unanswerable case' in relation to the quantification of its claim and that it is not possible on the information before the court to make a proper, or safe, assessment of what that quantum really is. He submits that on that basis summary judgment should be refused.

[10] Mr Crampton, who appeared for the plaintiff, submitted that it is up to the defendant to put the relevant factual material before the court by way

of affidavit on which his defence rests and that I should not penalise the plaintiff for any inadequacy in the material before the court. This is particularly the case, so he argued, in view of the fact that summary judgment can be sought even on a claim commenced by simple summons on the strength of meagre allegations with regard to the cause of action.

[11] In my view, however, those submissions miss the mark with regard to the present case. The plaintiff has pleaded its claim in admirable detail and it has annexed copies of the agreements on which it sues to the particulars of claim. Indeed, it was required to do so under Uniform Rule 18. Those agreements reveal that where it elects to cancel a rental agreement and reclaim the equipment it is obliged to credit the debtor in a particular way. Where its own particulars of claim reveal that it has not credited the debtor in that way, or at least failed to demonstrate that it has properly credited the debtor as it is required to do under the agreement, it leaves itself vulnerable to the kind of defence which has been advanced in this case.

[12] Whilst appreciating that the debtor, and hence the defendant, is no doubt substantially indebted to the plaintiff, one sympathises with the defendant's complaint that he is unable to properly answer or interrogate the quantum that has been claimed. Aside from the difficulty of

apportioning the payments that he claims he made, and the impact that that will have on the interest that has accrued and hence what is ultimately due, in the absence of appropriate allegations by the plaintiff with regard to the appraised values it is simply not possible to assess with any degree of confidence just what the total indebtedness is. Indeed it may be that the appraised values, if there were any, exceeded the prices realised on sale by substantial margins. One simply does not know. Moreover, since the agreement specifies that it is the plaintiff which must appoint the appraiser, the defendant is not in a position to put the relevant facts before the court.

[13] In those circumstances I am inclined to exercise my discretion against the granting of summary judgment. This is one of those cases where the pre-trial machinery of discovery, subpoena and so on may be required before a final judgment can be made.

[14] Mr Crampton asked that in the event that I refuse summary judgment I should nevertheless grant leave to defend subject to conditions with regard to the time for the delivery of pleadings and that I should direct under paragraph 21.2 of the Practice Manual of this court that the registrar shall enrol the matter on the expedited roll.

[15] Paragraph 21.3.4 specifically envisages that summary judgment matters such as this be placed on the expedited roll, and under paragraph 21.4 it is provided that unless the court otherwise directs the defendant shall file a plea within five days of the direction being made, failing which the defendant shall be *ipso facto* barred. There are also further provisions with regard to expedited discovery and so on.

[16] I am satisfied that the only material issue upon which the trial is likely to turn is the quantification of the claim and that that will be able to be disposed of within one day. In the circumstances I am prepared to direct that the matter be enrolled on the expedited roll, but subject to the caveat that at a Rule 37 conference to be convened within ten days after the close of pleadings the parties must specifically apply their minds to whether the matter continues to enjoy expedition in view of the pleaded defences and the matters then still in issue. This is because it may be that the pleaded defences will broaden the issues beyond what I anticipate that they will be. If the parties agree that the matter will not be determined within one day then they must remove the matter from the roll, or if they are not in agreement on whether it will finish within one day then they must approach the senior civil judge then on duty for a ruling on whether the matter should remain on the expedited roll. In the circumstances, I make the following order:

1. The application for summary judgment is refused.

2. The defendant is granted leave to defend the action.

3. The costs of the summary judgment application are reserved for decision by the trial court.

4. It is directed that this matter is enrolled on the expedited roll in terms of paragraph 21.3.4 of the Practice Manual of this court with the result that the time periods in paragraph 21.4 thereof will apply.

4. I direct that at the Rule 37 conference, which must be convened at least five weeks before the trial, the parties must seek to reach agreement on whether the matter will be disposed of in a trial lasting only one day and:

   (1) if they are agreed that the trial may last more than one day, the plaintiff is to remove the matter from the expedited roll;

   (2) if they are not in agreement on whether the matter will be disposed of in one day, the legal representatives of the parties are directed to approach the senior civil judge then on duty for a direction as to whether the matter should remain on the expedited roll or whether it should be removed therefrom.

DATE OF HEARING	27 NOVEMBER 2009
DATE OF JUDGMENT	2 DECEMBER 2009
COUNSEL FOR THE PLAINTIFF	MR D.P. CRAMPTON
PLAINTIFF'S ATTORNEYS	LANHAM-LOVE
COUNSEL FOR THE DEFENDANT	MR C. PRETORIUS
DEFENDANT'S ATTORNEYS NGWANE	STEENKAMP WEAKLEY NGWANE