IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No.: **23198/18**

In the matter between:

HE AND SHE INVESTMENTS (PTY) LTD	Applicant
and	
DEON HENDRIK BRAND N.O.	First Respondent
MEYER GOOSEN	Second Respondent
ECLIPSE SYSTEMS	Third Respondent
BRIAN RILEY	Fourth Respondent

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HE AND SHE INVESTMENTS (PTY) LTD	Applicant
and	
DEON HENDRIK BRAND N.O.	First Respondent
MEYER GOOSEN	Second Respondent
TYREMAC TYRES AND TUBES CC	Third Respondent
MOGAMAD FIROZ ABRAHAMS	Fourth Respondent

Heard: 13 February 2019

Delivered: 26 February 2019

JUDGMENT

MYBURGH AJ:

Introduction

[1] On 18 December 2018, He and She Investments (Pty) Limited ('*the plaintiff*') issued summons under case numbers 23198/2018 and 23199/2018 ('*the first claim*') and '*the second claim*'). Notices of intention to defend were served whereupon the plaintiff applied for summary judgment in respect of both claims. For convenience, and due to the similarity between the two claims, the applications were heard together.

[2] Regarding the parties:

1. The plaintiff operates a driving school.

2. The first defendant in both claims is Deon Hendrik Brand in his capacity as the executor of the estate of the late Johanna Elizabeth Goosen ('*the deceased*' and '*the estate*'). The plaintiff did not apply for summary judgment against the estate.

3. The second defendant in both claims is Meyer Goosen ('*Goosen*'), the son of the deceased and an erstwhile employee of the plaintiff.

4. the third defendant in the first claim was cited as Eclipse Systems ('*Eclipse*'). Eclipse is, however, not a separate entity but rather the trading name of the fourth defendant.

5. The fourth defendant in the first claim is Brian Riley ('*Riley*').[1]

6. The third defendant in the second claim is Tyremac Tyres & Tubes CC ('*Tyremac*').

7. The fourth defendant in the second claim, Mogamad Firoz Abrahams ('*Abrahams*'). Abrahams refers to Tyremac as "*his business*".

[3] Both claims arise out of the abuse of fleet management credit cards ('*fleet cards*') issued by Absa Bank Limited to the plaintiff and the misappropriation of the proceeds of the transactions put through on the fleet cards.

The applicable legal principles

[4] The applications are brought in terms of Rule 32(1)(b), which allows a plaintiff to apply for summary judgment for a liquidated amount in money as is the case here.

[5] When faced with a summary judgment application, a defendant has two options, of which the second applies in this case. In this regard, Rule 32(3)(b) provides as follows:

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

(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 the leave of the court by oral

[1] Riley's full names are Brian Roger Lloyd Riley. When I refer to Eclipse it is a reference to the business run by Riley as a sole proprietorship.

> *evidence of himself or herself or of any other person who can swear positively to the fact <u>that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor</u>*". [emphasis supplied]

[6] The question of what constitutes a sufficient defence to ward off summary judgment has been the subject matter of a many reported cases. If granted, summary judgment significantly abbreviates the judicial process by obviating the holding of a trial. It is also so that summary judgment is open to abuse by both parties. It is sometimes utilised by a plaintiff in order to force a defendant to hastily go on affidavit even though the former is aware that the latter has a defence that should be tested in a trial. The affidavit is then used for cross-examination purposes at the trial. It also does happen that defendants, well knowing that they have do not have a sufficient defence, cobble together an affidavit in the hope that, by kicking up enough dust, this deficiency will remain hidden for a while longer. For these reasons, it is instructive to revisit the legal principles pertaining to summary judgment as well the manner in which the principles are given content in their application to the facts.

[7] Counsel for the plaintiff referred to the oft quoted case, *Maharaj v Barclays National Bank Ltd* [2] where Corbett, JA held that:

> "*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*

[2] 1976 (1) SA 418 (A) at 426 A-D.

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". [emphasis supplied]

[8] In *Maharaj,* the plaintiff, a bank, had paid out an amount on behalf of the defendant and claimed repayment of that amount, along with interest. The defendant, in an affidavit which the court described as "*not a wholly satisfactory document*"[3] explained that he had instructed the bank to stop the payments on which the claim was based and that thereafter he "*froze his account*".[4] Hence, the defendant said, in the absence of his instruction, he did not owe the defendant the money as the bank had advanced the money without a mandate.

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[3] 426 G-H.
[4] 428 B.

[9] His Lordship Corbett, JA found that *"Viewing the affidavit as a whole, in the context of the claim set forth in the plaintiff's summons, I am of the view that it does appear to raise a bona fide defence and that it has disclosed this defence and the material facts upon which it is founded with just-and only just-sufficient particularity and completeness in order to comply with Rule 32 (3) (b)*".[5]

[10] In my view, the *Maharaj* case emphasises the importance of scrutinising the defendants' affidavit as a whole, the test being whether, despite its shortcomings, a defence is disclosed or not. The case recognises that a defendant's position is not always precisely set out in an affidavit. However, there is a threshold in that, despite the affidavit's imperfections, there must be a defence disclosed. Furthermore, it makes it clear that a defence must be set out with sufficient particularity and, importantly, that it must be sufficiently complete. If the setting out of a defence is not sufficiently complete, a defence is not disclosed. It is not for a court to speculate and complete a defence for a defendant.

[11] Van Loggerenberg *et al.*, with reference to a number of cases, in particular the *Joob Investments* case[6], comments as follows on the subject at hand:

> "*The remedy provided by the rule has for many years been regarded as an extraordinary and a very stringent one in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. In Joob Investments (Pty) Limited v Stocks Mavundla Zek Joint Venture the Supreme*

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5 428 B-D.

6 *Joob Investment v Stocks Mavundla Zek* 2009 (5) SA 1 (SCA) at para 31.

Court of Appeal, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated:

> *'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.*
>
> *Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather 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.* '',[7]

[12] Regarding the requirement that it must be *bona fide* defence, Van Loggerenberg states the following:

> "*All that the court enquires, in deciding whether the defendant has set out a bona fide defence, is (a) whether the defendant has disclosed the nature and grounds of his defence; 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 bona fide and good in law.*
>
> *Bona fides in the sub-rule cannot be given its literal meaning; the sub-rule does not require the defendant to establish his bona fides; it is the*

[7] Van Loggerenberg, Superior Court Practice, 2nd Ed. Original Service D-1381-D1-382 and the cases cited therein.

> *defence which must be bona fide, and whether it is bona fide or not depends upon the merits of that defence as raised in the defendant's affidavit. The subrule does not require the defendant to satisfy the court that his allegations are believed by him to be true. It will be sufficient if the defendant swears to a defence, valid in law, in the manner which is not inherently or seriously unconvincing; or, put differently if his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial. If, for example, the defendant omits facts upon which a defence can be based or set out the facts upon which he does rely in such a manner that the court is unable to say that if they are established they will constitute a defence to their action or some part of it, he will fail in his defence*".[8] [emphasis supplied]

[13] The last of the cases referred to by the learned author is *Trust Bank of Africa Ltd. V Wassenaar,* another case involving a bank – client relationship. In this instance the plaintiff claimed payment of money lent and advanced by way of overdraft facilities. The defendant defended the application for summary judgment on two grounds. Firstly, he contended that he had not concluded a contract with the plaintiff to advance the amount it had but rather a lesser amount. Secondly, he argued that the plaintiff, by virtue of the actions of one of its employees, was estopped from claiming in excess of the R800.00 overdraft that he had agreed to.

[14] His Lordship Milne J, dealing with deficiencies in the defendant's affidavit, held as follows:

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[8] Van Loggerenberg, Service 5, 2017, D1-411 and the cases cited therein, in particular *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Silver Leaf Pastry and Confectionary Co. (Pty) Limited v Joubert* 1972 (1) SA 125 (C) at 129; *Wright v Van Zyl* 1951 (3) SA 488 (C); *Border Concrete Engineering Co. (Pty) Limited v Knickelbein* 1982 (2) SA 648 (E) at 651 and *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 144.

"*There is, furthermore, a very serious defect or set of defects in the defendant's affidavit, namely, that no information whatsoever is given as to:*

(a) what amounts were 'furnished' by the defendant to Rossouw;

(b) what amounts were drawn by the defendant; and

(c) the dates when such amounts were furnished or drawn".[9]

[15] This is, in my view, a critical consideration, particularly in the present matter. In some instances, defects in the setting out of the defendant's case are excusable on the basis that, seen as a whole, a case is disclosed, as was the case in *Maharaj*. However, in other instances, the convenient failure to provide certain information, and / or the making of statements that appear to be vague by design, amount to defects that are so serious as to scupper the defendant's defence.

[16] Finally, in *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport*[10], Selikowitz, AJ (as he then was) held 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

[9] 143 F–G.
[10] 1986 (3) SA 654 (C).

> *a discretion against the plaintiff and in favour of the defendant*". [emphasis supplied]

[17] In *Pansera,* the plaintiff, as owner of a factory, claimed ejectment. The defendant relied on an option to remain in the factory for a further 12 months but failed to state that he had exercised the option. It was argued on this behalf that the court should "*imply that the defendant exercised the option from the facts*".[11] His Lordship declined the invitation to do so, holding that:

> "*If I were to accede to this request I would not only have to engage in speculation and conjecture but would have to import an essential allegation which defendant has not made. In examining those cases to which the Court was referred and in which Courts have exercised a discretion in defendant's favour, it is apparent that the Court has on each occasion acted in a situation where the defendant has by his positive allegation provided the skeleton of a defence but has failed to sufficiently flesh it out so that it can be held to sustain an independent existence*".[12]

[18] As alluded to above His Lordship decided that he was being asked to do more that flesh out the skeleton and for that reason he granted summary judgment. This case reaffirms the principle set out in *Maharaj*, i.e. that a setting out of a defence must be sufficiently complete and particularised. An imprecise setting out of a defence can be excused but, in my view, not an incomplete defence. Furthermore, a lack of particularity as to critical elements of the defence is problematic as it raises questions as to why particulars have been left out or expressed in vague terms. It must be

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[11] 658 B–C.
[12] 659 E-G.

assumed that in most cases things are left unsaid because there is no factual underpinning to say them.

The claims

[19] Regarding the first claim, the plaintiff alleges that the deceased, or Goosen, or both of them, colluded with Riley by utilising its fleet cards to misappropriate R4 034 706.47. This, it alleges, was done using the credit card facilities at Eclipse. The proceeds of the fraudulent scheme, less 20% commission that was retained by Riley, were then paid into Goosen's bank account and so the plaintiff was impoverished at the expense of Riley and Goosen.

[20] It is common cause that, while these transactions were not underpinned by supplies of goods or services, they were represented to be so. Thus, a fraud was perpetrated on both Absa Bank and the plaintiff.

[21] The second claim is similar, the difference being that instead of Riley, the other parties involved were Abrahams and Tyremac, and the amount is R2 446 735.29.

[22] Goosen proffered the following as a defence:

1. The plaintiff is a family business that used to be run by the deceased and her three sisters. The children of the sisters, including himself, were employed by the plaintiff, but had no decision-making powers and simply had to execute the instructions of the sisters.

2. When the deceased passed away, her share of the plaintiff was purchased by the remaining sisters and the proceeds paid into a trust, of which he and his siblings are the beneficiaries.

3. Goosen admits that *"certain transactions*" with the fleet cards were arranged by him, working with with Riley, Abrahams and Tyremac and that the proceeds of these transactions were paid into his personal bank account less the 20% commission retained by Riley and Abrahams/Tyremac.

4. He explains that at the time he did not realise that the transactions might be fraudulent, that he was instructed by the deceased to do what he had done. The deceased also told him to do it (he says) and to utilise the proceeds for the maintenance, repairs and upgrading of Klein Saxenburg Farm "*after Plaintiff's erstwhile directors had resolved to maintain the farm on which their parents and family members live*".

5. He denies that the proceeds were for his personal use or benefit, other than by virtue of the fact that he resides on the farm. He states the he did not have any power or authority to stop the payments and that he was in any manner enriched by the payments. However, he provided no particularity at all regarding the use of the funds diverted to his account despite this being a relatively easy thing to do. Furthermore, one would have expected that, given that a critical part of his defence was that he gained no benefit from funds transferred into his account, he would have

provided more information to show that this was indeed the case. His failure to do so is telling.

6. He denies fault on his part, stating that he was neither negligent nor intentionally part of any fraud and suggests that the plaintiff should claim damages from Brand, Eclipse and Riley. This is a denial without any substance. Goosen participated in a scheme that was, on his own version, fraudulent.

7. Finally, Goosen states that the plaintiff, on 26 June 2018, borrowed money from him and that this would form part of a counterclaim. Again, Goosen provides no particularity. He does not state where the loan agreement was concluded, who represented the plaintiff, or whether the loan agreement was oral or in writing. His lack of particularity is strange given that he was a party to the agreement and thus the information would surely be within his knowledge.

8. To use His Lordship Selikowitz's analogy in *Pansera,* Goosen does not provide the skeleton of a defence and nor does he do so in respect of his counterclaim.

[23] Riley's defence is as follows:

1. The deceased asked him to find someone who had a credit card machine as she wanted to effect transactions as the plaintiff "*required cash*

liquidity" and that whoever assisted her in doing so, would earn a 20% commission on each transaction. As with Goosen, Riley's setting out of the agreement is remarkably scant. He too does not provide the bare bones of this agreement which founds his defence.

2. The then says that the deceased also advised him that the 80% of each transaction, after deduction of his commission, should be paid into Goosen's bank account. How this would assist the plaintiff in improving its cash liquidity, when, on the face of it, the opposite would be the case, Riley does not explain.

3. Finally, Riley says that he obtained a credit card machine, did as requested and he did not think this to be fraudulent. His statement that he did not think he was committing a fraud when the scheme was *per se* fraudulent is conveniently bald. It is another example of a lack of *"sufficient particularity"* of the kind referred to by His Lordship Corbett, JA in *Maharaj*.

[24] Abrahams' defence is similar to that of Riley:

1. In 2014 he was approached by Riley and advised that the deceased "*needed a vendor to process card transactions in order to create cash liquidity in the company*".

2. The deceased, who spoke to him telephonically, explained that if he was willing to do so, he would earn a 20% commission on each transaction.

3. The proposal was acceptable to him, as he thought he was assisting the applicant with its finances and cash flow.

4. He denies that he had any intention of misappropriating the funds, but he does not deny that he retained the 20% commission on each transaction.

5. As with Goosen and Riley, Abrahams' affidavit is sparse when it comes to the essentials of his defence. Questions such as when and where the alleged agreement to assist the plaintiff was concluded, are left unanswered. He does not explain the exorbitant commission or how payment into Goosen's bank account could possibly assist the plaintiff's cash-flow. His convenient lack of particularity undermines his bald assertion that he was not intentionally party to the misappropriation of the plaintiff's money.

[25] Setting aside (for the moment) the lack of particularity and incompleteness of the defences set out by Goosen, Riley, Abrahams and Tyremac, all raise the defence that the scheme was born of an agreement between them and the deceased acting on behalf of the plaintiff.

[26] The question is whether this constitutes a good defence in law and in my view, as argued by counsel for the plaintiff, it does not.

[27] Each transaction, that was put though, without there being an underlying supply of services or goods, was fraudulent for the following reasons:

1. The scheme involved a misrepresentation that the transactions were underpinned by supplies of goods and services when they knew this was not the case.

2. This was *per se* an abuse of the fleet cards and a fraud perpetrated on the bank that issued the cards. It was also a fraud perpetrated on the plaintiff which owned the cards and would be impoverished by each transaction, a fleet card being a species of credit card.

3. The proceeds of the transactions were paid into Goosen's bank account and not the plaintiff's bank account and this they all knew. Riley and Abrahams were the ones who transferred the money, less 20% from their business bank accounts to that of Goosen. This also makes a mockery of their contention that they were assisting the plaintiff to finance itself. If that were the case they would have transferred the money to the plaintiff's bank account.

4. The retention of an exorbitant 20% in order to effect transactions that were ostensibly to finance the plaintiff without any services simply does not make sense. The question must rightly be asked why the plaintiff would do so, if it in any event had access to the fleet card credit facility.

[28] The transactions were thus clearly illegal and they all knew this to be the case whatever they say motivated them to participate in the scheme, for example to assist the plaintiff or, in Goosen's case, to maintain a farm which does not belong to the plaintiff.

[29] Thus, while the allegation that the scheme was born out of an agreement is highly questionable, in any event, it unenforceable due to it being illegal. An agreement is illegal if it is against public policy or good morals[13]. It follows that reliance on an illegal and hence unenforceable agreement does not constitute a valid defence in law.

[30] Furthermore, in the context of the law of delict any consent must be permitted by the legal order; in other words, the consent must not be *contra bonos mores* otherwise it does not constitute valid consent.[14]

[31] Goosen, Riley and Abrahams contend that the deceased gave them the consent to act fraudulently. This amounts to consent to act unlawfully, which is *contra bonos mores*, and is thus not a defence on which the defendants can rely.

Goosen's counterclaim

[32] Goosen claims that he has a counterclaim for monies loaned to the amount of R305 000.00.

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[13] *Sasfin v Beukes 1989 (1) SA 1 (A)* and *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).

[14] *Neethling, Potgieter and Visser, Law of Delict,* Seventh Edition at p. 113.

[33] As mentioned above, the counterclaim is devoid of particulars. Goosen merely states that "*On 26 June 2018 Plaintiff borrowed the amount of R305 000,00 from me at its special instance and request, which amount is due and payable to me, alternatively payment being demanded herewith. I therefore have a counterclaim of R305 000,00 against Plaintiff*".

[34] The setting out of the counterclaim is so conveniently austere that it does not cross the threshold. It is not even the skeleton of a claim.

The defence of prescription

[35] Prescription starts to run when the debt is due, and in terms of section 12(3) of the Prescription Act no 68 of 1969 a debt only becomes due when a creditor has knowledge of the identity of the debtor and the facts from which it arises.

[36] For this reason, the defence of prescription does not have merit in this matter as the plaintiff prosecuted its claims well within the requisite three years of becoming aware of the claims.

Conclusion

[37] In the circumstances I order as follows:

1. In respect of Case No. 23198/2018 the second, third and fourth respondents, on a joint and several basis, are ordered to pay the applicant:

(a) the amount of R4 034 806.47 plus interest on each of the transactions, as set out in the schedule "ES1" attached to the particulars of claim, at the legal rate due, calculated from the date of each transaction to the date of payment;

(b) costs of suit.

2. In respect of Case No. 23199/2018 the second, third and fourth respondents, on a joint and several basis, are ordered to pay the applicant:

(a) the amounts of R2 446 735.29 as set out in Annexure "TTT1" and R504 410.22 as set out in Annexure "TTT2" together with interest, at the legal rate from the date of each transaction to the date of payment.

(b) costs of suit.

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P A MYBURGH
Acting Judge of the High Court
26 February 2019

Appearances:

For the plaintiff:	Advocate J Joubert Instructed by Marais Muller Hendricks Inc.
For the second defendant:	Ms Andale Benjamin
For third and fourth defendants:	Advocate L Liebenberg Instructed by Coulters van der Walt