IN THE HIGH COURT OF SOUTH AFRCA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: A 294/19

In the matter between:

ECLIPSE SYSTEMS First Appellant

BRIAN RILEY Second Appellant

and

HE & SHE INVESTMENTS (PTY) LTD Respondent

AND

In the matter between:

TYREMAC TYRES & TUBES CC Third Appellant

MOGAMAD FIROZ ABRAHAMS Fourth Appellant

and

HE & SHE INVESTMENTS (PTY) LTD Respondent

Heard: 31 July 2020

JUDGMENT DELIVERED (VIA EMAIL) ON 4 SEPTEMBER 2020

SHER, J (LE GRANGE J et ROGERS J concurring):

1. We have before us two related appeals against the grant of summary judgment, in terms of which the appellants were held liable to pay to the respondent, jointly

and severally, an amount of R 4 034 806.47 in a matter under case no. 23198/18, and R 2 446 735.29 and R 504 410.22 in a second matter, under case no. 23199/18.

The background

2. The respondent is a company which operates a well-known driving school in Cape Town. Its business was jointly administered by a family of 3 sisters, who were co-directors: Sandra van der Westhuizen was responsible for the business' financial affairs and Elize Korf for its marketing, and until her death Joyce Goosen was responsible for its day-to-day operations. Van der Westhuizen's son was employed as the company's bookkeeper and Goosen's son Meyer was also employed by it, in an unknown capacity.

3. On 18 December 2018 the respondent caused summonses to be issued in the two matters referred to. In both of these the executor of the estate of Joyce Goosen was cited as the 1st defendant and her son Meyer as the 2nd defendant. By this time the respondent's sole directors were Van der Westhuizen and Korf. They signed joint affidavits in support of the applications for summary judgment.

4. In the matter under case number 23198/18 (the 'Eclipse' matter), a firm known as Eclipse Systems (the first appellant), and Brian Riley (the second appellant), who operated the said firm, were cited as 3rd and 4th defendants, whilst in the matter under case number 23199/18 (the 'Tyremac' matter) a close corporation known as Tyremac Tyres and Tubes CC (the third appellant) and its sole member Mogamad Abrahams (the fourth appellant), were cited as 3rd and 4th defendants.

5. The cause of action in both matters, insofar as the appellants are concerned, was the same. The respondent alleged that Joyce Goosen and her son Meyer had, together with Riley and Abrahams and their respective entities, 'misappropriated' the various sums which are referred to in the introductory paragraph, from it. In the 'Eclipse' matter it was alleged that the misappropriations occurred between September 2015 and November 2018, whilst in the 'Tyremac' matter it was alleged they took place between February 2014 and November 2018.

6. The misappropriations were allegedly effected by means of an arrangement whereby, at the instance of the Goosens, Riley and Abrahams processed a large number of fictitious motor vehicle expense transactions, via fleet management bank cards which had been issued to the respondent by Absa and Standard Bank.

7. The respondent claimed that a 'substantial' portion of the monies that were paid over to Eclipse Systems and Tyremac in satisfaction of the charges which were levied in this manner, was in turn paid over, by arrangement with the Goosens, into a bank account which was operated by Meyer.

8. Curiously, and notwithstanding the central averment that the alleged 'misappropriations' had been effected at the instance of Joyce Goosen, the respondent only applied for summary judgment against her son and the appellants, and not against her estate.

9. Meyer Goosen and the appellants duly filed opposing affidavits. Upon considering these the Court a *quo* held that they lacked particularity sufficient to sustain valid defences, and such defences as had been raised therein were in any event not *bona fide* or valid in law. It accordingly granted summary judgment against the appellants, in the terms prayed for.[1] Meyer did not seek leave to appeal the judgments and the Orders which were made against him. Leave to appeal to this Court was granted to the appellants by the Supreme Court of Appeal, on petition to it, after the Court a *quo* refused such leave.

The relevant principles

10. It is trite that summary judgment, a procedure which was adopted into our law from English law,[2] is aimed at allowing a plaintiff to obtain a final judgment summarily ie without a trial, in instances where a defendant does not have a legitimate defence to an action and has sought to defend it merely for the purpose of delay. It is aimed at preventing a defendant from raising a bogus or

[1] The judgment is reported *sub nom He & She Investments (Pty) Ltd v Brand NO & Ors* 2019 (5) SA 492 (WCC).
[2] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture* 2009 (5) SA 1 (SCA) at para [29].

sham defence, which is bad in law, in order to unjustifiably delay a plaintiff from obtaining what is due to it.[3]

11. Given its summary and final nature it has frequently been described as an 'extraordinary' and stringent remedy which makes drastic inroads on a defendant's right to present its case to a Court.[4] As a result, the Supreme Court of Appeal has warned that it is a remedy which is not intended to 'shut' a defendant out of defending a matter unless it is 'very clear indeed' that it has 'no case', and it is not to be utilized to prevent a defendant who has a 'triable issue or a sustainable defence' from having its day in Court.[5]

12. The applications for summary judgment in this matter were brought and heard before the amendments to the relevant rule[6] came into effect on 1 July 2019.[7] As the rule now stands an application for summary judgment can only be brought after a defendant has filed its plea, and in doing so the plaintiff must not only verify the cause of action and the amount claimed but must, in addition, also identify any point of law which it relies upon and the facts upon which its claim is based, and must also briefly explain why the defence which has been pleaded by the defendant does not 'raise any issue' for trial.[8] What the precise ambit and effect of the amendment is and how it differs from the previous requirements and the applicable test in summary judgment matters has not yet been definitively determined, but need not be decided by us.[9]

13. As it stood at the time, the rule simply required the plaintiff to verify the cause of action and the amount claimed, and to state that the defendant did not have a *bona fide* defence and had entered an appearance to defend solely for the

---

[3] *Id* at [31]; *Arend & Ano v Astra Furnishers* 1974 (1) SA 298 (C) at 304G.
[4] *Id*.
[5] Per Navsa JA in *Joob* n 2 at paras [31]-[32].
[6] Rule 32 of the Uniform rules.
[7] By way of GN R 842 in *GG* 42497 of 31 May 2019.
[8] R 32(1).
[9] In *Tumileng Trading CC v National Security & Fire (Pty) Ltd; E & D Security Systems CC v National Security & Fire (Pty) Ltd* [2020] ZAWCHC 28 Binns-Ward J held *obiter* at paras [24] and [40] that inasmuch as the provisions of R32(3)(b) have remained essentially the same and still require a defendant to satisfy the court by affidavit that it has a *bona fide* defence, the requirement in R 32(2)(b) that the plaintiff must show that the defence as pleaded does not raise an issue for trial cannot be taken literally, for a plea that did that would be excipiable, and unless the obligations on each of the parties as set out in the subrules referred to were harmonized the respective supporting and opposing affidavits 'would pass each other like ships in the night'.

purposes of delay; and (just as the subrule currently provides) in order to ward off summary judgment the defendant was required to satisfy the Court, by affidavit, that it had such a defence, by disclosing 'fully' the nature and grounds thereof and the material facts upon which it was based.

i) Ad the defendant's duty of disclosure

14. In the seminal decision in *Breitenbach v Fiat* [10] a full bench held that the obligation on a defendant to 'fully' disclose the nature and grounds of its defence and the material facts upon which it is based should not be taken literally, for to do so would require the defendant to set out, in full, all the evidence which it intended to rely on in order to resist the plaintiff's claim at trial.

15. Thus, what a defendant can reasonably be expected to set out in its affidavit depends upon the manner in which the plaintiff's claim has been formulated[11] and the defendant need not deal 'exhaustively' with the facts and the evidence which it relies upon in order to substantiate them.[12]

16. All that is required is for it to set out its defence with 'sufficient particularity'[13] and in a manner which is not 'needlessly bald, vague or sketchy'.[14] To this end the material facts upon which the defence is based should be set out in a manner which is 'sufficiently full' and complete enough to persuade the Court that, if what is alleged is proved at trial, it would constitute a defence to the claim.[15] If the stated material facts are equivocal, ambiguous or contradictory, or fail to canvass matters which are essential to the defence which has been raised, then the affidavit will not comply with the rule and summary judgment will be granted.[16]

17. Importantly, the defendant is not obliged to set out what is required of it with the same exactitude as would be required of a plea, and the Court is not required to evaluate what is set out, against the standards required of a pleading.[17]

---

[10] 1976 (2) SA 226 (T) at 228C-D.
[11] *Id,* at 229B.
[12] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426D.
[13] *Id*.
[14] *Breitenbach* n 10 at 228E.
[15] *Id.*
[16] *Arend* n 3 at 304A-B.
[17] *Maharaj* n 12 at 426E.

18. Finally, the defendant is also not required to persuade the Court of the truth or correctness of the facts which are set out by it, nor, where these are disputed, that there is a 'preponderance of probability' in its favour in respect of them, and the Court is not to 'endeavour to weigh or decide' disputed factual issues.[18]

ii) Ad a *bona fide* defence

19. As far as setting out a *bona fide* defence is concerned, the subrule does not require the defendant to establish its *bona fides*: it is the defence which must be *bona fide* and in this regard once again it has been held that the requirement must not be taken literally, for to do so would be to demand the impossible.[19] As was explained in *Breitenbach*:[20]

> 'On the face of it *bona fides* is a separate element relating to the state of the defendant's mind. A man may believe in perfect good faith that he has a defence, and may state honestly the facts which he relies upon, yet the law may be against him, or he may be honestly mistaken about the facts. He is *bona fide*, but he has no defence. Another man may make averments which, if they were true, would be an answer, in law, to the plaintiff's claim; but, to his knowledge, the averments may be false. He is not *bona fide*. If, therefore, the averments in the defendant's affidavit disclose a defence, the question whether the defence is *bona fide* or not, in the ordinary sense of that expression, will depend upon his belief as to the truth or falsity of his factual statements, and as to their legal consequences. It is difficult to see how the defendant can be expected, in his affidavit to 'satisfy the court'… not only that what he alleges is an answer to the plaintiff's claim, but also that his allegations are believed by him to be true. There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit. It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.'

21. As to the requirement that the defendant must set out the *nature* of its defence Erasmus[21] is of the view that the defendant is required to (merely) set out the 'character or kind' (sic) of defence which it intends to raise at trial. Such an approach is consonant with an understanding that a defendant is not required to set out its defence with the same degree of exactitude as would be required in a pleading.

The defendants' case

---

[18] *Arend* n 3, at 303H; *Maharaj* n 12 at 426A.
[19] *Breitenbach* n 10 at 228B.
[20] *Id*, at 227H-228B.
[21] *Superior Court Practice* (Van Loggerenberg *et al* Rev Serv 13) at D1-415.

22. In his opposing affidavit Riley (who is an IT consultant who performed genuine work for the respondent) alleged that during 2014, whilst he was at the respondent's premises, Goosen informed him that the respondent required 'cash liquidity' (sic) and she asked him to find someone who had a card machine which could be used to put through certain EFT charges as company expenses.
23. She advised him that the transactions were to be effected in order to 'assist' the company with its 'finances and cash flow'. The potential 'vendor' would be required to deposit 80% of the 'funds' which were generated in this manner into her son's (Meyer's) bank account and could retain the remaining 20% thereof as a commission, and to cover the costs of the transactions.
24. Riley consequently approached Abrahams, who agreed to assist. During the meeting which Riley held with him, Meyer was present and Abrahams conferred telephonically with Goosen.
25. In 2015 Goosen asked him to secure another card machine which could similarly be used to put through EFT charges as company expenses. She again advised him that this would 'greatly benefit' the respondent. Riley accordingly obtained his own card machine and proceeded to put through charges utilizing the fleet bank cards which Goosen or Meyer provided him with. They advised him when charges should be put through and what the amounts concerned should be. As was previously done by Abrahams 80% of the 'funds' which were generated in this manner were in turn paid into Meyer's account and Riley retained the remaining 20% in lieu of commission and expenses.
26. These transactions continued until Goosen passed away, at which time Van der Westhuizen and Korf called Riley to a meeting at the offices of the company's attorneys where he was accused of misappropriating funds belonging to the respondent and they allegedly attempted to 'bully' him into admitting this. He said that these accusations came as a complete shock to him as he was always under the impression that Van der Westhuizen and Korf knew of the transactions, given that Van der Westhuizen's son was the company bookkeeper and she oversaw the financial aspects of the business. As such, she would have had

'intimate' knowledge of all the transactions which had been effected over a number of years, in respect of which she had never raised a single query.

27. Consequently, Riley denied that he had ever had any intention of misappropriating any funds belonging to the respondent. He said that he had at all times believed that he was assisting the respondent and was doing so at its request and on its instructions, in terms of an agreement which he had entered into with it at Goosen's behest, in her capacity as a director.

28. In his affidavit Abrahams confirmed that he had been approached by Riley and Goosen in 2014 and was informed by her that she was looking for a vendor to process card transactions in order to create 'cash liquidity' for the company. If he was willing to do so he would be required to deposit 80% of the 'funds' generated into Meyer's bank account and could keep the remaining 20% as a commission, and to cover any expenses.

29. Goosen's proposal was acceptable to him as he understood he would be 'assisting' the respondent with its 'finances and cash flow'. At the time he dealt with Goosen he understood she was acting as a director of the respondent and had made the request on its behalf.

30. Pursuant to the agreement Meyer and later Riley brought the fleet cards to his (Abrahams') premises and instructed him to pass certain transactions in accordance with their instructions from the respondent via Goosen.

31. In the premises Abrahams similarly denied any intention of misappropriating funds from the respondent. He said that after Goosen's death Van der Westhuizen and Korf had also tried to intimidate him into admitting that he had misappropriated monies from the respondent and had also tried to obtain an undertaking from him to repay such monies.

32. For the sake of completeness, I mention that Meyer Goosen, in his affidavit opposing the summary judgment application against him, stated that he was told by his late mother to use the funds generated in the aforesaid manner to maintain, repair and upgrade the family farm, after the respondent's directors had resolved to maintain the farm on which their parents and the family members

lived. Riley and Abrahams, however, do not allege that this information was conveyed to them.

33. Lastly, in their affidavits both Riley and Abrams pointed out that the summonses in the two matters were issued on 18 December 2018 and had been served on them the following day. They contended that, in the circumstances, those portions of the respondent's claims which pertained to transactions which had been effected more than three years before this ie before 18 December 2015, had prescribed.

The findings of the Court a *quo*

34. As previously pointed out the Court a *quo* held that the appellants had failed to set out their defences with sufficient particularity, and such defences as had been raised were not *bona fide* or valid in law.

35. As far as Riley and his firm Eclipse Systems were concerned it held that his version of the agreement that he had entered into with Goosen was 'remarkably scant' and he had not set out the 'bare bones' thereof, and his averment that he did not think that he was committing a 'fraud' was conveniently bald, as it lacked sufficient particularity.

36. In like vein, the Court a *quo* held that Abrahams's affidavit was sparse as details as to when and where the agreement with Goosen had been entered into were not set out therein and, in addition, he had failed to explain the 'exorbitant' commission which he received, or how payment into Meyer's bank account could assist the respondent. The 'convenient' lack of particularity in his version undermined his bald assertion that he was not intentionally party to a misappropriation of the respondent's monies.

37. As far as the invalidity and alleged lack of *bona fides* of the appellants' defences are concerned it is apparent that the Court's conclusions were underpinned by a finding that a fraud had been perpetrated, both on the banks, and on the respondent. The Court pointed out that from the appellants' affidavits it was evident that none of the transactions were in respect of the actual supply of any goods or services, whilst they were represented to be so. Thus, in its view the transactions were clearly illegal and fraudulent and all the appellants 'knew this

to be the case'. In the circumstances any agreement which existed between the parties was illegal and *contra bonos mores* and the defences relied upon by the appellants constituted an impermissible attempt to rely on, or to enforce, an illegal agreement.

38. In addition, the Court was critical of the appellants' contentions that they had entered into the agreement with Goosen in order to assist the respondent with its 'cash liquidity' and its 'finances'. It held that the fact that the proceeds, less the commission the appellants were entitled to, were paid into Meyer's bank account made a mockery of these contentions. It also held that the retention of 20% of the value of the charges that had been levied, in lieu of commission and expenses was 'exorbitant' and 'did not make sense'.

39. Finally, the Court held that there was no merit in the defence of prescription because, in terms of the Prescription Act[22] a debt only became due when a creditor had knowledge of the identity of the debtor and the facts from which the debt arose, and the respondent had prosecuted its claims 'well within' the requisite three year period of becoming aware thereof.

An evaluation

40. In my view, the Court a *quo* misdirected itself in a number of material respects. In the first place, as far as the defence of prescription is concerned the respondent did not make any allegation in its particulars of claim, in either matter, in relation to when it became aware of the identity of the appellants, or the facts which gave rise to the underlying debts which gave rise to its claims. The respondent was not, of course, required to make such allegations, because a plaintiff is not required in its particulars of claim to anticipate a defence of prescription, and to do so may even be bad pleading. But the result, nevertheless, is that the Court's finding that the respondent had prosecuted its claims 'well within' three years of becoming aware thereof, was not based on any factual underpinning.

41. Whilst it is so that[23] prescription in respect of a debt only commences to run when a creditor has knowledge of the identity of the debtor and the facts from

[22] Act 68 of 1969.
[23] In terms of s 12(3) of the Act.

which the debt arises, ordinarily a debt will be understood to have prescribed within three years from the date when it arose, as it is generally assumed that the creditor would be aware of such facts, particularly in a matter such as the one before us, where it is alleged by the respondent in its particulars of claim that the transactions which gave rise to the losses it suffered were effected with the appellants, at the instance of one of its directors, pursuant to agreements that were concluded in this regard. Although ultimately the onus will rest on the appellants to prove when the respondent did, or could reasonably have become, aware of their identity and of the facts giving rise to the alleged indebtedness, on the limited information available at this stage it cannot be said that there is no reasonable prospect of the appellants discharging this onus.

42. In the circumstances, in the absence of any allegations in the particulars of claim, in either of the two matters, that the respondent was not aware of the identity of the appellants and the underlying facts from which the debts arose in respect of these transactions, until a date later than the date when each of these transactions was effected, the right to prosecute a claim in respect of them would *prima facie* have prescribed three years from such date.

43. From an examination of the schedules which are attached to the respondent's particulars of claim in both matters it appears that some 469 transactions were effected pursuant to the arrangement between the parties via various ABSA bank cards, between 26 January 2015 and 30 November 2018 (433 transactions in the Eclipse matter and 66 transactions in the Tyremac matter), and some 283 transactions were effected utilizing a Standard bank card (in the Tyremac matter) between February 2014 and November 2018.

44. This means that in respect of the Eclipse matter the claim in respect of some 55 transactions which were allegedly effected via ABSA bank cards between 4 September and 18 December 2015 (a period more than three years from date of service of the summons), totalling R 411 490.95 in value had, on the face of it, prescribed and *prima facie* the appellants had a *bona fid*e and valid defence in respect thereof.

45. Equally, in respect of the Tyremac matter the claim in respect of some 66 transactions which were allegedly effected via ABSA bank cards between 26 January and 28 August 2015 totalling R 504 360.22 in value (ie R 50 short of the entire second claim which is set out in annexure 'TT2') similarly appears to have prescribed and the appellants also *prima facie* had a *bona fid*e and valid defence in respect thereof.

46. In addition, in respect of the Tyremac matter the claim in respect of some 75 transactions which were allegedly effected via a Standard bank card between 10 February 2014 and 4 December 2015 (as set out in annexure 'TT1'), totalling R 592 736.27 in value, had also apparently prescribed, and judgment in such amount should accordingly also not have been granted.

47. Of course, as was pointed out in argument before us, in the event that the respondent can properly aver that it was not aware of either the identity of the appellants or the underlying facts which gave rise to the debts which form the subject of its claims, until some date later than the date when the respective transactions which are referred to in the preceding paragraphs were entered into, it would be entitled to make the necessary allegations in its replication in order to meet the prescription point at trial. Whether this will be possible depends *inter alia* on whether the knowledge which Goosen had, of the underlying transactions, and whether her alleged acts as an agent of the respondent, can be attributed to it. This is a question which also impacts on the appellants' principal defence that the transactions were effected by them in terms of an agreement which they had entered into with the respondent, represented by Goosen.

48. In this regard it is a fundamental and well-established principle of company law that a company is a separate juristic person which has an identity and legal personality which is separate and distinct, not only from its members, but also from its directors, who are responsible for its management.[24] As a result of this separation it is possible for a company to hold a director liable for defrauding or stealing from it, even if he is its sole director and shareholder.[25]

---

[24] *Salomon v A Salomon & Co Ltd* [1897] AC 22.
[25] *S v Hepker & Ano* 1973 (1) SA 475 (W) at 475G-H.

49. In *Jetivia* [26] the UK Supreme Court held[27] that whether legal responsibility for the acts of an agent, or her knowledge and state of mind, can be attributed to a company depends on the purpose for which the attribution is sought to be made, and the context in which the question arises.

50. In most instances the acts and the state of mind of its directors and agents can be attributed to it, and are, by applying the principles of the law of agency (including those applicable to actual or ostensible authority and any estoppel which may be raised in respect thereof); and whether the company will be liable to third parties in respect of such attribution will depend on such principles, and any applicable legislation and the company's memorandum and articles of association.

51. Generally, it can be said that in instances involving actions by innocent third parties against a company, or by a company against such parties, the acts and knowledge of its agents will ordinarily be attributed to it. This will also be the case where a company is charged with a criminal offence.[28] On the other hand, as was held in *Jetivia* [29] in cases where a company sues its agents or directors for loss caused to it by their conduct, such as in matters involving a breach of fiduciary duty, or fraud,[30] it would be obviously be inappropriate for them to seek to avoid liability on the basis that their own culpable knowledge and state of mind, and their acts, should be attributed to it.

52. In *Jetivia* a company in liquidation, Bilta (UK) Ltd, lodged claims against its former directors and against Jetivia, a Swiss company, and its sole director, on the grounds that they were parties to a fraudulent scheme involving VAT frauds pertaining to so-called 'carbon credits'.[31] It was alleged that Bilta had been deliberately set up to serve as a vehicle for perpetrating VAT fraud on the fiscus.

---

[26] *Jetivia SA & Ano v Bilta (UK) Ltd & Ors* [2015] 2 All ER 1083.

[27] Per Lord Sumption at paras [87] and [92] and Lords Toulson and Hodge at para [181]. In its recent decision in *Daiwa Capital Markets Europe Ltd v Singularis Holdings Ltd* [2019] UKSC 50 the Supreme Court re-affirmed these principles.

[28] *S v Van Den Berg & Ors* 1979 (1) SA 208 (D).

[29] Note 26 at paras [42]-[43], and [89].

[30] Vide *S v Smith* 1985 (2) SA 70 (T) at 72C.

[31] The scheme involved the purchase in the EU of 'EUAs' ie Emissions Trading Scheme Allowances which were zero-rated for VAT, which were then sold in the UK with VAT to a related company at a price lower than the price at

53. The Supreme Court rejected an appeal which was lodged against the decision of the Court a *quo*, and confirmed its ruling that in the action by the company against its directors (one of whom was its sole shareholder) and third party co-conspirators it would be inappropriate to attribute to it the wrongdoing of its directors, as a defence to the claims which had been brought against them.

54. In this matter the respondent company has sought to sue not only its erstwhile director Goosen and her son Meyer, who according to its allegations were the originators of an allegedly unlawful scheme which caused it to suffer financial loss, but also the appellants, as outsiders who were parties thereto. On the face of it the adversarial relationship between the parties in this matter is similar in nature, if not on all fours, with that in *Jetivia*, and the principle laid down in it would therefore appear to be applicable. But, in my view the circumstances of this matter are such that what actually happened and how and why the transactions were effected is highly suspect, and the Court a *quo* was not in a position finally to decide whether the acts and knowledge of Goosen (or any of the other directors for that matter) should, or should not, be attributed to the respondent.

55. In their opposing affidavits the appellants allege that the arrangement which was proposed to them by Goosen, and which they agreed to, must have been known to her co-directors, and they must have consented to it. As was pointed out by the appellants' counsel, some 750 transactions involving a total of just under R 7 million were effected utilizing a number of bank cards, over a period of just short of five years, between February 2014 and November 2018. According to the particulars of claim and the annexures thereto the transactions which were put through were in respect of the alleged servicing, repair and maintenance of specified motor vehicles, belonging to the respondent. One would assume that the financial statements would have revealed the nature and extent of these transactions over the years, at least insofar as the company's bottom line was concerned.

---

which they were bought, which on-sold them to entities outside the UK , thereby enabling the defendants to lodge claims for VAT refunds in the UK.

56. It is not unlikely, in such circumstances, that Van der Westhuizen, who was responsible for the respondent's financial affairs, and her son who was its bookkeeper, would have known what was going on, unless they deliberately turned a blind eye to what was happening under their very noses, or were party to it.

57. One is left with a sense of disquiet that in such circumstances not only was summary judgment not sought against Goosen's estate, but no attempt was apparently made to hold either Van der Westhuizen senior and junior, or Korf to account, yet judgment was taken against the appellants in full, although they only profited in respect of 20% of the losses that were sustained, less any expenses that would have been incurred. (In this regard the appellants would obviously have incurred bank charges for processing these transactions).

58. This disquiet is increased if one has regard for what is said by Meyer in his opposing affidavits. As mentioned earlier he was instructed by his mother to effect the transactions and to utilize the monies which were generated by them, for the maintenance, repairs and upgrading of a farm, on which he and his grandparents (ie the parents of the respondent's directors) and various other family members lived, after the directors had taken a resolution to this effect. These averments provide some context to the appellants' averments that they were informed by Goosen that the transactions would 'assist' the respondent with its 'liquidity' and 'finances'.

59. Be that as it may, in my view, in the light of these circumstances (including the appellants' at least *prima facie* partial defence to the claims on the grounds of prescription), this was pre-eminently a matter in which justice and fairness required that the Court should, in the exercise of its discretion, have refused to grant summary judgment and it should have directed that the matter proceed to trial, in order that these issues could be ventilated irrespective of any consideration of the appellants' principal defence ie that the transactions were passed in terms of agreements that were entered into, or any alleged deficiencies in respect thereof. In *Breitenbach* [32] it was held that if, on the

[32] Note 10 at 229F-H.

material before a Court, there is a reasonable possibility that an injustice might be done if summary judgment were to be granted, it would constitute a sufficient basis for the Court to refuse it, in the exercise of its discretion.

60. There are, in my view, a number of further reasons why the Court a *quo* erred and why summary judgment should not have been granted. In my view, it was not possible, on the limited basis of the curt allegations in the particulars of claim and the responses thereto in the appellants' opposing affidavits, to safely and definitively conclude that what occurred either constituted a misappropriation of the respondent's monies, or if it did, that the appellants had no principal defence thereto, which might succeed at trial.

61. It is important to remember that the respondent's claims were formulated on the basis of an alleged misappropriation and not on the basis of an alleged fraud ie on the basis that the appellants had stolen monies from the respondent and not that they deceived it by fraudulently misrepresenting the nature of the transactions which they effected. The scheme may well have constituted a fraud on the fiscus, or the banks, or even on the respondent, but in my view in this respect the Court a *quo* erred insofar as it repeatedly referred to the existence of a fraud which the appellants knowingly perpetrated on the respondent, as this was not the claim which was before it, and it is evident that it was heavily swayed by its views in this regard, and in large part its rejection of the explanations which were given by the appellants was based on this misdirection.

62. It is common cause that, in order to succeed in its claims, the respondent needed to establish that the appellants had the necessary intention to steal ie to deprive it of ownership of the monies that were allegedly misappropriated from it. In this regard the appellants alleged that they never had any such intention, as they acted on the instructions of the respondent, as conveyed to them by Goosen and her son, and in doing so they believed that they were assisting the respondent.

63. The respondent contends, much as the Court a *quo* did, that the version which the appellants have offered in this regard is highly improbable and implausible. But, as was pointed out previously, when considering and weighing up a defendant's version in a summary judgment application a Court does not

determine the probabilities thereof, for doing so would effectively be to determine the merits of its defence. There is indeed cause to be cynical and sceptical of much of the appellants' versions, and they may well flounder at trial. But the simple question at this stage of the litigation is merely whether it can be said that their versions are 'inherently and seriously unconvincing' to the extent that they can be rejected out of hand, and as I have previously attempted to point out, the answer to this question depends on, and can only be determined by, what comes out in evidence at the trial. In my view, as implausible as the appellants' averments may appear to be, they cannot be rejected out of hand at this stage.

64. Assuming, for the moment, that the respondent proves at trial that Goosen and Meyer stole money from the respondent by perpetrating a fraud on it, the appellants would only be jointly and severally liable if it were proved that they were co-conspirators ie that they, too, were dishonest. Dishonesty requires that the appellants should have known that the transactions in question were dishonest in relation to the respondent. A case of a dishonest misappropriation from the respondent would not be established by proving that the appellants knew that the transactions were bogus, and thus potentially fraudulent, in relation to the banks and/or the fiscus.

65. The appellants may not have carefully thought through the way in which the respondent might benefit commercially from the arrangement. They may simply have accepted at face value the representation to them by Goosen and Meyer that the transactions would benefit the respondent. But even if they had thought this through, and even if they knew that the respondent as a separate entity could not realistically benefit from the arrangement, they might – as lay people unacquainted with the legal principles relating to the attribution of knowledge and the strict distinction in law between a corporate entity and its controllers – have genuinely believed that everything was in order if the directors approved the arrangement. This belief, if genuine, would – however misguided it was – rule out *dolus*.

66. Lastly, insofar as the Court a *quo* held that the versions which they gave were 'conveniently' bald and scant, and thus did not provide sufficient particularity, I

respectfully differ. In its particulars of claim the respondent alleged that, with the knowledge and consent of Goosen the appellants processed the transactions in the Eclipse matter 'during or about' September 2015 and November 2018, and the transactions in the Tyremac matter 'during or about' February 2014 and November 2018. In response, the appellants admitted that the transactions had indeed been processed in the periods alleged, with the knowledge and consent of Goosen, and averred that this had occurred pursuant to agreements which they had concluded with her during 2014 and 2015, and they provided particulars of where the agreements were concluded, and the terms thereof. In the circumstances they provided the material particulars required for their defence. Whether it was a good defence is something else, but in my view they cannot be said not to have provided sufficient particularity thereof.

67. In the result, for these reasons I would uphold the appeal, and make the following Order:

67.1 The appeal is upheld, with costs.

67.2 The Orders of the Court a *quo* are set aside, and substituted with an Order in the following terms:

'*1. The applications for summary judgment in the matters under case nos. 23198/18 and 23199/18 are refused.*

2. The defendants are granted leave to defend.

3.Costs of the applications for summary judgment in both matters shall be costs in the cause.'

M SHER

Judge of the High Court

I agree, and it is so ordered.

A LE GRANGE

Judge of the High Court

I agree.

O ROGERS

Judge of the High Court

Attendances:
Appellants' counsel: Adv A Kantor SC
Appellants' attorneys: Coulters Van Der Walt (Cape Town)
Respondents' counsel: Adv IC Bremridge SC
Respondents' attorneys: Marais Muller Hendricks Inc (Cape Town)