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

CASE NUMBER A161/2022
REPORTABLE

In the matter between:

AHMR HOSPITALITY (PTY) LTD t/a Appellant
BAKENHOF WINELANDS VENUE
(Registration Number: 2017[…])

and

GENEVIEVE DA SILVA Respondent

JUDGMENT DATED 15 AUGUST 2023

KUSEVITSKY, J

[1] This is an appeal against a summary judgment which was granted against the Appellant on or about 25 April 2022 in the Wellington Magistrate's Court. The Appellant also further seeks condonation from this court for the late filing of the notice of appeal in the Magistrate's court. The Respondent (Plaintiff in the court *a quo*) has filed a notice to abide this court's decision.

Condonation

[2] It is common cause that Appellant failed to file its notice of appeal within the requisite 20 days after receiving the judgment. There was thus non-compliance with Rule 51(3) of the Magistrates' Courts Rules. As motivation for the application for

condonation from this court, the Appellant *inter alia* argues that the delay was a mere seven days out of time and did not prejudice the Respondent nor the administration of justice. It was stated that the delay was occasioned by the death of the founder and owner of the Appellant, who was the Defendant in the court *a quo*. I can see no reason why condonation in these circumstances should not be granted.

The merits

[3] Turning to the merits underlying the appeal. In the main action, the Respondent's claim was formulated as follows: On 23 November 2019 and at Green Point, the Respondent entered into a written venue hire agreement with the Appellant to host a wedding at their venue known as the Bakenhof Winelands Venue, situated on the R45 in Wellington. The material terms of the agreement were *inter alia* that the Respondent would hire the venue from the Appellant for her wedding on 2 May 2020 and in order to reserve the date, the Respondent was required to pay a deposit of R 50 000 (Fifty Thousand Rand). The deposit was duly paid to the Appellant, with the tacit, alternatively express term of the contract that the Appellant would be able to perform the functions so required by the Respondent.

[4] As we know, the Covid-19 pandemic struck and during March 2020, the South African Government declared an Alert Level 5 lockdown, which meant that *inter alia*, all forms of social gatherings were prohibited. In light of these developments, the parties agreed to postpone the event to 3 October 2020, the date being dependant, according to the Respondent, on the status of international air travel and event restrictions and social gatherings which were already imposed. However, on 15 May 2020, the Respondent sent the Appellant an email which stated the following:

> *"Unfortunately at this point we do not think it will be possible to go ahead with our wedding, as majority of our guests are from outside Cape Town and the prospect of travel does not look promising. We are looking at likely having a very small church ceremony only (and we are not sure when this would happen). Because of this we want to cancel our booking."*

[5] Furthermore, as a gesture of goodwill, the Respondent requested the Appellant to provide her with a schedule of costs already incurred by the Appellant and to refund the balance of the deposit to her. The Appellant neither provided the requested schedule nor attended to the refund of the deposit.

[6] In the court *a quo*, the Respondent argued that the payment of the deposit was to prevent the Appellant from suffering loss should the Respondent fail to perform or proceed with the booking. The Respondent averred that she was however forced to cancel due to the Appellant's inability to perform as required. She also averred that she confirmed the cancellation well in advance when no substantial services whatsoever had yet to be rendered by the Appellant. She also argued that in any event, the Appellant was not able to render the required services in light of the National Lockdown restrictions imposed at the time. She finally averred that there was no basis upon which the Appellant was entitled to retain the deposit paid by her under those circurstances.

[7] The Appellant defended the matter and in its plea, averred the following; it admitted that an agreement was entered into on 29 November 2019; they denied that the terms listed were the only material terms of the agreement; they admitted that on 19 March 2020 the parties agreed to postpone the date of the wedding to 03 October 2020 and also admitted the quoted content of the correspondence as received from the Respondent on 15 May 2020. The Appellant also admitted demand, but denied that it was liable to refund the Respondent any amounts or that any amounts were outstanding.

[8] It is common cause that the matter proceeded to summary judgment and the Magistrate found in Respondent's (Plaintiff) favour. In the notice of appeal, the Appellant argues that the court *a quo* erred in the following respects:

8.1 That the court failed to give regard to the express provisions of clause 2.1 of that agreement that provides that:

"the initial deposit including VAT (or any other percentage deposit agreed upon) becomes non-refundable 14 days (fourteen) days after the initial deposit has been paid."

8.2 The Appellant is of the view that the express provisions of clause 2.1 excluded the Respondent's entitlement to a refund and that the Appellant's reliance on this clause constituted a *bona fide* defence to the Respondent's claim at summary judgment stage.

8.3 The Appellant contends that the Magistrate erred in finding that it had a positive obligation or onus to establish, after cancellation of the agreement, that the Respondent was at fault for the failure of the wedding function to materialise; that the Appellant had suffered harm as a result of the cancellation by the Respondent and that the Appellant had rendered services to the Respondent in order to retain the deposit paid by the Respondent in circumstances where no such obligation rested upon the Appellant.

[9] Finally, the Appellant contends that the Magistrate erred in finding that proceeding with the wedding function, notwithstanding the agreement between the parties to postpone the wedding function to 3 October 2020, as a fact would have exposed both the Appellant and the Respondent to '*serious criminal charges'*, without evidence to support such a finding, or reference to any regulation or statutory provision that would support such a finding in either the pleadings or the affidavits of the summary judgment application.

Evaluation

[10] It is trite that an appeal court is only obliged to interfere where there has been a clear misdirection in the lower court. Furthermore, when an appellate court is seized with an appeal against a discretion exercised by a lower court, it may only interfere with that discretion in certain circumstances. These circumstances include whether the lower court has exercised its discretion in a non-judicial manner; applied the wrong principles of law; misdirected itself on the facts; or reached a decision that

could not have reasonably been reached by a court that has properly appraised itself with the relevant facts and legal principles.[1]

[11] On a perusal of the Appellant's plea, it is clear that it is a bald denial of the allegations as contained in the Respondent's particulars of claim. In fact, the only admission made by the Appellant was that an agreement was entered into; that the parties agreed to postpone the event and that correspondence and a demand was made. The plea as is stands, does not contain a shred of a defence. Naturally, confronted with this plea, the Respondent, as she was entitled to, applied for summary judgment averring that the Appellant did not disclose a *bone fide* defence to her claim; that it was a bare denial and that it had been entered solely for the purpose of delay.

[12] The approach to summary judgment in the lower court's mirrors to a certain extent that of the requirements in the High court. Following the amendments in 2019[2], summary judgment is now applied for after the filing of a defendant's plea. Furthermore, such as in the past, all that a defendant needed to do to avoid summary judgment, was to fully disclose the nature and grounds of their defence and the material facts on which it is based. In essence, a defendant needed to plead that *facta probantia* on the *facta probanda* so pleaded. I cannot see that there would be a distinction to this approach in the lower courts. The purpose of the rule however has not changed. It is still to obtain a speedy remedy to a claim where, *prima facie*, no *bona bide* defence has been disclosed or, such as in this instance, no defence at all in the plea has been advanced. In *casu*, no *facta probanda* has even been pleaded.

[13] The rules relating to summary judgment are trite and need no restatement. The issue of it being a 'drastic' or 'extraordinary' remedy has also been dealt with in several authorities[3]. See also *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[4] .To be clear, it is not. It is an exercise of sorting out the wheat from the chaff, so to speak. The procedural manner in which it is now dealt with is

[1] *Mathale v Linda and Another* [2015] ZACC 38 at para 40
[2] Rule 14 of the Rules of practice in the Magistrates Courts and R32 of the Uniform Rules of Court
[3] Dealt with in para 7 of the court *a quo's* judgment
[4] 2009 (5) SA 1 (SCA) at 11G-12D

common cause. Unlike in the past, a plaintiff, as well as a presiding officer, will now have the benefit of having both the defendant's plea and affidavit resisting summary judgment at its disposal; in the case of the former, to decide whether or not to proceed with the summary judgment application in light of the defences so raised by the defendant in its plea; and in the case of the latter, to decide whether or not a defendant is entitled to have its defences which it has raised in its plea, adjudicated at a trial. It is also trite that the defence so pleaded need not be an exercise of mastery or model of precision. All that is required from a defendant is to put forward a *bona fide* defence and to fully disclose the material facts relied upon for such a defence in order for the parties and ultimately the court, to make a determination as to whether the door should be shut on a time-wasting recalcitrant defendant, or whether the defences so raised, if it is proved at trial, would constitute a defence to the plaintiff's claim. If a court is of the view that a defendant has an unanswerable case to answer, much less no case as pleaded, then a plaintiff will be entitled to summary judgment.

[14] Having stated the above, it would thus be the natural course of progression for a defendant, in the face of a summary judgment application, to expand upon the defence or defences so raised in its plea - in its affidavit. But the cart cannot be put before the horse. In other words, in my view, a defendant cannot for the first time raise defences in its affidavit opposing summary judgment, where no such defences exist in its plea. In the new summary judgment formulation, rule 32(2)(b) sets out *inter alia* that a plaintiff must '*explain briefly why the defence 'as pleaded' does not raise any issue for trial*.' (own emphasis). This presupposes, that in the normal acceptable course of pleadings – and which are presumably non-excipiable – the matter would be adjudicated on the defendant's pleaded defence. This, in my mind, was perhaps one of the reasons that the requirement of the plea was introduced before summary judgment could be applied for, so that by the time that a defendant filed its opposing affidavit, that he would be committed to the version expressed in his plea, as opposed to a situation where a defence as contained in the affidavit is materially divergent from that which was contained in its plea. As an aside, a defendant is in any event required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent

with the plea, it cannot in the absence of an explanation for the inconsistency be said to be *bona fide*.[5]

[15] The Appellant in argument before us and in its heads of argument made the bold contention that even on the Respondent's own papers, a cause of action could not be sustained. In fact, if indeed the matter went to trial on the papers as pleaded, in other words, based on the bald denial by the Appellant, the Respondent would in all likelihood also have been granted judgment in her favour.

[16] In *casu*, what the Magistrate was confronted with was a bald denial by the Appellant in its plea. Furthermore, in its opposing affidavit, which I will also deal with hereunder, did not contain the issues that is consistent with the grounds of appeal relied upon in the Appellant's notice of appeal. The Magistrate was alive to the amendments and the case that the Appellant had to meet in order to resist summary judgment. The court made an evaluation based on the papers and evidence before it, stating that the Appellant had the opportunity of raising a defence to the simple averments made by the Plaintiff, yet it failed to do so. He also held that the defence of *pacta sunt servanda* put forward as a defence did not raise a triable issue. In my view, even if one were to argue that a defendant might have or could have amended its pleadings, as the Appellant has suggested in its heads of argument, the authorities have made it clear that summary judgment proceedings are not meant to take the place of exceptions. And in any event, a court, let alone an appeal court, is not there to speculate on how litigants intend to prosecute their case. They are confined to what is before them. In my view, I can find no misdirection on the part of the Magistrate. On this basis alone, the appeal should fail and a consideration of the grounds as raised would be an exercise in futility.

[17] For the sake of completion, this court did ask the Appellant to make additional submissions regarding the applicable legislative impediments that were operative to citizens and businesses during the Covid-19 pandemic at the time that the contract was cancelled, and whether public policy or fairness is a consideration or factor to be taken into account in this court's adjudication of the matter. In the Appellant's

[5] Breytenbach v Fiat SA (Edms) Beperk 1976 (2) SA 226 (T)

supplementary note, it suggested that this court was not entitled to enquire as to whether the contract was unenforceable, alternatively that clause 2.1 was unenforceable on the basis of impossibility of performance by the Appellant and/or unfairness as a result of public policy based on the Lockdown restrictions. The Appellant is of the view that this court is not competent to deal with this issue given that that was not the Respondent's pleaded case – and was not the case that the Appellant was called to answer. This contention is misguided as I will demonstrate in due course.

[18] I have dealt extensively with the fact that the Appellant did not answer at all to the Respondent's pleaded case. Furthermore, it certainly does not behove a defendant to attempt to make out a case or defence in its heads of argument, when no such case was pleaded in its papers. In *casu*, what the Appellant raised in its affidavit opposing summary judgment was the following: it complained that the application for summary judgment was not based on a liquid document or liquidated amount of money; that the Respondent had failed alternatively neglected to attach proof of the liquidated document or proof of the liquidated amount; and that the Respondent's founding affidavit failed to verify her cause of action.

[19] Now returning to the issue of the question of fairness and public policy. The Appellant in the opposing affidavit averred that the Respondent was still bound by the terms of the agreement in accordance with the *pacta sunt servanda* principle. The Appellant went on to allege that the Respondent cancelled the agreement without ever giving the Appellant the opportunity to perform in accordance with the agreement.[6]

[20] In support of this contention, the Appellant relied on the *dicta* enunciated in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[7] where Theron J, writing for the majority emphasised in para 81 thereof that '*the application of the common law rule of contract should result in reasonably predictably outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain… The*

[6] Paras 7 and 17 of the opposing affidavit.
[7] [2020] ZACC 13

enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependant on the "idiosyncratic inferences of a few judicial minds."

[21] The Appellant argued that the Magistrate did not engage in any of the above analysis nor could he have because the Respondent did not plead the existence of clause 2.1, nor did she request an order not to enforce it. In the first instance, this argument is misguided, since it was not the Respondent to have proved its case against the defendant. Rather, the onus fell upon the defendant to prove at summary judgment stage that it had *bona fide*, triable defences worthy of defeating an application for summary judgment.

[22] Secondly, the *dicta* in *Beadica supra* went further than that proposed by the Appellant. In a dissent[8], the court held that the issue of unfairness in contract law '*is never simply a 'legal' one that can be deduced from supposedly neutral legal principles in a self-executing way*…'. With regard to the morality of contracts, the court, referring to Bingham LJ in *Interfoto*[9] stated that the law of obligations recognises and enforces an overriding principle that in the making and carrying out contract, parties should act in good faith. The Court stated that fairness is thus universally recognised as integral to any system of contract law… *[t]o give content to fairness entails a moral choice or value judgment*.[10] Theron J however recognised that whilst the principle of *pacta sunt servanda* should be honoured and the need for certainty in the law of contract, the Supreme Court cautioned that this power should be exercised sparingly and only in the clearest of cases.[11] In my view, this is one of those cases.

[23] Without making a pronouncement, it seems as if the Appellant opportunistically held on to the Respondent's money when given the prevailing conditions at the time, it was not entitled to. Their actions were not only *contra bones mores*, but performance of the contract was impossible due to the conditions

[8]Froneman J and Madlanga J concurring at para 106
[9] at para 111
[10] at para 112
[11] at para 12

prevalent at the time – and it would have been immoral for the Appellant to have held the Respondent ransom and to dictate when they could get married, as a means or entitlement for them to have retained the deposit. The plaintiff was willing to pay for administrative expenses that the Appellant incurred. This was reasonable conduct. The Respondent sought a list of the expenses that justified the Appellant's alleged entitlement of the deposit. They failed to provide this. Instead, they relied upon clause 2.1 which provided for a deposit being non-refundable in circumstances, which public policy dictates would not have been *bona fide*. As I have stated above, the operation of *pacta sunt servanda* would have been applicable had the restrictions of the the Covid-pandemic and the attendant lockdown restrictions not been in place. Fairness and morality dictates that the retention of the deposit was not *bona fide*. I cannot find any misdirection in the Magistrate's finding in this regard.

[24] For all of the reasons advanced, the above appeal must fail. In the circumstances, I make the following order.

ORDER:

1. The appeal is dismissed with costs.

D.S KUSEVITSKY
Judge of the High Court

I agree

MI SAMELA
Judge of the High Court

ON BEHALF OF APPELLANT ADV. C FEHR