

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No
Date: 05/04/2023

CASE NO: 2022/9914

Δ Maier-Frawley

In the matter between:

**NISSAN FINANCE, A PRODUCT OF WESBANK,
OF FIRSTRAND BANK LIMITED**

Plaintiff

and

GUSHA HOLDINGS AND ENTERPRISES (PTY) LTD

First Defendant

MR TAGARA HOVE

Second Defendant

J U D G M E N T

MAIER-FRAWLEY J:

1. This is an opposed summary judgment application in which the plaintiff seeks the following relief:
 - 1.1. Cancellation of the agreement;
 - 1.2. Return of the motor vehicle;

- 1.3. Costs of suit;
- 1.4. Claim for damages to be postponed *sine dies*.
2. The plaintiff's claim apropos the first defendant is based upon an electronic instalment sale agreement (the 'agreement' or 'credit agreement') concluded between the plaintiff (represented by a duly authorised employee) and the first defendant (represented by the second defendant) relating to the first defendant's purchase of a Nissan motor vehicle.
3. The claim apropos the second defendant is based on a written suretyship agreement in terms of which the plaintiff avers in the particulars of claim that the second defendant *'bound himself as surety in solidum for and co-principal debtor jointly and severally with the First Defendant, for the due payment by the First Defendant to the Plaintiff, of all monies which the First Defendant may now or from time to time hereafter owe to the Plaintiff, from whatsoever cause and howsoever arising and whether as principal debtor, guarantor or otherwise and whether trading alone or in partnership or under any name, as well as for the due and punctual performance and discharge of any contract or agreement entered into by the First Defendant to the Plaintiff.'*¹ I mention at this juncture that the underlined portions in the above quote either do not appear in or do not accord with the contents of the written suretyship, annexure 'G' to the particulars of claim.²

¹ Par 25 of the particulars of claim.

² Relevant clauses in the suretyship, are the following;

"1... I/We, the undersigned, hereby declare that I/We bind myself/ourselves jointly and severally, as surety and as co-principal debtor for the punctual payment of all sums due or to become due to FirstRand Bank Limited (the Bank) by GUSHA HOLDINGS AND ENTERPRISES in terms of or arising out of or incidental to the Agreement stated above up to a value of the R177,082.50.

5...The Bank is under no obligation to enforce or pursue any of its rights against the Debtor before enforcing them against the surety/ies and co-principal debtor/s.

6. The suretyship is ... continuing security for the whole amount now or in future owing to the Bank.

17. The surety/ies or co-principal debtor/s shall be liable for all legal costs, on an attorney own client scale

4. Consequent upon the first defendant defaulting on its payment obligations under the agreement and the failure of the first or second defendant, despite demand, to bring the arrears up to date, the plaintiff instituted action to secure the return of the vehicle and cancellation of the agreement.
5. It should be pointed out that the plaintiff's particulars of claim are not a model of clarity or precision. The plaintiff pleaded in its particulars of claim that the first defendant (contracting party) was obliged in terms of the agreement to pay certain amounts stipulated in the agreement to the plaintiff on a monthly basis in discharge of its payment obligations. Regarding the plaintiff's right to cancel the agreement, it pleaded that it was a term of the agreement that *'In the event of the First Defendant breaching any terms of the Agreement (all of which are agreed to be material), the Plaintiff shall be entitled to immediately obtain possession of the goods and recover from the First Defendant, as pre-estimated liquidated damages, the total amount payable, but not yet paid, less the value of the goods as at the date of delivery thereof to the Plaintiff'*³ and that the *'first defendant has breached in*

21. The surety renounces the benefits of excu[s]sion, division and cession of action, revision of accounts and no value received." (emphasis added)

As can be seen, the liability of the surety was restricted to the principal debtor's indebtedness arising from or incidental to the credit agreement, limited to an amount of R177,082.50, and did not expressly include expansive liability for any indebtedness *of any nature from whatsoever cause* in respect of monies due and owing by the principal debtor under the credit agreement. Nor did the surety expressly guarantee the *'due and punctual performance and discharge of **any** contract or agreement entered into by the First Defendant to the Plaintiff.'*

³ This appears to be based on the breach clause (clause 13) contained in the terms and conditions of the agreement and annexed to the particulars of claim, which provides, in relevant part, as follows:

13. Breach

13.1 If:

13.1.1 you do not comply with any of the terms and conditions of the Agreement (all of which you agree are material) or

13.1.2 you fail to pay any amounts due in terms of this Agreement; or

...

...

13.2 Upon the occurrence of any of the abovementioned events, we shall be entitled, at our election and without prejudice, to:

13.2.1 claim immediate payment of the outstanding balance together with interest and all amounts owing or claimable by us, irrespective of whether or not such amounts are due

(sic) terms of the Agreement in that they have failed to maintain regular instalments on their account, the arrears being the sum of R36,14 l.79 and the full outstanding balance on the account amounts to R223,874.36.' (emphasis added). The plaintiff further *inter alia* pleaded that it complied with all its obligations in terms of the NCA, including sections 129 and 130 of the NCA. Notices in terms of s 129(1)(a) of the National Credit Act 34 of 1975 (the NCA) were sent by registered mail to the defendants respectively. Both defendants failed to respond to the s129 notices. Consequently, so the plaintiff pleaded, '*Should the Defendant [singular] fail to pay the arrears plus the costs, the plaintiff will request the Honourable court to cancel the Agreement by way of judgment.*' (emphasis added)

6. The plaintiff's manner of pleading obfuscates the surety's liability under the suretyship agreement (i.e., liability to pay any amounts due and owing by the first respondent on the first respondent's account under the credit agreement consequent upon the first respondent's default) with the first respondent's liability under the credit agreement to effect payment of the monthly amounts on its account on due date. It is clear from a reading of the credit agreement attached to the particulars of claim that the second defendant was not personally a contracting party to the credit agreement. His liability for payment of all sums due by the first defendant under the credit agreement, limited to an amount of R177 082.50, arose from the suretyship agreement as opposed to the credit agreement. Despite this, as alleged in the particulars of claim, the plaintiff delivered a notice in terms of s129 of the NCA to the second defendant. In this notice, attached as annexure 'F1' to the particulars of claim, the plaintiff's attorneys recorded, amongst others, the following:

at such stage; or

13.2.2 take possession of the Goods in terms of an attachment order, retain all payments already made in terms hereof by yourself and to claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the Goods determined in accordance with clause 11.5.2.3, which amount shall be immediately due and payable." (own emphasis)

“2. In terms of a deed of suretyship which you signed on the 18 September 2019 you bound yourself as a surety and co-principal debtor with GUSHA HOLDINGS AND ENTERPRISES (PTY) LTD together with the co-principals for all obligations due to our client in respect of the abovementioned agreement.⁴

3. According to our client's records GUSHA HOLDINGS AND ENTERPRISES (PTY) LTD is in arrears with R31,552.53. The next instalment of R4,214.28 is payable on 7 March 2022. The total balance outstanding under the agreement, including arrears, amounts to R223,279.41.

4. You have failed to meet your obligations in terms of the above agreement⁵ and accordingly your account is in arrears for more than 20 (Twenty) business days in the amount set out above.

5. Please note that our client is desirous to implement a repayment plan with you in order to settle the outstanding arrears and balance in respect of the abovementioned agreement in order to avoid the incurrence of any further unnecessary costs.

7. Should we not receive a response to this notice within 10 (ten) business days from date of this letter, then our client will exercise its right to -⁶

⁴ I point out that the reference to the ‘abovementioned agreement’ in paragraph 2 of the notice was clearly a reference to the credit agreement concluded between the plaintiff and the first defendant.

⁵ As the surety personally did not operate any account in terms of the suretyship and as the preamble to the notice unequivocally referred only to the first defendant’s default under the described credit agreement, the reference in paragraph 4 to ‘the above agreement’ was clearly a reference to the credit agreement itself.

⁶ Clause 13.3 of the Agreement provides for the delivery of a notice as envisaged in s 129 of the NCA following upon a breach by the first defendant of the terms of the agreement in two distinct circumstances: the first being in the event that the plaintiff elects to enforce the agreement (clause 13.3) and the second being in the event that the plaintiff elects to terminate the agreement in terms of s123 of the NCA (clause 13.5). In either event, the following procedure was to apply:

“13.3. If we elect to enforce the Agreement, a notice will be sent to you, which will set out:

13.3.1 the details of your default;

13.3.2 the period in which we require you to rectify the default;

13.3.3 your rights to refer this Agreement to a debt counsellor, alternative dispute resolution agent, Consumer Court or ombudsman with jurisdiction, with the intention of resolving any disputes or developing and agreeing on a plan to bring your payments under this Agreement up to date.

13.4 Any legal proceedings will not be commenced against you unless:

13.4.1 You have been in default for at least 20 (twenty) business days;

13.4.2 At least 10 (ten) business days have elapsed since the default letter or notice referred to above has been delivered...

13.4.3 You have failed to respond to the default letter or you have responded by rejecting our proposal;

7.1 Terminate the credit facility / credit agreement;

7.2 Close the credit facility / credit agreement;

7.3 Approach the Court to enforce the agreement.⁷

7. As per your credit agreement, you will be liable for any legal costs that our client incurs pursuing its outstanding balance because of your failure to settle your arrears, which legal costs can be taxed on request..." (emphasis added)

7. The defendants relied on various technical defences in opposing the grant of summary judgment. Only those ultimately pursued at the hearing of the matter need be mentioned. These include:

7.1. that the affidavit filed by the plaintiff does not comply with the provisions of rule 32(2)(b) in that the deponent has failed to verify the cause of action or to identify the point of law relied on;

13.4.4 You have not surrendered the Goods to us in terms of Section 127 of the Act;

13.5 Should we elect to terminate this Agreement in terms of Section 123 of the Act, the same procedure set out in 13.3 above, will be followed prior thereto.

13.6 Before termination of the Agreement you are entitled to reinstate the Agreement in respect of which you are in default, by paying all overdue amounts, as well as out permitted default charges and reasonable costs up to the time of reinstatement."

Section 123 of the NCA provides, in relevant part, as follows:

"123. **Termination of agreement by credit provider.**—(1) A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section.

(2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

Part C of Chapter 6 includes, amongst others, sections 129 and 130 of the NCA, which provide for procedures that are required to be followed for debt enforcement and prior to the institution of legal action.

Of relevance to the present matter, are sub-sections 3 and 4 of s129 of the NCA, which provide, in relevant part, as follows:

"(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not re-instate or revive a credit agreement after—

(a)...

(b)...

(c) the termination thereof in accordance with section 123."

⁷ This is presumably a reference to s 130(2) of the NCA

- 7.2. that the plaintiff failed to provide a certificate that evinces that it is registered as a credit provider in terms of s 40 of the NCA;
 - 7.3. that the plaintiff applied for summary judgment at a time when a binding settlement or payment arrangement was in force and being complied with by the defendants and pursued its application notwithstanding first defendant's payment of the arrears;
 - 7.4. that the plaintiff has failed to comply with the provisions of s 129 of the NCA; and
 - 7.5. that the deponent to the affidavit filed in support of the application for summary judgment was not authorised to depose to the affidavit.
8. As regards the merits of the plaintiff's claim, the plea filed by the defendant is, save in the respects identified below, tantamount to a bare denial of the averments made in the particulars of claim. The defendants plead that they 'do not admit' the citation of the plaintiff, which includes the allegation in paragraph 1.2 of the particulars of claim, namely, that the plaintiff is a registered credit provider. As regards the conclusion of the credit agreement, the defendants do not deny that the first defendant represented by the second defendant concluded the credit agreement in question. They deny only that the plaintiff was represented by a duly authorised employee in concluding the agreement. They also do not deny that the vehicle was delivered to the first defendant, only that it was the *plaintiff* (bank) that delivered it to the first defendant. The defendants aver that the first defendant purchased the vehicle from a motor dealer, and not the plaintiff, hence they plead that '*the plaintiff is required to prove the terms of the agreement it alleges in regard to what the plaintiff states in paragraph 6*' of the particulars of claim.⁸ In paragraph 6 of the Particulars of claim, the

⁸ Despite this, in the affidavit filed in support of the summary judgment application, the deponent, ostensibly in misreading the plea, states that '*The First and Second defendant deny entering into an agreement with the plaintiff, accepting delivery of the vehicle and being bound to the terms and conditions thereof.*'

plaintiff avers that the first defendant purchased the vehicle from the plaintiff in terms of the credit agreement. What remains denied in the plea is, *inter alia*: (i) that the second defendant bound himself as surety and co-principal debtor, and hence he denies the pleaded terms of the alleged suretyship; (ii) that either defendant received the s 129 notices; (iii) that annexure 'B' (copy of the credit agreement) was attached to the particulars of claim; (iv) that the first defendant breached the terms of the credit agreement; and (v) that the plaintiff complied with the provisions of s 129 of the NCA.

9. In the opposing affidavit deposed to by the manager of the first defendant (Mr Zita Ibizu Bgwaramba) on behalf of the first defendant, the first defendant raised only certain points *in limine*⁹ without disclosing the nature and grounds of its defence to the plaintiff's claim or the material facts relied on therefor.¹⁰ Furthermore, Mr Bgwaramba did not say anything about whether or not he could swear positively the fact that the first defendant has a *bona fide* defence to the action. In a separate affidavit headed 'confirmatory affidavit', the second defendant, Mr Hove, did no more than state that '*I have read the affidavit deposed to by Zita Ibizu Bgwarambo and oppose the application for summary judgment on the same grounds.*'

10. Nowhere in the defendants' opposing affidavits has either of the defendants specifically stated that the first defendant was not in arrears with its monthly instalments. On the contrary, in its opposing affidavit, the deponent states that a first payment was made on behalf of the first defendant for purposes

⁹ Being those points referred to in paras 8.3 to 8.5 above in the judgment, including the point that the credit agreement appears not to have been cancelled by the plaintiff and remains extant.

¹⁰ In terms of rule 32(3)(b), the defendant may satisfy the court by affidavit or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant 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." (emphasis added)

In terms of rule 32(5), if the defendant does not satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff.

of liquidating the arrears by way of monthly instalments, by agreement between the parties. In a later supplementary opposing affidavit deposed to by Mr Bgwaramba on behalf of the first defendant, he stated that he made certain payments to the plaintiff in respect of the arrears that remained outstanding. These payments occurred after service of the summons. This would seem to be a clear acknowledgment that the first defendant, contrary to what is averred by it in its plea, was indeed in arrears with its payment obligations in the amount averred in the particulars of claim at the time the summons was served. Of further significance, is the fact that the first defendant has not, in the opposing affidavit, alleged payment by it of any of the instalments under the credit agreement on due date, which were said by the plaintiff to have not been paid. Generally speaking, one would have expected such a statement to have been made in order to establish a *bona fide* defence for the purposes of resisting summary judgment. As regards the allegation in the plea that the defendants did not receive the s129 notices, neither of the defendants advanced any reason in their opposing affidavits as to why they could not collect the notices from the relevant post office after notification to them by the post office of a registered item awaiting collection, as pleaded and demonstrated by the plaintiff in the summons.

11. The question to be answered at the summary judgment stage is not whether a pleaded defence stands good prospects of success. It is whether the defence is genuinely advanced.¹¹

¹¹ See: *Guardrisk v Life Limited FML Life (Pty) Ltd and Another* (9859/2020) [2023] ZAGPJHC 137 (15 February 2023) at para 12, where the court endorsed and applied what was earlier stated in *Tumileng Trading CC v National Security and Fire (Pty) Ltd* [2020 \(6\) SA 624](#) (WCC) at paragraph 23. The court in *Bravura Solutions (Pty) Ltd v A1 Capital (Pty) Ltd* (12632/2020) [2021] ZAGPJHC 121 (13 May 2021) at paras 36-37, in echoing the decision of *Tumileng*, said that what the court is to consider is whether the defence raised by the respondent in its plea and affidavit resisting summary judgement, is a genuine defence or one that genuinely raises any triable issue or whether it is contrived, with the intention to delay the inevitable and undisputed debt. This presupposes a balancing act against the contentions by the applicant, weighed against those by the respondent.

12. In *Mpfuni*¹² I pointed out that in terms of the recently amended Rule 32(2) (b),¹³ a plaintiff is required to ‘verify the cause of action, and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial’. Thus, in order to comply with sub-rule 2(b), the affidavit filed in support of the application must contain:¹⁴

- (1) A verification of the cause of action and the amount, if any, claimed;
- (2) An identification of any point of law relied upon;
- (3) An identification of the facts upon which the plaintiff’s claim is based; and
- (4) A brief explanation as to why the defence as pleaded does not raise any issue for trial.

13. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* (*‘Tumileng’*),¹⁵ the court held as follows:

“[13] Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant’s prospects of success are irrelevant.

[15]... Under the new rule, a plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the pleaded defence is not bona fide;

¹² *Mpfuni v Segwapa Inc* 2022 JDR 0673 (GJ) at par

¹³ The amendments came into operation on 1 July 2019.

¹⁴ See: Erasmus, ‘Superior Court Practice’ (2nd edition) at D1-401

¹⁵ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paras 13 & 15.

in other words, by showing that the plea is a sham plea.” (footnotes omitted) (emphasis added)

14. Uniform rule 32(3)(b) sets out what is required by a defendant resisting summary judgment. In *Tumileng supra*, Binns-Ward J undertook a detailed analysis of the implications of the amendments to the rule, and at paragraphs 24 and 25 of the judgment, had the following to say about this requirement:

“[24]... As has always been the position, the opposing affidavit must ‘disclose fully the nature and grounds of the defence and the material facts relied upon therefor’. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant ‘has a bona fide defence to the action’....

[25] The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which ‘the nature and grounds of the defence and the material facts relied upon therefor’ have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was ‘contrived’, in other words not bona fide. And the amended subrule 32(3)(b) implies that it should continue to be the indicated method.”

15. The defendants’ opposing affidavits dealt only with a limited number of technical issues, and by no means addressed the issues referred to by the plaintiff when it dealt with the defences raised in the defendant’s plea. They failed to satisfy the requirements of rule 32(3)(b) and dismally failed to back up their bald plea with substantiating particularity. The defendants’ opposing affidavits, seen in isolation and absent the technical defences raised therein, do not identify nor do they substantiate a triable defence ‘on the face of it’ in the sense conveyed by Binns-Ward J in the *Tumileng case*. Put differently, having regard to the obvious deficiencies in the opposing affidavits identified in the preceding paragraphs, I have grave difficulty in finding that the ostensible defences to be deduced from the plea arising from the various

denials, including a denial of any liability to the plaintiff, have been shown to have been genuinely advanced in these proceedings.¹⁶

16. I turn now to deal with a point *in limine* on which the defendants rely.

Plaintiff's failure to verify the cause of action

17. This requirement, which was a requirement in subrule (2) of Rule 32 in its original form, has been retained in subrule (2)(b) of Rule 32 in its amended form. In *Mphahlele supra*, at paragraph 17, the court summarised the position thus:

"...what must be verified are the facts as alleged in the summons. Further, the deponent to the affidavit in support of the application for summary judgment must verify what has been referred to as a complete or perfected cause of action. From the foregoing, it is clear that this requirement of the subrule does not provide for a verification of evidence or the supplementing of a cause of action with evidence. It is confined solely to those facts which are already present and as pleaded in the plaintiff's summons (it being trite that a plaintiff in summary judgment proceedings is prohibited from taking a further procedural step in the proceedings by, for example, amending the particulars of claim and then seeking to claim summary judgment)."

18. Rule 32(2)(a) requires that the supporting affidavit be made by the plaintiff or by any other person who can swear positively to the facts. The defendants do not take issue with the fact that the deponent to the supporting affidavit

¹⁶ The remarks of Binns-Ward J in *Tumileng at par 45*, (cited in fn 14 above) with whose reasoning I agree, are entirely apposite in the context of this matter. There, the following was said:

"To borrow from Navsa JA's characterisation of the defendant's position in Joob Joob Investments, 'such defences as were proffered [were] cast in the most dubious terms'. The most probable inference in the circumstances is that no particularity has been furnished because the defences and supposed counterclaim are not genuinely advanced. This is especially so because the defendant not only failed, quite dismally, to satisfy the requirements of rule 32(3)(b), it also failed to respond to the challenge to it in the plaintiff's supporting affidavit to back up its bald plea with substantiating particularity. If a defendant fails to put up the facts that it obviously should have been able to do were it advancing a genuine defence, it cannot complain if the court is left in a position in which it is unable to find a reasonable basis to doubt that it does not have a bona fide defence. There is, moreover, nothing in the papers to justify the court exercising its overriding discretion in favour of the defendant." (emphasis added)

has set out the circumstances that support a conclusion that she is able to swear positively to the facts alleged in the summons.

19. Rule 32(2)(b) sets out what the affidavit must contain. The deponent to the answering affidavit is amongst others, required to verify the cause of action and the amount, if any, claimed¹⁷ in the supporting affidavit. Our courts have consistently held that if *ex facie* the supporting affidavit the requisite verification has not occurred, the court would have no jurisdiction to grant summary judgment.¹⁸ It is also trite that all the facts supporting the cause of action must be verified.¹⁹
20. The defendants submit that the supporting affidavit is devoid of any verification of the cause of action. The plaintiff on the other hand submits that paragraphs 5 and 7 of the supporting affidavit, in effect, '*confirm and/or verify the cause of action as stated in the particulars of claim*', when regard is had to the underlined portions in the quoted passage below. I disagree for reasons that follow. In paragraphs 5 and 7 of the supporting affidavit, the following is said:

"5. In the ordinary course of my duties as Recoveries Officer and having regard to the Plaintiff's records, accounts and other relevant documents in my possession and under my control, I have acquired personal knowledge of the First Defendant's financial standing with the Plaintiff and I can swear positively to the facts alleged and the amounts claimed in the Plaintiff's particulars of claim.

7. I have read the defendants plea and I verily believe and in my opinion, the defendants have no bona fide defence to the plaintiff's claim as set out in the particulars of claim and

¹⁷ It should be noted that in the present matter, no amount was claimed, rather, the plaintiff's (unliquidated) claim for damages, the calculation of which is only determinable at a future date, is sought to be postponed sine dies in the particulars of claim. As such damages claim falls outside the ambit of rule 32(1), such claim was likewise sought to be postponed in the summary judgment application..

¹⁸ *Absa Bank Ltd v Coventry* 1998 (4) SA 351 (N) at 353D-E; *Mowschenson and Mowchenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366C-D; *Shackleton Credit Management (Pty) Ltd v Microzone Trading* 88 CC 2010 (5) SA 112 KZP at 122F-I

¹⁹ *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 563; *Northern Cape Scrap & Metals Edms Bpk v Upington Radiators and Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 426-8.

that notice of intention to defend and the plea have been delivered solely for the purpose of delay.” (emphasis added)

21. Whilst certain amounts comprising the arrears and outstanding balance on the first defendant’s account are alleged in the particulars of claim, as I have already pointed out, no monetary amount as such is claimed in the particulars of claim. The claim on which summary judgment is sought is for cancellation of the agreement and return of the vehicle on account of a material breach of the agreement by the first defendant, which despite demand, was not remedied by it within the period stated in the demand, this, despite forewarning in the demand that the plaintiff would, in such event, exercise its right to terminate the agreement. This notwithstanding, the deponent to the supporting affidavit purported to swear positively not only to the facts alleged but to ‘the amounts claimed’ in the particulars of claim.

22. It is trite that a person who deposes to an affidavit in support of summary judgment must set out the circumstances from which the Court would be justified in coming to the conclusion that the facts are within his or her knowledge, or it must appear from the nature of his or her evidence that the facts are within his or her knowledge in order for a court to be satisfied that the deponent is a person who fulfils the requirement that he or she is one who can swear positively to the facts.²⁰ This is what the deponent did in paragraphs 4 and 5 of the supporting affidavit, and no more. If the ability to swear positively to the facts in the summons is to be regarded as tantamount to the actual verification of the facts, there would have been no need to differentiate between the separate requirements in sub-rules (a) and (b) of rule 32(2). A deponent’s knowledge of the facts enabling him or her to swear positively thereto is what qualifies or entitles the deponent to make the affidavit. It does not serve to fulfil the separate requirement of verification of the facts supporting the cause of action in the summons.

²⁰ See *Raphael & Co v Standard Produce Co. (Pty.) Ltd* 1951 (4) SA 244 (C)

23. The fact that the deponent states in paragraph 7 that she is of the opinion that the defendants have no *bona fide* defence to the plaintiff's claim as set out in the particulars of claim, likewise does not assist the plaintiff. It does not amount to a verification of the cause of action. In paragraph 7, the deponent does no more than provide the justification for being able to engage with the content of the plea.

24. *In Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at422E-H. Corbett JA, writing for a unanimous court, explained as follows:

“Moreover, the word 'verifying' cannot be taken to qualify the word 'facts' and to be part of the definition of the 'any other person' who may make the affidavit,... since this would run counter to the meaning of the word 'verifying' and the grammatical construction of the sentence in which these words occur. The relevant meanings of 'verify' in the Short Oxford English Dictionary are: 'to testify or affirm formally or upon oath;... to testify to, to assert as true or certain'. Clearly facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the affidavit verifies the facts...” (emphasis added)

The learned judge concluded that the words 'verifying the cause of action and the amount, if any, claimed' refer to the content of the affidavit – what must be set out in the affidavit – as opposed to the requirement relating to who may make the affidavit. Although *Maharaj* was decided before the advent of the 2019 amendment in the rule, as I have already indicated, the requirement in relation to verification was retained in the amended rule and thus judicial interpretation in relation to the requirement of verification in the pre-amended rule still holds good.

25. Courts determining summary judgment applications have, both prior to the recent amendments to rule 32 and subsequent thereto, consistently endorsed the approach that an applicant in summary judgment proceedings

must comply strictly with the requirements of the Rules of Court.²¹ For example, in *Fischereigesellschaft*,²² the court put it thus:

“As was pointed out in *Misid Investments (Pty.) Ltd v Leslie* 1960 (4) SA 473 (W), at p. 474, the applicant in summary judgment proceedings must comply strictly with the requirements of the Rules of Court. In his judgment in this case MUNNIK, A.J. (as he then was), indicated that to his mind the approach of the Court when objections were raised on technical grounds to an application for summary judgment had been correctly set out by MARAIS, J., in *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd.*, 1959 (3) SA 362 (W) at p. 366, where he stated: 'The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial.' I am in respectful agreement.”²³ (emphasis added)

26. As stated in *Pillay*,²⁴ summary judgment cannot be granted in respect of a cause of action not so verified. The absence of a *bona fide* defence does not cure the defects in the summary judgment application read with the summons.²⁵
27. For the reasons given, the point *in limine* holds good and plaintiff is not entitled to summary judgment. As the point raised is dispositive of the application, it is not necessary for me to determine the remaining points relied on by the defendants.
28. One further issue that arose subsequent to the hearing of the application requires mention. During the course of oral argument tendered at the

²¹ Decisions post amendment include *Mphahlele* supra; *Tumileng* supra; and *Mpfuni* supra.

²² *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 111A-B.

²³ *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) is authority for saying that if *ex facie* the founding affidavit the requisite verification of the cause of action has not occurred, the court would not have jurisdiction to grant summary judgment.

²⁴ *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (TPD) at 536C-E. See too: *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* 2016 JDR 2035 (FB) (“*Buttertum*”), a Full Bench decision by Moloi and Daffue JJ of the Free State Division, Bloemfontein, para 46, (albeit decided in the context of the same requirement appearing in Rule 14 of the Magistrates’ court rules) where the following was said: “... the absence of a defence did not cure the defects in the summary judgment application read with the summons... Wallis, J (as he then was) mentioned in *Schackleton Credit Management* supra that the starting point in adjudication of a summary judgment application is the application and if that is defective, then cadit quaestio.” (emphasis added)

²⁵ *Ibid* *Buttertum*, at par 46.

hearing of the application, both counsel who appeared for the parties raised the fact that the arrears alleged in paragraph 11 of the particulars of claim to be owing by the first defendant in the amount of R36 141,79, had since been paid on behalf of the first defendant. After judgment was reserved in the matter but before judgment was delivered, the first defendant filed a supplementary affidavit (albeit without leave of court first having been obtained) in which the deponent thereto, *inter alia*, stated that he had paid the amount of R36 141,79 to the plaintiff on 10 February 2023. This payment was presumably made in an attempt to avoid the grant of summary judgment on the basis of the plaintiff's own pleading, where it will be recalled that the plaintiff averred (in paragraph 28 of the particulars of claim) that '*Should the defendant fail to pay the arrears plus costs, the Plaintiff will request the above Honourable Court to cancel the agreement by way of judgment.*' The fact of the payment, which occurred after service of summons, and after the institution of the summary judgment, and after the opposing affidavits were filed, shone a light on the question of whether or not a defendant can file a supplementary opposing affidavit in summary judgment proceedings.

29. Rule 32(4) expressly precludes the applicant in summary judgment proceedings from adducing any evidence otherwise than by the affidavit referred to in subrule 2. No annexures to a plaintiff's verifying affidavit are allowed except if the claim is founded on a liquid document, in which instance a copy of the document must be annexed to the affidavit, although the inclusion of evidence in the affidavit, or the annexing of documentary evidence, will not invalidate the application, but will simply be ignored by the court.²⁶ In dealing with the provisions of Sections 129(1) and 130 of the

²⁶ *Wright v McGuinness* 1956 (3) SA 184 (C); *Kosak & Co. (Pty) Ltd v Keller* 1962 (1) SA 441 (W); *Triple Jay Equipment (SWA) (Pty) Ltd v Muller* 1962 (3) SA 115 (SWA); *South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd* 1962 (3) SA 601 (W); *Trust Bank of Africa Ltd v Hansa (supra)*; *Venter v Kruger* 1971 (3) SA 848 (N) at 851; *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T). Whilst these cases were decided before extensive amendments were made to Rule 32, in *Absa Bank Limited v Mphahlele N.O and Others* (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020), par 14, ('*Mphahlele*'), a case decided after the amended rule came into operation, the court reached the same conclusion.

National Credit Act, No. 34 of 2005 in the context of a summary judgment application, the Supreme Court of Appeal has held that Rule 32(4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application and that reliance on a document not annexed to the summons but handed up at the hearing without complaint, was simply inadmissible.²⁷

30. The rule is however silent on what a defendant who opposes the application for summary judgment may or may not do regarding adducing further evidence. In the present matter, the first defendant simply filed a supplementary affidavit after the hearing. In this affidavit, it provided documentary proof of its payment on 10 February 2023 (i.e., three days prior to the hearing of the matter). The affidavit did no more than provide evidence under oath in support of information that had already been placed on record from the bar by counsel representing the parties. As earlier indicated, during the course of their oral submissions, both parties' counsel alluded to the fact that the payment had been effected and both made submissions in regard thereto. The supplementary affidavit served to evidence what was essentially a common cause fact, which was certainly not prejudicial to the applicant.

31. As I see it, I have a discretion to permit the supplementary affidavit.²⁸ This court in any event has inherent power to regulate procedure in terms of Section 173 of the Constitution, which may include the power to grant procedural relief where the rules of court make no provision for it. This was recognised in the pre-constitutional dispensation, as stated by Gardiner JP in *Cohen & Tyfield v Hull Chemical Works* 1929 CPD 9 at 11: '(j)ust as the Court has the power to make a Rule, so it has an inherent power, when just cause is shown, to do something which is not provided for by the Rule'. Within the

²⁷ *Rossouw and Another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) at paras [35] and [46]

²⁸ See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at para [32]

constitutional dispensation, the power extends to overlooking procedural irregularities or eschewing formalism in the application of the rules to allow a court to take account of relevant evidence in the interests of justice, particularly in the absence of prejudice being occasioned to the opposite party.²⁹ In my view, the evidence tendered in the supplementary affidavit is relevant to the extent set out in paragraph 10 above and is received for that purpose.

32. The defendants succeeded in warding off summary judgment on a technical basis in circumstances where any triable defences were not shown to be *bona fide*. The costs order below accounts for such circumstances.
33. In the circumstances, the following order is granted:

ORDER:

²⁹ An approach that eschews formalism where the interests of justice so dictate has been endorsed by the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at par 39, where the following was said:

“Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures. Recently in *PFE International and Others v Industrial Department Corporation of South Africa Ltd*, this Court reaffirmed the principle that rules of procedure must be applied flexibly. There this Court said:

‘Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.’ ”

See too: *Eke v Parsons* 2016 (3) SA 37 (CC) at par 39, where the following was said:

“...Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that the rules exist for the courts, and not the courts for the rules”. (footnotes omitted).

- 33.1. Summary judgment is refused.
- 33.2. The defendants are granted leave to defend the action.
- 33.3. The costs of this application shall be costs in the trial.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 13 February 2023
Judgment delivered 5 April 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 5 April 2023.

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