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

REPORTABLE

Case no: 21758/2012

In the matter between:

BUSINESS PARTNERS LTD Plaintiff

and

THE TRUSTEES FOR THE TIME BEING OF THE RIAAN BOTES FAMILY TRUST First Defendant

OMAR BOTES Second Defendant

JUDGMENT: 3 MAY 2013

Schippers J:

[1] This is an application for summary judgment which raises an interesting question of procedure - whether the application may be deferred by delivery of a notice in terms of rules 35(12) and (14) of the Rules of Court. The plaintiff claims against the first and second defendants jointly and severally, payment of the sum of

R1 438 783.36 being the balance outstanding on a loan agreement and legal costs, together with interest and costs on an attorney and own client scale. As against the second defendant, the plaintiff claims payment of the costs of execution, insurance,and rates and taxes up to a maximum amount of R300 000.00, and an order declaring certain property known as Portion 9 of the Farm Ronwe No 851 in the Drakenstein Municipality Division, Paarl, Province of the Western Cape, in extent 11.4275 hectares and held by Deed of Transfer No T 68582/2004 ("*the property*"), specially executable; and costs of suit on an attorney and client scale.

[2] The plaintiff's claim against the first defendant, the Trustees for the time being of the Riaan Botes Familie Trust ("*the Trust*"), arises from a loan agreement entered into between the plaintiff and the Trust, in terms of which it lent and advanced the sum of R1 500 000.00 to the Trust. The claim against the second defendant is based on a deed of suretyship concluded between the plaintiff and the second defendant. In terms of that agreement, the second defendant bound himself as surety and co-principal debtor, limited to a maximum amount of R1 500 000.00, for the principal debt, and for R300 000.00 as a preferent charge to cover costs of execution, insurance, rates and taxes and interest, arising from a mortgage bond. The second defendant undertook to pay the plaintiff on demand, the full amount owed by the Trust to the plaintiff under any instrument of debt or any agreement in force,should the Trust fail to discharge any of its obligations to the plaintiff. The second defendant registered a surety mortgage

bond over the property as a covering security for all sums of money owing to or claimable by the plaintiff from the Trust.

[3] The summons was sued out on 14 November 2012 and served on 28 November 2012. The defendants delivered their notice of intention to defend on 12 December 2012. This application was delivered on 13 December 2012 and set down for hearing on 24 January 2013.

[4] On 22 January 2013 the defendants delivered a notice of their intention to oppose this application. However, they have not furnished security to the plaintiff for any judgment which may be given, neither have they delivered any affidavit to show that they have a *bona fide* defence to the action. Instead, on 22 January 2013 they delivered a notice in terms of rules 35(12) and (14) of the Rules of Court ("*the notice*"). It states *inter alia* that the defendants require the plaintiff, within 15 days of delivery of the notice, to produce for their inspection and permit them to make copies or transcriptions of various documents referred to in the summons, particulars of claim, verifying affidavit and the annexes thereto. The notice further states that should the plaintiff fail to produce the documents or permit the defendants to make copies or transcriptions thereof, application will be made to the Court compelling them to do so.

[5] The defendants contend that they are entitled to a response to the notice before delivering their opposing affidavits in this application. This, they say, is essential to ensure that they have a fair opportunity to defend the matter.

[6] The defendants are however mistaken, for the following reasons. First, they ignore both the purpose of, and the procedure for, summary judgment. Second, they misconstrue the provisions and purpose of rules 35(12) and (14).

[7] The purpose of the summary judgment procedure in rule 32 of the Rules of Court is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim.[1] It was designed to prevent vexatious litigation by not allowing a party to defend an action when he has no *bona fide* defence.[2]The Supreme Court of Appeal (SCA) has held that it was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs seeking to enforce their rights.[3]However, the procedure is not intended to shut out a defendant with a triable issue or sustainable defence from placing it before the court, unless it is clear that he has no case.[4]In *Maharaj*,[5]Corbett JA said that the remedy provided by the rule is extraordinary and drastic, and its grant is based on the supposition that the plaintiff's case is unimpeachable and that the defence is bogus or bad in law.[6]The SCA has since held that the summary judgment procedure can no longer be regarded as extraordinary because our courts have successfully applied it for almost a century; and that having

[1]Cilliers et al (eds*): Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa (Vol 1 5th ed 2009)* at 516 – 517.
[2]*Meek v Kruger*1958 (3) SA 155 (T) at 159–160A.
[3]*Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA (1) (SCA) para 31*; Majola v Nitro Securitization 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) para 25.
[4]*Joob Joob Investments*n 3para 31.
[5]*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).
[6]*Maharaj*n 5 at 423G.

regard to its purpose and proper application, it is drastic and holds terror only for a defendant who has no defence.[7]

[8] The basic steps in an application for summary judgment are these.

(1) Within 15 days after the date of delivery of a notice of intention to defend, the plaintiff may apply for summary judgment together with interest and costs, if the claim in the summons is on a liquid document; for a liquidated amount in money; for delivery of specified movable property; or for ejectment.[8]

(2) The application must be accompanied by an affidavit which must comply with three requirements. First, it must be made by the plaintiff or any other person who can swear positively to the facts. Second, the deponent must verify the cause of action and the amount, if any, claimed. And third, the affidavit must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and the notice of intention to defend has been delivered solely for the purpose of delay.[9]

[7] *Joob Joob Investments* n 3paras 32 and 33.
[8] Rule 32(1).
[9] *Fischereigesellschaft F Busse & Co. Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 108A, affirmed in *Maharaj*n 5 at 422A-C.

(3) Upon the hearing of the application, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the court by affidavit or with the leave of the court, by oral evidence, that he has a *bona fide* defence to the action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether it discloses a *bona fide* defence.[10] Where the defence is based on facts in the sense that material facts alleged by the plaintiff in its summons are disputed or new facts are alleged constituting a defence, all that the court enquires into is: (a) whether the defendant has disclosed the nature and grounds of his defence and the material facts upon which it is founded; and (b) whether on the facts so disclosed, the defendant appears to have a defence which is both *bona fide* and good in law, to either the whole or part of the claim.[11]

(4) If a defendant furnishes security or satisfies the court that he has a *bona fide* defence which is good in law, the court is bound to give leave to defend and the action proceeds in the ordinary way.[12]If the defendant fails to furnish security or satisfy the court in this way, then the court has a discretion whether or not to grant summary judgment.[13]

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[10]*Maharaj* n 5at 425G-H.
[11]*Maharaj* n 5at 426A-C.
[12]Rule 32 (7); *Maharaj* n 5 at 426C;*Joob Joob Investments*n 3 para 32.
[13]Rule 32(5).

[9] Having regard to the purpose and construction of rule 32, it will immediately be noted that rule 35, which governs discovery, inspection and production of documents (essentially pre-trial procedures), does not feature at all in the summary judgment procedure. Its exclusion is hardly surprising. To allow discovery and inspection of documents before delivery of an opposing affidavit to summary judgment as the defendants would have it, would delay the swiftenforcement of a claim. That is the very purpose of rule 32 - to dispose of a clear case without putting the plaintiff to the expense of a trial. Moreover, to allow compliance with the notice first, would run counter to the express provisions of rule 32. Thus rule 32(3)(b) requires the defendant to establish a *bona fide* defence which is good in law. This is not a high threshold. It is sufficient if on the facts disclosed, the defendant appears to have a *bona fide* defence.[14]Opposing affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence.[15]All that is required is that the defence must not be set out baldly, vaguely or laconically that the court gains the impression that the defendant has dishonestly sought to avoid presenting a fuller or clearer version of the defence.[16] It could never have been the intention of the drafters of the Rules that a defendant should first be allowed to invoke rule 35(12) or (14) – and to delay summary judgment proceedings even further where there has been no compliance with those rules, to the prejudice of a plaintiff. This construction is underscored by rule

[14]*Maharaj* n 5 at 426B.
[15]*Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970(1) SA 674(C) at 678E.
[16]*Breitenbach v Fiat SA (Edms) Bpk* 1976(2) SA 226 (T) at 229A.

32(3)(b), in terms of which the opposing affidavit must be delivered before noon on the court day but one before the day on which the application is to be heard.

[10] Rule 35 reads inter alia as follows:

> *"(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and permit him to make a copy or a transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the Court, use such document or tape recording in such proceeding provided that any other party may use such documents or tape recording.*
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> *…*
>
> *(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."*

[11] Rule 35(14) requires "*a clearly specified document*" to be made available for the purpose of pleading, and then only if it is necessary for that purpose.[17] Moreover, what is envisaged in the ruIe is a document or tape recording relevant to an issue "*in the action*". On its plain wording the rule is limited in its application.[18]The ambit of rule 35(12) is wider than rule 35(14) in that the former refers to "*any document or tape recording*", and does not require a detailed descriptive reference to such

[17]*Cullinan Holdings Ltd v Mamelodi Stadsraad*1992 (1) SA 645 (T) at 647E-F.
[18]*Quayside Fish Suppliers CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534F.

documents.[19]It is of course open to the defendants to invoke rule 35(12) and (14). However if they had difficulty in dealing with the pleadings because they required documents in order to determine what the plaintiff's case is, this should have been stated in affidavits opposing summary judgment as justification for their inability to deliver an affidavit disclosing the nature and grounds of the defence and the material facts upon which it is based.[20]But what the defendants cannot do,is circumvent the provisions of rule 32(3)(b) by delivery of the notice, in order to obtain documents which might support a *bona fide* defence or to defer summary judgment proceedings, as was submitted by Mr Newton on their behalf.

[12] For the above reasons I have come to the conclusion that an application for summary judgment cannot be deferred by delivery of a notice in terms of rules 35(12) and (14) of the Rules of Court, without more.

[13] What remains then, is whether the plaintiff is entitled to summary judgment.

[14] The plaintiff's claims are of the kind contemplated in rule 32(1).It has delivered an affidavit by Ms R. Achmat, a legal managerin its employ, who states that the facts in the summons are within her own knowledge, in that she is personally in control of this matter; the relevant records, documentation and files are under her control; and she has examined that documentation and has personal knowledge of their contents.

[19]*Erasmus v Slomowitz* (2) 1938 TPD 242 at 244; *Cullinan* n 17 at 648D-E.
[20]See in this regard *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 497G-I.

She goes on to say that the defendants are indebted to the plaintiff in the amounts and on the grounds stated in the summons; that they do not have a *bona fide* defence; and that they have entered an appearance solely for the purpose of delay.Copies of the loan agreement; the certificate of balance in respect of the loan; the deed of suretyship; and the surety mortgage bond, are annexed to the affidavit.

[15] The plaintiff has thus complied with the provisions of rule 32(2), save for the claims for R9 920.17 in respect of outstanding legal costs, and the claim for payment of an additional sum up to a maximum of R300 000.00. I am not persuaded that the plaintiff has an unanswerable case in relation to these claims.

[16] The defendants have not filed any affidavits opposing summary judgment. The provisions of rule 32(3)(b) are not peremptory in the sense that a court has the power, in proper circumstances, to extend the time for delivery of opposing affidavits.[21]But the defendants have not filed an application for an extension of time within which to deliver such affidavits. They have opposed this application solely on the basis that the plaintiff is obliged to comply with the notice, by which they must stand or fall.

[17] Apart from this, it appears from the timing and content of the notice, as submitted by Mr Steenkamp on behalf of the plaintiff, that the defendants do not have a *bona fide* defence and that the notice has been delivered in order to take advantage

[21]*General Plumbing Supplies (1956) (Pty) Ltd v Continental Engineering Co (Pty) Ltd* 1960 (3) SA 663 (W) at 667C-668C.

of the unavoidable delays which will result if the case goes to trial. To begin with, the defendants waited nearly six weeks before delivering the notice. It was delivered a day but one before the hearing of this application. If the defendants really needed the documents in order to prepare their opposing affidavits in this application, they would have filed the notice earlier. Rule 35(12) does not provide for a time period within which a party should comply with such a notice; and rule 35(14) provides for only five days. The notice stipulates a generous time frame for the delivery of the documents – 15 court days. The inference is inescapable that this was done for the purpose of delay.

[18] The notice itself shows a lack of sincerity on the part of the defendants. The documents sought in items 1, 19, 20 and 21 are the originals of documents such as the loan agreement, the suretyship and the surety mortgage bond,attached to the particulars of claim and the application for summary judgment. Items 2 and 5 refer to annexes to the pleadings which are before the Court. Items 3, 14 to 18 and 22 do not refer to existing or identifiable documents at all, and are requests for general discovery. For example, in item 22 the defendants require the plaintiff to produce *"all of the 'applicable records, documentation and the relevant files' under the control of Rabia Achmat referred to in paragraph 3.1 of her verifying affidavit"*.

[19] The result is that summary judgment is granted as follows:

(1) Against the defendants jointly and severally, the one paying the other to be absolved, for:

(a) payment of the sum of R1 428 863.19;

(b) interest on the said amount at the rate of 8.5% per annum, compounded monthly *a tempore morae* from 26 October 2012 until date of payment;

(c) costs of suit on a scale as between attorney and client;

(2) Against the second defendant:

Portion 9 of the Farm Ronwe No. 851 in the Drakenstein Municipality division of Paarl, measuring 11.4275 hectares and held by Deed of Transfer No. T68582/2004, is declared specially executable.

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SCHIPPERS J

Counsel for the Plaintiff:	**Adv. Marius Steenkamp**
Instructing Attorneys:	*Mayats Attorneys* Ref: AA Mayat Claremont
Counsel for the First & Second Defendant	**Adv. Alan Newton**

Instructing Attorneys:	*VV H Attorneys* Ref: A Maree 23 Oewerpark Stellenbosch
Dates of hearing:	24 January 2013
Date of judgment:	03 May 2013