IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D4630/2021

In the matter between:

TALKSURE TRADING (PTY) LTD	**PLAINTIFF**
and	
KRISHNAVENI NAIDOO	**FIRST DEFENDANT**
SOHAN SUMENDRAN NAIDOO	**SECOND DEFENDANT**

ORDER

Summary judgment is granted against the first defendant for:

1. Payment of the sum of R1 359 000.
2. Interest on the aforesaid sum at the rate of 7.25% from 20 July 2021 to date of final payment.
3. Cost of suit.

JUDGMENT

Introduction

[1] This is an opposed application for summary judgment which raises issues involving the right against self-incrimination and the right to remain silent in civil proceedings.

The plaintiff's cause of action

[2] The plaintiff instituted action against the first and second defendants for payment of the sum of R1 359 000 together with interest from the date of summons and costs of suit. The basis upon which the amount is claimed emanates from an alleged fraudulent scheme which the defendants were allegedly involved in.

[3] In terms of an agreement concluded between the plaintiff and an entity known as Ignition Sales and Marketing CC (ISM), a short-term lender, the plaintiff would assist its employees from time to time to acquire staff loans. In applying for such staff loan, an employee would complete an ISM application form and would supply three months' bank statements, his or her identity document and a notice confirming his or her bank details. A designated employee of the plaintiff would complete the declaration by the employer to confirm the employee's residential address and would then email the completed application to ISM.

[4] If the employee's application was successful, a loan agreement would be sent to the designated employee of the plaintiff for signature. Once the signed loan agreement was emailed to ISM, the loan amount would be paid into the nominated bank account of the employee. At all material times, the first defendant was the pay-roll officer and designated employee assigned by the plaintiff to facilitate the process and to send the applications through to ISM.

[5] After a while, the plaintiff engaged with ISM to verify its suspicions that there were irregularities in that amounts were being paid into the same recurring bank account. An investigation was subsequently concluded which confirmed the plaintiff's suspicions. When the records of ISM were examined, it was established that five bank accounts, two of which were held with First National Bank and three with ABSA bank were supplied to

ISM into which the loan amounts were paid. Investigations subsequently revealed that four of the account numbers were in the name of the first defendant and one bank account was in the name of the second defendant.

[6] Over the period from 1 October 2018 to 31 May 2019, the first defendant sent signed and completed documents to ISM, allegedly on behalf of employees of the plaintiff. The information provided to ISM by the first defendant was false in that most of the applications to ISM were made in the name of ex-employees of the plaintiff. Employees' signatures were fraudulently obtained or inserted, and the bank account details listed in each of the fraudulent loan applications were the bank account details of the first and second defendants.

[7] As a result, monies were paid by ISM to the defendants and not the plaintiff's employees as listed in the loan applications. The first defendant created fictitious accounting entries which created the impression that the employee was repaying his or her loan to ISM, when in fact the plaintiff was making payment to ISM in respect of the fraudulently obtained loans. An investigative report confirmed such fraudulent scheme embarked on by the first and second defendants and the various amounts paid, which resulted in the plaintiff being defrauded in the amount of R1 359 000. Details of the alleged loans and amounts paid by the plaintiff are contained in schedules annexed to the particulars of claim.

[8] The first defendant, in embarking on this fraudulent scheme, was able to create 19 different bank accounts through which she processed the 417 fictitious staff loans for her own benefit and that of the second defendant. The plaintiff acted to its prejudice by honouring the repayment terms of the fraudulent loans secured by the first defendant on the mistaken belief that same had been secured by its employees.

The first defendant's plea

[9] Only the first defendant defended the action and her plea constituted a bare denial. She denied having any knowledge of the agreement concluded between the plaintiff and

ISM and the manner in which the loans were granted, and indicates that only duties incidental to the process of applying for loans were performed by her. Interestingly, she does not deny that she was responsible for submitting the requisite loan application documents to ISM.

[10] In addition, the plea did not disclose a defence and the first defendant merely denied the findings of the plaintiff's investigative report and did nothing to disturb the *prima facie* evidence of the plaintiff's claims. She admitted that she was employed as the pay-roll officer and human resources administrator by the plaintiff but denied the remainder of the allegations and indicated that she had no knowledge thereof.

[11] In addition, she admitted that in relation to the process highlighted by the plaintiff, which was to be followed for loan applications, the duties were performed not only by her but also by team leaders and campaign managers attached to ISM's finance department. She indicated that the contents of the investigative report were not disclosed to her and she was not the sole employee responsible for processing the loan applications or the accounting entries relating to the payment of the loans.

The summary judgment application

[12] The plaintiff applied for summary judgment within the *dies* prescribed by the Uniform Rules of Court.

Plaintiff's application

[13] In support thereof, the plaintiff avers that the first defendant's plea does not disclose a defence which raises any issues to be determined at trial. The claim is based on a fraudulent scheme and transactions implemented and carried out by the first and second defendants and the plea of the first defendant is a bare denial. Although she denies having any knowledge of the agreement between the plaintiff and ISM and the manner within which the loans were granted, she indicates that her duties were incidental to the process of applying for loans. She further does not deny that she was responsible for submitting the requisite loan application documents to ISM.

[14] Although the first defendant denies the findings of the plaintiff's investigative report, this does not disturb the *prima facie* evidence of the spreadsheets annexed to the plaintiff's particulars of claim as annexures B1 to B18, which set out fictitious persons who applied for loans, the loan amounts and the prejudice caused to the plaintiff by having to pay these amounts to ISM.

[15] In addition, what is pertinent is that the plaintiff in its particulars of claim references five bank accounts into which the loan amounts were paid. It is not disputed that loan amounts were paid into these bank accounts and that four of those bank accounts were in the name of the first defendant and that the fifth one is in the name of the second defendant. It is for these reasons that the plaintiff submits that no triable issues are raised and consequently, it is entitled to summary judgment.

First defendant's opposition

[16] In opposition to summary judgment, the first defendant raises various points in limine and advances three grounds on the merits in opposition, namely:

(a) The deponent to the affidavit, Gavin De Jager, alleges that he is an adult male. The affidavit has not been commissioned in accordance with the peremptory provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 in that the commissioner of oaths does not identify the gender of the deponent nor is the identity of the commissioner reflected in the affidavit.

(b) The affidavit in support of summary judgment makes reference to defendants however, the application is only brought against the first defendant.

(c) The deponent to the affidavit does not have personal knowledge of the allegations contained in the affidavit and these are hearsay in nature as the deponent does not know the first defendant.

(d) Criminal proceedings have been instituted against the defendants in the magistrates' court, and as a consequence thereof, the first defendant's constitutional right to remain silent has been infringed by the institution of the summary judgment proceedings.

(e) Some of the claims have become prescribed by the effluxion of time.

(f) The plaintiff is claiming damages.

[17] In the alternative, the first defendant indicates that she has not made any fraudulent claims nor has she received any money pursuant to the alleged fraudulent claims. The crux of her defence is that she wants to exercise her right to remain silent so as not to incriminate herself in the criminal trial and the effect of the summary judgment application is to compel her to flout her constitutional right to remain silent. She, in addition, submits that she is not liable to the plaintiff for any amount claimed and prays for summary judgment to be dismissed and that she be given leave to defend the action.

Analysis

Rule 32

[18] Rule 32(1) provides that a plaintiff may, after a defendant has delivered a plea, apply to court for summary judgment for a liquidated amount in money together with any claim for interest and costs. Rule 32(2)*(a)* provides that '[w]ithin 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts'. In such affidavit, rule 32(2)*(b)* requires that the deponent to the affidavit must 'verify the cause of action and the amount . . . claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based'. In addition, the deponent must also briefly explain why the defences pleaded do not raise any issue for trial.

[19] In terms of rule 32(3):

'The defendant may—

(*a*) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(*b*) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), 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.'

[20] Summary judgment was not intended to prevent a defendant from defending an action, unless it was evident that the defendant had no case in the action. It was intended to prevent spurious defences and defeating the rights of parties by delaying a matter. The rule was designed to prevent a plaintiff's claim based upon certain causes of action from being delayed by what amounts to an abuse of the process of court. It is granted in circumstances where the plaintiff's claim is unimpeachable as the defendant has no proper defence.

[21] The procedure has often been characterized as being 'extraordinary' and 'stringent' as it makes inroads on a defendant's right to have his case heard in the ordinary course of events. Courts are thus only willing to grant summary judgment in circumstances where it is clear that the plaintiff has an unanswerable case. Where there is no defence, a court's discretion ought not to be exercised against a plaintiff to deprive it of the relief that it is entitled to. It is also not designed to provide a plaintiff with a tactical advantage or to provide a preview of the defendant's evidence and also not to limit his defences to those disclosed in the affidavit.

[22] The dicta in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* is apposite:

'…the summary judgment procedure was not intended to "shut (a defendant) out from defending", unless it was very clear indeed that he had no case in the action. 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 who were endeavouring to enforce their rights.'[1]

[23] This is perhaps why Navsa JA held that the time had come to discard labels such as 'extraordinary' and 'drastic' and stated the following:

[1] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASC 23; 2009 (5) SA 1 (SCA) para 31.

‘[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G - 426E.’

[24] Among the ways in which a defendant can avoid summary judgment, is to satisfy the court by affidavit that he/she has a *bona fide* defence to the claim on which summary judgment is being applied for. The use of the word ‘satisfy’ does not translate into ‘proof’. The rule merely requires that the defendant must set out in the affidavit facts which, if proved at trial, will constitute an answer to the plaintiff’s claim.

[25] The locus classicus in respect of what an affidavit opposing summary judgment ought to contain, is set out by Corbett JA in *Maharaj* as follows:

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has “fully” disclosed the nature and grounds of his defence and the

material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence . . . At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'[2]

Points in limine

[26] I propose to firstly deal with the points in limine raised. The commissioner of oaths' failure to identify the gender of the plaintiff's deponent is condonable by the court. It is evident that the deponent to the affidavit is a male and this is a mere omission from the last portion of the affidavit and is not fatal.[3] The affidavit contains the details of the SAPS branch at which the affidavit was commissioned, and the force number of the police officer who commissioned the affidavit. I consequently agree with the submission that the identity of the commissioner is identifiable from this information. In my view, given the fact that the affidavit is substantially compliant[4] and admissible, the point in limine in this regard is without merit.

[27] As regards the second point in limine, this too is without merit. In the paragraphs referred to by the first defendant, the deponent to the affidavit merely confirms the plaintiff's cause of action against the defendants as pleaded in the particulars of claim - as he is required to do. The affidavit correctly records that summary judgment is only being sought against the first defendant.

---

[2] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-F.
[3] *Swart v Swart* 1950 (1) SA 263 (O) at 265-267.
[4] *Mndiyata and others v uMgungundlovu CPA and others* [2021] ZAECMHC 6 .

[28] Turning now to the point in limine that the deponent to the affidavit does not know the first defendant, and consequently any facts deposed to in the affidavit constitute hearsay and are inadmissible. The first defendant indicates that the deponent to the affidavit does not have actual personal knowledge of the facts to enable him to depose to the verifying affidavit and cannot derive such knowledge from the plaintiff's records.

[29] In the affidavit in support of summary judgment, the deponent, Gavin De Jager, indicates that the facts contained in the affidavit are known to him. He is a director of the plaintiff and authorized by the plaintiff to institute the action and to prosecute the summary judgment application. He further indicates at paragraph 3 of the affidavit that '[i]n the ordinary course of my duties as a Director of the Plaintiff, I have acquired personal knowledge of the Defendant's dealings, as well as the Plaintiff's claims against the Defendant'. He further indicates that 'at all material times I have been involved with that which forms the subject of the Plaintiff's claims against the Defendant'.

[30] As a consequence, he has the requisite personal knowledge for purposes of the summary judgment application. At paragraph 4 of the affidavit, he indicates that he has perused the content of the plaintiff's file and records with reference to the defendants and can consequently swear positively and verify as true and correct, the grounds and facts contained in the plaintiff's summons and particulars of claim, the plaintiff's cause of action against the first defendant, and further that the first defendant is indebted to the plaintiff in the amount claimed in the summons and the particulars of claim being R1 359 000.00

[31] Rule 32(2) provides that any application for summary judgment must be accompanied by an affidavit by any person who can swear positively to the facts. The primary contention advanced by the first defendant is that Mr De Jager is not a person who can 'swear positively to the facts' envisaged in rule 32(2).

[32] In *Maharaj,* Corbett JA, in considering the requirement that the affidavit should be made by the plaintiff himself or by any person who can swear positively to the facts, stated the following:

'Concentrating more particularly on requirement *(a)* above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person "who can swear positively to the facts". In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, *prima facie*, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated . . . The mere assertion by a deponent that he "can swear positively to the facts" (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words . . . In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised . . . The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court . . . The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it . . .'[5]

[33] A similar contention arose in *Rees and another v Investec Bank Ltd.*[6] The affidavit deposed to by the deponent, Ms Ackerman, in that matter, is similar to that deposed to by Mr De Jager in the current matter. In considering the authorities, the Supreme Court

[5] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423A-H.
[6] *Rees and another v Investec Bank* Ltd [2014] ZASCA 38; 2014 (4) SA 220 (SCA).

of Appeal took the view that by virtue of the fact that Ms Ackerman had access to the documents at her disposal and had been corresponding with the appellants in regard to the debtors, she had met the requirements of rule 32(2). That she did not sign the certificates of indebtedness nor was present when the suretyship agreements were signed, were found to be of no moment.

[34] The Supreme Court of Appeal took the view that these ought not to be 'elevated to essential requirements, the absence of which is fatal to the respondent's case'. It took the view, with reference to what Corbett JA held in *Maharaj,* that '"undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism'.[7] The court found that:

'At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj.*'[8]

[35] In my view, applying the authorities referred to hereinbefore, Mr De Jager is duly able to depose to the affidavit in support of summary judgment, and such allegations in the affidavit are not of a hearsay nature. In the result, the points in limine are without merit and fall to be dismissed.

Merits

[36] Turning now to the three further grounds advanced by the first defendant in opposition to summary judgment. Firstly, the claim is premised on monies paid by the plaintiff to ISM emanating from a fraudulent scheme. That the monies were misappropriated is not denied by the first defendant. In addition, all the plaintiff needs to do is to satisfy the court that the monies owed to it are in a liquidated amount. The first defendant has conceded in her heads of argument that monies misappropriated

[7] Ibid para 15.
[8] Ibid.

constitute a liquidated claim. Consequently, this ground of opposition falls to be dismissed.

[37] The plaintiff alleges in the particulars of claim that it was on receipt of the investigative report in 2021 that it became aware that the first and second defendants were aware of and had knowingly perpetrated the fraud. It issued the action in July 2021, a few months after the report had been compiled. Prescription begins to run from the time the wronged party became aware of its cause of action. This ground likewise is without merit and falls to be dismissed.

[38] Turning now to the next issue raised by the first defendant, namely whether having to file an affidavit dealing with the detailed allegations both in the summary judgment application as well as in the particulars of claim would infringe on her right to remain silent, is the subject matter of a number of decisions. This has been in the context of disciplinary proceedings, criminal proceedings as well as insolvency enquiries. They are of assistance in the determination of the issues in this matter.

[39] Nugent J in *Davis v Tip NO and others*[9] had cause to consider this aspect in the context of disciplinary proceedings where the applicant was arrested on charges of fraud and theft. These criminal charges arose from the same circumstances which underpinned the disciplinary proceedings instituted against the applicant. The court considered this in the face of an application for the postponement of the disciplinary proceedings pending the finalization of the criminal proceedings. The applicant had alleged that if the disciplinary proceedings were allowed to proceed, his right to remain silent at the criminal trial would be compromised.

[40] When penning the judgment, Nugent J confirmed that it was '. . .well established that a Court will intervene to protect the right to remain silent in criminal proceedings even if the threat thereto is only an indirect one.'[10] He then held the following:

---

[9] *Davis v Tip NO and others* 1996 (1) SA 1152 (W).
[10] Ibid at 1156I-1157A.

'Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented . . .

In the present case the preservation of the applicant's rights lies entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices he may be called upon to make.'[11]

[41] In relation to the right to remain silent, the court held as follows:

'The right to remain silent derives from an abhorrence of coercion as a means to secure convictions by self-incrimination (see *S v Zuma (supra* at 658D (SA) (at 586*e* (SACR) and 417H-I (BCLR))), and it exists to ensure that there is no potential for this to occur. It achieves this by protecting an accused person from being placed under compulsion to incriminate himself; not by shielding him from making legitimate choices.

The applicant's submission suggests that, if the alternatives which are to be chosen from are equally unattractive, then choice is tantamount to compulsion, and that the right to silence entitles an accused person not to be faced with that choice. I do not agree. What distinguishes compulsion from choice is whether the alternative which presents itself constitutes a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so. While the distinction between choice and compulsion may at times be a fine one, in my view it is essential that it should be maintained if a salutary principle is not to be extended beyond its true province and thereby risk falling into disrepute.

In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice.'[12]

---

[11] Ibid at 1157E-H.
[12] Ibid at 1158G-1159B.

[42] Navsa J in *Seapoint Computer Bureau (Pty) Ltd v Mcloughlin and De Wet NNO*[13] also considered the request to stay a civil action pending the finalization of criminal proceedings alternatively until such time as the decision had been taken by the prosecuting authority not to prosecute the defendant. Following the reasoning in *Davis,* the court concluded that a stay of the proceedings was not warranted.

[43] In such civil action the plaintiff claimed payment of a sum of money together with interest and costs from the defendant such claim being based on the alleged unlawful appropriation by the defendant of monies due to the company. It was common cause that there was a nexus between the action and the criminal investigation instituted. The defendant in defence of the action indicated that any cross examination in the action would expose him to the risk of making incriminating statements which would prejudice his position in subsequent criminal proceedings in support of the submissions that the civil proceedings ought to be stayed the applicant referred to a long line of decisions in which our courts have held that where civil and criminal proceedings arising out of the same circumstances are pending the civil proceedings are stayed until the finalization of the criminal proceedings. This is done on the basis that the person may be prejudiced in the criminal proceedings if the civil proceedings were heard first as such a person might be subject to cross examination or might be compelled to disclose information in the civil proceedings before such criminal proceedings are disposed of in reasoning why the approach in *Davis* was correct.

[44] Navsa J considered all the South African authorities referred to and the origin of the rule against self-incrimination and the right to remain silent as conducted by Nugent J, and found that in such matters ‘compulsion by the State was the mischief aimed at’.[14] All the authorities referred to dealt with sequestration proceedings or enquiries in terms the Companies Act 61 of 1973. A further factor which he considered was that in enquiries, ‘compelling mechanisms were available to the authorities concerned’.[15] He held that:

---

[13] *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W).
[14] *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W) at 649B-C.
[15] Ibid at 649D.

'Another factor is that the "coercive power of the State" is more clearly seen in enquiries such as insolvency and companies legislation, and, presumably, in the structures creating the authorities conducting the enquiries in the *Williams* and *Phillips* cases. Why, one may well ask, is no authority available from any jurisdiction to show that in civil litigation involving two private parties, and where no coercive State machinery can be brought to bear on one of them, a Court was willing to stay proceedings. The answer readily presents itself and is alluded to in the *Davis* judgment and referred to by the plaintiffs' counsel. The improper application of principle will cause the administration of justice to fall into disrepute. To protect the right to remain silent is eminently desirable. To deny a plaintiff recourse to a judgment to which he may be entitled, because a police investigation against the opposing party may materialise, and where the defendant is not subject to coercive means, is not serving the cause of justice.'[16]

[45] Nasva J agreed with the principles followed by Nugent J in *Davis* and indicated that a defendant should be left to his choice as to how he conducts the civil proceedings. Similarly, in *South African Tea, Coffee and Chicory Association and others v Ynuico Ltd and others,*[17] Magid J had to consider an application for a stay of proceedings pending the determination of the criminal trial. Similarly, in that matter, the respondent had elected not to deal with the factual allegations upon which the applicant had relied for the claim.

[46] Magid J took the view that the respondents were 'not subject to any coercive machinery of the State nor to any statutory or other compulsion to give evidence in these proceedings'[18] and consequently they could not be prejudiced by responding to factual allegations against them in the conduct of the pending criminal proceedings.

[47] A similar stance was adopted in *Equisec (Pty) Ltd v Rodriques and another*[19] and *Nedcor Bank Ltd v Behardien*.[20] In *Behardien,* Cleaver J was faced with a similar situation as in the present case where summary judgment proceedings were instituted for payment of monies due which had been unlawfully misappropriated by the respondent whilst in the

---

[16] Ibid at 649D-G.
[17] *South African Tea, Coffee and Chicory Association and others v Ynuico Ltd and others* 1997 (8) BCLR 1101 (N).
[18] Ibid at 1106.
[19] *Equisec (Pty) Ltd v Rodriques and another* 1999 (3) SA 113 (W).
[20] *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

applicant's employ. Criminal proceedings had been instituted and the respondent sought a stay of the summary judgment application pending the conclusion of criminal proceedings and also on the basis that under those circumstances, he was not required to disclose a bona fide defence as this would infringe his right as an accused person in the criminal trial not to be compelled to give self-incriminating evidence.

[48] Following on the dictum in *Davis,* Cleaver J took the view that the respondent in these circumstances was similarly not being coerced to depose to the affidavit and was 'required to choose between incriminating himself or having summary judgment granted against him. If this occurs, that is a consequence of the choice which he has made, but not a penalty for doing so'.[21] The court took the view that the 'provisions of Rule 32(3)*(b)* of the Uniform Rules of Court are not provisions which compel the respondent to show his hand before the criminal trial has been concluded'.[22]

[49] Not surprisingly, this issue drew the attention of the Supreme Court of Appeal in *Law Society of the Cape of Good Hope v Randell*,[23] where in an application to strike off an attorney, the attorney sought to stay the civil proceedings, pending the conclusion of a related criminal matter for theft of trust funds as well as fraud. The basis upon which the respondent had sought a stay of the proceedings was that if he was compelled to make a sworn statement in advance of the criminal proceedings, he would be prejudiced and his rights against self-incrimination would be violated, as guaranteed in section 35 of the Constitution.

[50] Mthiyane DP indicated that having regard to the line of cases, specifically that of *Davis*:

'In my view the golden thread that runs through the previous cases that were considered in *Davis . . .* is that they all involved sequestration proceedings, in which the examinee respondent was required to subject himself or herself to interrogation or to answer questions put to him or her by the provisional trustee. Clearly in each one of those cases there was an element of compulsion

[21] Ibid at 314G-I.
[22] Ibid at 315A-B.
[23] *Law Society of the Cape of Good Hope v Randell* [2013] ZASCA 36; 2013 (3) SA 437 (SCA).

because s 65 of the Insolvency Act prior to its amendment provided that the person concerned was not entitled to refuse to answer questions.'[24]

He found that in granting a stay of the prosecution in circumstances where there was no compulsion, the court a quo committed a misdirection.

[51] The Supreme Court of Appeal confirmed the general principle that

'where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first.'[25]

[52] As in this instance there was no legal compulsion on the respondent to testify. The Supreme Court of Appeal held that:

'In my view the approach in *Davis* is sound and does no more than reiterate the approach of the previous decisions, namely that a stay will only be granted where there is an element of state compulsion impacting on the accused person's right to silence. It is true that the judges in those cases do not specifically refer to compulsion, but this is a matter of deduction made from the way the general principle was applied in matters which primarily involved sequestration proceedings. The development and formulation of the principle occurred in the context of sequestration proceedings. There is no authority to support the proposition that the principle is of application in ordinary civil proceedings not involving an element of compelled response on the part of the party who seeks a stay of civil proceedings. Our courts have only granted a stay where there is an element of state compulsion.'[26]

[53] The Court further held that:

'[31] I agree with the approach in *Davis*. I also think that to extend the court's intervention to cases where an applicant for a stay of the civil proceedings has a "hard choice" to make, would bring the right to remain silent into disrepute. The ratio for the discretion being narrowly circumscribed is that a distinction must be maintained between the situation where an individual has the choice whether to testify (even though the alternatives over which he has a choice are equally

[24] Ibid para 12.
[25] Ibid para 15.
[26] Ibid para 23.

unattractive) and where he is compelled to because a failure to do so attracts a penalty . . . According to the decision in *Davis* this is necessary to ensure that the "salutary principle", enshrined in the right to silence, is not to be extended beyond its true province and thereby risk falling into disrepute . . .

[32] The respondent in this case falls outside the category of parties who are subject to compulsion to testify or to disclose their defence. He has a "hard choice" to make as to whether he should respond to the allegations in the striking-off application or face the consequences of not responding. In my view, the learned judge's broad formulation of the general principle applicable to applications for a stay was erroneous. The only prejudice the court below referred to was that "making a sworn statement in opposition to the main application might serve to prejudice the respondent in the conduct of his defence in the criminal matter". The respondent, however, denies any wrongdoing and, if he were to respond, would in any event probably file an exculpatory statement. Any claim to violation of the respondent's right to silence appears to be illusory. On the papers the respondent has already disclosed essentials of his defence when he filed a plea in a related civil matter. Significantly, he has not sought to stay those proceedings. I do not see how he could claim that filing an answering affidavit in the striking-off application would prejudice him.'

[54] The first defendant has not sought a stay of these proceedings pending the finalization of the criminal proceedings. Secondly, in terms of the various authorities, she has an election to make. She may abandon her defence to the plaintiff's claim or waive her right to remain silent. There is no coercion involved. She cannot claim prejudice as a consequence of the election. By electing to remain silent, she does not disclose a *bona fide* defence to the plaintiff's action nor any issues which warrant the matter being referred for trial.

[55] I have also considered the submissions made by the first defendant in the heads of argument and they are without merit. It is evident that the first defendant has not raised any triable issues in her plea or answering affidavit and has rather contented herself with making out a case in the heads of argument. In addition, there is no compulsion being exerted on the first defendant which can excuse her from responding to the allegations in the particulars of claim as well as in filing an answering affidavit in opposition to summary judgment. The authorities referred to are clear in this regard and consequently the first

defendant has not set out a *bona fide* defence warranting this court's refusal of the summary judgment application.

Costs

[56] There is no need to depart from the usual order in relation to costs nor have any submissions been made that warrant this court from departing therefrom.

Conclusion

[57] The delivery of the judgment has regrettably been delayed by a number of factors. One of them being that I have not had the necessary secretarial support for a considerable period of time. This has been brought to the attention of the Office of the Chief Justice as well as the Judge President, Acting Judge President and Deputy Judge President of the division.

Order

[58] In the result, summary judgment is granted against the first defendant for:

1. Payment of the sum of R1 359 000.
2. Interest on the aforesaid sum at the rate of 7.25% from 20 July 2021 to date of final payment.
3. Cost of suit.

HENRIQUES J

Appearances

Counsel for the plaintiff:	Mr. I. Veerasamy
Plaintiff's attorneys:	Mac Gregor Erasmus Attorneys Inc. First Floor, Bond Square 12 Browns Road The Point,Durban
Tel No:	031 201 8955
Reference:	Mr JM Klingbiel /sv/TAL1/000028
Email:	sandra@meattorneys.coza justine@meattorneys.co.za

Counsel for the defendant:	C Van Reenen
Defendants attorneys:	Ravin Singh, Asheena Singh and Company Suite 2, Stanger Centre KingShaka Street, Kwa-Dukuza RKS / AM / CIV / MSN
Email:	ravin-asheenasingh@telkomsa.net c/o Messenger King, Mesdames Asha Ramchunder Attorneys, Suite 1001 Durban Club Chambers, Durban

Date of argument:	16 August 2022
Date of judgment:	28 July 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 28 July 2023.