REPUBLIC OF SOUTH AFRICA

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

Case Number: 2023/007205

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

[redacted] _____

DATE SIGNATURE

In the matter between:

NEDBANK LTD Plaintiff

and

SEBOPYE RAISIBE KGOBE Defendant

JUDGMENT

AMM, AJ

Introduction

1. This is an opposed application for summary judgment. Mr Reineke appears for the plaintiff. Mr Muller appears for the defendant.

2. The plaintiff, a registered credit provider, proceeds in its action against the defendant in terms of an instalment sale agreement for the defendant's purchase of a 2017 Toyota Hilux motor vehicle.

3. The plaintiff seeks payment, by way of the summary judgment application, of the outstanding balance of R 294,326.03 said to be due by the defendant to the plaintiff under the instalment sale agreement, together with interest and costs.

The status of the summary judgment application

4. As required under the (relatively new) summary judgment regime, the summary judgment application is pursued after the defendant has filed her plea in the plaintiff's action.

5. The plaintiff's summary judgment affidavit is deposed to by Christel Toweel, a Team Leader in the plaintiff's Litigation and Defended Department.

6. The defendant has filed an affidavit resisting summary judgment. There is certain material disharmony between that alleged in the defendant's plea and that asserted in the defendant's affidavit resisting summary judgment. The affidavit resisting summary judgment is moreover lamentably equivocal as to whether or not the defendant intends to pursue an (illiquid) counterclaim against the plaintiff. I return to this disharmony below.

The plaintiff's need to verify a complete and unobjectionable cause of action

7. The legal principles applicable to summary judgment applications are well-established and trite. Uniform rule 32(2)(a) and (b) provide (my italics for emphasis):

> "(a) Within 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.

(b) *The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action* and the amount, if any, claimed, 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."

8. The need for the plaintiff to verify its cause of action in the affidavit filed on its behalf in support of the summary judgment application remains under the new summary judgment regime. Q Leech AJ. in *FirstRand Bank Limited v Badenhorst NO and Others*[1] (footnotes omitted[2]) states:

> "7. The rule prior and post the amendment required plaintiffs to verify the cause of action. The cause of action consists of the facts required for judgment, not the evidence. A formulaic verification of the cause of action was accepted by our courts prior to the amendment. The deponent verified the cause of action by referring to the facts alleged in the summons, particulars of claim or declaration. The deponent did not have to repeat the facts ….
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> …
>
> 12. … As indicated above, in interpreting the requirement to verify the cause of action under the rule prior to amendment, our courts concluded that it was unnecessary to repeat the facts alleged in the summons, particulars of claim or declaration and referencing the alleged facts was sufficient. The repetition of the alleged facts is no more necessary under the amended rule, and the introduction of an express requirement to reference the alleged facts would be superfluous in the context of the established interpretation of the requirement to verify the cause of action."

9. At the risk of stating the obvious, it is trite that the deponent to the plaintiff's affidavit in support of the summary judgment application can only verify a

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1 (2022/5936) [2023] ZAGPJHC 779 (10 July 2023) para 7

2 The omitted footnoted cases are *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16, p. 23 and *Strydom v Kruger* 1968 (2) SA 226 (GW), headnote and p. 227B

complete or unobjectionable cause of action. As such, what the deponent in the supporting affidavit must verify must be a completed (perfected) cause of action. A deponent cannot be said to "verify" a cause of action which is not a complete cause of action; that is a cause of action which is bad in law, excipiable or lacking in averments necessary to sustain a cause of action (claim).[3]

10. For example, Watermeyer J. in *Jagger and Co. Ltd v Mohamed*[4] held that a defendant in summary judgment proceedings was not obliged to raise a defence on the merits where he had a defence to the plaintiff's declaration by way of an exception which goes to the root of the action.

11. Accordingly, if a plaintiff's cause of action is incomplete or objectionable, then the plaintiff's claim(s) and cause(s) of action cannot competently form the subject matter of an application for summary judgment; let alone be competently verified by the plaintiff's deponent.

12. The following dicta of Swain J (as he then was) in *Du Coudray v Watkins* is particularly apt, and comprehensive, in the above regards:

> "[22] The exercise of a discretion whether to grant summary judgment or not, should also involve a consideration of the necessity for the plaintiff to verify the cause of action, whether in terms of Rule 32(2) of the High Court Rules, or Rule 14(2)(a) of the Magistrates' Court Rules. This aspect is a vital and necessary component of the plaintiff's right to obtain summary judgment. It is clear that the cause of action to be verified must be complete. I comprehend that the need for the plaintiff to file such an affidavit verifying the cause of action, is to ensure that the Court is presented with a *bona fide* claim, which is neither frivolous, nor vexatious. An allegation in such an affidavit that the defendant has no *bona fide* defence to the action, cannot validly be made where the cause of action is not complete. The obligation on the plaintiff to verify a complete cause of action on which summary judgment is sought, arises

[3] See inter-alia *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 423
[4] 1956 (2) SA 736 (C) 738

> independently of the obligation imposed upon a defendant to set out a *bona fide* defence to the action. Consequently, if *ex facie* the summons, particulars of claim or declaration, a complete cause of action is not made out, which does not give rise to a presently exigible claim as verified by affidavit, the Court in the exercise of its discretion should refuse summary judgment. This is so, even if the defendant in the Magistrate's Court has not filed an exception, or application to strike out, in terms of Rule 17 7), or such a defence has not been raised by the defendant in the affidavit opposing summary judgment, in terms of Rule 14(3)(c) in the Magistrates' Court, or Rule 32(3)(b) in the High Court.
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> [23] Consequently, the fact that the appellant did not raise the issue of the incomplete nature of the respondent's cause of action, by way of an exception in terms of Rule 17 (7), nor in the affidavit opposing summary judgment, matters not."

13. Whilst I am unable to locate a judgment that that suggests that this principle no longer exists under the new summary judgment regime, it would, I believe, be an anathema within the context of summary judgment proceedings if it no longer existed. Nevertheless, during the course of argument, Mr Reineke, who appeared for the plaintiff, conceded that this principle remains. The concession is appreciated, and well made in the best traditions of the Bar.

14. As such and mindful of the discretion referenced by Swain J above, if *ex facie* the plaintiff's particulars of claim there is a defect in the plaintiff's pleaded cause of action, and the issue has not been dealt with by way of an exception, the court should refuse to enter summary judgment irrespective of whether or not the defendant has filed an affidavit to oppose it.[5]

[5] See *Transvaal Spice Works & Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200

An analysis of the plaintiff's particulars of claim

15. Stripped to its essence, the plaintiff's cause of action is one for goods sold and delivered (under an instalment sale agreement).

16. That said, the plaintiff's particulars of claim in the action fails to allege the delivery of the motor vehicle. This is indubitably a necessary averment if the plaintiff's cause of action, per its particulars of claim, is to be regarded as complete and unobjectionable, and, as such, capable of being properly verified within the province of an application for summary judgment.

17. As set out above, the defendant does not raise the incomplete and objectionable nature of the plaintiff's particulars of claim in her plea nor in her affidavit resisting summary judgment, nor in the heads of argument filed on her behalf in respect of this summary judgment application For the reasons set out elsewhere in this judgment, this is immaterial.

18. Mr Reineke accepted that the plaintiff's particulars of claim do not allege the delivery of the motor vehicle. He nevertheless manfully argued that the plaintiff's particulars of claim are nevertheless not incomplete nor objectionable. His arguments stood essentially on two legs.

    18.1. First, Mr Reineke argued that the annexures to the particulars of claim include an electronically signed document with the moniker "Acceptance of agreement and acknowledgement of delivery", and as such an express allegation pertaining to delivery was not required to be made in the particulars of claim. I, with respect, disagree.

    18.2. A plaintiff's particulars of claim are required to contain a clear and concise statement of the material facts upon which the pleader relies for its, his or her claim.[6] At the risk of stating the obvious, parties therefore do not plead

[6] See uniform rule 18(4) and 18(5).

to annexures to pleadings, but plead to averments contained in the pleadings.

18.3. The acceptance of delivery document is not pleaded nor referenced (expressly or otherwise) in the plaintiff's particulars of claim. It should have been.

18.4. It is unhelpful that the document is merely included as an unreferenced document forming part of a bundle of whether documents annexed to the particulars of claim with the label "Instalment Sale Agreement Number 775342001"; particularly where the document does not comprise the instalment sale agreement itself. This is especially so because the bundle, marked B, is defined in paragraph 4 of the plaintiff's particulars of claim as "the agreement".

18.5. Moreover, neither the defendant nor the court can be reasonably expected to trawl through annexures to a particulars of claim, in order to speculate on the undisclosed non-existent cross-referencing and/or relevance of any material facts contained therein, within the context of the plaintiff's particulars of claim.

18.6. Whilst relevant to applications, I believe the *dicta* and reasoning in inter-alia *Swissborough Diamond Mines* on this score is equally apt to pleadings, particularly within the context a plaintiff's obligation to comply with uniform rule 18(4) and 18(5).[7]

18.7. Second, Mr Reineke argued that clause 3.2 of the "MFC vehicle terms and conditions" included as part of bundle B to the plaintiff's particulars of claim

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7 *Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA* 1999 (2) SA 279 (T) at page 324 F-H which states:

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. See *Lipschitz and Schwarz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H and *Port Nolloth Municipality v Xahalisa and Others*; *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B--C."

places the relevant pleading "obligation" on the defendant on the question of delivery. Clause 3.2 reads:

> "You must collect the Goods from the Seller or from Us at your own cost on signing the document confirming that You took delivery of the Goods."

18.8. I again, with respect, disagree. I am unable to find that clause 3.2 imposes the suggested pleading "obligation" on the defendant. If anything, I believe clause 3.2 imposes an obligation on the plaintiff, at the very least, to plead and assert in its particulars of claim that (i) the terms of clause 3.2 as one of the relevant material terms of the instalment sale agreement, and (ii) the defendant factually or actually collected the motor vehicle (Goods), or factually or actually took delivery (*traditio vera de manu in manum*), or took delivery by way of constructive (symbolic) delivery.

19. In the above circumstances, the plaintiff's particulars of claim are incomplete and objectionable, and as such that the application for summary judgment is defective. Because the summary judgment application is defective, I need not have regard to the defendant's plea or its affidavit resisting summary judgment.

20. It is indubitably required that the plaintiff must first get "its house in order" so to speak in summary judgment proceedings, before the defendant can properly and rightly be called upon to contest the plaintiff's claims in summary judgment proceedings.

21. Otherwise stated, if the plaintiff has failed to place itself with the jurisdictional ambits of the rule, the merits or demerits of the defendant's affidavit opposing summary judgement should ordinarily become irrelevant.[8]

The defences raised by the defendant

22. Notwithstanding that stated above regarding the plaintiff's failure to place itself with the jurisdictional ambits of the rule, the less said about the defences raised

[8] Van Nikerk et al, *Summary Judgment; a* Practical *Guide*, Lexis Nexis, Issue 2, para 12.2

by the defendant in its plea and in its opposing affidavit in the summary judgment application, and the disharmony between the two, the better.

23. Summary judgment is infamously "an extraordinary, stringent and drastic" procedure and remedy.[9] It should therefore only be granted when it is clear that the plaintiff's claim is good and the defendant has no defence. Here the plaintiff's pleaded claim is incomplete and I have grave reservations about the defendant's defences.

24. However, Navsa JA states in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*: "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."[10] Navsa JA thereafter concludes: "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."[11]

25. Whilst the plaintiff fails to allege in its particulars of claim that the delivery of the motor vehicle to the defendant, or the defendant's collection of the motor vehicle, the facts, such as they are and as they reveal themselves, in paragraph 3 of the affidavit resisting summary judgement, refer referencing parallel action proceedings against Motus Group Toyota by the defendant, indicate that the defendant took delivery of or collected the motor vehicle, but that the motor vehicle may have been subsequently destroyed in fire due to an undisclosed (presumably manufacturing) defect.

26. It is however a long established and trite principle of our law[12], and others internationally[13], that "hard or bad facts cannot make soft law". I use this

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9 See inter-alia *Joob Joob Investments v Stocks Mavundla Zek JV* [2009] All SA 407 (SCA). (see, *for* example *Firstrand Bank Limited t/a Wesbank v Maenet JA Attorneys Inc* [2021] ZAGPPHC 612 and *Beyonce Hairpiece Salon and General Mechandiser (Pty) Ltd and Another v Bester and Another* [2023] ZAKZPHC 92)

10 Supra para 31

11 Supra para 33

12 Mailula *Hard Cases Make Bad Law: Reflections on the South African Constitutional Court's Jurisprudence on the Development of African Customary Law in South Africa*, South African Public Law, V38, 2023

13 Shahshahani*, Hard Cases Make Bad Law? A Theoretical Investigation*, New York School of Law, November 2019

expression within the context of what appears to be the poor case advanced by the defendant in opposition to the summary judgement application, but the defendant nevertheless surviving the summary judgement application. This

27. If I were to turn a blind eye and overlook the material defect in the plaintiff's particulars of claim and ensuing defects in the application for summary judgment and instead focus on the defects, as well as the vacuous and ambiguous allegations in the defendant's plea and affidavit resisting summary judgment, I would be guilty of allowing hard or bad facts to make soft law, and with it undermining the long-established jurisdictional requirements posed upon the plaintiff in bringing a summary judgement application.

Costs considerations

28. Turning to the question of costs, subject to the court's discretion [14], costs ordinarily follow the result. the reason for dismissal of the application judgment is obviously premised on a "judges point".

29. Ordinarily this would allow a court, in the exercise of its discretion, to not make a costs order either way. That said, the "point" that determines this application is fairly obvious once revealed, and it ought, in ordinary course, to have precluded the plaintiff from proceeding with the summary judgment application in the first place. Nevertheless, I believe that I must find a manner to express my disquiet with the defendant's plea and affidavit resisting summary judgment but, particularly her accompanying serendipity. I intend to do so, in the exercise of my discretion, in not making a costs order.

30. The plaintiff's incomplete particulars of claim served as the defendant's unknown, uninvited, and unexpected saviour in this summary judgment application. Both the plaintiff and the defendant should possibly reconsider their respective pleadings.

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[14] *Vassen v Cape Town Council* 1918 CPD 360 and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 3

My apprehension to counsel

31. My findings and sentiments on costs notwithstanding, I must express my appreciation to the counsel who argued before me. Their arguments were succinct, pithy and free of hyperbole and needless emotion. Most importantly, the relevant concessions were readily made when required. Counsel were professional in every respect, and I herewith express my gratitude and appreciation.

Order

32. I grant the following order:

The application of summary judgment is dismissed with no order as to costs.

G AMM

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on **19 October 2024**.

For the plaintiff:	Adv. M Reineke Instructed by DRSM Attorneys
For the defendant:	Adv. E Muller Instructed by Elliott Attorneys Inc.

Date of Hearing:	09 October 2024
Date of Judgment:	19 October 2024