IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION: MIDDELBURG LOCAL SEAT

DELETE WHICH IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO O [redacted]
(3) REVISED

11/09/2023

DATE SIGNATURE

CASE NO: 5055/2022

In the matter between:

BABCOCK FINANCIAL SERVICES (PTY) LTD **APPLICANT**

And

GERT JACOBUS ERASMUS **1ST RESPONDENT**

GERT JACOBUS ERASMUS N.O **2ND RESPONDENT**

THE TRUSTEES FOR THE TIME BEING OF GERT ERASMUS FAMILY TRUST **3RD RESPONDENT**

ELIZE ERASMUS N.O **4TH RESPONDENT**

THE TRUSTEES FOR THE TIME BEING OF NICO ERASMUS FAMILY TRUST **5TH RESPONDENT**

JUDGMENT: APPLICATION FOR SUMMARY JUDGMENT

Vukeya J

[1] This is an application wherein the applicant prays for an order that Summary Judgment be granted against the defendants jointly and severally the one paying the other to be absolved for *pro tanto;* Payment in the amount of R2 514 078. 04; interest thereon at the rate of 7% *per annum a tempora morae* calculated from 3 September 2019 to date of final payment and costs of suit on attorney and client scale.

[2] In the applicant's founding affidavit deposed to by Mieke Immelman, it is alleged that on 18 January 2016, the first respondent, acting personally, bound himself in writing, jointly and severally, as surety and co-principal debtor in *solidum* with the principal debtor, for any payment on demand to the applicant for all sums which the principal debtor may, then and from time to time and however arising, become due and payable to the applicant by the principal debtor.

[3] The applicant further alleges that on 18 May 2016, the fourth respondent, as authorised by the other trustees, bound the Nico Erasmus Family Trust, in writing, jointly and severally, as surety and co-principal debtor in *solidum* with the principal debtor, for any payment on demand to the applicant for all sums which the principal debtor may, then and from time to time and however arising, become due and payable to the applicant by the principal debtor.

[4] According to the applicant, the second respondent, as authorised by other Trustees, bound the Gert Erasmus Family Trust in writing, jointly and severally, as surety and co-principal debtor in *solidum* with the principal debtor, for any payment on demand to the applicant for all sums which the principal debtor may, then and from time to time and however arising, become due and payable to the applicant by the principal debtor.

[5] Immelman verifies the cause of action and avers that as at the date of deposing to the affidavit, the respondents were indebted to the applicant in the amount to R2 514 078.04 in respect of a Master Lease Agreement ("MLA") under contract number 000386 entered into by the applicant and Moonstone transport (Pty) Ltd ("Moonstone"), the principal debtor.

[6] The applicant's basis for the claim is, in a nutshell, that it leased ten (10) vehicles to Moonstone under a lease agreement and this lease agreement included various schedules, which schedules specifically incorporated terms and conditions of the lease agreements. These schedules also set out the details of each vehicle and rental amount to be paid by Moonstone on a monthly basis. The applicant signed these schedules on 20 January 2016 and Moonstone signed them on 27 January 2016.

[7] According to the applicant, it complied with its obligations and delivered the vehicles to Moonstone granting them the use and possession of the vehicles in accordance with the lease agreement and Moonstone accepted delivery of those vehicles and signed a Release note and Acknowledgment of Delivery. By so doing, it

acknowledged that it received the vehicles in good order and condition to its satisfaction and according to its specification and requirements.

[8] The applicant alleges that Moonstone breached the lease agreement by failing to make due and punctual payments of the amounts due in terms of the various schedules and unlawfully sub-leased the vehicles to Siyenlo Transport (Pty) Ltd and Leyapax (Pty) Ltd and by so doing, contravened the terms of the lease contract. Immelman further alleges that Moonstone also purported to cede its rights under the lease agreement to third parties without the consent of the applicant in terms of clause 19.1 of the lease agreement.

[9] It is further alleged that Moonstone failed to adequately maintain the vehicles in accordance with its obligations and also failed to insure the vehicles and provide the applicant with proof of insurance in terms of the lease agreement. This resulted in the applicant cancelling the lease agreements on 03 September 2019 and demanding return of the vehicles by no later than 5 September 2019. The applicant also informed Siyenlo and Leyapax in writing to return the vehicles as the agreement they had with Moonstone was unlawful.

[10] During 2019, Moonstone went into business rescue and the applicant, after discussions with the appointed business rescue practitioner, was granted consent to recover the vehicles from Siyenlo, The applicant took possession of the vehicles from Siyenlo on 13 September 2019 and notified the respondents in writing on 1 October 2019 and also demanded payment of the outstanding amount from them.

[11] The applicant states that it sold all vehicles at a fair value and then set off the proceeds received from the sale of each vehicle against the outstanding amount owed and the unexpired terms of each of the lease agreement for each vehicle. This was an attempt on the part of the applicant to mitigate any or all damages which could be suffered as a result of the breach. The applicant therefore avers that all amounts owing after it sold the vehicles became due and payable immediately.

[12] When the respondents were served with a Summons they all filed a notice of intention to defend the action after which they filed their plea. In their first plea, the respondents denied that they were indebted to the applicants, they subsequently amended their plea stating that Moonstone paid to the applicant an amount which was in excess to the amount claimed in the applicant's particulars of claim. The applicant, after receiving the defendant's amended plea applied for Summary Judgment which the defendant opposed by filing its notice of opposition of the summary judgment application.

[13] In the affidavit opposing the granting of summary judgment, the deponent, Gert Erasmus raised the following three points *in limine*:

13.1. <u>Authorisation:</u> The respondent raised an issue that the deponent to the applicant's founding affidavit has failed to provide proof of authorisation enabling her to institute and prosecute the proceedings either from the applicant or from Fast Forward Finance (Pty) Ltd. The respondents contend that the applicant should have filed a resolution as proof of this authorization;

13.2. Hearsay: It is the respondents' contention that the affidavit deposed to by the deponent amounts to hearsay as the deponent was not a party to the agreements. The respondents contend that the deponent has failed to make an averment in her affidavit to curtail the aspect of hearsay in that she has the documents in her possession, has perused same and does the contents fall within her personal knowledge.

13.3. Consent to Magistrate's Court: The respondents allege that in terms of each of the agreements alleged in the applicant's summons the parties consent to the jurisdiction of the Magistrate's Court, however, the applicants elected to institute action in the High Court. They therefore pray that in the event that a cost order is granted in favour of the applicants, that the applicant be ordered to recover costs on a Magistrate's Court Scale.

[14] Regarding the merits of the summary judgment application the respondents deny the allegations made by the applicants and base their denial on the fact that Moonstone made payments to the applicant between September 2018 and May 2019 to the total amount of R4 135 318, 43. They therefore assert that there are no amounts due and payable to the applicants as this was in excess of what was claimed by the applicants and that the applicant failed to take these payments into consideration when calculating the alleged damages.

[15] The respondents also deny that any valid suretyship agreements were concluded. They allege that the surety agreements makes provision for the details of the resolution authorising the signatory to be referred to but this was not filled in the agreement making it invalid. According to the respondents, at the time of the alleged breach, Moonstone was under business rescue and a business rescue practitioner had taken over.

[16] It is the respondents' evidence that they were not parties to the lease agreement between Moonstone and the applicant and therefore could not have breached the lease agreement. They further base their denial on the fact that according to the applicant the first respondent signed the suretyship agreement on 18 January 2018 whereas the Master Lease Agreement was entered into on 27 January 2018. They contend that the surety agreement cannot pre-date the main agreement in terms of which the parties bound themselves.

[17] It is further denied by the respondents that valid sureties were entered into by the second and fourth respondents which are binding to the third and fifth respondent. According to the respondents, the applicant has failed to prove that the second and fourth respondents were duly authorised to bind the third and fifth respondents. Furthermore, the respondents state that the applicant has failed to prove that the exclusions of the National Credit Act are applicable to the matter and therefore the applicant has an obligation to put forth the basis on which it relies to aver that the agreement is excluded from the provisions of the National Credit Act.

[18] According to the respondents the MLA specifically makes reference to the fact that each schedule constitutes a separate lease agreement. Each schedule was signed on different dates and therefore they do not form part of the MLA. It is therefore the respondent's evidence that the schedules do not constitute a valid lease agreement. The respondents further dispute the evidence of the applicant that the vehicles were delivered to Moonstone and that delivery notes were signed on delivery. They deny that there was any authorisation by the trustees

[19] In a supplementary affidavit to the Summary Judgment application filed by the applicant, it concedes that Moonstone made certain payments between September 2018 up to and including May 2019 in respect of the monthly rental of the vehicles. Ms Immelman avers in this affidavit that Moonstone defaulted in its obligations to make punctual payments from June 2019 as and when they became due. It is the applicant's evidence that despite the payments made by Moonstone, the respondents alternatively Moonstone remain indebted to the applicant. It is on these basis that the applicant submit that the respondents have not raised any *bona fide* defence and requests that judgment be granted in their favour.

[20] In its heads of argument the applicant submits that the only issue to be determined in this application is the amount owing by the respondents to the applicant. It was submitted on behalf of the applicants that this issue can be resolved by considering the certificates of balance and the statements showing payments made by Moonstone leaving a balance of R2 389 579.01. According to Counsel for the

applicant, because the only defence raised against the applicant's claim is the allegation that payments have been made, there is no issue for trial.

[21] Counsel for the applicant pointed the court out to paragraph 7 and 8 of the applicant's supplementary affidavit in support of application for summary judgment on paginated page 257 in which the applicant explains that when Moonstone made payment in the amount of R4 135 318, 43 these payments were received and recorded accordingly. According to Counsel for the applicant, the payments were allocated to each of the 10 accounts from September 2018 to May 2019, but there remains a debit balance in respect of each of those 10 accounts and the debit balance makes up the amount owed to the plaintiff.

[22] Referring to the case of *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) in which it was held that the rule requires the defendant to set out in his affidavit sufficient facts, which if proved at trial, will constitute an answer to the plaintiff's claim. Counsel further referred the court to the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) Counsel for the applicant argued that the respondents' defence that the debt has been settled is not good in law and therefore does not amount to a defence to the application for Summary Judgment.

[23] In their heads of argument, it is submitted on behalf of the respondents that no amount is due and payable to the applicant after the amount of R4 135 318. 43 was paid by the respondents. An amount of R1 745 739, 42 in excess of the amount claimed by the applicant was paid and therefore, on this basis alone, the application

falls to be dismissed. Counsel for the respondents argues that although the applicant has conceded that the respondents made payments between September 2018 and May 2019 in respect of the lease agreements, it still maintains that the respondents are still indebted to it without laying the basis for this further averment.

[24] Counsel further referred to the case of *Firstrand Bank Limited t/a Wesbank v Maenet JA Attorneys Inc.* (8557/2021) [2021] ZAGPPHC 612 (17 September 2021) where it was held that: *"The Summary Judgment application call for strict circumspection and judicial oversight in balancing the rights of both the applicant and the defendant. The Summary Judgment proceedings have been described as drastic and robust proceedings. In Joob Joob Investments v Stocks Mavundla Zek JV [2009] All SA 407 (SCA) it was held that summary judgment proceedings are no longer extraordinary and the Rule must be applied properly.*

Naturally, summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the court to come to a decision".

Counsel argued that the applicant has failed to establish a clear and unanswerable case for the granting of summary judgment as it has failed to place a clear claim before court after the respondent proved that it has paid the applicant in excess of its claim.

[25] Furthermore, the respondents submit in their heads of argument that the surety agreements allegedly concluded by the 2nd and 4th respondents binding the 3rd and fifth respondents are incomplete and lack the required proof of authorisation to constitute valid surety agreements. According to Counsel, the fact that there is no date on which the Board of Trustees made the resolution to authorise the conclusion of the

surety agreements means that the sureties were not authorised by the Board of Trustees and therefore they are invalid.

[26] An application for Summary Judgment is regulated in terms of Rule 32 which provides that:

> *(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—*
>
> *(a) on a liquid document;*
>
> *(b) for a liquidated amount in money;*
>
> *(c)… and (d)…*
>
> *(2) (b) The plaintiff shall, in the affidavit referred to in sub-rule (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.*
>
> *(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.

[27] Rule 32 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 the court. (See *Meek v Kruger* 1958 (3) SA 154 (T) at 159–60). In certain circumstances, therefore, the law allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court. (*See Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G).

[28] The question in this application is whether the respondents have a *bona fide* defence which, if raised at a trial raises a triable issue against the applicant's claim. What is clear from the papers and arguments made in this application is that the respondent avers that Moonstone made payments to the respondent for the monies claimed and that it has in fact overpaid the applicant. The applicant has not denied this version, it states that the amounts received from Moonstone were recorded accordingly.

[29] If the applicant states in his particulars of claim that during September 2019 when it cancelled the agreement, alternatively, when it took possession of the motor

vehicles from Siyenlo, Moonstone was in arrears with its payments since August 2018 in the amount of R7 600 928.37 (unexpired term), it suggests that the applicant has not calculated the amounts paid by Moonstone between September 2018 to May 2019. This is what prompts the respondent to make submissions that there has been a miscalculation of the amounts and that Moonstone has over-payed the applicant. This because, after the respondents denied that Moonstone failed to make payments, they provided proof of payments to the applicant for the period September 2018 to May 2019, which amounts were in excess of the claimed amount but, it seems the amounts paid did not reduce the amounts owing when it was supposed to, the amount remained the same.

[30] I am inclined to agree with the applicant in its submission. The applicant's particulars of claim do not mention any payments received by the applicants from Moonstone for the periods mentioned above, in fact, they allege that Moonstone is liable to make payments to the applicant of the aggregate amount of R2 389 579. 01. The applicant, though it acknowledges these payments made by Moonstone, it gives no substance to why they do not reduce the claim amount except to indicate that they were recorded accordingly. If the applicant is adamant that the respondents are still indebted to it even after providing proof of payment, it has to prove its claim properly in a trial and my view is that the respondents' defence raises a triable issue for the trial.

[31] In *Venter v Kruger* 1971 (3) SA 848 (N) the court held that it is not intended in Summary Judgment proceedings, that a court should investigate the defence and

decide whether the probabilities of success are with the defendant or not. What the plaintiff has to do is to verify his claim and what the defendant has to do is disclose in his affidavit fully the nature and the grounds of his defence. It is trite law that in order to resist summary judgment, the defence put up by the defendant must be sufficiently complete and particularised. It does not have to be precise, but it must be complete.

[32] The respondents have, in my view, provided sufficient particularity to their defence. They have punched holes to the applicant's allegations that they are in any way indebted to it. They have provided proof that the applicant may have been paid in excess of what it has claimed while the applicant states that it has allocated those amounts accordingly without showing this in the evidence provided to the court. This is a matter of calculation which, according to Counsel for the applicant has nothing to do with an application for Summary Judgment.

[33] I am disinclined to agree with Counsel as the applicant applies for summary judgment on the basis of the claim being for a liquidated amount in money. It is the duty of the applicant to show how the claimed amount is calculated. The applicant is required to verify the cause of action and the amount claimed. In essence, the applicant is required to prove its claim and discredit the respondents' plea and if the applicant fails on this threshold, then summary judgment cannot be granted. In my view, it will not suffice to only state that the amounts were allocated accordingly without proving it.

[34] It is therefore my considered view that the applicant has failed to make out an unanswerable case against the respondents for the granting of Summary judgment. The defence raised by the respondents calls for an answer, and therefore I find that the respondents' defence is a *bona fide* and that it will sustain a triable issue at the subsequent trial.

[35] In the result I make the following order:

The application is dismissed, with costs.

[redacted]

VUKEYA LD

JUDGE OF THE HIGH COURT

For the Applicant: Adv. Christopher Gibson

Applicant's Attorneys:
SENEKAL SIMMONDS INC.
BEDFORDVIEW
Tel: 011 450 3084
Ref: D J Kleynhans/B380/MAT9995
C/o BIRMANS INC. ATTORNEYS
Middelburg
Tel: 013 282 5976
Ref: A Marais
Email: kleynhans@sesi.co.za; service@sesi.co.za; anina@birmans.co.za

For the Respondent: Adv SA Tyson

Respondent's Attorneys:

Theron, Jordaan & Smit Inc

Wilkoppies

Krugersdorp

Tel: 018 462 2703

C/o Kruger & Bekker Attorneys

Middelburg

Tel: 013 282 4889

Ref: HF1355

OR AVA/VZ/48679

Email: naadiya@kclaw.africa; andries@kclaw.africa; nazleen@kclaw.africa

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