THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 519/2011

In the matter between:

ANDRIES VISSER **First Appellant**
YOLANDE VISSER **Second Appellant**

and

EREKA KOTZE **Respondent**

Neutral Citation: *Visser v Kotze* (519/2011) [2012] ZASCA 73 (25 May 2012)

Coram: Heher, Van Heerden, Mhlantla, Leach JJA and Ndita AJA

Heard: 30 April 2012

Delivered: 25 May 2012

Summary*:* Application for summary judgment – defence of duress raised – requirements for summary judgment and for defence of duress – bona fide defence of duress not disclosed – summary judgment granted

ORDER

On appeal from: Western Cape High Court, Cape Town (Bozalek and Goliath JJ sitting as a court of appeal):

1 The appeal is upheld with costs on the scale as between attorney and client.
2 The order of the court below is set aside and replaced with the following:

'1. The appeal is dismissed with costs on the scale as between attorney and client.

2. The magistrate's order is amended to the extent reflected in the substituted order set out hereafter.

3. Summary judgment is granted against the first and third defendants, jointly and severally, the one paying the other to be absolved, as follows:

3.1 payment of the sum of R178 500;

3.2 interest on the said sum at the rate of 15.5 per cent per annum from 4 August 2009 to date of payment;

3.3 costs on the scale as between attorney and client.'

JUDGMENT

VAN HEERDEN JA (HEHER, MHLANTLA, LEACH JJA and NDITA AJA concurring):

1]In this case, the appellants sued a close corporation by the name of Asapi 1046 CC t/a PFC Durbanville, as the first defendant, in the Bellville Magistrates' Court for moneys due and owing under a loan agreement. The second and third defendants, Ms Noleen van den Bergh and Ms Ereka Kotze, the latter being the present respondent, were also sued as sureties under a 'Deed of Suretyship', signed by them for the debts of the close corporation. To avoid confusion, I shall refer to the parties as they were in the Magistrates' Court.

2]The plaintiffs applied for summary judgment against the first and third defendants. This was opposed by them on the ground that the loan and

suretyship agreements had been entered into under duress. The magistrate was unimpressed with this defence. He held that the defendants had not established a bona fide defence to the plaintiffs' claim, and granted summary judgment against them. The first and third defendants then noted an appeal to the Western Cape High Court. However, the first defendant (the close corporation) was subsequently liquidated and the liquidators did not proceed with the appeal.

3]The third defendant's appeal to the high court against the summary judgment order was successful. The high court held that, although the third defendant's affidavit opposing summary judgment fell short of being comprehensive, it succeeded in establishing a bona fide defence of duress sufficient to ward off summary judgment. The third defendant was granted leave to defend the action. The high court refused leave to appeal, and the present appeal by the plaintiffs is before us with the leave of this court.

4]The material facts are as follows. On 11 November 2008, the plaintiffs and the first defendant concluded a written agreement of loan, in terms of which the plaintiffs agreed to lend the first defendant an amount of R425 000. It was noted that this amount had already been paid to the first defendant. No interest was payable on the loan, but the first defendant was obliged to repay the capital amount on demand. The first defendant consented to the jurisdiction of the relevant magistrates' court in respect of all proceedings connected with the agreement.

5]On the same day, the second and third defendants signed a document titled 'Deed of Suretyship', in terms of which they bound themselves as sureties and co-principal debtors with the first defendant for all and any debts owed by the first defendant to the plaintiffs. The second and third defendants also consented to the jurisdiction of the magistrates' court. Furthermore, the suretyship provided that the amount of any debt of the first defendant for which the sureties were liable to the plaintiffs would be established by a certificate signed by the plaintiffs, which would be proof of the amount of the indebtedness and valid for the purpose of obtaining summary judgment.

6]According to the plaintiffs, the defendants paid a total amount of R96 000,

leaving an outstanding balance of R329 000, as set out in a certificate by the plaintiffs. By means of a letter dated 27 July 2009, addressed to the defendants by the plaintiffs' attorneys, the plaintiffs demanded payment of the sum of R329 000 within 7 days. Neither this nor any other amount was paid by the defendants, giving rise to the action in the magistrate's court referred to above.

7]The first and third defendants entered appearance to defend and the plaintiffs then applied for summary judgment against them. This was opposed. In her affidavit opposing summary judgment on behalf of both herself and the first defendant, the third defendant stated the following:

'In and during October 2008, the Plaintiffs submitted the Defendants with documents to be signed in replacement of the existing Agreements. The Plaintiffs related that the first agreements already signed were not worth the paper it was written on. As a result, the Defendants consulted with their previous Attorney, Mr JP Van Niekerk of Smit Kruger Inc in Durbanville, who advised us against signing such documentation for various reasons, most important of which was the fact that the capital amount in the Loan Agreement was incorrect as per paragraph 6 hereunder.

After attending a meeting with Mr Van Niekerk on or about the 30th October 2008 in Durbanville, both Second Defendant and I were accosted by the Plaintiffs in their double-cab LDV, who pulled their vehicle in front of us preventing us from being able to move forward and in the process, nearly driving over my foot.

The First Plaintiff then started attacking my character, accusing me of being a thief, and further threatening that if Second Defendant and I did not sign the documentation which they had presented to us, they would report us to the Commercial Unit of the SAPS, and also inform my husband. The First Plaintiff was well aware of the fact that I am petrified of my husband who previously held a high position within the Directorate of Special Operations (Scorpions), and that I would do anything to prevent the Plaintiffs from making contact with him to inform him of the First Defendant's precarious financial position.

As a consequence of the coercion and fear which was installed upon the Second Defendant and I, we reluctantly signed the new Loan Agreement which is marked Annexure "B" to the Plaintiffs' Particulars of Claim, as well as the Deeds of Suretyship marked Annexure "C" thereto.'

8]As recorded earlier, this reliance on duress as a defence to avoid summary judgment did not succeed in the magistrates' court. It did, however, succeed on appeal to the Western Cape High Court which refused summary judgment and

gave the third defendant leave to defend the action. Which of these approaches is correct is the subject of the present appeal.

9]Magistrates' court rule 14 deals with summary judgment. In terms of rule 14(3) *(c)*, as it was at the time of this case:

'Upon the hearing of an application for summary judgment, the defendant may –

. . . .

(c) satisfy the court by affidavit delivered not later than noon of the day preceding the hearing of the application (which affidavit may by leave of the court be supplemented by oral evidence) that he has a *bona fide* defence to the claim on which summary judgment is being applied for or a *bona fide* counterclaim against the plaintiff. Such affidavit and evidence shall disclose the nature and grounds of the defence or counterclaim.'[1]

The new rule 14(3)*(b)*, the successor to rule 14(3)*(c)*, provides that 'such affidavit or evidence shall disclose *fully* the nature and grounds of the defence *and the material facts relied on therefor'* (emphasis added), which is the wording used in the equivalent Uniform rule 32(3)*(b)*. As the case law shows, however, the difference in wording makes no difference to the requirements for an affidavit opposing summary judgment. [2]

10]The remedy of summary judgment has for many years been regarded as an extraordinary and stringent one in that it closes the doors of the court to the defendant and permits a judgement to be given without a trial. However, in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture,*[3] Navsa JA, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated:[4]

'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

1 The Magistrates' Court Rules were subsequently amended by GN R740 in *GG* 33487 dated 23 August 2010.

2 See, eg, *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 177E-178C. See also *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228C-E; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E.

3 *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

4 Paras 32-33.

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[5] 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 on 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.

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.'

11]As already indicated, one of the ways in which a defendant can avoid summary judgment, is to satisfy the court by affidavit that he or she has a bona fide defence to the claim on which summary judgment is being applied for. The word 'satisfy' does not mean 'prove'. What the rule requires is that the defendant must set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. The classic and much-quoted formulation of the approach to an affidavit opposing summary judgment is that set out by Corbett JA in the *Maharaj* case[6] 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 ground 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

5 Referred to in fn 2 above.

6 At 426A-E,cited by Navsa JA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* para 24 fn 11.

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.'[7]

12]As is evident from the extract from her affidavit set out above, the third defendant's defence to the plaintiffs' claim under the loan agreement and the suretyship agreement was one of duress. Allegations were also made about the capital amount reflected in the loan agreement, the payments made by the first defendant and the balance owing by the first defendant to the plaintiffs. We need not concern ourselves with these latter allegations in that, during the hearing before the magistrate, the plaintiffs confined their claim to an amount of R178 500, an amount conceded by the third defendant (in her opposing affidavit) as indeed being due by the first defendant to the plaintiffs. The third defendant's opposition to the summary judgment proceedings thus stands or falls by her reliance on duress.

13]The elements necessary to set aside a contract on the ground of duress were described by Corbett J in *Arend & another v Astra Furnishers (Pty) Ltd*[8] as follows:

'[I]t is clear that a contract may be vitiated by duress *(metus)*, the *raison d'etre* of the rule apparently being that intimidation or improper pressure renders the consent of the party subtracted to duress no true consent. . . Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based on fear, the following elements must be established:

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the

7 See also *Tesven CC & another v South African Bank of Athens* 2000 (1) SA 268 (SCA) paras 22-23.

8 *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C).

person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or *contra bonos mores.*

(v) The moral pressure used must have caused damage.'[9]

14]To assess the third defendant's defence of duress, it will be useful at this stage to repeat the material part of her affidavit opposing summary judgment:

'The First Plaintiff then started attacking my character, accusing me of being a thief, and further threatening that if Second Defendant and I did not sign the documentation which they had presented to us, they would report us to the Commercial Unit of the SAPS, and also inform my husband. *The First Plaintiff was well aware of the fact that I am petrified of my husband who previously held a high position within the Directorate of Special Operations (Scorpions), and that I would do anything to prevent the Plaintiffs from making contact with him to inform him of the First Defendant's precarious financial position.'* (Emphasis added.)

15]Reliance on the highlighted part of the affidavit set out in the preceding paragraph is misplaced. It does not even approximate a defence that the agreements are vitiated by duress. The threat is not unlawful – it appeared to be common cause that the first defendant was in a precarious financial position and the communication of this fact to anyone could hardly be considered unlawful. The third defendant does not dispute the fact that the first defendant was indebted to the plaintiffs or that she signed the two agreements. The concern that she expresses is that her husband will come to know of the first defendant's financial position. That her husband might react badly to learning of the first defendant's financial position can hardly be regarded as duress on the part of the plaintiffs.

16]The crux of the third defendant's asserted duress is that it was the fear of communication to or contact with her husband on that aspect that drove her to signing the agreements. There is no direct allegation in the affidavit referred to

9 At 305 in fin – 306C. See also *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 439A-E; *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) para 36; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) paras 10-11. See also Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* 3 ed (2007) at 117ff; RH Christie & GB Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 313ff and the other authorities cited by these authors.

the preceding paragraph and in para 7 above that it was fear or pressure in respect of the other aspects mentioned that caused the third defendant to sign the agreements. In any event, a report to the Commercial Unit of the SAPS would not, to any right-minded person not guilty of any criminal wrongdoing, have constituted a threat. A loan agreement and a suretyship agreement were in issue. There is no discernable link to any criminal conduct deserving the attention of the police.

17]It must also be remembered that, although the confrontation between the plaintiffs and, inter alia, the third defendant took place on 30 October 2008, the loan agreement and deed of suretyship were signed only on 11 November 2008. The third defendant made no allegation that she had any contact whatsoever with the plaintiffs during this 12-day period. It is also not stated in her affidavit whether, during this 12-day period, either plaintiff made any attempt to carry out any of their alleged 'threats' by contacting either the SAPS or the third defendant's husband. She also did not indicate whether, during this period, she sought legal advice or in any other way attempted to avert the evil which she allegedly feared. This lapse of time makes the defence of duress even more implausible.

18]In light of the above, it is clear that the third defendant's affidavit opposing summary judgment has not disclosed a bona fide defence of duress to the plaintiffs' claim.

19]Counsel for the third defendant contended that, even if it be found that third defendant's affidavit lacks particularity regarding the material facts relied upon and falls short of the requirement of the sub-rule, the court may still, in an appropriate case, exercise its discretion in favour of the third defendant and refuse summary judgment if there is doubt as to whether the plaintiffs' case is unanswerable.[10] He argued that this was such a case and that the court below should have exercised its discretion in the third defendant's favour.

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10 At the time of this case, this discretion was to be found in Magistrates' court rule 14(6), the relevant part of which provided that 'the court may, if the defendant does not so. . . satisfy the court, give summary judgment for the plaintiff.' The same provision is to be found in the new rule 14(5), the wording of which is almost identical to that of Uniform rule 32(5). Magistrates' court rule 14(5) provides that '[i]f the defendant does not . . . satisfy the court as provided in subrule (3), the court may enter summary judgment in favour of the plaintiff.'

20]As was pointed out in *Breitenbach v Fiat SA (Edms) Bpk*[11] the court's discretion in this regard 'should not be exercised against a plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before the Court.' In this case, the material before the court is such that there is simply no basis for the exercise of a residual discretion against the plaintiffs and in favour of the third defendant.

21]The plaintiff sought an an award of costs on an attorney and *own* client scale, at all the relevant levels. This type of cost order had been foreshadowed in the provisions of both the loan agreement and the suretyship agreement. However, when questioned as to the difference (if any) between attorney and *own* client costs, on the one hand, and attorney and client costs, on the other,[12] counsel indicated that he was prepared to formulate the relief sought by the plaintiffs so as to claim attorney and client costs throughout.

22]The following order is therefore made:

1 The appeal is upheld with costs on the scale as between attorney and client.

2 The order of the court below is set aside and replaced with the following:

'1. The appeal is dismissed with costs on the scale as between attorney and client scale.

2. The magistrate's order is amended to the extent reflected in the substituted order set out hereafter.

3. Summary judgment is granted against the first and third defendants, jointly and severally, the one paying the other to be absolved, as follows:

3.1 payment of the sum of R178 500;

3.2 interest on the said sum at the rate of 15.5 per cent per annum from 4 August 2009 to date of payment;

3.3 costs on the scale as between attorney and client.'

B J VAN HEERDEN

JUDGE OF APPEAL

11 At 229F.

12 See *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 92; *L & P Plant Hire Bpk & others v Bosch & others* 2002 (2) SA 662 (SCA) para 41.

APPEARANCES:

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