

SOUTH AFRICA / JUDGMENT

Development Bank of Southern Africa v Muller (49303/2016) [2017] ZAGPPHC 391 (28 March 2017)

[2017] ZAGPPHC 391**COURT**

North Gauteng High Court, Pretoria

BEFORE

E Molahlehi

CASE / FILE NUMBER

49303/2016

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****SOUTH DIVISION, PRETORIA****CASE****NO: 49303/2016****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

DATE:

28/3/2017

In

the matter between

THE

DEVELOPMENT BANK OF

APPLICANT

SOUTHERN

AFRICA

AND

NICHOLAS

PHILIPPUS

MULLER RESPONDANT

Heard

on: 01 November 2016

Delivered:28 March 2017

JUDGMENT

Molahlehi J

Introduction

[1] This is an application for summary judgment in terms of which an order is sought to direct the defendant to pay the plaintiff an

amount of R719 474.53 including he prescribed the rate of interest. The application is opposed by the defendant on the basis that the plaintiff has failed to comply with the requirements of rule 32 of the Uniform Rules of the Court (the Rules).

[2] The plaintiff avers in the particulars of claim that it made two payments in the amounts of R575 579.62 and R143 894.90 into the

bank account of the defendant on 15 April 2014 and 1 July 2013 respectively. Both payments were made were according to the plaintiff

made into the bank account in the bona fide but mistaken belief that payment was made into the bank account of Kellog Brown and Root South Africa (RF) (ty) Ltd (Kellog). The payment was made to settle the debt which the plaintiff had with of Kellog.

[3] In his affidavit opposing the summary judgment the defendant stated the following:

"4 The deponent to the affidavit simply states that she verifies the "relief sought," This falls short of what is required to be verified in terms of the rules of the court and as such the application should be dismissed."

5 The deponent to the affidavit further does not provide a proper factual basis to confirm even the relief sought or that she has personal knowledge of the matter and it is denied that she has."

The legal principles

[4] An application for a summary judgment is governed by the provisions of rule 32(2) of the Rules which amongst other things requires that the deponent to the affidavit in support of such application to positively swear to the facts verifying the cause of action for the plaintiff's claim.

[5] The purpose of a summary judgment is stated in *Joob Joob (Pty) Ltd v Mavundla Zek Venture*, [1] as follows:

"[31] 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.

[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."

[6] It is trite that an application for summary judgment in terms of rule 32 of the Rules has to be accompanied by a supporting affidavit wherein plaintiff or someone acting on its behalf deals with the following:

1. Wears positively to the facts verifying the cause of action and the amount and the amount, if any, claimed
2. Stating that in his or her opinion there is no bona fide defence to the action, and
3. That the intention to defend was delivered solely for the purposes of delay,
4. On its behalf swears positively to the facts verifying the cause of action and the amount claimed."

[7] The plaintiff would be entitled to the summary judgment once the above requirements have been satisfied.

[8] In order to mount a successful defence to a summary judgment application the defendant has to file an opposing affidavit wherein

himself/herself or any other person on his/her behalf deals with the following in the opposing affidavit:

1. Swear positively to the fact that he /she has a bona fide defence to the action,

2. Discloses fully the nature and the grounds of the defence and the material facts relied upon therefor.

[9] The essence of the defendant's defence in the present matter is set out in the affidavit resisting summary judgment in the following terms:

"4 The Applicant's application for summary judgment is fatally defective and stands to be dismissed for this reason alone.

5. The deponent to the affidavit simply states that she verifies "relief sought". This falls short of what is to be verified in terms of the rules of court and such application should be dismissed.

6. The deponent to the affidavit further does not provide a factual basis to confirm even the relief sought or that she has personal knowledge of the matter and it is denied that she has."

[10] The above defence in my view bears no merit when regard is had to the proper approach when dealing with technical defects in an affidavit in support of a summary judgment. It is generally accepted that technical defects or errors in an affidavit will sustain as a defence where it is shown that the defendant is prejudiced by such defects or errors. The test to apply in determining whether summary judgment should be granted in the face of an error or defect in a supporting affidavit is whether there has been substantial compliance with the requirements of the rule. The key issue is whether the defendant can, from the reading of the plaintiff's particulars of claim be able to appreciate what case he or she has to answer to. In other words, can the defendant discern from the plaintiff's particulars of claim what case he or she has to answer to.

[11] As stated in *Standard Bank of South Africa v Roestof*, [2] the papers must be read in their totality and that it was not the function of the court to protect the dishonest defendant. The court further held that:

"If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him."

[12] In *Liberty Group Ltd v Sighn and another*, [3] the court said that:

"[44] The remarks of Myburgh J in *Western Bank* must however be seen in the context that the irregularity in question was one of a number of defects raised by the defendant in that case. In addition, in the present case, Mr. Tobias has not pointed to any prejudice suffered by the defendants as a consequence of the irregularity.

When regard is had to the fact that the point was only seized upon by the defendant, when I raised it at the hearing, I have no doubt that the irregularity should be condoned. I accordingly condone the irregularity."

[13] In the present matter, my view is that there is no doubt from the reading of both the summons and the supporting affidavit for the

summary judgment that the deponent to the supporting affidavit intended to verify the cause of action. It is in this respect clear

from the summons that the relief sought by the plaintiff is payment of the amount of R719 474.53 by the defendant.[4]

[14] In considering the complaint of the defendant concerning the technical defect that may be there in the supporting affidavit, account has to be taken of the fact that the defendant has not claimed that it has suffered any prejudice as a result thereof.

[15] The other complaint by the defendant is that the deponent to the supporting affidavit has failed to set out the factual basis to

confirm her personal knowledge and the factual basis to confirm the relief sought.

[16] In terms of the rule, the deponent to the supporting affidavit is required to "swear positively to the facts verifying the cause of action." In my view what is required in this regard is not evidence supporting the facts concerning the claim but what the deponent needs to do is to verify that which is set out in the particulars of claim.

[17] The suggestion by the defendant that the deponent to the supporting affidavit has no first knowledge of the facts in this matter bears no merit. It is in this respect trite the deponent to the affidavit in support of the summary judgment need not necessarily

rely on direct knowledge of the facts for the purposes of being able to positively to such facts.

[18] In *Rees and Another v Investeck Bank Limited*, [5] the Supreme Court of Appeal in dealing with the issue of formalism and the requirement of direct knowledge of documents related to the matter held that:

"[15] The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in *Maharaj*, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. 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 institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*."

[19] It is clear in the present matter that the deponent to the supporting affidavit acquired knowledge from the documents which were

under her control including those that she had access to for the purposes of this matter.

[20] In light of the above I find that the applicant has made out a case for the summary judgment and thus its application stands to succeed. I see no reason in the circumstances of this case why costs should not follow the results.

Order

[21] In the premises the following order is made:

1. The summary judgment application is granted.
2. The defendant is ordered to pay plaintiff the amount of R719 474.53 with interest at the rate of 10.25% per annum from date of the summons to the date of final payment.
3. The defendant is to pay the costs of the suit.

E Molahlehi

Judge of the High

Court, Johannesburg

APPEARANCES:

For the Plaintiff: J. M Hoffman

Instructed by Strauss Daly Inc

For the Defendant: W.G Pretorius

Instructed by Lamberti Attorneys

[1] 2009 (5) SA 1(SCA).

[2] 2004 (2) SA 492 (W).

[3] 2012 (5) SA 526 (KZN) at paragraph 44.

[4] See Taxi Securitization (Pty) Ltd v Mbatha and two similar cases 2011 (1) SA 310 (GPJ) at paragraph 11.

[5] 2014 (4) SA 220 (SCA)

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Prepared on 14 October 2026 · Esheria