

SOUTH AFRICA / JUDGMENT

Meredith v Moodley (25339/2020)

[2023] ZAGPJHC 176 (21 February 2023)

[2023] ZAGPJHC 176**COURT**

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

25339/2020

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Source record**REPUBLIC OF SOUTH
AFRICA****IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG****CASE****NO: 25339/2020****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE:**

21 FEBRUARY 2023

In

the matter between:

MEREDITH

WAYNE KEVIN

Plaintiff

And

MOODLEY

DEVANDREN

Defendant

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 21 February 2023.

JUDGMENT

SENYATSI J:

- [1] This is an opposed application for summary judgment and strike out of certain alleged irrelevant paragraphs in the answering affidavit resisting summary judgment application. The parties will be referred to as in the main action. The application was previously set down together with an application for an amendment of the plea in the main action. The court in those proceedings, De Wet AJ presiding, handed down judgment on the amendment of the plea and postponed the summary judgment sine die.
- [2] The parties are shareholders in a company known as MPower Bearings (Pty) Ltd (“the company”) in which the plaintiff holds 49% of the equity and the defendant holds 51% of the equity.
- [3] The relationship between the parties deteriorated as a result of which the plaintiff addressed an email on 10 July 2020 to the defendant making a proposal to acquire all the defendants shares in the company. The plaintiff contends that the exchange of communication constitutes an agreement of sale of the shares by the defendant to him for a purchase consideration of R3 million. This is disputed by the defendant who avers that he is married in community of property and that his wife did not consent to the disposal of his shares. He says the consent was required given that he and his wife owned all the shares previously before they disposed of 49% to the plaintiff.
- [4] The issue in this application is whether the Defendant has disclosed a bona fide defence in the context that the parties had animus contraliendi, whether formalisation of the agreement was a pre-requisite and whether the Plaintiff’s tender complies with his reciprocal obligation. Furthermore, the other controversy is whether or not paragraphs 34 to 49 of the defendant’s answering affidavit to the summary judgment application stand to be struck out from the pleadings as irrelevant evidence. It should be remembered that the amendment of the plea was allowed by court as already stated.
- [5] In his amended plea, the defendant pleads that he is married in community of property to Devandren Moodley and that in terms of section 15(2) of the Matrimonial Properties Act 88 of 1884, the Defendant may not without the written consent of his wife , inter alia, alienate any shares forming part of the joint estate. He contends that the shares that form the subject of this action are assets of the joint estate of the Defendant and his wife.

- [6] The Defendant furthermore states in his plea that he did not have consent from his wife whether written or otherwise to implement any purported acceptance of his proposal.
- [7] The Defendant furthermore pleads that he does not have consent from his wife whether written or otherwise to formalise any purported agreement to alienate the shares and that the agreement relating to the sale of shares is void ab initio.
- [8] In his affidavit resisting the application for summary judgment; he raises the defence as per amended plea pertaining to the fact that he is married in community of property to his wife and that she was not given consent to the sale of shares which are part, of the joint estate. He contends that the agreement is void ab initio.
- [9] In his support for summary judgment, the plaintiff contends that there is no bona fide defence and therefore no triable issue. He avers that it is impermissible for the defendant to have a change of mind after the offer to purchase 51 % of the shares is accepted.
- [10] The summary judgment application is regulated by Rule 32 of the Uniform Rules which came into operation on 1 July 2019. The rule states as follows:

“(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) For delivery of specified movable property; or
- (d) For ejectment;

Together with any claim for interest and costs.

(2)

- (a) Within 15 days after the date of deliver 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 the 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.
- (c) If the claim is founded on liquid document as a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

- (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 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 defence and the material facts relied upon therefore.
- (4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub rule (2) not may, either party cross-examine any person who gives evidence orally or on affidavit: Provided that the person who gives oral evidence such questions as it considers may elucidate the matter.”
- [11] From the reading of the rule, it is clear that the rule provides for only one affidavit from each of the parties. The plaintiff making the use of the rule to apply for the summary judgment has no other room to manoeuvre in so far as supplementing his affidavit is concerned. The same position applies to the defendant.
- [12] Following the amendment of the plea, the plaintiff filed a supplementary affidavit stating in the main that the point of law raised by the Defendant that the agreement of sale was void ab initio due to the absence of his wife’s consent as not raising a triable issue. He contends that the defendant is a businessman and that the sale of shares was in the ordinary course of business. He contends furthermore that the defendant’s wife displayed a complete disinterest in the sale of shares by not joining the proceedings and her failure to deliver a confirmatory affidavit resisting the summary judgment application.
- [13] It is trite that a court seized with the summary judgment application must be careful to guard injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross-examination, to satisfy it that he has bona fide defence.[1] The court must therefore only come to the assistance of the plaintiff in summary application proceedings, only in a clear case where the defendant, on papers, does not demonstrate a bona fide defence, but simply resist the summary judgment to delay the case.
[2]
- [13] In *Edwards v Menezes*[3], Van den Heever J stressed that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as
prayed, that the plaintiff has an unanswerable case, that summary judgment will be granted.
- [14] The requirements to successfully resist summary judgment application are also trite. The Defendant must firstly, disclose the nature and grounds of his defence and the facts upon which it is founded.[4] Secondly, the defendant must show that the defence disclosed is bona fide.[5] It not necessary at this stage for the court to consider the credibility of what is averred on the papers. It is sufficient is

prima facie, the defendant raises a defence the facts of which, if proven at trial, constitutes a defence to the claim.

- [15] I have considered the defendant's affidavit and the submissions made in regard thereto, together with the supplementary affidavit by the plaintiff. Although the plaintiff avers that the disposal of shares was done in the ordinary course of business by the defendant who did not need the spousal consent, I hold a different view. MPower is not an investment company as it sells bearings. The sale of shares in that company is not done in the ordinary course of business like for instance selling bearings. This is an element that may require to be considered by the trial court taking into account the evidence to be led by the parties and the legal arguments in support or in opposition thereto. Accordingly, I am of the view that this is a triable issue which should be referred to trial.
- [16] The next issue that I need to deal with is the application to strike out paragraphs 34 to 49 both inclusive contained in the defendant's affidavit resisting summary judgment and the corresponding annexures "SJ3 to SJ6" thereto.
- [17] The basis of the strike out application is that the paragraphs and the annexures complained of contain irrelevant material which constitutes an inadmissible evidence.
- [18] In opposing the strike out application, the defendant avers that the paragraphs and annexures sought to be struck out, are an amplification of his defence to the summary judgment application and are therefore relevant and admissible as evidence.
- [19] The strike out procedure is also trite and regulated by rule 23 (2) of the Uniform Rules. Rule 23 (3) states that where any pleading contains averments which are scandalous, vexatious or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, supply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule 6, but the consent shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it is not granted.
- [20] The purpose of an application to strike out is to reduce the issues that will have to be canvassed in the pleadings and, more particularly, at trial.[6]
- [21] A decision whether or not to strike out is discretionary in nature.[7] In *Tshabalala-Msimang v Makhanya*[8] it was held that an irrelevant matter contains allegations that do not apply to the matter in hand and do not contribute in any way or the other to a decision of such matter. Irrelevant in this context means irrelevant to the issue[9]. The court seized with the determination of the application, is not concerned with the validity of the claim, or defence. All the court is concerned with is whether the passage sought to be struck out is relevant in order to raise an issue on pleadings.[10]

- [22] Another test for determination is whether or not the matter in a pleading is irrelevant to consider in the pleadings as a whole.[11] Irrelevant matters pleaded as history will not be struck out.[12] On the other hand, facts stated not for the purpose of supporting any claim for relief, but in anticipation of a possible defence, will be struck out.
- [23] In *University of Johannesburg v Auckland Park Theological Seminary and Another*[13] the Constitutional Court affirmed that an expansive approach should be taken to admissibility of extrinsic evidence of the context and purpose for which a document was created (whether or not the words used are ambiguous) so as to determine what the parties to the contrast intended. The courts should err on the side of admitting evidence of context because context is everything.
- [24] In exercise of the courts discretion, paragraphs 34 – 49 have been considered in the context of the amended plea, this is in support of his *résistance* to summary judgment. The court needs not concern itself with the credibility or lack thereof arising from what is averted. For as long as the pleaded paragraphs lent themselves to be relevant to the pleaded defence in so far as context is concerned, I am not able to find any justification for the paragraphs and the annexures thereto to be struck from the pleadings.
- [25] More importantly, the paragraphs give context to the background facts relating to what the Defendant's wife does in terms of managing the financial affairs of the joint estate. The defendant states that he sought and obtained spousal consent when he stood as surety on behalf of MPower and that the consent was in writing. There is no basis that the content of paragraphs 34 - 49 should be struck out as irrelevant. On the contrary, this will assist the trial court to have regard to the context relating to the paragraphs as supported by the annexures in order to adjudicate the dispute between the parties.
- [26] The plaintiff plead, in alternative to his strike out application that, in the event the strike out application is refused, he should be granted leave to supplement his affidavit in support of his summary judgment application. He relies on Rule 6 (6) to seek the alternative relief.
- [27] Rule 6 (6) states that the court, after hearing an application whether brought *ex parte* or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.
- [28] It should be remembered that Rule 32 (4) provides that only one affidavit may be delivered. The amended Rule 32 does not provide any other exigencies after the pleadings have been exchanged. Consequently, this results in the very impediment that the parties face in summary judgment application.
- [29] The rule does not make provision to bring an application in terms of Rule 6 (6) if leave to defend the action is granted. I have already found that there is a triable issue based on the amended plea.

[30] If, after the amendment of the plea is allowed as in this case, and the plaintiff is still of the view that there is no triable issue, the plaintiff is, in the absence of a provision to that effect in Rule 32, not entitled to file a supplementary affidavit in order to deal with the amended plea and its contention that it does not raise a triable issue.[14] I am in agreement with the learned author on this approach.

[31] Accordingly, reliance on Rule 6(6) is misplaced and should fail.

ORDER

[32] The following order is made:

- (a) The application for summary judgment is refused and the costs will be the costs of the main action.
- (b) Application for a strike out is dismissed with costs.

ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 8 August 2022

DATE JUDGMENT DELIVERED: 21 February 2023

APPEARANCES

Counsel for the Plaintiff: Adv

HP van Nieuwenhuizen

Instructed by: Fontes

Inc Attorneys

Counsel for the Defendant: Ad W B Pye SC

Instructed by: Shaheed

Dollie Incorporated

[1] See *Breitenbach v Fiat SA* (Edms) Bpk 1976 (2) SA 226 (T) at 227 D – H; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 94 (W) at 950 A – B.

[2] *Maisel v Strul* 1937 CPD 128, *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767; *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C – 676D.

[3] 1973

(1) SA 299 (NC) at 304 -5

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- [4] See *Breitenbach v Fiat SA (Edms) Bpk*, supra at p226A
- [5] *JSH Engineering Solutions CC v Oosthuizen t/a One Way Diesel Stop*
- [6] See *Erasmus et al*; *Superior Court Practice*, 2nd at D1 -307 at para 6
- [7] *Stephen v De WET* 1920 AD 279
- [8]
- [2007] ZAGPHC 161; [2008] All SA 509 (W) at 516 e - f
- [9] See *Meintjies V Wallachs Ltd* 1913 TPD 278 at 285
- [10] See *Bosman v Van Vuuren* 1911 TPD 825 at 832; *Brown v Bloemfontein Municipality* 1924 OPD 226 at 229, *Katz v Saffer and Saffer* 1944 WLD 124 at 133; *Rail Commuters Action Group v Transnet Ltd*, supra at p83H.
- [11] See *Meintjies v Wallachs*, supra at 285
- [12] See *Richter v Town Council of Bloemfontein* 1920 TPD 172 at 174; *Rail Commuters Action Group v Transnet Ltd*, supra, at 83I – 84B
- [13] 2021(6) SA 1 CC
- [14] *Erasmus et al Superior Court Practice* 2 Ed p D 1 – 416 A
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