

SOUTH AFRICA / JUDGMENT

Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments (1206/2022; 1511/2022) [2023] ZAECMKHC 65 (23 May 2023)

[2023] ZAECMKHC 65

COURT

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

1206/2022; 1511/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO. 1206/2022

and

1511/2022

In

the matter between:

VELOCITY

FINANCE (RF)

LIMITED Plaintiff

and

DESERT

FOX INVESTMENTS (PTY) LTD

t/a

DESERT FOX

INVESTMENTS Defendant

JUDGMENT

LAING J

- [1] This is a matter that involves two summary judgment applications, involving the same parties and the same issues. The parties agreed that the matters could be dealt with under a single judgment.[1]

Background

- [2] The plaintiff alleges that, on 23 December 2020, the defendant concluded an instalment sale agreement ('ISA') with Volkswagen

Financial Services SA (Pty) Ltd ('VFS') for the purchase of a motor vehicle.[2] The material terms thereof are not immediately relevant, save to say that they were typical of an agreement of such nature.

- [3] The defendant, it is alleged, took delivery of the vehicle but subsequently failed to keep up with the payment of instalments. At

some stage, VFS transferred its rights and duties to the plaintiff, who in turn cancelled the instalment sale agreement and instituted

action against the defendant. The plaintiff claims the return of the vehicle and damages.[3]

- [4] In its plea, the defendant contends, inter alia, that the plaintiff lacks locus standi because it failed to properly plead the transfer of rights and duties from VFS. It also alleges that the plaintiff made a contractual undertaking not to proceed against the defendant, pending approval of the proposed restructuring of the defendant's payment of arrears. The remainder of its plea is a bare denial of the plaintiff's claim.

- [5] The plaintiff then made application for summary judgment, which will be discussed in the paragraphs that follow.

Plaintiff's case

- [6] The plaintiff's application for summary judgment was supported by the affidavit of a manager in the plaintiff's Specialised Collections Department, Ms Aphiwe Mayola.

- [7] She asserted, in relation to the defendant's plea, that the ISA expressly permitted VFS to transfer its rights and obligations to the plaintiff without notification to the defendant. She attached a copy

of the cession agreement to which VFS and the plaintiff were parties.

[8] Furthermore, Ms Mayola indicated that the defendant had been obliged to make an initial payment by 25 March 2022 in accordance with the proposed restructuring. It had, however, failed to make such payment

or any other.

[9] Ms Mayola contended that the defendant's defence did not raise any issue for trial.

Defendant's case

[10] The defendant advanced several arguments, as apparent from the opposing affidavit of its sole director, Mr Mohammed Mayat. Only the arguments relevant to the matter are mentioned below.

[11] Mr Mayat stated that Ms Mayola was not competent to depose to the plaintiff's supporting affidavit. This was because she was not a party to the ISA, played no role in its implementation, and had nothing to do with the proposed restructuring. She lacked personal knowledge of the matter and was not able to swear positively to the facts thereof.

[12] Furthermore, the cession agreement attached to Ms Mayola's affidavit was dated 18 July 2017. It contemplated VFS's sale of 'participating assets', which included ISAs of the type that forms the subject of the present matter. The cession also contemplated the sale of 'subsequent participating assets', which pertained directly to the later ISA concluded by the plaintiff and defendant on 23 December 2020. Any such sale had to comply with the stipulated preconditions. The plaintiff, argued the defendant, had failed to indicate whether it had indeed done so.

Issues

to be decided

[13] The present matter is characterised by a swirl of defences raised by the respondent, mostly technical in nature. There appear to have been subtle changes in the colour and intensity of the defences over time.

[14] When the matter was argued, however, the parties had crystallised the issues to the following: (a) whether Ms Mayola could swear positively to the facts, as envisaged under rule 32(2) of the Uniform Rules of Court ('URC'); and (b) the effect of the plaintiff's alleged non-compliance with rule 18(6).

[15] A brief consideration of the applicable legal framework follows.

Legal framework

[16] The summary judgment procedure contained in rule 32 was designed to prevent a plaintiff's claim from being delayed by an abuse of court process.[4] It permits the plaintiff to approach the court, in certain circumstances, for the granting of judgment in his or her favour without need for the delay and expense of proceeding to trial. Nevertheless, the procedure was not intended to deny the defendant the opportunity to present his or her defence to the court when there is indeed a triable issue.[5]

[17] The relevant portion of rule 32 is set out below:

‘(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) ...
- (b) on a liquidated amount in money;
- (c) ...
- (d) ...

together with any claim for interest and costs.

- (2) (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 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.
 - (c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit...
- (3) The defendant may–
- (a) ...
 - (b) satisfy the court by affidavit... 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...
- (4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2)...’

[18] The case law indicates that, in general, the courts have required strict compliance with the provisions of rule 32 but are, nevertheless,

prepared to condone technical defects in the adoption of the procedure. Van Loggerenberg comments as follows:[6]

‘It has been pointed out by Van den Heever J in *Edwards v Menezes*[7] that the courts have approached rule 32 from diametrically opposite points of view. On the one hand it has been stressed that the

defendant must show, not that he is bona fide, but that he has a good defence: that the defendant must show a defence which, assuming the alleged facts to be true, is good in law; thus the defendant’s duty under rule 32(3)(b) has been emphasized. On the other hand it has been 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. Van den Heever J has expressed, with good reasons therefor, a preference for the latter approach.[8] The author is in respectful agreement with this view.’[9]

[19] From the above, it could well be said that wherever a court focuses its enquiry, be it on either the plaintiff’s case or the

defendant’s defence, there is no reason to exclude the basic principle that the plaintiff’s case must properly disclose a cause of action. His or her pleadings cannot be excipiable.[10] This assumes even more importance within the context of a procedure that does not allow the benefit of a reply or the advantages of cross-examination.

[20] The above principles constitute the framework for the assessment of the facts and argument that inform the matter.

Application to the facts

[21] The issues, as identified earlier, will be addressed in sequence.

Competency of Ms Mayola to swear positively to the facts

[22] The respondent contends that Ms Mayola has no direct knowledge of the matter. She states that she has relied on the records of the plaintiff, but has not specified these, making it impossible for the court to ascertain whether she can indeed swear positively to the

facts.

[23] Furthermore, asserts the respondent, to the extent that Ms Mayola has relied on electronic records, these are inadmissible by nature, constituting hearsay evidence. The respondent asserts that she has failed to meet the requirements of section 15(3) of the Electronic Communications and Transactions Act 25 of 2002 (‘ECTA’), which would otherwise enable the court to attach the appropriate evidential weight to the records in question. She has also failed to supply, properly, the certification envisaged under section 15(4), necessary to render the records admissible on the mere production thereof. Insofar as the respondent has purported to have done so, the certification is not that of Ms Mayola but someone else, [11] and pertains only to the ISA and not to the cession agreement or anything else.

[24] The respondent argues that, by reason of the above, Ms Mayola cannot be said to have been able to have sworn positively to the facts or to have been able to have verified the applicant's cause of action.

[25] The applicant has referred to three authorities in this regard. In the matter of Stamford Sales & Distribution v Metraclark,[12] Swain AJA observed that:

‘...This court in *Dean Gillian Rees v Investec Bank Limited* (330/13)

[2014] ZASCA 38 (28 March 2014), in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:

“As stated in Maharaj,[13] ‘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.” (My emphasis.)

In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.

...The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in Maharaj.

...An insistence upon personal knowledge by a deponent to a verifying affidavit of all the material facts forming the basis for the cause of action, where the cessionary of a claim seeks summary judgment against the debtor, in most cases would effectively preclude the grant of summary judgment. The consequences of this narrow approach is illustrated by the decision in *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W). It was held that it had to appear from the verifying affidavit that the facts relating to the claim of the cedent against the debtor were within the knowledge of the deponent who was able to swear positively thereto. The deponent in such a case was *prima facie* making the affidavit on behalf of a cessionary and there was nothing in the affidavit to indicate that the deponent had any connection

with the cedent, which presumably would have enabled him to acquire this knowledge. To insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all the material facts of the claim of the cedent against the debtor,

emphasises formalism in procedural matters at the expense of commercial pragmatism.’[14]

[26] The above passage was quoted in *South African Securitisation Programme (RF) Ltd v Fullimput 11 (Pty) Ltd* and another,[15] where Binns-Ward J remarked that an apparent lack of first-hand knowledge of the facts could, depending on the circumstances, be

remedied by reference to the papers. The court ‘looks at the matter “at the end of the day” on the basis of all the material that is properly before it’.[16]

[27] The additional case to which the applicant referred was *Firststrand Bank Ltd v Desert Fox Investments (Pty) Ltd*,[17] where Collett AJ affirmed the principles espoused in *Stamford Sales & Distribution*, saying that ‘[d]irect knowledge of the material facts underlying the cause of action gleaned by a person who may be in possession of the documentation has been regarded as sufficient’.[18] The court also cited Maharaj as the basis for the principle that ‘[e]ven if an affidavit fails to measure up to all the requirements, at the end of the day, reference may be had to other documents properly before the court in the proceedings’.[19]

[28] Mindful of the above authorities, this court is satisfied that an overly formalistic approach to the requirements of rule 32(2) would not advance the respondent’s opposition. The deponent to the affidavit in support of the application, Ms Mayola, may not have been a party to the ISA or played any role in its implementation and may not have had anything to do with the proposed restructuring of the respondent’s arrears, yet her statement that she has control and access to all of the records that pertain to this matter and her assertion that she has acquainted herself therewith may well be sufficient when considered with the documents properly presented.

[29] The court, however, remains to be persuaded that the applicant has made out a case for summary judgment. This will be explained further, below, in relation to the other issue raised by the respondent.

Compliance with rule 18(6)

[30] The respondent argues that the applicant has relied on the cession agreement but has not complied with the provisions of rule 18(6). To that effect, the applicant has failed to plead whether the cession agreement was written or oral and when, where and by whom it was concluded. It has also failed to attach a copy or part thereof to its particulars of claim.

[31] The starting point is the date of the cession agreement, viz. 18 July

2017. At that time, the ISA between the applicant and the respondent had not yet been concluded. [20] It was not a ‘participating asset’ that formed the subject of the cession agreement, argues the respondent. The parties

thereto had, however, made provision for the sale of ‘subsequent participating assets’ at a future date, such as the ISA in question. To that effect, the relevant portions of clause 5.3 of the cession agreement state as follows:

‘5.3.1 The Seller [VFS] shall be entitled... in relation to a pool of proposed Subsequent Participating Assets... to deliver to the Issuer [the applicant], a list containing, inter alia:

- (a) details of all proposed Subsequent Participating Assets... that the Seller wishes to sell, cede, delegate and assign to the Issuer in accordance with the provisions of this Agreement;
- (b) the book value of such Subsequent Participating Assets...
- (c) the Relevant Transfer Date with effect from which the Seller wishes to sell, cede, delegate and assign such proposed Subsequent Participating Assets...

5.3.2 The Issuer shall be obliged to purchase all proposed Subsequent Participating Assets... provided that, as at the Relevant Transfer Date:

- (a) a Sale Supplement... in respect of those Subsequent Participating Assets... has been completed and signed by the Seller and the Issuer... The Seller shall deliver a copy of the signed Sale Supplement to the Administrator, for delivery to WesBank, a division of FirstRand;

[etc]’

[32] The completion of a ‘sale supplement’ was just one of 11 conditions that had to be fulfilled before the applicant could purchase the ‘subsequent participating assets’. The applicant, argues the respondent, has failed to plead the fulfilment of the above conditions, and has failed to attach the ‘sale supplement’ to its papers, which would have indicated whether VFS’s rights and duties were indeed transferred to the applicant in relation to the ISA that forms the basis of this application. Consequently, contends the respondent, the applicant has failed to demonstrate that it has the necessary locus standi in the action proceedings.

[33] To this, the applicant merely asserted in argument that it had indeed pleaded that VFS had transferred its rights and duties. This had been done in accordance with the cession agreement.

[34] The provisions of rule 32(2)(b) require a plaintiff to verify the cause of action and the amount claimed, and to identify any point of law relied upon and the facts upon which the claim is based. The classic definition of a cause of action, made by Lord Esher MR in *Read v Brown*,^[21] is the following:

‘every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’^[22]

- [35] In the present matter, the applicant relies on VFS's transfer of its rights and duties under the ISA. The applicant was not an original party thereto. Whereas the applicant attached a copy of the ISA, in compliance with rule 18(6) of the URC, it failed to attach a copy of the cession agreement. This only emerged when the applicant brought its application for summary judgment. From the cession agreement itself, it is apparent, on the face of it, that the ISA is a 'subsequent participating asset' and that certain conditions had to be fulfilled before the applicant could purchase and accept transfer of the VFS's rights and duties.
- [36] The provisions of rule 32(4) make it clear that the only evidence that the applicant may present for purposes of its application for summary judgment is its supporting affidavit. A court is required to ignore any additional evidence, such as the cession agreement.[23] Here, not only has the applicant failed to attach the cession agreement to its particulars of claim and to plead the details thereof, as required by rule 18(6), but it has also failed to plead fulfilment of the conditions. Such averments constitute the facts necessary for the applicant to prove before judgment can be granted in its favour. They constitute an integral component of the applicant's cause of action.
- [37] The courts have previously held that where a plaintiff fails to verify his or her cause of action with clarity and exactitude, it is defective and his or her claim must fail.[24] In the present matter, the respondent has argued that the applicant's particulars of claim are excipiable. The court is inclined to agree. The shortcomings in the applicant's claim, as identified by the respondent, give rise to the question of whether the applicant has the necessary locus standi to pursue the claim set out in its particulars. This is a triable issue.

Relief and order

- [38] The court is satisfied that the applicant's failure to have attached the cession agreement to its particulars of claim and its failure to have pleaded the details thereof, as well the fulfilment of the relevant conditions, amounts to fatal non-compliance with the provisions of rule 18(6) and renders its particulars excipiable. It cannot be said that the applicant has an unanswerable case.
- [39] Consequently, the court is satisfied that the respondent has a bona fide defence. The court cannot grant judgment in favour of the applicant when there is doubt about its locus standi. The application must be refused.
- [40] The costs must still be decided. If the court was not prepared to grant the application, then the applicant argued that costs should be made in the cause. This was especially so where the procedure did not allow for a reply. The respondent, in contrast, argued that it was entitled to its costs by reason of the applicant's disregard for the provisions of rule 18(6) and the irregular nature of the application.
- [41] The court is of the view that there is merit in the respondent's argument. Considering the shortcomings in the applicant's pleadings, such that it failed to properly disclose a cause of action, there was simply no basis upon which it could have launched the present

application.

[42] Consequently, the following order is made:

- (a) the applications for summary judgment, brought in terms of case number 1206/2022 and case number 1511/2022, respectively, are dismissed; and
- (b) the applicant is directed to pay the respondent's costs in relation thereto.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the plaintiff: Adv Sephton, instructed by Huxtable Attorneys, Makhandla.

For the defendant: Adv Knott, instructed by Cloete & Co., Makhandla.

Date of hearing: 02

March 2023.

Date of delivery of judgment: 23 May 2023.

[1] The material facts for purposes of the judgment are essentially the same. Insofar as there may be minor differences, these will be indicated.

[2] The subject of the sale was a 2020 Volkswagen Amarok 2.0 BITDI Highline under case number 1206 / 2022, and a 2017 BMW X5 XDrive30D M-Sport under case number 1511 / 2022.

[3] The plaintiff claimed an amount of R 927,056 and R 785,102 under the respective case numbers, *supra* n 2.

[4] See *Meek v Kruger* 1958

(3) SA 154 (T), at 159-60; and, more recently, *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), at 11C-G.

[5] See the English authority of *Jacobs v Booth's Distillery Co* 85 LT 262 (HL); and, most recently in South African case law, *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys* (unreported, GP case no 8557/2021, dated 17 September 2021), at paragraph [2].

[6] *DE van Loggerenberg, Erasmus: Superior Court Practice* (Jutastat e-publications, RS 17, 2021).

[7] 1973

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

[8] *Ibid.*

[9] *DE van Loggerenberg, op cit*, D1-383 to D1-384.

- [10] See *Dowson & Dobson Industrial Ltd v Van der Werf and others* 1981 (4) SA 417 (C).
- [11] The certification was provided by a Ms Leanne Jaliel under case number 1206 / 2022, and by a Ms Melinda Heneke under case number 1511 / 2022.
- [12] (676/2013) [2014] ZASCA 79 (29 May 2014).
- [13] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).
- [14] *Stamford Sales & Distribution*, n 10, *supra*, at paragraphs [10] to [12].
- [15] 2021 JDR 1571 (WCC).
- [16] At paragraph [15].
- [17] (Unreported, ECD case no 2214/2022, dated 30 November 2022.)
- [18] At paragraph [13].
- [19] At paragraph [14].
- [20] The applicant pleaded that it was only concluded on 23 December 2020.
- [21] 22 QBD 131.
- [22] Cited in RC Claassen, *Claassen's Dictionary of Legal Words and Phrases* (LexisNexis, July 2022, SI 25).
- [23] *Venter v Kruger* 1971 (3) SA 848 (N); *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), at 453 I-J. See, too, the discussion in *DE van Loggerenberg*, *op cit*, at D1-406.
- [24] *Visser v De la Ray* 1980 (3) SA 147 (T), at 150.

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