IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO.59/2016**

In the Matter Between:

GODFREY KHETHO SIBANDZE **APPELLANT**

AND

SALIGNA DEVELOPMENT CO. (PTY) LTD **RESPONDENT**

Neutral Citation: Godfrey Khetho Sibandze v Saligna Development Co. (Pty) Ltd (59/2016) [2017] SZSC 33(09th October, 2017)

Coram: **MCB MAPHALALA CJ; MJ DLAMINI JA; RJ CLOETE JA.**

Heard: **10TH August, 2017.**

Delivered: **09th October, 2017.**

Summary: Civil Practice – Summary judgment – Ownership of motor vehicle – Combined Summons – Rule 32 – Sufficiency of defendant's affidavit – Plaintiff's replaying affidavit – Appeal dismissed

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JUDGMENT

M.J. DLAMINI JA

[1] This is an appeal against the judgment of Annandale J, as he then was, granting summary judgment in favour of the respondent (herein referred to as the 'plaintiff') against the appellant (hereinafter called the 'defendant'), in a case in which the plaintiff claimed ownership of a motor vehicle which is equally claimed by defendant. There are five grounds of appeal all of which boil down to a charge that the court **a quo** erred in allowing a replying affidavit which contained new material or raised new issues thereby making a case not otherwise made out in the original particulars of claim. The defendant alleges the replying affidavit did not afford him an opportunity to respond.

[2] One other ground of appeal is that the bluebook annexed to his answering affidavit showing defendant as owner of the vehicle claimed by plaintiff should have "tipped the scales" in favour of the defendant for a trial of the issue. The ground based on the bluebook was apparently abandoned, and rightly so, and was only mentioned in passing. ***A quo***, the argument had been that the bluebook reflecting defendant as 'owner' of the motor vehicle provided ***prima facie*** evidence of ownership which should not be ignored as if it was not there. This point was disposed of on the basis of **Graham v**

Ridley 1931 TPD 476, AT 479; **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993 (1) SA 77 at 82; **Dandi Investments v. Dlamini and Others** [2008] SZHC 41 (28 October 2008) and **Afinta Motor Corporation v Neves** [1999] SZHC 42 (16 July 1999) to the effect that a bluebook does not provide evidence of ownership, that is, " … nothing much turns on the bluebook". And **Wille's Principles of South African Law**, 6th ed. At 200 states: "*The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may, by means of a* ***vindicatio or reclame****, recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing, and that the thing is in the possession of the defendant"*. In **Barclays National Bank Ltd v Love** 1995 (2) SA 514 (D & CLD) at 517F, Miller J. says: *"It is true….that summary judgment is an extraordinary remedy which will not lightly be granted and that, before depriving a defendant of the opportunity of resisting a claim in the ordinary way prescribed by the Rules, the Court will need to be satisfied that the requirements of the Rule which provides the extraordinary remedy have been fully met"*.

[3] In his particulars of claim plaintiff makes two short statements: "**3. Plaintiff is the owner of a silver VW Polo with registration No. PSD 066 AS"**, and **"4. Defendant is in possession of the said vehicle"**. Against the plaintiff's particulars, defendant filed his notice of intention to defend together with his plea to the action. The plea simply states: "*It is denied that the plaintiff is the owner of motor vehicle described in this paragraph. The*

plaintiff is put to the strict proof thereof. The defendant states that he is the owner of the motor vehicle in question". The trial court proceeded on the basis that the plaintiff's two sentences suffice to found a vindicatory action and summary judgment. The verifying affidavit is equally short. This of course is not surprising, and even less so that a replying affidavit became necessary allegedly to provide 'back-ground' information but effectively to bolster a case that was otherwise teetering on the brink of collapse at the threshold. Thus in para [18] the learned trial Judge states: "….*The plaintiff, in my view, has provided sufficient and ample explanation of this state of affairs*". It is this 'explanation' contained in the replying affidavit that defendant complains about as 'new' material which should have been disallowed. The contents of the replying affidavit add to and improve the particulars of claim. See the *headnote* to **Venetian Blind Enterprises (Pty) Ltd** 1973 (3) SA 575 (R).

[4] Is the above statement of the defence full and sufficient to require the matter to go to trial? Stated differently: is the defence statement 'sufficiently full to persuade the court that what the defendant has alleged, if it is proved at a trial, will constitute a defence to the plaintiff's claim? Surely the defence has put in a bald allegation of ownership not at all different from plaintiff's original claim. As it is, the defence lacks material or detail acceptable in law to show why defendant says the vehicle is his. The defence statement needs serious fleshing – a full explanation why defendant claims to be the owner instead of plaintiff, thereby justifying a trial.

[5] Because of the stringent nature of the summary judgment, capable of at once shutting the door to defendant's defence, in these proceedings the defence should not be subjected to any high powered judicial scrutiny as that could unduly deny defendant the right to defend himself. After all, summary judgment is discretionary. As Colman J says in **Breitenbach v Fiat SA** 1976 (2) SA 226 (T) AT 227 D – E:

> "It is, however, even more important to guard against injustice to the Defendant, who is called upon at short notice, and without the benefit of further particulars, discovery or cross-examination, to satisfy the court in terms of sub-rule (3) (b). If the requirements of that sub rule are too stringently applied, a defendant who has a defence to the action brought against him may be denied, unjustly, an opportunity of establishing that defence by the ordinary procedure of a civil suit. It is because of that that Marais J in ***Mowschenson and Mowschenson v. Mercantile Acceptance Corporation of South Africa Ltd*** 1959 (3) SA 262 (W) went so far as to say that the doors of the court should be closed to a defendant only if 'there is no doubt but that the plaintiff has an unanswerable case".

[6] In para [4] the learned Judge ***a quo*** correctly stated: "In this *actio in rem*, the two main essentials that a plaintiff must allege and prove is (sic) that he has ownership of the vehicle and that the defendant was in possession of it at the time the vindicatory action was instituted against him". Ordinarily, the issue arising ***in casu*** is whether having regard to the terse particulars of claim, plaintiff did prove ownership**. Chetty v Naidoo** 1974 (3) SA 13 (A), referred to by the learned Judge *a quo*, states: " *The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is*

the owner and that the defendant is holding the res…" (My emphasis). In my opinion, with respect, the original particulars of claim only alleged and did not prove plaintiff's ownership of the motor-vehicle. In para [17] the learned trial Judge further states: "…… presently, although the **onus** of proof of ownership remains with the plaintiff, he need to do no more in his particulars of claim than to state that he is the owner – see **Graham v. Ridley** 1931 TPD 476 at 479 and **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993 (1) SA 77 (A) at 82". The learned Judge seems to be here saying that the plaintiff need not prove but only allege ownership. With respect this does not seem to be the true position per the cases referred to.

[7] **Graham v Ridley** (supra) is a case of ejectment from premises allegedly owned by plaintiff. Greenberg J at 479 states: "The pleadings and the facts showed that the plaintiff was the owner of the premises and the court held that ….he had a *prima facie* right to succeed because of his ownership". The learned Judge clearly refers to "pleadings and facts" as showing that plaintiff was owner of the premises. *In casu*, there are no 'pleadings and facts' other than an allegation, which, on its own, does not prove and is no evidence of ownership. The learned Judge continued: "*Prima facie*, therefore, <u>proof</u> that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession i.e. to an order for ejectment". (My emphasis).

[8] In **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** (supra) Nienaber

JA stated: *"In essence the appellant's cause of action for the eviction of the respondent was the rei vindicatio … The first pertinent [issue] is whether the appellant had proved its title to the property. Since its claim was vindicatory in its nature, ownership was an essential averment and had to be adequately proved by it* ***(Ruskin NO v Thiergen*** *1962 (3) SA 737 (A) at 744 A-B). Failure to adduce proper proof would result in the failure of vindicatory proceedings irrespective of a detentor's own entitlement of occupation (……). The best evidence of ownership of immovable property is the title deed to it (****R v Nhlanhla*** *1960 (3) SA 568 (T) at 570 D - H;…) A public document is admissible in evidence according to section 18 of the Civil Proceedings Evidence Act 25 of 1965, if a copy thereof is produced which purports to be signed and certified as a true copy or an extract from the relevant register by the officer to whom custody of the original is entrusted"*. (My emphasis). And Marais AJ says: *"There can be no doubt that summary judgment cannot be obtained in respect of a summons which fails to disclose a cause of action"*. **Dowson and Dobson Industrial Ltd v Van der Werf and Others** 1981 (4) SA 417 (C) at 423C.

[9] What we gather from the above cases is that ownership must be proved and not merely alleged. Mere allegation, without proof, of ownership as we find in the particulars of claim *in casu* has the potential weakness that it could freely allow an ET from outerspace to descend and successfully lay bare claim to ownership of property otherwise owned and occupied or possessed by any terrestrial. In the **Goudini Chrome** case it clearly was not

sufficient proof for the deponent (McGrath) that the appellant was the registered owner of the property; a duly signed and certified copy of the title deed was necessary and had not been filed. (See also s 18 of our *Civil Evidence Act*, 1902).

[10] In ***Ruskin N.O. v Thiergen*** (supra), in a claim of ownership of a motor vehicle, Van Winsen JA at 744 A stated: *"The action is accordingly vindicatory in its nature and, as is usual in such actions, the burden rests upon the vindicator, in the absence of an admission on the pleadings of his title as owner, to prove such title. Voet 6.1.24 (Gane's Trans. Vol 2 at p237) says that in vindicatory actions 'the proof of ownership lies before everything on the plaintiff. If he has been unable to fulfil it the possessor is to be absolved…"* Referring to the cases of Zandberg v. Van Zyl 1910 A.D 302 and K & D Motors v. Wessels 1949 (1) SA 1 AD, the learned judge observed: *" Both these cases are illustrations of the application of the doctrine propounded by Voet, loc cit, that the vindicator (…) bears the onus against the possessor of proving his superior title"*. In all these cases, whether they involve movable or immovable property, the cliche is *proof of ownership* by the plaintiff or claimant. *In casu*, but for the replying affidavit, no such proof was fulfilled by plaintiff / respondent in terms of the original statement of cause.

[11] Summary procedure presupposes that plaintiff has established a cause of action. ***In casu***, the defendant placed himself in an invidious predicament when he pleaded without deciding if there was a cause established by the

summons. By pleading over without demur defendant had to meet the requirements of the summary procedure in presenting his defence. Beck's **Theory and Principles of Pleading in Civil Actions,** 4th ed, p 57, states: *"The Defendant is obliged in his plea, to admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration … He must clearly and concisely state all material facts upon which he relies"*. And **Herbstein and Van Winsen** in the 3rd edition, p306, are to the same effect: *"The affidavit filed by defendant must set out his defence fully. This requirement has been interpreted as meaning in sufficient detail to enable the court to decide whether, if the facts stated therein are true, it would constitute a defence to the claim"*.

[12] The defendant having thus pleaded, the adequacy of the plaintiffs' particulars of claim must be assumed. That is why defendant has contented himself with the vain attack of 'new materials' contained in the replying affidavit to bolster a cause that barely existed. In my view, this attack was belated. Appellant must stand or fall by his defence. Colman J in ***Breitenbach*** case (supra) at p 227G states; *"One of the things clearly required by Rule 32 (3) (b) is that he set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence"*. Interestingly, 'having a defence' is what our Rule 32 prescribes and not a "*bona fide* defence" as the South African Rule 32 of The *Uniform Rules of Court* states. In my opinion there seems to be no material difference between having a defence and having a *bona fide* defence. The difference

if any is only salutary. At the end of the day the defendant has or has not a defence. (See Colman J at 227H on this vexing issue of *bona fides*). The question must then be asked whether defendant has pleaded a defence which, if proved at the trial, will answer plaintiff's claim: (It being assumed that plaintiff has made a *prima facie* case of ownership).

[13] What rule 32 (3) (a) requires is that the plaintiff's verifying affidavit must also state that *"in the deponent's belief there is no defence to that claim .... and such affidavit may in addition set out any evidence material to the claim"*. It would seem to me that the sub rule allows the inclusion in the same verifying affidavit of additional evidence relevant to the claim. In that regard, in my view, it was not necessary to resort to a replying affidavit for the so-called 'background' information which the trial court referred to as 'sufficient and ample explanation' in its judgment. And that 'background' material turned out to be substantial compared to the original particulars of claim. Indeed, in my view the replying affidavit set out more than just "background relationship between the parties" as the trial judge said. Were that the only reason, it would certainly have been irrelevant and inadmissible. But the 'background relationship' is exactly what explained how and why plaintiff is owner of the vehicle even though registered in the name of defendant.

[14] It is difficult to understand what really necessitated the verifying affidavit in the absence of the transcript since it appears defendant did not properly

understand his own defence. Defendant took a point *in limine* based on the bluebook reflecting defendant as owner of the claimed vehicle. Defendant went on to say, in his affidavit opposing the summary judgment application, that if the point *in limine* failed, he had an alternative defence to the claim. But that defence also turned out to be founded on the same bluebook as evidence of his ownership of the motor vehicle. Surely and clearly, if the point *in limine* failed the alternative defence was also doomed to failure. That much should have been obvious to defence counsel. Thus the defence to the summons and the summary judgment was limited and lacked detail. There was therefore no need for the lengthy replying affidavit covering thirteen paragraphs over four pages.

[15] Plaintiff's replying affidavit was, of course, allowed the with leave of court under sub-rule (5)(a). One would suppose that the need for such additional affidavit would have been canvassed before it was allowed. It would have been at that time that its scope or coverage would have been determined. In all the circumstances of the case, however, it is difficult to say that the said verifying affidavit was irregular and inadmissible. Even if it be conceded that it was irregular and inadmissible it does not seem to me that its exclusion would have made much of a difference to the outcome of the application having regard to the defence presented.

[16] In response to a summary judgment application under rule 32 (1), sub-rule (5) allows the defendant to "show cause" against such application "to the

satisfaction of the court". Under sub-rule (4) (a), however, unless defendant at the hearing of the application "*satisfies the court with respect to the claim …that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim…. the court may give judgment against the defendant on the remedy or relief claimed*". *What defendant is then required to* show in terms of the rule is that he has a defence with respect to the claim and that defence, if sound, can only be better dealt with at a trial of the cause. In other works defendant must establish a triable issue. While defendant is not expected to present his entire defence at this stage, he must nonetheless disclose sufficiently of that defence to convince the court that there is indeed a reason for the matter to go to trial. How much is sufficient will depend on the facts of each case.

[17] An example, by comparison to the defence statement *in casu*, may be found in the statement of Colman J in **Breitenbach (supra)** at 230H – 231A:

> *"In his affidavit he does not say that he paid the rentals monthly as they fell due. He does not say when or how he made the payments relied upon or what their amounts were. What he has really done is to state the nature of the defence, but not the facts relied upon in support of it, which were, presumably, a series of payments by him. The defendant does not even allege that he had paid all the rent which, according to the plaintiff's particulars of claim, became payable to it. He contents himself with the allegation that he had*

paid to the plaintiff all that is due to it, without indicating what he concedes to have been due.

"That, in my judgment, is far less than can be expected from a defendant in summary judgment proceedings. It lacks the forthrightness, as well as the particularity, that a candid disclosure of a defence should embody. The impression which one receives is rather that the defendant was being deliberately vague, …"

A great deal of the above may be said of the defence statement in the present matter. Defendant seems to have been caught unawares and he could not retreat and restrategise. But summary judgment should always be anticipated in such like actions. The law books are clear in what situations summary judgment may be resorted to.

[18] It is salutary that for summary judgment to stand the summons and particulars of claim must in the first place make out a case or cause of action for the plaintiff. It is in this sense that the plaintiff's claim is supposed to be 'unimpeachable' or 'unanswerable'. In **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (AD) at 423 E-H, Corbett JA states: "… *While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasized (….). The grant of the remedy is based upon the supposition that the plaintiff's claim is*

unimpeachable and that the defence is bogus or bad in law. …The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents that are properly before it (…)". In my view the documents before court would include the replying affidavit in the present matter.

[19] In **Barclays National Bank Ltd v Love** 1975 (2) SA 514(D &CLD) at 517 F Miller J observed that having regard to its extraordinary remedy summary judgment "will not lighly be granted" unless the court is satisfied that the requirements of the Rule have been fully met by the plaintiff. And further points out that what the defendant should show in summary proceedings is that "the statement of the material facts [is] sufficiently full to persuade the court that what the defendant has alleged, if it be proved at the trial, will constitute a defence to the plaintiff's claim". See **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (J) at 228D. At p227B – C of the **Breitenbach** case Colman J. pertinently observes: *"The purpose of the procedure known as summary judgment is well-known. … It is a procedure aimed at the defendant, who, although he has no* bona fide *defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgment in favour of the plaintiff. In a case where that is what the defendant has done, the summary judgment procedure serves a socially and commercially useful purpose. The relevant Rule should, therefore, not be interpreted with such liberality to defendants that the purpose is defeated"*. And Herbstein and Van Winsen (p302, 3rd ed) say:

"The procedure provided by the rules has always been regarded as one with a limited objective viz, to enable a plaintiff with a clear case to obtain the swift enforcement of his claim against a defendant who has no real defence to the claim", and *"[b]y means of this procedure a defence of no substance can be disposed of without putting the plaintiff to the expense of a trial"*.

[20] In these proceedings defendant is mainly concerned with the additional or new information contained in the replying affidavit. Indeed, in my view, but for the additional ('background') material the plaintiff would have made no cause of action to base application for summary judgment. Since the replying affidavit is permissible under the Rule, defendant should have applied to strike out any part of the affidavit to which he objected. The information in the replying affidavit became part of the particulars of claim and material before court on which the determination whether a cause of action had been made out against which a full and sufficient defence must be presented to avert summary judgment being granted. Instead of attacking the contents of combined summons as supplemented by the replying affidavit, defendant took a point *in limine* with a view to defeating the entire claim to which he had already pleaded. It was at this stage late to attack the particulars of claim as presenting a 'bald and unsubstantiated statement' amounting to an 'abuse of the court process'. Clearly defendant in his attack only viewed the original combined summons, ignoring the replying affidavit which followed his opposition to the application. Sub-rule (5) (a) allows plaintiff 'an affidavit in reply' to defendant's opposition.

[21] In the replying affidavit plaintiff explains how the vehicle came to be registered in the name of the defendant, and explains in para 7: "*The plaintiff paid for the vehicle but ….it was agreed between plaintiff and defendant that … the car would initially be in [defendant']s name … and used by the defendant as part of his employment package*". The vehicle was thus not a gift to the defendant. This additional information sufficiently explains why plaintiff claims ownership of the vehicle. As already pointed out this additional information becomes part of the original particulars of claim and to that extent plaintiff's case is unanswerable. Van Winsen J in **Gilinsky v Superb Launderers and Dry Cleaners (Pty) Ltd** 1978 (3) SA 807(C) at 811E states: "*It is important to note that a decision as to whether a plaintiff's case is unanswerable or not must be founded on information before the court dealing with the application. This information is derived from the plaintiff's statement of case, the defendant's affidavit or oral evidence and any documents that might properly be before the court. It would be inappropriate to allow speculation and conjecture as to the nature and ground of the defence to constitute a substitute for real information as to these matters. On the other hand, even if a court concludes that such information as is disclosed by defendant in his affidavit is not a sufficient compliance with the provisions of Rule of Court 32 (3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's case can be characterized as 'unanswerable'. In that case the court would in the exercise of its discretion refuse summary judgment*". To be sure, the

replying affidavit was one such document properly before court not to be ignored in assessing the adequacy of the defence statement.

[22] Even if I may be wrong in holding that the replying affidavit and its contents were admissible, I would still come to the same conclusion on the matter, viz, that defendant did not put up the kind of defence required in summary judgment proceedings, that is, a defence which "satisfies the court with respect to the claim ...." [sub-rule (4) (a)]. The exclusion of the replying affidavit would not improve the evidence of the defendant: it would still be where it is. Defendant's only claim to ownership is the registration of the vehicle with the bluebook 'evidence' reflecting him as owner. The bluebook evidence not being conclusive, defendant should have elaborated, explaining how the vehicle got registered in his name: whether he bought it or was donated to him by some benefactor. The mere reference to the registration on the bluebook was thus far from being 'full and sufficient' defence to the plaintiff's claim of ownership.

[23] On the numerous cases on the extraordinary and stringent remedy of the summary judgment and its tendency to shut the door of the court on the face of the defendant who has intimated his desire and intention to oppose the summons, it need only be said that the door must indeed close 'at the end of the day' where the defence proferred does not show any light at the end of the tunnel. Whilst the policy of the courts in exercise of their discretion under sub-rule (4) (a) is to be slow to grant summary judgment, the courts' discretion must still be exercised judicially. In this regard

Colman J in **Breitenbach** case at 229H further observes: *"It seems to me that if, on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant"*. There would be no point in refusing the judgment where on the papers before court there is no defence, *bona fide* or otherwise. It is not enough for the defence to present 'evidence' only to 'tip the scales' in its favour. There must be evidence which, if proved at the trial, would render answerable plaintiff's otherwise unanswerable case. In my opinion, this is not the position *in casu*.

[24] For the foregoing, I would dismiss the appeal and uphold the order of the learned trial Judge including costs.

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M.J. DLAMINI JA

I agree _____

MCB MAPHALALA CJ

I agree _____

RJ CLOETE JA

For Appellant **KQ. Magagula**

For Respondent **RJS. Perry**