IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA 100/2016

In the matter between:

SUSAN ELIZABETH TEE Appellant

and

COLLEGIATE HIGH SCHOOL FOR GIRLS Respondent

JUDGMENT

MBENENGE J:

[1] This appeal arises from a decision taken by the Magistrate, Port Elizabeth (North End) granting summary judgment for payment by the appellant of the sum of R110 745.00 together with interest thereon calculated at the rate of 9% per annum payable from the date of service of summons to date of payment.[1]

[2] The action was founded on a debt allegedly owed by the appellant to the respondent, pursuant to the provisions of section 40(1) of the Schools Act 84 of 1996 (the Act) which renders liable a parent to pay school fees determined in terms of

[1] The Magistrate merely ordered that "*the application for summary judgment is granted*." It is assumed that the relief was granted in the terms prayed for in the summons, but nothing, for present purposes, hinges on this.

section 39[2] of the Act, unless or to the extent that he or she has been exempted from payments in terms of the Act, and section 41 of the Act which confers on a public school the right to enforce, by process of law, the payment of school fees by parents who are liable to pay in terms of section 40.

[3] The liability of the appellant towards the respondent was predicated solely on the allegation that the appellant had not been exempted from paying school fees, and had failed and/or neglected to pay the outstanding fees. No specificity was given regarding how the amount claimed was made up, nor was any light shed regarding the academic years for which the amount had been levied.

[4] After the appellant had entered appearance to defend the action, the respondent launched the summary judgment proceedings subject to this appeal, seeking payment of the amount claimed in the main action. In opposing the summary judgment application, the appellant contended, in *limine*, that the action is, in the first place, bad for failure to join Mr Claude Sydney Tee (Mr Tee), the appellant's erstwhile husband, who is a parent as contemplated in section 40 of the Act and, secondly, hit by *lis alibi pendens* in that summons had previously been issued by the respondent against the appellant and Mr Tee for the recovery of the same amount, based on the same cause of action, which case is still pending. On the merits, it was contended that the appellant applied for, and was granted, exemption from liability for school fees by the respondent.

[5] Annexed to the affidavit filed in opposition to the summary judgment application were copies of the following documents:

(a) decree terminating the marital bonds between the appellant and Mr Tee, dated 23 November 2011;

(b) summons (to which is annexed the relevant particulars of claim) issued by the governing body of the respondent whereby the sum of R110 745.00 for

[2] Section 39 regulates the procedure for determining and charging fees at a public school

outstanding fees was being claimed against the appellant and Mr Tee in their capacities as parents defined in section 1 of the Act;

(c) letter dated 1 March 2013 penned by the appellant ostensibly forwarding the "*[a]pplication [f]orm for reduction of school fees*"; and

(d) email transmission by Mr Tee to the appellant's attorney of record wherein *inter alia* an undertaking was made that Mr Tee would pay the school the sum of R84 000 in full and final settlement of the outstanding fees.

[6] In granting summary judgment the court *a quo* was of the view that, for purposes of section 40 of the Act, the parents of a leaner could be sued jointly or severally, leaving it to the school concerned to sue one or both parents. The court *a quo* was not convinced that there had been sufficient evidence of the appellant having been exempted. In this regard it reasoned:

> "The least that the defendant could have done is to seek or to go ask for an affidavit from Mr Glover to say indeed that she was exempted, alternatively to provide her with anything so as to say that she was indeed exempted, but there is nothing of that sort before the court."

[7] The *in limine* points raised by the appellant in her opposing affidavit were done short shrift in the following terms:

> "Now there were no points of law that were raised to say that, upon which the defence by the respondent is based on whatsoever." (sic)

[8] A plethora of grounds[3] support the instant appeal, but such grounds boil down to two contentions, namely that the court *a quo* erred in not upholding the in *limine* defences raised by the appellant, and in not finding that sufficient evidence had been placed before the court *a quo* pointing to the existence of a *bona fide* defence to the main action.

[9] It is hard to fathom what the court *a quo* meant when it pronounced that no points of law had been raised. That conclusion flies in the face of the content of the

[3] There are ten in all

affidavit filed by the appellant in opposition to the summary judgment application and the submissions advanced by the appellant's attorney at hearing stage. The defences of non-joinder and *lis alibi pendens* were raised in clear terms as preliminary points. By definition, these are points of law falling to be determined before the merits can be gone into. Whilst they are dilatory defences that do not go into the merits of the case, they may be successfully raised to resist summary judgment. Rule 14(3)(b) of the Magistrate's Court Rules merely requires that a defendant bent on resisting summary judgment deliver an affidavit "*disclos[ing] fully the nature and grounds of the defence and the material facts relied upon therefor*." The fact that the defences may be dilatory in nature does not strip them of being defences valid in law.

[10] Central to this appeal is the question whether section 40 of the Act envisages joint liability or joint and several liability. That question arises in this instance because of the trite legal position that the right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners.[4]

[11] The question that is at the heart of this appeal was fully considered and answered as follows in *MS v Head of Department, Western Cape Education Department & 2 Others*:[5]

> "[104] In this instance the joint and several liability is not stipulated in s 40(1). There are also no indicators in the said provisions to infer that the liability to pay by parents as co-debtors are jointly and severally. To presume otherwise would definitely impose an unnecessary heavy burden on parents like MS and is irreconcilable with the paramountcy that must be afforded to the best interest of the child as a principle in our Constitution. In my view, on a proper construction of the provisions of s 40(1) the liability of a parent (as in this instance) to pay school fees must be regarded as jointly and not jointly and severally. I am referring here to the liability of the parent to the school in terms of s 40(1), not the liability for school fees *inter se* (between parents), which may be effective by private arrangements. Such an interpretation is in accordance with the general principle in our law that co-obligators are liable only jointly unless an intention to impose joint and several liability is plainly expressed or can be clearly inferred. (See "*The Law of Contract in South Africa*" by RH Christie at page 290)."

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4 *Burger v Rand Water Board & Another* 2007 (1) SA 30 (SCA) 33, also see *United Watch & Diamond Company (Pty) Ltd& Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) at 415 E-F

5 Reportable, but as yet unreported judgment, of the Western Cape Division by Le Grange J delivered on 15 September 2016 under Case No 18775/13

[12] I associate myself with both the reasoning and the conclusion reached by Le Grange J in his erudite judgment in the *MS* case[6] on the subject at hand.

[13] In my view, therefore, the appellant and Mr Tee do fall within the category of persons with respect to whom joinder is necessary. The court *a quo* erred in concluding otherwise and in not upholding the appellant's defence of non-joinder.

[14] It can be gleaned from the affidavit the appellant filed in opposition to the summary judgment application that all the requisites of *lis alibi pendens*[7] had been satisfied. The papers make it demonstrably clear that there are separate proceedings pending between the appellant and the respondent (or their privies), based on the same cause of action in respect of the same subject matter. The court *a quo* could and should have exercised its discretion in favour of upholding the appellant's *lis alibi pendens* defence, as well, and erred in not so doing.[8]

[15] Had the court *a quo* upheld the *in limine* points dealt with above it would not have had to deal with the merits of the case. Despite that, and for the sake of completeness, I shall deal, albeit briefly, with the question whether the court *a quo* erred in not upholding the appellant's defence on the merits.

[16] From a reading of the impugned judgment and as pointed out in paragraph [6] above, the court *a quo* was dissatisfied with the quantum of evidence placed before it establishing that the appellant had been exempted, and insisted that documentary evidence substantiating such exemption or a confirmatory affidavit from an official of the school (Mr Glover) should have been delivered.

[17] All that rule 14 (3)(b) requires is a significantly full disclosure of the material facts to persuade the court that what the defendant has alleged, if proved at the trail,

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6 *Supra*

7 See *George vs Minister of Enviromental Affairs & Tourism* 2005 (6) SA 297 (Eqc)

8 See *Nedbank Limited vs Hermunus Phillipus Kloppers*, unreported judgment of the Gauteng Division, Pretoria by Mali J under Case No: 66933/2015 delivered on 29 July 2016

will constitute a defence to the plaintiff's claim. This may be achieved without the defendant giving a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence.[9]

[18] Regard being had to the averments made in the affidavit filed in opposition to the summary judgment application, coupled with the annexures thereto, I am satisfied that the appellant did set out her defence with the requisite degree of particularity and completeness.

[19] In all these circumstances, I propose granting the following order:

19.1 The appeal succeeds, with costs.

19.2 The order of the court *a quo* granting summary judgment is set aside and substituted with the following :

> "1. Summary judgment is refused.
>
> 2. The defendant is granted leave to defend the main action.
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> 3. Costs of the summary judgment application shall stand over for determination by the court hearing the main action."

[9] *Maharag v Barclays National Bank Ltd* 1976(1) SA 418 (A) 426

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S M MBENEGE

JUDGE OF THE HIGH COURT

I agree

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M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the Appellant	:	Ms Van Der Merwe
Instructed by	:	**DOLD & STONE INC.** **10 African Street** **GRAHAMSTOWN**
For the Respondent	:	No Appearance
Date heard	:	11 November 2016
Judgment delivered	:	11 November 2016