REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 23920/2014

DATE: 16 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JACOBUS JURIE SNYMAN **APPLICANT**

and

LEVEY RACING (PTY) LTD t/a **YAMAHA LIFESTULE**

CENTRE (REG NR.: 2013/0088506/07) **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] This is an application for summary judgment in terms of uniform rule 32. On or about 18 December 2013 the applicant and the respondent duly represented by one Shane Levey, concluded a written agreement of sale wherein the respondent sold to the applicant a BMW S1000RR motorcycle. The purchase price of the motorcycle is R136 000. The relevant express, alternatively implied terms of the agreement, were, amongst others, that the respondent would make the service booklet and spare key available to the applicant. The applicant duly effected payment of the full purchase price and the respondent effected delivery of the motorcycle to the applicant. The respondent however, failed to deliver the service booklet and the spare key. The applicant issued summons against the respondent alleging cancellation of the said agreement. The respondent filed appearance to defend hence the summary judgment application.

[2] The relief sought by the applicant is for an order confirming the cancellation of the agreement entered into between the parties on 18 December 2013; payment from the respondent to the applicant in the amount

of R136 000 after which the applicant will deliver the BMW SlOOORR motorcycle to the respondent; interest on the amount of R136 000 at a rate of 15.5% *per annum a tempore morae* from date of cancellation and costs of suit.

[3] In his heads of argument, the applicant's counsel submits that the respondent answered to the summons with a tender in terms of uniform rule 34 and contends that the applicant accepted the tender and wishes to have the tender made an order of the court. I must say this was the first time this issue was raised as it does not form part of the applicant's claim in the particulars of claim.

[4] The respondent is opposing the application and in its affidavit opposing the application for summary judgment, has raised, firstly, a point *in limine* on *locus standi.* The respondent's contention being that the applicant has cited the wrong defendant. According to the respondent the person to be sued is one Shane Levey (Levey) who is the owner of the motorcycle. Secondly, on the merits, the respondent raises a defence of fictional fulfillment in that the applicant refused Levey's tender to provide him with the updated service booklet and the spare bey.

[5] At the hearing of the application, the respondent's counsel, on the basis of the issue raised for the first time in the applicant's heads of argument wanted to hand in some letters which he submitted showed that the applicant had rejected the respondent's uniform rule 34 tender. When the applicant's counsel objected to the handing in respondent's counsel wanted the matter to be postponed in order to allow the respondent an opportunity to file a supplementary affidavit, needless to say that this application was also opposed. I, instead of postponing the application, allowed him to hand in the said letters.

[6] On consideration of the issues before me, ! came to the conclusion that: firstly, the introduction by the applicant's counsel of the tender in terms of uniform rule 34 in his heads of argument is litigation by ambush and should not be entertained; secondly, the defences raised by the respondent are *bona fide* and leave to defend the matter should be allowed.

[7] In a summary judgment application, where the question of whether the respondent has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The respondent is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed, that there is a preponderance of probabilities in his or her favour.[1]

[8] All that a court requires, in deciding whether the respondent has set out a *bona fide* defence, is

8.1 whether the respondent has disclosed the nature and grounds of his or her defence, and

8.2 whether on the facts so disclosed the respondent appears to have, a defence which is *bona fide* and good in law. It is sufficient if the respondent swears to a defence, valid in law, which if advanced may succeed on trial.[2]

[9] The defences raised by the respondent are good defences - they are *bona fide* and valid in law and if raised at trial may constitute a defence to the applicant's claim.

[10] As regards the issue of costs my view is that an appropriate cost order should be costs in the cause.

[11] In the premises I make the following order:

11.1 The application is dismissed.

11.2 The respondent is granted leave to defend the matter.

11.3 Costs are costs in the suit.

EM KUBUSHI

JUDCE OF THE HIGH COURT

APPEARANCE

HEARD ON THE: 11 SEPTEMBER 2014

DATE OF JUDGMENT: 16 SEPTEMBER 2014

FOR APPLICANTS: ADV A BOTHA instructed by VAN HEERDEN & KRUCEL ATTORNEYS

FOR RESPONDENTS ADV E COLEMAN instructed by N AGNEW INCORPORATED

c/o PULE INCORPORATED

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1 See Nair v Chandler 2007 (1) SA 44(T) at 47B-C and Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426A-E

2 See Maharaj v Barclays National Bank Ltd above at 426B and Marsh v Standard Bank of SA Ltd 2000 (4) SA 947 (W) at 949E-F