

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

21/10/2015
DATE


SIGNATURE

CASE NUMBER: A3054/2015

In the matter between:

ALBA GAS & WELDING EAST RAND (PTY) LTD

APPELLANT

and

CLOSWA BILTONG (PTY) LTD

RESPONDENT

JUDGMENT

CHAITRAM AJ:

- [1] This appeal relates to the interpretation and application of the provisions of Rule 32(2) of the Magistrates Court Rules.
- [2] The appellant was the plaintiff in the court a quo when the court had 'refused' to enter a default judgment in its favour on a liquidated claim at trial stage in the absence of the defendant.
- [3] The appellant contends that the magistrate had misapplied the provisions of Rule 32(2), in terms of which the plaintiff was entitled to its judgment.
- [4] I will refer to the parties as plaintiff and defendant.
- [5] The key facts are the following:
 - [5.1] This was a defended action in the Boksburg magistrates court in terms of which the plaintiff claimed the sum of R47 466-44 for the supply of goods and/or services to the defendant during March 2012 to July 2012 at the defendant's instance and request. The claim arises from a credit facility between the parties in terms of which it is alleged that the payments due to the plaintiff fell due for payment within thirty days of the date of plaintiff's invoice. Plaintiff pleaded that it rendered the relevant statement to the defendant and that the period of thirty days had elapsed without any payment having been made by defendant. Due compliance with the provisions of the National Credit Act 34 of 2005 (the NCA) was pleaded.

- [5.2] The defendant raised a special plea in terms of which it, firstly, disputed that the plaintiff had complied with the provisions of Section 129 of the NCA, and, secondly, suggested that the credit that the plaintiff had advanced to the defendant was done in contravention of Section 81(2) of the NCA and, therefore, amounted to reckless credit.
- [5.3] In its main plea the defendant, essentially, puts the plaintiff to the proof of its allegations regarding the supply of the goods and/or services, and implies that it is entitled to a rebate for certain of the goods that were returned, and for which the plaintiff has not accounted.
- [5.4] The defendant also raised a counterclaim for a debatement of the plaintiff's account on the basis that the plaintiff had reneged on an agreement to re-negotiate the purchase price of the goods, that the defendant had returned some of the goods, and that an appropriate credit was due to be passed in favour of the defendant.
- [5.5] After pleadings had closed, the action was properly enrolled for trial on 11 February 2015.
- [5.6] At the commencement of the trial, plaintiff's counsel took the point that the defendant's attorney had no mandate to represent the defendant at the hearing, the attorney having previously withdrawn as the defendant's attorney of record. Mr Padayachee, an attorney who appeared for the defendant at the trial, effectively, conceded that he had no mandate to appear on behalf of the defendant, that the defendant's main witness was abroad in China, and that he was simply there to seek a postponement to protect the defendant's rights as he had previously been on record for the defendant. The

magistrate upheld the point that Mr Padayachee was not authorised to represent the defendant, and excused Mr Padayachee from the proceedings.

- [5.7] The defendant was then, both, unrepresented and in default of appearance.
- [5.8] Plaintiff's counsel promptly sought the entry of a default judgment in the plaintiff's favour in terms of the provisions of Rule 32(2).
- [5.9] The magistrate decided to reserve her judgment without inviting plaintiff's counsel to address any particular concern that she may have had in the matter.
- [5.10] On 03 March 2015 the magistrate rendered her judgment in terms of which she 'refused' the plaintiff's request for a default judgment.
- [6] An assessment of the magistrate's decision must commence with an assessment of the provisions of Rule 32(2) (the Rule) of the Magistrates Court Rules, the material parts of which read as follows:
- 'If a defendant...does not so appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary'.
- [7] The Rule provides the mechanism for a plaintiff to obtain his/her relief at the trial stage of an action when the defendant is in default of appearance.

- [8] Although the Rule uses the permissive 'may' in relation to the court's discretion whether or not to grant the plaintiff his/her relief, the discretion must, obviously, be exercised after a proper assessment of the facts and/or evidence. In other words, the discretion not to enter the judgment in plaintiff's favour cannot be exercised arbitrarily. A court's refusal to enter a judgment in plaintiff's favour must be objectively justifiable.
- [9] The Rule also seems to suggest that the court is vested with a discretion whether or not to consider evidence in support of the plaintiff's claim. It would probably be more accurate to state that in certain circumstances the court would be obliged to hear appropriate evidence, in others it will be quite unnecessary, whilst in some it may be purely optional, depending on the nature of the proceedings and the facts pleaded.
- [10] The learned author D E van Loggerenberg in *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, 10th ed, vol 2: The Rules, p 32-3, correctly, states the following:
- 'The court may, in certain circumstances, be obliged to hear evidence in order to enable it to exercise its discretion in a proper manner. Thus, for example, if the claim is for an unliquidated amount of money, the court cannot exercise a proper discretion in the absence of evidence in regard to the quantum of the plaintiff's claim. If the plaintiff's claim is for the amount of a penalty in a contract, the court would be entitled to hear evidence, in terms of the provisions of the Conventional Penalties Act 15 of 1962, in order to determine whether or not the penalty is disproportionate to the 'prejudice' suffered by the plaintiff.'*
- [11] It would, accordingly, follow that, in principle, no evidence at all would be necessary to be heard in relation to most liquidated claims.

- [12] The court would, nevertheless, be obliged to satisfy itself that all of the legal pre-requisites for a plaintiff to succeed in his/her action have been satisfactorily met. It must be considered that, very often, the trial date may be the first time when a judicial officer may get to consider the case critically. The nature of our civil litigation procedures is such that the court may not have had an appropriate prior opportunity to pronounce on defects in the action.
- [13] For instance, it may be discovered that the summons, in fact, does not disclose a cause of action, which fact may have been overlooked by the defendant; or that the cause of action itself may not be one that the court has jurisdiction to adjudicate-over; or that the claim exceeds the court's monetary jurisdiction; or that there has been a misjoinder, or a non-joinder; or that the plaintiff has failed to comply with certain legal pre-requisites for the institution of the action envisaged in provisions such as Section 129 of the NCA, Section 3 of The Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002, and a myriad of similar provisions. Still, in other instances, the court may consider it prudent to call for original liquid documents, or other original contracts/documents upon which the cause of action has been based.
- [14] In many of these areas the court's discretion to call for appropriate evidence will be optional, depending on the nature and extent of the allegations in the summons. Indeed, if there is a fatal defect in the plaintiff's action, the court will be well entitled to simply dismiss the plaintiff's action.
- [15] The Rule, however, certainly neither requires nor envisages that the plaintiff proves his cause of action. The nature and terms of the dispute are a matter between the parties.

It is not for the court to take up the cudgels of either party's case. One of the main purpose of a trial is to adjudicate-over and finalise disputes between the parties. By being in default of this exercise, the defendant renounces his right to create a dispute. His pleaded dispute, accordingly, falls away and the plaintiff's claim becomes undisputed. A litigant is, generally, not required to prove an undisputed claim, except merely to justify his/her relief in respect of mainly illiquid claims where the court is called-upon to assess the fairness and reasonableness of the relief, and to ensure that other legal pre-requisites applicable to the action have been fulfilled. There can be no question that a plaintiff ought, generally, to succeed on the merits of his/her claim without the need to lead evidence in support of it.

[13] It must be appreciated that a plaintiff has undertaken the burdensome legal journey to trial in search of his/her perceived elusive justice. In the absence of the defendant at the trial, the plaintiff ought not to be subjected to further unnecessary hurdles to overcome.

[14] Plaintiff's counsel was correct to submit that the Rule must be applied in the same manner as that of Rule 12(7), namely undefended actions where the court has a discretion to call for further evidence in relation to the plaintiff's claim. Further evidence in such undefended actions are generally limited to the substantiation of illiquid claims, and compliance with legal pre-requisites, and not to the proof of a plaintiff's cause of action.

[15] It is not entirely clear from the magistrate's reasons for her judgment whether she considered that it was necessary for the plaintiff to prove its cause of action, or whether

she concluded that the plaintiff's claim failed to disclose a cause of action. It seems to be some sort of hybrid between the two. In either event, she was wrong. As stated already, the plaintiff was not required to prove its claim. The magistrate's criticism of the plaintiff's particulars of claim is without merit. All of the necessary *facta probanda* in order to sustain a claim for the payment of monies due for goods and/or services supplied have been pleaded. The summons, clearly, discloses a cause of action.

[16] A major concern about the magistrate's approach to the matter, however, is that she concluded the matter without ever indicating to the plaintiff's counsel at the trial, or to the plaintiff's attorney after she had reserved her judgment to study the papers, that she had certain concerns with the papers. She was obliged to bring her concerns to the attention of the plaintiff's legal team and allow them the opportunity of addressing her concerns with the view of overcoming them. She was not entitled to conclude the matter on terms that the plaintiff was not allowed the opportunity to address.

[17] In any event, the magistrate erred in both, her approach to the matter, and in her conclusions on the merits of the case. There was no reason not to grant the plaintiff its relief.

[18] The appeal must, therefore, succeed. In the court *a quo*, plaintiff's counsel had requested a fee for counsel's appearance in an amount in excess of the amount allowed in the magistrate's court tariff of fees and allowances. Whilst counsel may do so, counsel is required to justify the request. In this matter, no motivation was advanced to the magistrate to do so. This matter in the court *a quo* appears to have

been quite simple and straightforward, and does not merit an award of counsel's fees in excess of the amount allowed in the tariff.

[19] I, accordingly, make the following order:


1. The appeal is upheld with costs;
2. The order of the court a quo is set aside and substituted with the following:

Judgment is entered in favour of the plaintiff for:

- i). payment of R47 466-44,
- ii). interest thereon at 15.5% per annum with effect from 01 September 2012 to date of payment,
- iii). Costs of suit, including costs of counsel.


A CHAITRAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree.


G WRIGHT
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Appellant:	Adv. D L Williams
On behalf of the Respondents:	No Appearance

Date Heard: 19 October 2015

Date Judgment Delivered: 21 October 2015