REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

10/1/2012

CASE NO: 5659/2011

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

2011-12-15
DATE

SIGNATURE

In the matter between:

AKD COMMUNICATIONS (PTY) LTD	**FIRST APPLICANT**
CRAIG CHARLES DAWSON	**SECOND APPLICANT**
STANTON RHETT HALL BAINES	**THIRD APPLICANT**
MUCH-ADO INVESTMETNS CC	**FOURTH APPLICANT**
ANDREW KEITH DAWSON	**FIFTH APPLICANT**

and

BUSINESS PARTNERS (PTY) LTD	**RESPONDENT**

J U D G M E N T

HIEMSTRA AJ

[1] The applicants apply for condonation for the late filing of their opposing affidavit in a summary judgment application brought by the respondent under the same case

number. The respondent opposes the application and seeks to have the summary judgment application be heard at the same time. This is sensible and cost effective. The papers in the summary judgment application are before me.

APPLICATION TO STIKE OUT

[2] The respondent filed an answering affidavit in the condonation application. The applicants claim that this answering affidavit deals with the merits of the respondent's (plaintiff's in the summary judgment application) case in the summary judgment application. It is argued that this circumvents the provisions of Rule 32(4) of the Uniform Rules of Court, which provides that a plaintiff in summary judgment proceedings may adduce no evidence otherwise than by the affidavit referred to in subrule (2). The affidavit in terms of subrule (2) is limited to a statement that in the opinion of the deponent, the defendant does not have a *bona fide* defence and that the notice of intention defend had been delivered solely for the purpose of delay. The plaintiff must also confirm the cause of action and the amount claimed. The applicants apply for the offending paragraphs of the answering affidavit to be struck out.

[3] I can only deal with the condonation application after I have dealt with the striking-out application. In a condonation application an applicant must show, *inter alia* that it has prospects of success. In summary judgment proceedings the defendant only has to show that he has a *bona fide* defence. Van Reenen J held in *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town*[1] that the prospects of success in a condonation application in summary judgment proceedings had to determined with reference to what was sufficient to ward off the granting of summary judgment. The decision whether or not a prospect of success exists, should be based on exactly the same evidential material as that upon which an application summary judgment had to based, namely the affidavit in support of the application for summary judgment and the opposing affidavit. Accordingly, the introduction of additional evidential material in a condonation application in summary judgment proceedings by the plaintiff is inadmissible on the ground that it is irrelevant. In *Klipton Industries Ltd v Kersen & Another*[2] Flemming DJP said that this general principle is subject to the requirement that a party who is not *bona fide* should not be assisted.

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[1] 2003 (5) SA 140 (CPD)
[2] 1995 (1) SA 185 (TPD) at 184D

[4] Mr J.S. Stone, appearing on behalf of the respondent (plaintiff in the summary judgment proceedings), argued that the offending paragraphs in the answering affidavit to the condonation application are intended to show that the applicants are not *bona fide*, and are not aimed at introducing evidentiary material that would show that the applicants do not have a *bona fide* defence.

[5] The relevant paragraphs of the answering affidavit are 8.4, 8.5, 8.6 and 8.7. I have perused these paragraphs. Although they dispute on persuasive grounds the truthfulness of the allegations of the applicants in their affidavit resisting summary judgment, a plaintiff in summary judgment proceedings is precluded from adducing evidence contradicting the defendant's affidavit resisting summary judgment. The affidavit also puts the applicant to the proof of certain allegations. It is not necessary for a defendant to prove any of its allegations in such proceedings. These allegations are irrelevant and therefore inadmissible.

[6] Paragraphs .4, 8.5, 8.6 and 8.7 of the respondent's answering affidavit in the condonation application are therefore struck out.

LOCUS STANDI OF FIRST TO FOURTH APPLICANTS

[7] The founding affidavit in the condonation application was deposed to by the fifth applicant. There are no confirmatory affidavits by or on behalf of the other applicants, nor any proof of authority to the fifth applicant to depose on their behalf. The fifth respondent simply said: "*I am duly authorised to depose to this affidavit on behalf of the Defendants.*"

[8] The respondent has challenged the fifth applicant's authority to represent the other applicants. In the replying affidavit the fifth applicant merely reiterated that he represents the other applicants. There is no explanation for the lack of affidavits confirming that the fifth applicant represents them. The fifth applicant contends that the respondent should comply with the Rules if it wishes to challenge his authority. There is no Rule that prescribes any such procedure. If the fifth applicant purports to rely on Rule 7(1), it is misplaced. That Rule deals with the special type of power of attorney

which is given by a client to his or her attorney to authorise him or her to institute or defend legal proceedings on the client's behalf.[3]

[9] I therefore find that only the fifth applicant is properly before the court. The first to fourth applicants have not made out a case for condonation and it is accordingly refused. They have also failed to show prospects of success, in the summary judgment application.

EXPLANATION FOR LATE FILING OF AFFIDAVIT OPPOSING SUMMARY JUDGMENT

[10] The opposing affidavit had to be filed by 14 April 2011 and was filed on 15 April 2011. Normally such a short delay would be condoned. However, the reasons for this delay bear scrutiny.

[11] The fifth applicant's main alleged defence is that the summons of the respondent is excipiable. He blames the delay in filing the opposing affidavit on the erroneous advice of his attorney that the exception must be heard before the exception. For that reason, the attorney did not regard it as necessary to file an opposing affidavit.

[12] On 9 March 2011, the applicants' attorney wrote to the respondent's attorney and said *inter alia*:
"*As I understand the position, the exception must always be heard before the application for summary judgment.*"

[13] The respondent's attorney replied as follows on 16 March 2011:
"*We refer to the above matter and advise that we are proceeding with our application for summary judgment.*"
Therefore, the applicants' attorney already knew on 16 March 2011 that the respondent intended to proceed with the summary judgment application.

[14] On 13 April 2011 the respondent's attorney wrote to the applicants' attorney that his understanding of the legal position concerning exceptions and the raising of other

[3] *Erasmus, Superior Court Practice* B1-59 and the cases referred to by the learned authors.

legal contentions in summary judgment proceedings is incorrect. On 18 April 2011, the day of the set down of the summary judgment application, the applicant's attorney wrote *inter alia*:

"*There is ample authority that the Exception must be heard before the application for summary judgment.*"

[15] Two points can be made regarding the view of the applicants' attorney: The first is that he is completely wrong. A defendant may raise as a defence in a summary judgment application that the summons is excipiable. If that is found to be the case, summary judgment will be refused. The exception need not be heard first or separately. The second is that, even if he is correct, which he is not, there was still no reason not to file the opposing affidavit within the prescribed time period. The sequence in which the exception and the summary judgment had to be heard is irrelevant.

[16] The applicants' attorney already knew on 16 March 2011, nearly a month before the expiry of the time period, that the respondent did not agree with his contention and that the respondent would proceed with the summary judgment application. Knowing that the applicant was proceeding with the summary judgment application, the least that could be expected of prudent attorney is be ready to meet the application. Every attorney should know that he cannot simply ignore a summary judgment application because he believes that it had been set down prematurely. He should at least raise that point on affidavit.

[17] I therefore find that the explanation for the late filing of the opposing affidavit is inadequate. However, the scales may be tipped in favour of an application for condonation if the applicant can show good prospects of success. I shall therefore examine the applicant's alleged defences.

PROSPECTS OF SUCCES

[18] The fifth applicant did not deal with the applicants' prospects of success in the application for condonation. For this reason alone, condonation should be refused. However, the affidavit refers to the applicants' exception and a Notice to Remove

Cause of Complaint is attached, which sets out the grounds of exception. I shall consider whether there are any prospects of the exception being upheld.

[19] The applicants' main defence is that the summons is excipiable. They raise four grounds for exception in their belated affidavit resisting summary judgment:

First Ground: No acceleration clause

[20] The summons is based on a loan agreement entered into between the first applicant and the respondent. The other applicants have bound themselves as sureties and co-principal debtors for the due and proper repayment by the first applicant of the debt for an unlimited amount. The respondent stated in paragraph 3.7 of its particulars of claim that in terms of the loan agreement, in the event of any one instalment not being paid on due date, the full balance then outstanding in terms of the agreement would immediately become due, owing and payable.

[21] The applicants contend that the loan agreement does not contain such an acceleration clause. This is baffling. Clause 27 of the loan agreement provides as follows:

"***BREACH***

Without prejudice to any of its rights in law of in terms of this Agreement, Business Partners shall be entitled to withhold any potion of the loan not paid out and claim immediate payment of the outstanding balance due by the Borrower to Business Partners in terms of this Agreement (whether or not the due date for payment has arrived), as well as, ..."

[22] This ground of exception therefore holds no water. However, in argument, Mr van der Merwe, for the applicants, put a different gloss to this submission. As I understand him, he contends that clause 27 provides that Business Partners may in the event of breach claim immediate payment of the outstanding balance. He contrasted clause 25 which provides as follows:

"***PROOF OF AMOUNT OWING***

A statement purporting to be signed by manager or accountant of Business Partners (whose appointment or authority need not be proved) shall, for all purposes (including provisional and summary judgment) be deemed to be prima facie *proof of all*

amounts owing by the Borrower to Business Partners, and of the interest rate applicable to the loan from time to time."

He argued that the amount of the "*outstanding balance due*" as per clause 27, and the amount of "*all amounts owing*" as per clause 25 are not the same. Therefore, as I understand Mr Van der Merwe, the two clauses are inconsistent with each other and therefore a certificate of indebtedness as provided for in clause 25 is no proof of the outstanding balance.

[23] This is a highly ingenious submission. It is correct that the *amount owing* may differ from the *outstanding balance due* while the borrower continues to pay regularly in terms of the agreement, because the full outstanding balance is not yet due. However, the amounts converge when clause 27 kicks in. Then the amount owing becomes the outstanding balance.

[24] This ground of exception is misconceived and does not constitute a *bona fide* defence.

Second Ground: No allegation that moneys had been advanced

[25] Rule 18(4) the Uniform Rules provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[26] The respondent set out clearly and concisely in the particulars of claim that it had lent and advanced the sum of R2 049 974.00 to the applicants. The applicants contend that the respondent did not plead if, or when, it advanced the monies in terms of the agreement. It is contended that it is therefore not possible to calculate the interest payable on the loan if the plaintiff does not plead the date of the advance.

[27] The applicants know whether the applicant has actually advanced the loan and when. If the respondent had not actually advanced the loan, the applicants would know it, and can easily deny it in their plea.

[28] I find this ground utterly spurious and it does not constitute a defence.

Third Ground: No allegation as to when the breach occurred and what payments were not made

[29] I reject this ground for the same reasons that I rejected the second ground.

Fourth Ground: No allegations that conditions precedent had been fulfilled

[30] The applicants refer to the conditions precedent contained in clause 8.4 of the loan agreement and contend that the respondent had failed to plead whether they had been complied with.

[31] These conditions precedent are all obligations that the applicants had to comply with before the money would be advanced. It is peculiarly within the knowledge of the applicants whether they have fulfilled the conditions precedent. If they have not, and the money had nevertheless been advanced, then they are in any event liable to repay it.

[32] This ground is therefore also not a defence.

[33] I therefore find that the alleged grounds of exception do not constitute a *bona fide* defence. In fact they are so spurious that is apparent that the applicants will raise any manner of technical argument solely for the purpose of delay.

OTHER DEFENCES RAISED

[34] The applicants contend that the fourth applicant had been released from his suretyship. Even if that is so, the fourth applicant is not properly before court and I will have no regard to this submission. In any event, clause 34.2 of the loan agreement provides that "*No representation, variation, modification, consensual cancellation, waiver of or consent to depart from any provision of this Agreement shall be of any force or effect unless confirmed in writing and signed by the parties.*"

[35] In respect of the other applicants, the applicants contend that they were granted certain indulgences in terms of which they would not be called upon to pay the amount outstanding. This is also covered by clause 34.2.

CONCLUSION

[36] The applicants have failed to make out a case for condonation. The summary judgment application is therefore unopposed. I have found that the particulars of claim are not excipiable. Even if the other defences were before court, they do not constitute a *bona fide* defence.

I therefore make the following order:

1. Condonation for the late filing of the applicants' affidavit resisting summary judgment is refused;

2. Summary judgment is granted in the following terms:

   2.1 Payment of the sum of R1 688 052.82

   2.2 Interest on the sum of R1 688 052.82 at the rate of 9% per annum calculated from 26 December 2010 to date of payment;

   2.3 Costs of suit as between an attorney and client, together with value added tax thereon.

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	1 December 2011
Date of judgment:	19 December 2011
Counsel for the applicant:	Adv. J.S. Stone
Attorney for the applicant:	Morris Pokroy Attorney
Counsel for the respondent:	Adv. Van der Merwe
Attorney for the respondent:	T.G. Fine Attorney, c/o Friedland Hart Solomon & Nicolson