REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 39472/2013

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2014·02·28 .....
DATE

.....
SIGNATURE

28/2/2014

In the matter between:

NEDBANK LIMITED Plaintiff

and

D&K COFFIN MANUFACTURERS CC Defendant

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application for summary judgment. The plaintiff instituted 17 claims against the defendant for payment of monies allegedly due and owing, pursuant to various written agreements of sale concluded between William Tell Industries (Pty) Ltd (William Tell) and the defendant during the period 11 July 2012 – 24 August 2012, in terms of which the defendant purchased certain goods from William Tell. It is alleged that the goods were delivered to the plaintiff, and the plaintiff did not pay the purchase price.

[2] The plaintiff alleges that on 8 October 2010 it and William Tell entered into a written invoice discounting agreement in terms of which the plaintiff purchased the existing and new debts of William Tell, and William Tell ceded all its rights, title and interest in and to the existing debts to the plaintiff. Consequently, the plaintiff alleges that the defendant is indebted to it in the amount of R797 775.43, being the amount alleged to be previously owed to William Tell.

[3] Before I consider the contentions on behalf of the parties, I deem it pertinent to set out the jurisprudential framework within which an application for summary judgment should be considered, which is trite and established. The defendant must satisfy the court that he has a *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof.

[4] In *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk*[1] it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade it that he has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is *bona fide* and good in law. See *Maharaj v Barclays National Bank*[2].

[1] 1978 (1) SA 164 (W) at 171
[2] 1976 (1) 418 (A) at 426

[5] In the present matter, the defendant has raised three points in its affidavit resisting summary judgment. The first concerns the authority of the deponent to the affidavit supporting summary judgment. The affidavit in support of summary judgment on behalf of the plaintiff was deposed to by Mr Christopher Seripe, who describes himself as a recoveries manager of the plaintiff. The defendant denies that Mr Seripe has personal knowledge of the facts giving rise to the cause of action, more specifically the dealings between representatives of William Tell and the defendant, as he was not an employee of William Tell during the conclusion of the agreements between William Tell and the defendant.

[6] For this contention, the defendant placed reliance on the following passage in *Erasmus, Superior Court Practice*, at B1-216:

> 'Where the cessionary of a debt sued the debtor on the debt and applied for summary judgment on the strength of an affidavit signed by a director of the cessionary company, and there was nothing in the affidavit to indicate that he had any connection with the cedent of the claim, ... summary judgment was refused. See also *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W).'

[7] The second point raised by the defendant is whether there has been a valid cession of the alleged debts. It should be borne in mind that invoice discounting agreement between the plaintiff and William Tell was concluded on 8 October 2010, *before* the agreements the agreements between William Tell and the defendant were concluded. In terms of clause 3.2 of the invoice discounting agreement, the delivery of new debts would constitute cession thereof to the plaintiff, suggesting that cession would only take place upon delivery of the debts. The defendant contends that in the absence of an allegation that the alleged debts have been delivered to the plaintiff or have in fact been ceded to the plaintiff.

[8] Thirdly, the defendant alleges that it has a counter-claim which it intends to institute against William Tell in the amount of R3,5 m, being alleged damages suffered as a result of loss of sales for the months of September, October and November 2012 due to a delay by William Tell to supply the defendant with certain material. This fact is confirmed in a confirmatory affidavit deposed to by Mr Warren Zevenster, the sales representatives of William Tell

[9] The remedy of summary judgment is an extraordinary and drastic one, which has the hallmark of a final judgment in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. In *Dowson and Dobson Industrial Ltd v Van der Werf*[3] it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain*[4], and *Standard Krediet Korporasie v Botes*[5]. Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude*[6].

[10] From what is stated in para [6] above, it appears that the defendant's first point with regard to the competence and authority of Mr Seripe to swear positively to the facts giving rise to the cause of action, was well-taken. Mr Seripe does not appear to be a person who can swear positively to the facts verifying the cause of action and the amount claimed. Similarly good to stave off summary judgment, is the second point relating to the cession. That point, in my view, should prudently be left for

[3] 1981 (4) SA 417 (C) AT 419
[4] 1984 (4) SA 544 (C) AT 550
[5] 1986 (4) SA 946 (SWA)
[6] 2009 (4) SA 669 (E) at 672C-676D

determination by the trial court. The defendant's intended counter claim is an additional consideration why leave to defend should be granted.

[11] To sum up, I am more than satisfied that the defendant has disclosed a *bona fide* defence. Any of the two defences raised, individually or cumulatively, is enough to stave off summary judgment. If proved at the trial, they will constitute a complete defence to the plaintiff's claim. What is more, the intended counter claim is not so far-fetched or inherently implausible as to be rejected off hand. I therefore take a view that the defendant's defences have merit, and not raised solely for the purpose of delay. They therefore constitute a *bona fide* defence worthy of ventilation in a trial. The defendant is therefore entitled to be granted leave to defend.

[12] In the result the order I make is the following:

1. The defendant is granted leave to defend the action;
2. The costs of this application shall be costs in the cause.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 8 NOVEMBER 2013**
JUDGMENT DELIVERED	**: 28 FEBRUARY 2014**
FOR THE PLAINTIFF	**: ADV AJ SCHOEMAN**
INSTRUCTED BY	**: *SNYMAN DE JAGER INC.*, PRETORIA**
FOR THE DEFENDANT	**: ADV JH JOOSTE**
INSTRUCTED BY	**: *AMOD'S ATTORNEYS*, DURBAN**
	***JAFFER ATTORNEYS*, PRETORIA**