IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case **No: 46587/2014**

Date: 19 September 2014

In the matter between:

S & P POWER UNITS (PTY) LTD Plaintiff

And

ENERGISER (SOUTH AFRICA) (PTY) LTD Defendant

JUDGMENT

NOBANDA AJ:

[1] The Plaintiff applied for summary judgment against the Defendant based on a "written agreement". The Defendant filed an opposing affidavit resisting the application.

Summary of facts.

[2] The Plaintiff claims that it entered into a written agreement with the Defendant on 29 August 2011 in terms of which the Plaintiff purchased 330 000, 00 industrial size manganese alkaline cells at US$ 0.64 per cell. That the said agreement constituted of a number of written documents comprising of the following:

a) emails dated 29 August and 5 September 2011 respectively;

b) emails dated 3 and 6 February 2012 respectively; and

c) a purchase order issued to the Defendant by the Plaintiff.

[3] The Plaintiff claims that the Defendant breached the agreement by delivering cells which *were not of the required high drain capacity which the Defendant contractually agreed to supply.* As a result, Plaintiff suffered damages[1]. The Plaintiff then sets out the damages

as follows:

> "*13.1 R82 293.55 penalty for late delivery;*
>
> *13.2 as a result of the Plaintiff not being in a position to supply the correct cells in the first place, and only after Armscor resolved to change the specifications Armscor also insisted that the Plaintiff should afford Armscor a credit note of 10% of price per pack, resulting in a price reduction to the disadvantage of the Plaintiff of R31 914.39;*
>
> *13.3 R59 714.04 which amount represents extra costs for the testing of the cells at Gerotek in order to verify whether the cells comply to the amended specifications, which costs would not have had to be incurred had the Defendant supplied the correct product;*
>
> *13.4 R17 210.80 representing extra costs incurred by the Plaintiff for preparing packaging of the cells for further testing;*
>
> *13.5 R547 949.96 representing loss of profit suffered by the Plaintiff as a result of the Plaintiff being unable to supply to Armscor the full range of the products, which it would have supplied under the tender had the correct products been supplied in the first place.* [2]

[4] The Defendant's defence is *inter alia*, that it never contracted with the Plaintiff and accordingly that it is not indebted to the Plaintiff. In addition, the Defendant claims that the Plaintiff's application is defective in that the Plaintiff's claim is for damages. Accordingly, that it falls outside the parameters of the Rule 32 of the Uniform Rules. To that end, the Defendant incorporated in its affidavit a copy of its Rule 23(1) notice filed on the 22 August 2014 setting out *inter alia*, its defence.

[5] From the above, it is not necessary to go into the details of the Defendant's defence raised in its affidavit resisting summary judgment. *Ex facie* the Plaintiff's Particulars of Claim and the Rule 23(1) notice, the following is evident:

> a) It is not clear when the "written agreement" Plaintiff relies upon was concluded. Plaintiff alleges it was on 29 August 2011. However, on the same breath Plaintiff alleges the agreement comprises of emails of 5 September 2011, 3 and 6 February 2012 respectively. Therefore, before one can even determine whether Plaintiff's claim is a liquidated claim or not, the Plaintiff had to show first the existence of a contract or agreement with the Defendant,
>
> b) In addition, *ex facie* the Plaintiff's Particulars of Claim it cannot be determined whether the Plaintiff's claim is a liquidated claim or demand as it depended on a number of factors, *inter alia*,

whether there is a written agreement and whether the cells were defective, the extent of the defect, etcetera.

[6] The court has a discretion in deciding whether a claim is a liquidated claim or not. In ***Fattis Engineering Co (Pty) Ltd v Vendic Spares (Pty) Ltd*** the court stated that, in exercising its discretion a court can regard certain claims as liquidated demands 壯***unless of course there are features, appearing from the claim as phrased or other relevant circumstances, which preclude the Court from regarding such a claim as a debt or liquidated demand in the sense discussed in this judgment***.[3] (emphasis provided).

[7] The way Plaintiff's claim is phrased, it is clear that the Plaintiff will have to prove the existence of a written agreement with the Defendant. In addition, Plaintiff's claim shows that the damages claimed flow directly from the "defective" cells. As such, the Plaintiff would also require to lead evidence to prove the breach, in this case, the defect. Although Plaintiff's counsel argued that the amounts claimed are "liquidated", in the light of the above, the claim itself, in my view, is not a liquidated claim. As such, Plaintiff's claim is not a liquidated claim as contemplated in Rule 32(1) of the Uniform Rules. Accordingly the application for summary judgment is refused.

COSTS

[8] The Defendant's counsel argued that in the event that the Plaintiff's application is refused, I should award costs against the Plaintiff in terms of Rule 32(9)(a). The Defendant's counsel argued, *inter alia*, that the issue regarding Plaintiff's defective application was raised with the Plaintiff's attorneys of record in a letter dated 1 August 2014. In that letter, the Defendant proposed that the application for summary judgment be removed from the roll and the costs be reserved. Notwithstanding, the Plaintiff persisted with the application.

[9] From the documents filed, it appears on 21 August 2014, the Defendant filed a notice in terms of Rule 23(1) of the Uniform Rules, giving Plaintiff an opportunity to remove the numerous (5) causes of complaints within 15 days, failing which the Defendant would except to the Plaintiff's Particular of Claims.

[10] In a letter dated 22 August 2014, the Plaintiff *inter alia*, acknowledged the receipt of the Rule 23(1) notice and advised the Defendant *inter alia*, that the Defendant should withdraw the notice as it was an irregular step. I don't intend to deal with this issue here. Of more importance for these purposes is that the Plaintiff advised the Defendant that it intends to proceed with the application unless the Defendant files its opposing affidavit disclosing its defence whereinafter Plaintiff will re-consider its position of whether or not to proceed with the summary judgment application.

[11] As a result, the Defendant filed its affidavit resisting summary judgment on 5 September 2014. The

matter was argued on 10 September 2014. The Plaintiff's counsel vehemently persisted with the application for summary judgment notwithstanding the Rule 23(1) notice and the Defendant's affidavit resisting summary judgment.

[12] In response, the Defendant's counsel argued that the Plaintiff should not have proceeded with the application in the light of the Defendant's letter referred to above and the Rule 23(1) notice. It was contended by the Defendant's counsel that not only did the Plaintiff cause the Defendant to incur unnecessary costs but the Plaintiff waisted the Court's time in persuing the application notwithstanding. As a result, the Defendant's counsel argued that upon refusing summary judgment, this is an appropriate case where the Court should show that it will not countenance such conduct by awarding costs in term of Rule 32(9)(a) of the same Rule.

[13] The Plaintiff's counsel similarly argued that punitive costs should be awarded against the Defendant. In summary, Plaintiff's argument *inter alia*, was that Defendant's conduct in refusing to file its opposing affidavit disclosing its defence as requested in the 22 August 2014 letter, the Plaintiff would have probably not proceeded with the application.

[14] This argument cannot be legally sound. It is trite that whenever a Plaintiff in a summary judgment application become aware that the Defendant relied on a defence which might entitle it to leave to defend, such Plaintiff should not persist with the application. The Plaintiff was aware of the Defendant's defence at the very least on 22 August 2014 when the Plaintiff received the Defendant's Rule 23(1) notice. The notice itself was long preceded by the Defendant's letter of 1 August 2014 wherein the Plaintiff was advised of its defective application and warned that if Plaintiff proceeds with the application, costs will be sought in terms of Rule 32(9)(a).

[15] Notwithstanding, in response to the Rule 23(1) notice that clearly sets out the Defendant痴 defence, the Plaintiff still sought an affidavit resisting summary judgment. This was a clear abuse of the Rule. In *South African Bureau of Standards v GGS/AU (Pty) Ltd, Patel J* (as he then was), stated that Rule 32(3)(b) does not require a defendant who relies on the excipiability of the plaintiff痴 claim as formulated, file an exception in terms of Rule 23(1)[4]. Inversely, in my view, Rule 32(3)(b) can not require a defendant who has already filed a notice in terms of Rule 23(1) alleging that Plaintiff's claim as formulated is excipiable, to file an affidavit opposing summary judgment.

[16] More discerning is that even after the Plaintiff was in possession of the opposing affidavit, which by the way, has to be filled within the time specified in subrule (3) (a), the Plaintiff proceeded to argue the application. At at the very least, the Plaintiff should have granted the Defendant leave to defend and argue

the issue of costs. Instead, the Plaintiff proceeded with the application notwithstanding that it was foredoomed to failure as it was fatally defective.[5]

[17] This is a clear abuse of this Rule and the Court has to indeed show its disapproval and countenance this conduct. Not only did the Plaintiff abuse the Rule, the Plaintiff showed total disregard for the Defendant's rights by putting the Defendant through unnecessary litigation. Plaintiff's conduct towards the Defendant was not only unreasonable and unjustifiable but also oppressive. Furthermore, the Plaintiff waisted the courts time in pursuing the application under the circumstances.

[18] In the premises, I make an order in the following terms:

(i) The Plaintiff's summary judgement application is dismissed and the Defendant is granted leave to defend the action.

(ii) The Plaintiff is ordered to pay the Defendant's taxed costs on a scale as between attorney and own client;

(iii) The main action is stayed in terms of Rule 32(9)(a) of the Uniform Rules of Court pending taxation by the Defendant of its costs and the payment thereof by the Plaintiff to the Defendant.

LP NOBANDA

ACTING JUDGE OF THE HIGH COURT

Heard on: 10 SEPTEMBER 2014

For the Applicant: Adv.: S. MARITZ

Instructed by: TIM DU TOIT & CO INCORPORATED

For the Respondents: Adv.: B. MASELLE

Instructed by: GOLDMAN JUDIN INC

Date of Judgment: 19 SEPTEMBER 2014

footnote1