

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

Case No: **35851 / 2015**

On 21 January 2016

Before: The Honourable Holland-Müter AJ.

In the matter between:

CAVEONET INVESTMENTS (PTY) LTD
t/a BECKER AND MZIMELA INVESTIGATIONS

Plaintiff


and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

- [1] This is an application for summary judgment. The plaintiff issued a Combined summons against the defendant for the amount of R 15 523 248,87, the alleged outstanding balance due and owing to the defendant for professional services rendered by the plaintiff. See clause 6 of the summons.
- [2] The matter was argued on 17 November 2015. After hearing arguments, due to the volume of the application and short notice to hear the matter, I reserved judgment.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
21/1/2016	
DATE	SIGNATURE

- [3] The plaintiff alleged a written agreement (annexure 'A' to the summons) to be the basis of the claim against the defendant for the outstanding balance due and owing for services rendered. See clauses 3 & 4 of the summons.
- [3] The written agreement referred to above was entered into on 17 September 2001 between the defendant and Becker and Mongwe (Pty) Ltd, the latter represented by one of it's directors, Mr G M Becker. See clause 3 of particulars of claim.
- [4] All rights, interests and duties of the said Becker and Mongwe were ceded to the now plaintiff during November 2009. The plaintiff, Caveonet Investments (Pty) Ltd trading as Becker and Mzimela Investigators, is a different party than the original party to the agreement. See clause 3 of the particulars of claim. No detail of the cession is pleaded.
- [5] The verifying affidavit on behalf of the plaintiff in terms of section 32(2) in the application for summary judgment was deposed to by one Frederik Gerhardus Becker. This person is on face value not the G M Becker who represented Becker and Mongwe when entering into the agreement on 17

September 2001, the agreement relied upon in the application for summary judgment.

- [6] The defendant, in the opposing affidavit, raised various preliminary points. One of the points raised in par 22 to 26 of the affidavit concerns the alleged cession of the agreement between the plaintiff and its predecessor to the agreement. The objection is that a copy of the cession is not annexed to the particulars of claim, resulting in a non-compliance with the provisions of Rule 18(6) of the Uniform Rules of Court. In terms of the Rule, a party relying upon a contract shall state whether it is written or oral, when, where and by whom it was concluded, and if in writing, annex a true copy of the agreement to the pleadings. A cession, being a contract, is subject to the above, and failure to annex a copy, renders the particulars objectionable and excipiable. There is no detail whether it was oral or in writing, when, where and by whom it was concluded.
- [7] The plaintiff argued that it does not rely on the cession but on the service level agreement between the parties. See par 4.2 of the written heads of argument.

[8] To rely on the service level agreement, the plaintiff should aver why it can rely on the agreement, in view thereof that it was not a party to the initial agreement. The casual link between the plaintiff and the agreement is the cession, resulting that the absence of any averments with regard to the cession as required by Rule 18(6), is fatal to the application. The argument on behalf of the plaintiff not to rely on the cession leads to only one result in that the plaintiff wants to rely on an agreement it is not a party to. I cannot but disagree with this argument. **See Erasmus, Superior Court Practice B1-132 C** as to this requirement. The law does not expect the plaintiff to do the impossible, but the averments with regard to the cession are necessary to link the plaintiff with the agreement. On this alone the application cannot succeed.

[9] A plaintiff has an onus as to the cause of action relied upon. He bears the onus of proving that his action is clear, complete and not excipiable. See **Gulf Steel (Pty) Ltd v Rack-Lite Bop (Pty) Ltd 1998 (1) SA 679 O**. The lack of the necessary averments with regard to the cession, also bearing in mind that a plaintiff cannot reply in summary judgment applications, results

in the plaintiff's application to be defective.

[10] The defendant also has a onus to satisfy the court that he has a bona fide defence to the action. This however does not mean the defendant has to prove his defence. He only has to advance facts which, should they eventually be proved at a trial, constitute a defence, stated differently, to advance a reasonable triable contention. See **Van Niekerk Summary Judgment, A Practical Guide** at 11-26 to 11 -27.

[11] The plaintiff's claim is in fact based on 9 742 different invoices as compiled in the schedule **B-1 to B-256**. The schedule indicate that on each of these invoices, certain payments, although in part only, were made by the defendant. The last column of the schedule, headed as “ **Difference**”, totals to the amount claimed in the particulars of claim. The plaintiff avers this amount to be a *liquidated amount* for the purposes of summary judgment.

[12] The crux of the defendant's argument is that this amount in dispute, in view of the service level agreement, is in excess of the agreed tariffs. It is common cause that these amounts were “*taxed off*” by the defendant on receiving each invoice for reason being in excess to the prescribed agreed tariffs.

[13] Stated differently, the dispute between the parties is whether the amounts claimed in the plaintiff's invoices were according to the agreed tariffs in the service level agreement or not. The plaintiff argues that the amounts are according the agreed tariffs whilst the defendant argues the opposite. It is not possible for the court on the papers before court to find yes or no. Owing the fact that the plaintiff may not reply, the defendant may avoid summary judgment by advancing facts which has to be rebutted by the plaintiff to be successful. See **Van Niekerk** supra at p 11-27, and **Geysdorp Trading Co v Nathym (Pty) Ltd 1954 (2) SA 575 T at 577 E-H** and **Venter v Cassimjee 1956 (2) SA 242 N at 245 F-H**.

[14] The defences raised by the defendant do not amount to a mere denial of the plaintiff's claim but in my view discharges the defendant's onus and constitutes a bona fide defence and he should be granted leave to defend. I cannot find that the facts advanced by the defendant are untrue and therefore the application cannot succeed.

[15] The argument on behalf of the defendant as to the absence of personal knowledge of the deponent to the verifying affidavit in terms if Rule 32 (2),


one F G Becker, in view of the finding above, need not be addressed any longer.

[16] I therefore make the following order:

16.1 The application for summary judgment is refused;

16.2 The defendant is granted leave to defend the action; and

16.3 The costs of the application will be costs in the cause.



HOLLAND-MÜTER AJ

BY ORDER OF COURT
REGISTRAR