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

**Case Number:** 65745/2019

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

.....  
**E.M. KUBUSHI**

**DATE: 25-01- 2021**

In the matter between:

**SS    PROFILING    (PTY)    LTD**  
**Plaintiff/Applicant**

(REG. NO.: 1997/11096/07)

and

**J P TERBLANCHE    Defendant/Respondent**

(ID NO.: [...])

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**JUDGMENT**

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**KUBUSHI J,**

*This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.*

[1] This is an opposed application for summary judgment which emanates from an action instituted against the defendant/respondent (J P Terblanche) for the alleged breach of a written loan agreement entered into between the plaintiff/applicant (SS Profiling Pty Ltd) and Gateway Auto Body CC, in respect of which the respondent has purportedly bound himself as surety thereto.

[2] Having filed a notice to defend and subsequently filed a plea, the applicant has applied to court for summary judgment on the basis that the respondent's plea does not disclose a cause of action.

[3] The respondent is opposing the summary judgment application on the ground that his plea raises a *bona fide* defence.

[4] In accordance with uniform rule 32 (3), upon hearing of an application for summary judgment the defendant may satisfy the court by affidavit that she/he has a *bona fide* defence to the action; such affidavit shall disclose fully, the nature and grounds of the defence and the material facts relied upon.

[5] In this instance, the nature and grounds of the respondent's *bona fide* defence to the applicant's claim are summarised as follows in the respondent's heads of argument:

5.1. The respondent has raised two special pleas, one being the lack of *locus standi*, the other being the lack of jurisdiction.

5.2. The applicant's particulars of claim are *ex facie* exceptible, as they lack averments necessary to sustain a cause of action and are vague and embarrassing as is envisaged in uniform rule 23.

[6] In regard to the special pleas raised the question is whether the said pleas are a *bona fide* defence entitling the respondent to be granted leave to defend the matter.

[7] Uniform rule 32 (3) requires that the court be satisfied that the respondent's defence as stated in his plea constitutes a *bona fide* defence to the applicant's claim.

[8] In deciding whether the defendant has set out a *bona fide* defence, all the court enquires, is whether on the facts so disclosed, the defendant has disclosed the nature and grounds of her/his defence; and whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.<sup>1</sup>

[9] The defences raised by the respondent in this regard are, in my view, *bona fide*. The defences are valid and good in law and it is clear that there is a possibility that the special pleas advanced may succeed on trial.

[10] As far as the respondent's contention that the applicant's particulars of claim are *ex facie* exceptible is concerned, the applicant's claim is founded on the alleged breach of a written lease agreement. Such a lease agreement

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<sup>1</sup> Erasmus: Superior Court Practice 2ed Volume 2 pD1-411.

is required in terms of uniform rule 18 (6) to be attached to the applicant's particulars of claim. It is common cause that the applicant has failed to attach the written agreement relied upon to its particulars of claim.

[11] The applicant contends that the lease agreement has been subsequently provided to the respondent. It is, however, worthy to note that the fact that the said lease agreement was sent to the respondent's attorneys by email and that it was included in the pleadings bundle and bundle for summary judgment, does not formally form part of the pleadings and remains not incorporated therein as is required in terms of uniform rule 18 (6). The pleadings are, thus exceptible.

[12] On the basis of the aforesaid, the summary judgment application cannot succeed.

[13] On the issue of the costs of the application, I am in agreement with the respondent that a cost order should be awarded against the applicant. In the old dispensation, when summary judgment was applied for after the filing of a notice to defend, it was understandable that the dismissal of the application would be without costs because the applicant would not be aware of the defence that the respondent would bring against her/his claim. However, in the new dispensation, where the plea is filed before the application can be launched, the applicant is placed in a better position and is well informed of the respondent's defence when taking the decision to apply for summary judgment. As such, it is my view that, where the application is instituted whilst

well aware that it would not succeed, the applicant must be mulcted with costs.

[14] This is one such application, where the applicant should be mulcted with costs. At the time of launching the application, the applicant was well aware that the special pleas raised are valid defences which might succeed at trial. The applicant had already been made aware that its particulars of claim were exceptible and should have known better that the respondent was going to oppose the summary judgment application on these grounds.

[15] In the circumstances I make the following order:-

1. The application for summary judgment is dismissed with costs.
2. The respondent is granted leave to defend the matter.

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**E.M KUBUSHI**  
**JUDGE OF THE HIGH**  
**COURT**  
**GAUTENG DIVISION, PRETORIA**

Appearance:

Applicant's Counsel	: Adv. L. Swart
Applicant's Attorneys <b>Incorporated</b>	: <b>Taute Bouwer &amp; Cilliers</b>

Respondent's Counsel : Adv. J. Stroebel  
Respondent's Attorneys : **Raath Attorneys.**

Date of hearing : 04 November 2020  
Date of judgment : 25 January 2021