REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2019/33240

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

7 June 2021

DATE

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MOKOSE SNI

In the matter between:

STEFANUTTI STOCKS (PTY) LIMITED — Plaintiff

(GEOTECHNICAL DIVISION) — *(Applicant in summary judgment)*

(Registration number: 2003/022221/07)

and

KPMM ROADS AND EARTHWORKS (PTY) LIMITED — Defendant

(Registration number: 2004/034445/07) — *(Respondent in summary judgment)*

JUDGMENT

MOKOSE J

[1] In this application for summary judgment, the plaintiff seeks payment of the sum of R2 804 207,52 plus interest and costs. It is opposed by the defendant on the grounds that it is not the author of the email upon which the plaintiff relies and as such, resists the summary judgment on the basis that it has a *bona fide* defence to the plaintiff's claim.

[2] The facts are briefly that on or about 14 May 2018 the plaintiff and an entity known as KPMM Construction (Pty) Limited (hereinafter known as "the company") concluded a written sub-contract in terms of which the plaintiff would provide and install piling in relation to the doubling of the Gwaing River Bridge in George in the Western Cape. In exchange for the performance of such work, the plaintiff would from time to time issue invoices for payment.

[3] In pursuance of the agreement, it is alleged that the company and the defendant instructed the plaintiff to issue all agreement related invoices to the defendant as opposed to the company. The defendant undertook to make payment of all the invoices to the plaintiff. The plaintiff relies on an email by Mr Kevin Padayachee dated 25 February 2019 which read as follows:

"As per our payment advice and your statement, we hereby confirm that the amount due to yourselves is R2 804 270,52 including VAT and excluding retention for the work done on the Gwaing River `bridge contract. As discussed with yourself, our current cash flow situation and our plans to remedy this situation, we note that payment will be made as stated below....."

[4] The plaintiff contends that the defendant, duly represented by its operations director, acknowledged unconditionally and in writing its indebtedness to the plaintiff in the sum of R2 804 207,52 in exchange for the services rendered by the plaintiff to the company in terms of the agreement. The director undertook to make payment as follows:

(i) a down-payment of R1 000 000,00 on 29 March 2019;

(ii) a second down-payment of R1 000 000,00 on 26 April 2019; and

(iii) a final down-payment of R804 207,52 on 31 May 2019.

[5] The plaintiff avers that on instructions of both the company and the defendant it punctually and in compliance with the agreement issued invoices in terms of the agreement. However, the defendant and/or the company failed or refused or omitted to make payment to the plaintiff commensurate to the invoices issued and as such, became indebted to the plaintiff in the sum of R2 804 207,52.

[6] The defendant failed to make such payment to the plaintiff in respect of the debt or undertaking as stated above. The plaintiff launched an action against the defendant seeking the following relief:

(i) Payment in the sum of R2 804 207,52;

(ii) Interest at a rate of 10.25% a tempore morae on the following amounts:

(a) R2 426 346,91 from 25 June 2018 to date of payment; and

(b) R377 923,61 from 25 July 2018 until date of payment;

(iii) Costs of suit.

[7] The defendant filed an exception causing the particulars to be amended. The defendant's plea was served after a notice of bar had been served.

[8] The plaintiff, having considered the defendant's plea, formed the view that it neither disclosed a *bona fide* defence to the action nor raised a triable issue and elected to pursue the summary judgment.

[9] Rule 32 of the Uniform Rules of Court was amended on 1 July 2019. It permits a summary judgment application to be brought 15 days after the defendant has filed its plea. The Full Bench in the matter of **Raumix Aggregate (Pty) Ltd v Richter Sand CC, and Similar Matters**[1] held that the purpose of the amended Rule 32 is to:

> *"...allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice."*

[10] Rule 32(2) provides that a plaintiff in a summary judgment application must set out the following in its affidavit supporting such an application:

(i) it must verify the cause of action and the amount claimed;

(ii) it must identify any point of law relied upon;

(iii) it must identify the facts upon which the claim is based; and

(iv) a brief explanation as to why the defence pleaded does not raise an issue for trial must be set out.

[1] 2020 (1) SA 623 (GJ) at 627E-F

[11] In opposing a summary judgment application, the defendant must set out in the affidavit resisting the summary judgment, facts which, if proved at the trial, will constitute an answer to the plaintiff's claim[2]. Accordingly, the defendant must disclose fully the nature and grounds of his defence and the material facts upon which he relies. The defence must have a reasonable possibility of success at trial.

[12] In deciding whether a defendant has set out a *bona fide* defence to the summary judgment application, a court must consider whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be *bona fide*. The court must therefore be apprised of all facts upon which the defendant relies with sufficient particularity and completeness so as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be granted for the defendant. Whilst the defendant's defence must go to the merits of the application and must be valid in law, the defendant is not required to disclose the whole of his defence but must disclose the 'nature and grounds' of a *bona fide* defence and the material facts relied upon. The disclosure of the defendant must be such that the material facts are sufficient as to persuade the court that what has been alleged by the defendant, if it is proved at the trial, will constitute a defence to the plaintiff's claim.

[13] The term 'cause of action' was defined in the matter of **McKenzie v Farmer's Co-Operative Meat Industries Limited**[3] as *"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

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[2] Breytenbach v Fiat SA (Pty) Ltd 1976 (2) SA 226 (T)
[33] 1922 AD 16 at 23

[14] The plaintiff contends that its claim is premised on a written acknowledgment of indebtedness ("AOD") and attendant undertaking by the defendant to pay the amount invoiced by the plaintiff to the company.

[15] The defendant's plea consisted of a special plea of non-joinder and a plea on the merits. The defendant contends that the cause of action is inextricably linked to the agreement and an alleged oral instruction. It further contends that the plaintiff verifies the cause of action which is against the company and yet only seeks summary judgment against the defendant.

[16] The crux of the defendant's defence is that the plaintiff has sued the incorrect party. It should have sued the company being the entity with whom it had concluded the agreement attached to the particulars of claim. The defendant is of the view that the plaintiff has failed to sue the company for the reason that it has been placed under business rescue and is avoiding to stand in line with other creditors in submitting a claim against the company's liquidated estate.

[17] Furthermore, the defendant contends that the plaintiff's affidavit in support of the application for summary judgment does not comply with Rule 32(2)(b) in that it fails to verify its cause of action with clarity and exactitude.

[18] Whilst the plaintiff alleges in its particulars of claim that the cause of action is based on an agreement between itself and the company and an instruction by the company to issue all 'agreement related invoices' to the defendant as opposed to the company, the defendant is of the view that the application for summary judgment should be refused on the ground that the company should have been joined as a defendant in the matter and in support thereof, referred the court to the matter of

Cape Business Bureau (Pty) Limited v Van Wyk and Another[4] where the court held that if a plaintiff fails to verify his cause of action with clarity and exactitude it is defective and his claim will fail.

[19] After careful consideration and a thorough reading of the particulars of claim I am reluctant to support the plaintiff's application for summary judgment for the reason that the cause of action is inextricably linked to the agreement. Whilst the particulars of claim give a background to the matter and refer to the agreement concluded by the company with the plaintiff, it further informs of the terms and conditions of the agreement and the invoices issued to the company. The particulars of claim describe how the indebtedness of the defendant occurred where the defendant undertook to pay the debt of the company thereby identifying the breach of the AOD. In my view, the cause of action pleaded, being the agreement concluded, was concluded not with the defendant but with the company where the action was being pursued only against the defendant. Accordingly, I am of the view that the application for summary judgment should fail as the plaintiff has failed to verify its cause of action.

[20] The defendant pleads that it has a *bona fide* defence to the action as per Rule 32(3)(b). In considering whether a defendant has set out a *bona fide* defence, the court considers whether the defendant has disclosed the nature and grounds of his defence and whether on the facts so disclosed, the defendant appears to have a defence which is *bona fide* and good in law.[5]

[21] The defendant's defence to the action are:

(i) that the plaintiff failed to join the company as a party to the action;

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[4] 1981 (4) SA 433 (C) at 439

[5] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

(ii) that the defendant did not unconditionally acknowledge it indebtedness to the plaintiff as it was to the author of the mail; and

(iii) that the defendant is not a party to the agreement and that the plaintiff is in fact suing the defendant in terms of the agreement and not the AOD.

[22] The plaintiff alleges that the defendant's plea of non-joinder does not raise a triable issue because the company is in business rescue and that the moratorium contemplated by Section 133 of the Companies Act 71 of 2008 prevents any party from pursuing enforcement against the company. Furthermore, the plaintiff is of the view that on any permissible permutation, the company does not have any legally recognised interest in the subject matter of this litigation.

[23] I disagree with the plaintiff. Section 133(1)(a) and (b) of the Companies Act 71 of 2008 provides that no legal proceedings against the company may be commenced or proceeded with in any forum except in limited circumstances which include where the business rescue practitioner has provided written consent or with the leave of the court.

[24] Secondly, the defendant contends that the email was sent by the company and not be the defendant. I agree with the defendant that if the court were to find that the email was sent on behalf of the company then the defendant would be prejudiced as it would not have been given an opportunity to put its evidence before the court where findings can be made against it.

[25] A further defence is that the defendant did not acknowledge that it is indebted to the plaintiff. The plaintiff asserts that the email sent by Mr Padayachee, on which the plaintiff relies on, contains

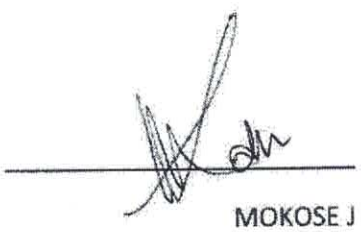
an equivocal admission of indebtedness by the company, being the debtor. The plaintiff asserts further that Mr Padayachee had ostensible authority to address the email to the plaintiff issuing the AOD on behalf of the defendant so binding the defendant.

[26] This is denied by the defendant who also denies that it is the debtor and that the email is an AOD.

[27] I am of the view that the issue of whether Mr Padayachee had ostensible authority and is now estopped from denying that he was so authorised cannot be dealt with in the summary judgment application. There has been no replication filed. I am accordingly satisfied that the defendant has a *bona fide* defence to the action. Accordingly, the following order is granted:

(i) the application for summary judgment is dismissed with costs; and

(ii) the defendant is granted leave to defend the action.



MOKOSE J

Judge of the High Court

Gauteng Division, Pretoria

For the Applicant:

Adv P Lourens instructed by

Roestoff Attorneys

For the Respondent:

Adv C van der Linde instructed by

Knowles Husain Lindsay Inc

Date of Hearing:	13 October 2020
Date of Judgement:	7 June 2021

Judgment transmitted electronically