IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 7328/2021P

In the matter between:

BLUEBIRD LOGISTICS (PTY) LTD	**APPLICANT**
and	
ZULULAND BUS SERVICES CC	**FIRST RESPONDENT**
MDUDUZI WILFRED SITHOLE	**SECOND RESPONDENT**

JUDGMENT

BEZUIDENHOUT J:

[1] Applicant brought an application for summary judgment in the sum of R2 411 909-87 together with interest thereon and costs on a scale as between attorney and client. In addition it sought an order that a list of property as set out in the notice of motion be declared especially executable and ordering that Applicant be entitled to attach and remove the said movable property from Respondents. It also sought an order declaring the movable property executable generally hypothecated in terms of the

bond. The application was opposed by Respondents who had filed their plea and an opposing affidavit.

[2] The affidavit in support of the application for summary judgment was signed by one Pieter Sarel Nicolaas Swart, a director of Applicant. He stated that he was involved in the day to day business activities of Applicant and that he had perused and familiarised himself with all the documentation and records pertaining to the debt owed relating to this matter and all the pleadings therein. He confirmed that the facts contained therein and in the particulars of claim are within his personal knowledge and correct. He further contends that Respondents do not have any *bona fide* defence and entered notice of intention to defend and their plea solely for the purpose to delay the matter.

[3] Respondents raised various points *in limine* which will be dealt with firstly. It was submitted that the deponent to the affidavit did not set out that he was duly authorised to bring the application and that it was therefore not authorised. This issue has been decided in the case of Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) where it was held that the deponent to the affidavit need not be authorised to either bring the application or depose to the affidavit but that it is necessary that the attorney be authorised to do so. If the opposing side was of the view that the attorney was not authorised then the procedure in terms of rule 7 had to be followed.

[4] It was contended that the deponent could not swear positively to verify the cause of action and amount as he did not have the requisite personal knowledge. His knowledge of the facts is not direct but derived from a perusal of the documents furnished to him alternatively discussions which he may have had. He does not have the requisite personal knowledge to depose to the affidavit. The deponent is a director of Applicant a private company. He has knowledge of the day to day activities as set out in the affidavit and acquainted himself with all the documents relating to the claim and also has personal knowledge thereof. This is sufficient as is set out in the case of Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP).

[5] The deponent had to verify each and every amount that may be claimed in the summons and particulars of claim. There are at least four causes of action set out and the failure of the deponent to verify each and every cause of action renders the application fatally defective. In paragraphs 9 and 10 of the affidavit in support of the application for summary judgment the deponent confirms the cause of action as in the amended declaration. It refers to the particulars of claim as amended and to the claim as set out therein. It is accordingly sufficient to establish exactly what the causes of action are and that the fact the affidavit of the deponent merely states cause of action and not causes of action does not take the matter any further.

[6] It was submitted the relief sought by Applicant in paragraphs 4 and 5 of the notice of the application are incompetent for an application for summary judgment. They relate to the issue of declaring certain movable property specially executable and that the movable property generally hypothecated in terms of the bond be declared executable. It was submitted on behalf of Respondent that uniform rule 32(1) specifically sets out the causes of action upon which an application can be brought for summary judgment and that this relief does not fall therein. It was submitted on behalf of Applicant that the declaration of executability of movable property is ancillary relief to the judgment as well as the hypothecation of a notarial bond and is permissible in summary judgment proceedings. I was referred to the decision of Nedperm Bank Ltd v Verbri Projects CC 1993 (3) SA 214 (W) at 219 C – D. It was submitted on behalf of Respondents that the relief sought was not that of perfecting the notarial bond. In this matter it was held that to declare movable property executable was ancillary relief which could be granted. In the matter of NPGS Protection and Security Services CC and Another v Firstrand Bank Ltd 2020 (1) SA 494 (SCA) it dealt with declaring immovable property executable. Although summary judgment can be brought for the monetary relief it has to be accompanied in this division by an application in terms of rule 46 to declare immovable property executable and accordingly the said decision is distinguishable from the present situation. Although it may be ancillary as set out in the decision of Nedperm Bank I am not satisfied that it is relief which is to be granted with an application for summary judgment.

[7] It was submitted on behalf of Applicant that the statements were attached and there was an acknowledgment of debt. If it was paid Respondent could easily have put up proof of payment which they did not do. The bonds are attached to the particulars of claim and the acknowledgment of debt as well. There is accordingly no tangible defence that can be determined and that the defences are merely to delay. I was referred to the decision of JoobJoob Investments v Stocks Mafundla (ZEK) 2009 (5) SA (1) (SCA) where it was held that there must be a triable issue. Further that summary judgment proceedings must no longer be regarded as extraordinary and drastic and that one should rather concentrate on the proper application of the rule. There must be a sustainable defence. It was submitted that Respondent admitted that he was supplied with fuel from time to time and that the invoices were annexures to the founding affidavit. Respondent had to prove that he had made the necessary payments which was not done and therefore there was no triable issue.

[8] There is further no dispute that the acknowledgment of debt was signed by the Second Respondent on behalf of First Respondent. Respondents on 17 June 2021 paid the sum of R 100 000-00 and R150 000-00 in March and April 2021. The decision not to supply Respondent with fuel was a business decision that was taken by Applicant. No proof in respect of the arrear invoices was provided and the onus of payment has not been discharged and the debt of R 1 211 908-87 falls due.

[9] It was submitted on behalf of Respondent that all that Respondent needs to show is that there is an issue which could be proved at trial and it does not need to prove that it is true. It is sufficient if Respondents affidavit shows a reasonable possibility that the defence advanced may succeed at trial. I was referred to Marsh and Another v Standard Bank of South Africa Ltd 2000 (4) SA 947 W at 950.

[10] It was submitted that Respondents have set out in their opposing affidavit facts which will constitute a good defence.

[11] In their plea Respondent denies that it is indebted to Applicant in the sum of R 2.5 million. It is contended that Second Respondent was a member of Imyameka

Trading CC and that after payments were made there was an amount due to Jubane Petroleum Pty (Ltd) and that Imyameka was placed into business rescue on 23 December 2015. Jubane's claim is included in the business rescue plan and Jubane was paid the dividend and Imyameka's liability to Jubane was lawfully extinguished. Imyameka was also in July 2017 placed under liquidation. There is an action still pending where Jubane instituted action against Second Respondent and his father based on a suretyship agreement and a surety bond.

[12] Applicant purchased Jubane and took over the debts owing to Jubane as a going concern. Thereafter Petro Fuel purchased the debts owing to Applicant as a going concern. Second Respondent was advised by representatives of Applicant that as he was the sole member of First Respondent he remained liable for the debts to Jubane and had to sign the acknowledgment of debt otherwise they could not continue to supply him with diesel. As a result of these representations the acknowledgment of debt was signed. The said misrepresentation was incorrect. The acknowledgment related to a claim for payment of R 2.5 million in respect of petroleum delivered by Applicant to First Respondent. No such delivery had taken place between them.

[13] Second Respondent was not liable to Jubane because he had not signed the suretyship agreement and therefore there was no debt owed to Applicant by Second Respondent who would otherwise not have signed the acknowledgment of debt if they had not been misled. In annexure "B" there is a debit entry on the 15 March 2021 of the transfer R 2.5 million with no explanation therefore. There are accordingly two actions against Second Respondent at least where different parties claim payment of the same indebtedness by Imyameka which was extinguished by payment of the dividend in terms of the business rescue plan. It is contended that the acknowledgment of debt is not in respect of products supplied to Frist Respondent but that was supplied to Imyameka which went into business rescue and later into liquidation. They accordingly deny that they are in arrears. It was further submitted that there are common directors between Jubane, Applicant and Petro Fuel. Applicant must therefore have been aware of the adoption of the business rescue plan and the payment thereunder. It was further

contended that the acknowledgment of debt was taken over by Petro Fuel and that Applicant has no *locus standi* to institute the action. This interaction is not dealt with by Applicant and is an issue which needs to be addressed by discovery and at trial.

[14] It is further contended that payment was made in the sum of R 1 000 000-00 in the mistaken belief that the acknowledgment of debt was lawfully concluded and validly binding and therefore Respondent would have a counter claim against Applicant for the repayment thereof. It is contended that there are allegations which require Applicant to replicate to and are triable issues. It is further contended that from the plea it was clear that there was a *bona fide* defence and that Respondents should accordingly be granted leave to defend the said matter.

[15] In the decision of Independent Electoral Commission v Krans Onspannings 1997 (1) SA 244 (TPA) it was held at 249 that a defendant does not need to prove his defence. This means that the court does not need to evaluate the evidence or to reach a conclusion that the defence probably will succeed. It refers to the decision of Soorju v Pillay 1962 (3) SA 906 (N) at 908 G:

> "I consider this test a guide to the meaning of the same words in the rule of the magistrate's court. A defendant must consequently set up his defence honestly, disclose fully the nature and grounds of it, insofar as it relies upon facts, lay before the court facts which if proved will be a good defence. The defence must accordingly not be set out vaguely.

[16] It was held in Breitenbach v Fiat South Africa Eds Bpk 1976 (2) SA 226 (TPD) at 229 that the word "may" confirms a discretion on the court that even if the defendants affidavit does not measure fully up to the requirements of sub rule 3 (b) of rule 32 the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion must however not be exercised capriciously so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[17] The Court will not be disposed to granting summary judgment where giving consideration to the information before it is not persuaded that Applicant has an unanswerable case.

[18] In the present matter what is set out in Respondents opposing affidavit is much of what is set out in the plea which was filed. It is lengthy plea which provides much detail. In both the affidavit and the plea it is alleged that there had been various takeovers of the company and that business rescue proceedings had been completed in terms of which certain payments were made and that that extinguished the debts. It also contends that debts were taken over and businesses as going concerns.

[19] The issue that the acknowledgement of debt was signed under duress as they were told that they had to sign it or would not be provided with further fuel does not in my view disclose a defence. However, that on its own is not sufficient to prevent summary judgment. The further issues raised in the papers are complex relating to the different takeovers business, business rescue proceedings and payments made and whether there is any payment due at this stage. It is alleged by Respondents that they in actual fact have a counter claim due to the payment that they had made. From a reading of the affidavit and the plea it would appear that there may possibly be defences that may be proved at trial. Although it may be a borderline case, it is in my view considering all the factors mentioned that summary judgment be refused in the circumstances.

Accordingly the following order is made:

1. Summary judgment is refused.
2. Respondents are granted leave to defend the matter.
3. Costs are reserved.

BEZUIDENHOUT J.

JUDGMENT RESERVED ON:	**25 AUGUST 2022**
JUDGMENT HANDED DOWN ON:	**21 SEPTEMBER 2022**
COUNSEL FOR APPLICANT:	**D M B BOND**
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