

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 15788/2007

DATE: 6 AUGUST 2008

5 In the matter between:

ESPADON MARINE (PTY) LIMITED APPLICANT

and

HIK ABALONE FARM (PTY) LIMITED DEFENDANT

10 JUDGMENT

DAVIS, J

15 The defendant in a notice of motion initially applied for the following relief;

20 “1.1 Setting aside the plaintiff’s notice of bar dated the 18th of January 2008 an application for judgement of default dated 8 February 2008;

25 1.2 Directing the plaintiff to comply with the provisions of Rule 18(6) as it was called upon to do so in terms of the defendant’s notice in terms of Rule

30(A) dated 22 January 2008;

1.3 Granting the defendant leave to reapply
on these papers duly supplemented for
further relief in the event of the plaintiff
failing to comply with orders sought in
1.2 above within ten days;

1.4 Directing the plaintiff to pay the costs
hereof.

2. Alternative to 2.1 condoning the
defendant's failure to respond to the
plaintiff's notice of bar dated 18 January
2008.

2.2 Uplifting the bar pursuant to the
plaintiff's notice of bar dated 18 January
2008 and setting aside the notice of bar
an application for judgment by default
delivered pursuant thereto.

2.3 Condoning the late delivery of the
plaintiff's notice in terms of Rule 30(A)
dated 22 January 2008.

2.4 Directing the plaintiff to pay the costs
hereof only in the event of it opposing
same.”

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It now appears from the submissions made by Mr Sievers on
behalf of the defendant that all that defendant now seeks is
relief in terms of the alternative prayer, that is that the bar be
uplifted, that it be given leave to file its plea and the costs of
the application stand over for determination of trial.

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It appears to be trite law that two requirements are necessary
to be established prior to such an application being successful.

1. a reasonable explanation as to the failure to pose the
notice of bar;

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2. a measure of particularity to be shown by the
applicant in the case relating to the merits of its case.

Indeed I shall return to both of these requirements
presently.

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The chronology in this case is of critical importance. It
appears that in November 2007 plaintiff instituted an action
against the defendant, which action plaintiff is characterised
as involving a multi-million rand damages claim. On 19
November 2007 defendant delivered an entry of appearance to

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defend. On 16 January 2008, defendant delivered a Rule 35(14) notice requesting that plaintiff make available for inspection any written agreement in respect of the joint venture project referred to in paragraph 5 of its Particulars of Claim by plaintiff. On 18 January 2008 plaintiff delivered a notice of bar to defendant's Cape Town service address. On 21 January 2008 defendant delivered a Rule 30 notice calling upon plaintiff to comply with Rule 18(6) in that it had failed in its Particulars of Claim to allege whether the agreement set out in paragraph 5 thereof was written or oral.

On 22 January 2008 plaintiff served a Rule 35(14) notice on defendant calling for certain documentation for "purposes of possible replication to defendant's plea". On 23 January 2008 defendant filed a Rule 30(A) notice calling upon plaintiff to comply with Rule 18(16) in respect of the agreement relied upon as the Particulars of Claim. On 4 February 2008 it appears that the notice of bar came to the defendant's attention for the first time.

On 6 February 2008 defendant filed a Rule 30 notice alleging that the delivery of a notice of bar was an irregular step in that plaintiff had failed to comply with defendant's notice in terms of Rule 35(14) of the 15th of January 2008. On 5 February 2008 defendant's attorney wrote to plaintiff's attorney

requesting that they uplift the notice of bar and if agreement existed in respect of the joint venture that they furnish a response to that effect. On 8 February 2008 plaintiff delivered an application for default judgment to be heard on 18 February 2008. On 13 February 2008 defendant delivered the present application for removal of the bar. On 13 February, being the same date, defendant's attorney wrote to plaintiff's attorney proposing that should the plaintiff consent to the relief sought by the defendant as I have outlined it, no cost would be sought against the plaintiff.

On 18 February 2008 Waglay, J made an order postponing the matter to today. Accordingly the application brought by defendant was not heard but postponed for today's hearing.

It is also relevant to note the following: After the application had been lodged by the defendant, together with the supporting affidavit deposed to by defendant's attorney, Mr Inglis on 12 February 2008, a lengthy answering affidavit was deposed to by Mr Coetzee, the attorney acting on behalf of the plaintiff, on 15 February 2008. Three days later, that is the morning, before the matter came before Waglay, J, defendant deposed to a replying affidavit again by way of Mr Inglis.

The matter, having been postponed, a further supplementary affidavit was filed, this time by Mr Haw who described himself as the director of the defendant, such affidavit being deposed to on 9 July 2008. Attached to this affidavit was a copy of defendant's plea in response to plaintiff's Particulars of Claim.

With this chronology, I turn to an evaluation of the two requirements, which need to be established for a successful application of this kind.

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1. The explanation for the delay

In the founding affidavit to this application Mr Inglis states as follows;

“On the afternoon of 4 February 2008 I opened amongst the defendant's attorneys incoming mail for that day an envelope addressed to the defendant's attorneys by the office of Mr H W Hurter, the Sheriff for the District of the Cape, the defendant's attorneys Cape Town service address in this matter. Contained in the envelope were the following documents.

13.1 A notice of bar that had been served by the plaintiff's attorneys upon the office of the sheriff on 18 January 2008 ...

13.2 Plaintiff's notice in terms of Rule 35(14)

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served upon the office of the sheriff on
the 22nd of January 2008 ...

In addition to this explanation, in the replying affidavit, to
5 which I have already made reference, Mr Inglis states as
follows;

10 "When the plaintiff's notice of bar came to my
attention on 4 February 2008 it was immediately
apparent to me that the time within which the
defendant was to have delivered its plea back in
terms of the notice of bar (at any event) had
expired. This created for the plaintiff (and for
myself) an immediate practical problem. I could
15 see little point in embarking upon a witch hunt to try
and identify and punish the person responsible with
the situation that had arisen. However as I have
stated in the founding papers I did telephone Mr
Hurter and was entirely satisfied with his reaction
20 to the situation. However, I had not bargained
upon the approach that had been adopted by the
defendant in its answering papers. As the
plaintiff's attorney in its answering papers points
out, I am an attorney of some 23 years experience.
25 In my experience even in matters where the parties

have litigated on a less than amicable basis my experiences have been that I have been treated in the collegial (a formal) manner. My experiences have not been of a series of "ambushes" such as I believe the plaintiff had endeavoured to lay in the current matter. (There is some confusion in this paragraph as to whom Mr Inglis represents. I have quoted the paragraph as it appears in the affidavit but it must be borne in mind that Mr Inglis is the attorney for the defendant).

When I approached Mr Hurter to request that he act as my Cape Town service address I did so because he being an officer of the Court of many years standing was accustomed to dealing with court process and documents. I also have a personal and business relationship with him, having represented him on a number of occasions in legal matters. The arrangement, which was agreed (and implemented) was that in the case of shortage notices (such as formal court notices, notices of contention and further the like) these would be transmitted to my offices by the Sheriff's office by way of fax. This has been successfully implemented since the inception of the arrangement between myself and Mr Hurter, the notable (and regrettable)

exceptions being those relating to the plaintiff's notice of bar and notice in terms of Rule 35(14). In the case of longer documents (such as applications etc) the arrangement was that my office would be telephoned and arrangements would be made for the collection of the article. I have discussed the current allegation with both Mr Hurter and Mrs Theresa Withers, to whom the plaintiff incorrectly referred to as Willois. In this regard I refer to the affidavit by Mr Hurter."

Mr Hurter confirms the contents of Mr Inglis' affidavit in the confirmatory affidavit.

15 Mr Spamer, who appeared on behalf of the plaintiff, did not appear to take much issue with this aspect of the case and rightly so. There had been an administrative mistake which it would be difficult to attribute to the defendant. The explanation itself is of a reasonable and plausible kind which
20 would satisfy the requirement insofar as the application is concerned.

Bona Fide defence

I turn therefore to deal with the second of the two
25 requirements, that is that there is some indication of a *bona*

fide defence to the plaintiff's claim, which *prima facie* has some prospects of success (see rule 27(1)). Mr Spamer focused most of his argument, which he eloquently presented to me this morning on this issue. In essence, the argument runs along the following lines: The founding affidavit provides little indication of the contents a *bona fide* defence to plaintiff's claim. The replying affidavit is at best skeletal in its description of defendant's case; to the extent that there is evidence, which would satisfy Rule 27(1), it is contained in the defendant's supplementary affidavit of Mr Haw of 9 July 2008, which is hopelessly late and which provides, in Mr Spamer's view no indication as to why it has come at the 'proverbial 11th hour', nor is there any appropriate procedure followed in order for this affidavit to be duly admitted to Court.

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On this basis Mr Spamer submitted that, if the Court is not prepared to take account of the contents of the supplementary affidavit, then insufficient evidence has been put up by the defendant to meet the requirement, as I have outlined it in terms of Rule 27(1).

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In his Mr Spamer correctly sets out the law in the following fashion:

25 It is required of a defendant who wishes to lift a bar to set out

sufficient information to enable the Court to come to the conclusion that the defence is *bona fide* and not put up merely for the purpose of delaying such satisfaction on the plaintiff's claim. The defendant does not, as a rule of law, necessarily have to set out the nature of the defence, nor does he necessarily have to make out a *prima facie* defence in his affidavit. There may however be occasions when the defendant will be obliged to do one or other, or even both, in order to satisfy the Court that it is *bona fide* in its intention to defend, whether he be obliged or not will depend upon *inter alia* the amount of information the Court can abstract from the pleadings which may be before it. See Dalhousie v Bruwer 1970(4) SA 566 (C) at 571 – 572. See also Colyn v Tiger Food Industries Ltd t/a Mead Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at 9.

The question, crisply is the following: Is there enough information for the Court to satisfy itself that there is a *bona fide* intention to defend. Mr Sievers contended that in matters of this kind which are brought on motion, a court must follow the usual rules with regard to motion proceedings and examine the contents of the founding affidavit and answering affidavit. In the founding affidavit Mr Inglis says that;

“The defendant's legal representative has

experienced some difficulty with the question of plea arising more particularly from the allegations contained at paragraph 5 thereof."

5 He then continues;

10 "The plaintiff however in his particulars failed to state, as it was obliged to have done in terms of the provisions of Rule 18(6) whether the contract (for within the context of the plaintiff's Particulars of Claim that is what the joint venture project is) was "written or oral and when, where and by whom it was concluded".

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In short Mr Sievers submitted that, in the founding papers the defendant had stated that it was having considerable difficulty in puzzling out the very nature of the plea in order to develop an adequate defence thereto.

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In the replying affidavit of 18 February with the advantage of the answering papers which have been deposed to on 15 February Mr Inglis is able to take the matter slightly further.

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"With the plaintiff's statement now before the above Honourable Court that the very thing upon which the plaintiff relies for its relief it seeks in its claim against the defendant is not based upon agreement between the parties, the defendant is even more at a loss to know how it is to plead to the plaintiff's claim.

To the extent that the defendant is able to guess at the true nature of the plaintiff's alleged claims, defendant denies a joint venture project alleged by the plaintiff, the duty of care alleged pursuant thereto, indeed any contractual privity between plaintiff and defendant of the nature alleged by the plaintiff in its Particulars of Claim.

Such contractual bonds as may attach to the parties for the purpose of the subject matter alleged by plaintiff exist between the individual parties and Hatcheries. The defendant strongly suspects that the reason the plaintiff has formulated its claim with itself as plaintiff is to avoid the exclusion of liability by the defendant Hatcheries as set out in the

Agreement of Lease between defendant and Hatcheries, a copy of which is annexed and from which it is evident, the term is Hatcheries and not as the plaintiff has suggested.”

In this particular connection, Mr Sievers pointed out that it was only upon receipt of the answering papers on 15 February that various agreements which were alleged to have been concluded were referred to (see paragraph 11.5 of the answering affidavit) and in which the plaintiff undertook to be made available at the hearing if the application should be required or necessary.

To the extent that the plaintiff had a justifiable complaint with regard to the explication of the defence as contained in the supplementary affidavit Mr Sievers submitted that the initial replying affidavit had been deposed to in great haste, having been required to be placed before the Court for a possible hearing on 18 February 2008. The supplementary affidavit of 9 July 2008, which I might add, is almost a month prior to this hearing, was completed in a ‘more relaxed time frame’, given that the parties knew that the matter had been postponed to this day.

In that affidavit Mr Haw says;

“The need for the supplementary affidavit has arisen from the view that defendant is in the position to sufficiently plead to the plaintiff’s Particulars of Claim in the light of the averments made in the plaintiff’s answering affidavit.”

It is significant that the plea, attached to this affidavit, to a very large extent, contains a series of denials; a denial that there is a contract between the parties, a denial that the law of defect is applicable to such a case.

Mr Sievers submitted that once the case turns on the question of a delictual course of action as opposed to a contractual course of action, then the very nature of plaintiff’s case becomes markedly more complex in the light of *dicta* of the Supreme Court of Appeal in Trustees Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd 2006(3) SA 138 (SCA) where the Court adopted a cautious approach about extending delictual liability to new situations. In particular, it referred to the earlier decision in Lillicrap Wassenaar and Partners v Pilkington Brothers (Pty) Ltd 1985(1) SA 475 (A), where it was held that concurrent delictual liability for pure economic loss

will not be allowed where the parties relationship is governed by contract.

Mr Sievers submitted that the Court in the Two Oceans
5 Aquarium case extended its reasoning to a situation where the parties had not yet been in a contractual relationship at the time of the alleged delict but where it had been anticipated that they would in the future conclude a contract and where the claimant had been in a position to avoid the risk of harm by
10 contractual means, but failed to do so. The plaintiff, as an alleged joint venture partner of the defendant, was in a position to avoid the risk of harm by contractual means. Mr Sievers's point made, was that, if the factual edifice as set out in the founding papers is examined together with the
15 expansion, to some extent in the replying papers, and developed in the supplementary affidavit, it is clear that a *bona fide* course of defence has been raised. This was thus not a case where the defendant had adopted a stratagem simply for the purposes of delay.

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Turning to the applicable law in point, as I noted earlier the defendant does not have to set out the comprehensive details of a defence, nor necessarily to make out a *prima facie* defence in its affidavit. What it has to do, it appears to me, is
25 to comply with the rule, which is to show that it has a *bona fide*

defence to plaintiff's claim, which *prima facie* has some prospect of success. How does the Court deal with this requirement?; it examines what is put up to it on affidavit, and with its own knowledge of the law, or alternatively the knowledge of the law which is advanced in this case by defendant, it makes a determination, a determination which has to weight other than to examine whether the rather low threshold of Rule 27(1) has been met. It is important that the threshold not be placed at too high a level. Consider the alternative. The alternative is that the notice of bar continues, the default judgment follows, and that rights enshrined in Section 22 of the Constitution, (Republic of South Africa Constitution Act 108 of 1996), being , the right of access to a court, is to some extent limited, perhaps unjustifiably so. I make no comment on this argument, save to say that in an interpretation of any such rule it is imperative to take account of the objects and purport of the constitution (see Section 39(2) thereof).

In my view, the founding and replying affidavits provide some basis of explanation. Furthermore, it was, in my view, not unreasonable for a further affidavit to be put up, particularly in that Waglay, J had postponed the case to today. There was a month between the time that that affidavit was filed and the hearing of this case, more than adequate opportunity for any

further evidence to be placed before this Court, had the plaintiff so wished to do.

In my view the defendant has met the requirements as set out in Rule 27(1) of the Act. Accordingly the notice of bar of 18 January 2008 is set aside. The plaintiff is given leave to file its plea. The costs of this application will stand over for determination at the trial.

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DAVIS, J

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