Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 25277/09

In the matter between:

ONYX DISTRIBUTORS CC **Plaintiff**

and

JENTA COURIERS **Defendant**

JUDGMENT DELIVERED: 3 FEBRUARY 2011

BINNS-WARD J:

[1] The plaintiff has applied for summary judgment in respect of its claim of R336 938,34, allegedly due and payable by the defendant in respect of services rendered. It appears from the papers that the plaintiff is a transport company and that the defendant operates a courier business.

[2] The defendant opposed the application on the basis contemplated in rule 32(3)(b) of the Uniform Rules of Court. In doing so it was required to set out in an opposing affidavit the nature and grounds of its defence and to state the material facts sufficiently fully to satisfy the court that the defence is *bona fide*. What is required of a defendant to comply with the sub-rule has been authoritatively stated in the oft quoted *dicta* of Corbett JA in in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E[1]:[O]ne of the ways[2] in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) 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 both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty.) Ltd. v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N), *Arend and Another v Astra Furnishers (Pty) Ltd*, [1974 (1) SA 298 (C)] at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliot*, 1948 (1) SA 1084 (C) at p. 1087; *Herb Dyers* case, *supra* at p. 32.)

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[1] Cf. also *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 All SA 396) at para.s [22]-[25].

[2] The other way is by providing security, as contemplated by Uniform Rule 32(3)(a).

(The significance of the underlined sentence was recently emphasised in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at footnote 11.)

[3] The defendant delivered two affidavits in opposition to the application. The second affidavit is really a supplement to the first and most materially introduces a ground of defence to the plaintiff's claim, which according to the deponent, was only belatedly discovered. The plaintiff's counsel argued that the second affidavit should not readily be admitted. He purported to rely in this respect on *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W). The case does not support his argument. Indeed it is apparent that in *Juntgen*, the plaintiff's counsel, who likewise opposed the introduction of a second opposing affidavit by the defendant, relied on the authority of the judgment in *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T). The facts in *Joubert*, were however entirely distinguishable, as indeed they are in the current matter. In *Joubert*, the intended second affidavit was not yet in existence on the date upon which the summary judgment application had been enrolled for hearing, and a postponement was required for it to be created. In *Juntgen*, Flemming J recognised that the defendant in a situation in which a postponement was required would need to be make out a case for the indulgence, and in a summary judgment application context, just as in any other ordinary situation, it was not to be had merely for the asking. Flemming J however recognised that in a situation in which no procedural prejudice could arise for the plaintiff, it would be wrong to erect 'procedural hedges' in the way of

a defendant's ability to comply, as best as it was able, with the requirements of sub-rule 32(3)(b) and that if the defendant needed to supplement its originally filed affidavit for that purpose, it should be allowed to. Insofar as it is necessary therefore, I rule that the second affidavit on behalf of the defendant is admitted in the summary judgment proceedings. The case was argued on the assumption that it would be so admitted.

[4] Before dealing with the grounds of defence, properly so-called, upon which the defendant relies, it is convenient first to deal with an argument raised by the defendant's counsel which was not adumbrated in the opposing affidavits. It was to the effect that the particulars of claim were vague and embarrassing. The submission, as I understood it, was to the effect that the nature of a particular internal contradiction or inconsistency in the pleading fatally subverted the allegedly liquidated nature of the claim and also the reliability of the supporting affidavit in the summary judgment application. Counsel submitted in the latter respect that the deponent to supporting affidavit either could not have read the summons properly, or that he had falsely purported to confirm a claim in circumstances which the internal inconsistency in the pleading contradicted.

[5] The problem raised by the defendant's counsel arose out of paragraphs 3 and 4 of the plaintiff's particulars of claim read with the relevant annexures. Paragraphs 3 and 4 contained the following allegations:

> 3. Defendant is indebted to the Plaintiff in the amount of R336,938,34 (THREE HUNDRED AND THIRTY SIX THOUSAND NINE HUNDRED AND THIRTY EIGHT RAND AND THIRTY FOUR CENTS), in respect of transport services

rendered by the Plaintiff to Defendant at the Defendant's special instance and request during October 2008 to June 2009, as reflected in the enclosed statements marked "POC1".

4. The rates pertaining to Plaintiff's transport services were agreed between Mr Rohan Preece of the Plaintiff and one Ben Nylrenda of the Defendant on 12 June 2008, as reflected in the emails attached hereto as annexure "POC2".

The relevant annexure reflected certain rates that had allegedly been agreed between the parties and recorded in somewhat cryptic terms in an email sent by a representative of the defendant to a person in the plaintiff's employ on 12 June 2008. Contrary to what has been alleged in paragraph 4 of the pleading, the content of the email correspondence annexed as annexure POC 2 does not purport to record a generally applicable agreement on rates, but rather pertains to the resolution of a query on identified invoices raised by the defendant on 17 July 2008.

[6] In my judgment, while it is clearly apparent that the pleading was inept, it is equally apparent on a reading of the combined summons as a whole that the ineptness does not derogate from the allegation of a claim for services rendered made up as set out in the statement annexed to the summons as annexure POC 1. It is impossible to reconcile the computation of the amounts due in respect of the several invoices identified in annexure POC 1 with the rates reflected in POC 2, but it is significant that it is equally impossible to reflect the POC 2 rates with the defendant's own reconciliation account which is set out in annexure JO 1 to the defendant's plea.[3] Three examples taken randomly from

[3] The defendant delivered a document, which although it purports to be a plea does not comply in material respects with the requirements of the rules relating to pleading. Assuming, however, for

the defendant's reconciliation will suffice to illustrate the point. The rates reflected on POC 2 were R9 500 and R6 500, respectively; but in the defendant's reconciliation no difficulty was expressed with invoice26450 in the amount of R3 070; invoice 25252 in the amount of R750, or with invoice 26256 in the amount of R9710. Invoices 26450 and 26256 are reflected on annexure POC 1 to the particulars of claim as components of the computation of the plaintiff's claim in the action and an amount corresponding to that reflected in respect of invoice 25252 dated 9-12-2008 on the defendant's reconciliation is indicated on POC 1 as a component of the plaintiff's claim related to invoice 25352, also dated 9-12-2008, which suggests that only typographical error distinguishes what are in all probability the same invoice.

[7] Rule 32 requires of the deponent to an affidavit supporting a plaintiff's claim to summary judgment to verify the cause of action and the amount claimed and to state that in his/her opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered by the defendant solely for the purpose of delay. The defect identified by the defendant's counsel in the plaintiff's pleading gives me no reason to believe that the deponent in support of the application did not believe in the truth of the allegation that the claim was for services rendered and quantified as set out in statement annexed to the summons. The defect also does not derogate from the adequately articulated allegations of the nature and quantification of the claim in the summons. That

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present purposes that the document falls to be treated as a plea notwithstanding its manifest defects, the filing of a plea does not constitute a bar to a timeously instituted application for summary judgment; see *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 595C-I.

the defect was not material for the purposes of the consideration of the summary judgment application is vouched by the fact that the defendant made nothing of the point in either of its opposing affidavits; on the contrary it provided a reconciliation which engages in material respects with the content of the composition and quantification of the claim as set out in annexure POC 1 to the particulars of claim.

[8] In a supplementary written submission, furnished with the leave of the court, the defendant's counsel submitted that the aforementioned defect in the particulars of claim rendered the pleading excipiable and argued that summary judgment could not be given on an excipiable summons. He cited the following judgments in support of that contention: *Ritz v Katzeff* 1950 (1) SA 584 (C); *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd & Another* 1998 (1) SA 679 (O) following *Northern Cape Scrap and Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) and *Threeball Construction (Pty) Ltd v Lipshits* 1987 (2) SA 633 (W).

[9] I should preface my consideration of this argument by recording that it is evident from this court's judgment in *Arend & Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 314 that the excipiability of a claim is a matter that properly falls to be considered in the context of weighing a plaintiff's compliance with rule 32(1) and (2). Once that much is acknowledged it is axiomatic that summary judgment cannot be granted on a claim that is excipiable on the grounds that it is bad in law or does not disclose a cause of action. The position is not so self-evident where the complaint is that the summons is vague and

embarrassing. Exceptions on the grounds that a pleading is vague and embarrassing are upheld only if the complaint gives rise to a situation in which the defendant will be seriously prejudiced if the offending allegations are not expunged. The nature of the prejudice in such situations generally goes to the defendant's ability to plead to the allegations in the particulars. The position was explained thus by Conradie J, as he then was, in *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A-D:

> It has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged.
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> In this Division the practice was stated by Benjamin J in *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630 when he said that
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> > '... save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed'.
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> This approach was approved in *Kahn v Stuart and Others* 1942 CPD 386 at 391 which was in turn followed in *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 711F - H.
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> An excipient must satisfy the Court that he will be substantially embarrassed, ie prejudiced, if the offending pleading is allowed to stand. (See Herbstein and Van Winsen *Civil Practice of the Superior Courts in South Africa* 3rd ed at 339; Joubert (ed) Law of South Africa vol 3 para 199.)

[10] The observation made by Steyn J in *Ritz v Katzeff*, supra, that summary judgment proceedings are not the place to enter into the merits of an exception does not, with respect, strike me as being correct if taken as a statement of unqualified principle. It is demonstrably at odds with the approach of Corbett J in *Astra Furnishers* supra, loc cit. Having regard to the rationale for the existence of

the summary judgment procedure, which was recently rehearsed by Navsa JA in *Joob Joob Investments* supra, at para.s [30]-[31], it would defeat the policy behind the procedural remedy if a defendant were able to resort to an ill-founded argument that the formulation of the plaintiff's claim was materially vague and embarrassing and thereby avoid summary judgment on a supposed principle that the mere assertion of the argument prohibited the consideration of a grant of summary judgment. If the argument that the summons was sufficiently prejudicially vague and embarrassing is readily identifiable as misconceived at the summary judgment stage, it would be absurd to require that its consideration be deferred in circumstances that after its later disposal a trial would have to ensue when no cognisable defence had been made out in opposition to the summary judgment application. I thus find myself in respectful agreement with the criticism expressed by Blieden J in *Standard Bank of SA Ltd v Roestof* 2004 (2) SA 492 (W) at 498A-D of the reasoning in *Gulf Steel.*[4] See also *Coetzee and Others v Nassimov* 2010 (4) SA 400 (WCC) at 402F-G. The rules of court fall to be interpreted and applied in a manner that furthers their purpose; and that is to facilitate the efficient administration of justice, not the taking by parties of purely technical points. *Threeball Construction* is distinguishable on the facts.

[11] In the current case, for the reasons already discussed earlier in this judgment, the ineptness of the pleading has evidently not been seriously

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[4] In doing so I have not overlooked the comments on Blieden J's dicta by Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP), but point out that, for the reasons given, I do not consider that the ineptness in the particulars of claim gives rise to a situation in this case where it can validly be said that the plaintiff has not complied with rule 32(1) and (2).

prejudicial to the defendant. Moreover, the defendant has seen fit to have already pleaded to the particulars of claim and thus its opportunity to take exception to the summons on the grounds that the particulars of claim are vague and embarrassing has passed.

[12] Moving on then to examine the defence which the deponent to the opposing affidavits sought to make out. The points made may be summarised as follows (I deal with only with those that the defendant's counsel persisted with in argument, but have `considered the grounds of opposition set out in the opposing affidavits in their totality):

1. The plaintiff was aware from the correspondence exchanged before the institution of proceedings that the claim was *bona fide* contested and the summary judgment application was thus an abuse of process.

2. The plaintiff would charge more than the agreed rates. In this respect the deponent relied on the rates reflected in annexure POC 2 and, with reference to the reconciliation undertaken by the defendant in annexure RP 2 to the opposing affidavit, gave numerous instances in which, for example say R10 500 would be charged for a load instead of the apparently agreed R9 500.

3. The defendant was unable to do a reliable reconciliation of its account with the plaintiff because it did not have all the 'source

documentation' available and the plaintiff had failed to engage in a debate of the reconciliation submitted to it by the defendant.

4. The defendant has a liquidated claim against the plaintiff in the sum of R34 818,50, which falls to be set off against the plaintiff's claim.

[13] I do not consider that it follows that because the plaintiff was aware that the defendant disputed its claim, at least in part, that it was bound by such knowledge to accept that the claim was *bona fide* disputed, or that the defendant had a proper defence. I am not persuaded that it can be said on the basis of the correspondence exchanged between the parties before the institution of the action that the sole or primary purpose of the summary judgment application was to obtain a purely tactical advantage by forcing the defendant to put its case on affidavit ahead of a trial.

[14] I consider that the defendant has succeeded, albeit barely so, in establishing that there is a *bona fide* dispute about the quantification of certain items in the plaintiff's claim. The defendant has been assisted in this regard by the plaintiff's allegation of agreed rates as set out in annexure POC 2 to the particulars of claim, discussed in a different context above. It has also weighed with me in this regard that the plaintiff at no time appears to have reacted to the detailed reconciliation statement submitted to it by the defendant some months before the action was instituted.

[15] The defendant's claim that its reconciliation was unreliable because of an unavailability of relevant source documentation does not impress. It is

inconsistent with the repeated description of the reconciliation by the defendant in correspondence with the plaintiff as 'a full reconciliation'. The defendant's 'full reconciliation' reflected that it accepted that it was indebted to the plaintiff on running account in the sum of R71 271,34. The belatedly expressed equivocation about the validity of the apparent admission of liability in the aforementioned amount because of a lack of source documentation and an alleged ignorance of how the opening figure of R141 500 on the statement annexed as annexure POC 1 to the particulars of claim, issues not raised at the time the defendant was contending that the plaintiff should accept its 'full reconciliation' statement leaves me in doubt about the defendant's *bona fides* in regard to its current endeavour to persuade the court that the entire amount of the plaintiff's claim is disputed; on the contrary I find the defendant's averments in this regard unconvincing.

[16] The defendant's contention that its claim of R34 818,50 falls to be set off against the plaintiff's claim is curious in the context of the assertion that the plaintiff does not have a liquidated claim. In any event the nature and basis of the defendant's alleged claim is described in the most inadequate terms in the second opposing affidavit. The deponent treats of the alleged claim as follows:

> In amplification of the aforementioned difficulties the Defendant was confronted with in the summons with annexures, is a further invoice that I discovered subsequent to the drafting of the Opposing Affidavit. A copy of this invoice is annexed hereto as annexure "RPA2". This invoice is from the Defendant to the Plaintiff in the amount of R34 818,50 for services rendered by the Defendant to the Plaintiff. This amount has not been included in my previous calculations. This does not just bring down the amount of R71 271,34 with R34 818,50 (according to my calculations) but also reiterates and

> confirms that it is impossible to determine at this stage, without resorting to rules of discovery and a trial on such documentation, what amount, if any is owed by the Defendant to the Plaintiff.'

The annexed invoice, dated 29 May 2009, and which refers to seven items each related to a date during the period 30 April 2009 to 19 May 2009 might be meaningful to someone acquainted with the codes and cryptic descriptions reflected in the body of the document, but it is completely meaningless to the court. There is furthermore no explanation of why this alleged counter-claim was not identified or raised earlier. The purported reliance on the claim described in the invoice thus certainly does not comply with the particularity required of a defendant in terms of rule 32(3)(b).

[17] The plainitff's counsel pointed out that items totalling R85 250 in the defendant's reconsilaition being credits which the defendant contended were due to it by the plaintiff were unexplained. He also pointed out that the defendant had given no particulars of the payment it alleged that it had made, but not been credited with. Counsel submitted that the defendant had failed to give sufficient factual description of these contested amounts for it to be held that it had complied with rule 32(3)(b). I agree with that submission. However, in the exercise of the court's discretion I am not disposed to grant summary judgment against the defendant in respect of those amounts. I consider that on the total conspectus of the facts, including the defendant's submission of a full reconciliation to the plaintiff before the action was instituted and the plaintiff's apparent failure to answer that reconciliation statement, it would be unreasonable to close the doors to the defendant on those items.

[18] I propose to grant summary judgment in the amount in which the defendant calculated that it was liable to the plaintiff on the running account. As that amount falls within the jurisdiction of the magistrates' court, it is desirable that the issue of costs be stood over for determination by the court which determines the action for payment of the balance of the plaintiff's claim. If the plaintiff does not succeed in obtaining judgment in an amount which in total exceeds the magistrates' court jurisdiction that would have an effect on the scale on which the costs of the summary judgment proceedings should be awarded.

[19] The defendant failed to comply with the practice note requirements regarding the filing of heads of argument. I granted the application for condonation in this respect, but the defendant must pay the costs occasioned by the application.

[20] In the circumstances the following orders are made:

(a) Summary judgment is granted in favour of the plaintiff in the sum of R71 271,34.

(b) Summary judgment is refused in respect of the balance of the plaintiff's claim and to that extent the defendant is granted leave to defend the action.

(c) The costs of the summary judgment application are stood over for later determination by the court which determines the action in respect of the balance of the plaintiff's claim.

(d) The defendant is directed to pay the plaintiff's costs incurred in respect of the defendant's application for condonation for the late filing of its heads of argument.

A.G. BINNS-WARD
Judge of the High Court