

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

Case No. 3670/2019

In the matter between:

TUMILENG TRADING CC

Applicant / Plaintiff

and

NATIONAL SECURITY AND FIRE (PTY) LTD

Respondent / Defendant

Case No. 3671/2019

And in the matter between:

E & D SECURITY SYSTEMS CC

Applicant / Plaintiff

and

NATIONAL SECURITY AND FIRE (PTY) LTD

Respondent / Defendant

JUDGMENT (Application for leave to appeal)

(Transmitted by email to the parties' legal representatives and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on
Monday, 15 June 2020)

BINNS-WARD J

[1] The defendant in case no.s 3670/2019 and 3671/2019, National Security and Fire (Pty) Ltd, has applied for leave to appeal against the judgment of this court handed down on 30 April 2020, in which summary judgment was granted against it in favour of each of the plaintiffs in those actions. I shall not rehearse here what the claims were about. That may be ascertained from the principal judgment.¹

[2] The test in such applications is set out in s 17(1)(a) of the Superior Courts Act 10 of 2013. I am enjoined to grant leave only if I form the opinion that the contemplated appeal

¹ The principal judgment is listed on SAFLII as *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28 (30 April 2020).

would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[3] Mr Oosthuizen SC, who led Mr *Abrahams* in the application for leave to appeal but had not appeared for the defendants when the applications for summary judgment were heard, argued three issues in support of his contention that leave should be granted. He submitted (i) that there was a reasonable prospect that another court might hold that the plaintiffs had failed to comply with the requirements of rule 32(2)(b) in respect of the content of their supporting affidavits in the summary judgment applications, (ii) that the claims concerned were not for ‘a liquidated amount in money’ within the meaning of rule 32(1)(b), and (iii) that the novelty of the procedures under the amended rule 32 afforded a compelling reason why the matters should be reconsidered on appeal.

[4] Mr Oosthuizen submitted, quite correctly in my view, that if the supporting affidavits had failed to comply with rule 32(2)(b), the applications for summary judgment should have failed at the first hurdle and the court should not have even reached the stage of considering them on their merits.² Equally correctly, however, he conceded the authority of the appeal court’s judgment in *Maharaj*, in which it was held that the adequacy of the averments in the supporting affidavit fall to be assessed with regard to the papers before the court considered as a whole.³ This obviously includes the pleadings. The respect in which Mr Oosthuizen argued that the supporting affidavits fell short was that, in his submission, they failed to ‘*identify the facts upon which the plaintiff’s claim is based*’. When pressed during argument on the nature of the alleged deficiency being contended for, he submitted, if I understood him correctly, that they should have provided particularity of the clients involved and, in respect of each of them, stated the amounts of each of the recurring commissions involved. This was not a point taken in the defendant’s opposing affidavits in the summary judgment applications, nor, to the best of my recollection, was it a contention advanced in argument when the applications were heard.

[5] The deponents to each of the supporting affidavits addressed the relevant requirement in rule 32(2)(b) by making the following averments:

² Cf. *Absa Bank Ltd v Le Roux and Others* [2013] ZAWCHC 148 (7 October 2013); 2014 (1) SA 475 (WCC) at para 15 and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* [2010] ZAKZPHC 15 (4 May 2010); 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) at para 25.

³ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423.

‘The plaintiff’s claim is based on the facts set out in its Particulars of Claim, in particular that the defendant terminated the agreement between the parties (“the Agreement”) in terms of clause 6.1 thereof, that the plaintiff remains entitled to the payment of commission and that the defendant has breached the Agreement by failing and/or refusing to pay such commission to the plaintiff.’

[6] I discussed this requirement of the amended subrule at paragraphs 17-20 of the principal judgment. In paragraphs 19-20 I summed up my view of the position as follows:

[19] Is the deponent to the supporting affidavit then required to repeat in narrative form what should already be apparent from the plaintiff’s pleadings? Or is he or she expected to set out the *facta probantia* in elaboration of the *facta probanda* alleged in the pleadings? Having regard to the purpose of summary judgment proceedings, which is to prevent matters in which the *defendant* does not appear to have a bona fide *defence* having to go to trial, no obvious point is served by an elaborate supporting affidavit concerning the merits of the *plaintiff’s* pleaded *claim*.

[20] I think that it would be desirable therefore if plaintiffs were encouraged to confirm what should already be apparent from their pleaded case as succinctly as possible. No purpose will be served by a laborious repetition of what the judge and the defendant should be able to discern independently from the pleaded claim. No harm will be done by using a ‘formulaic’⁴ mode of expression if it serves the purpose; which, it seems to me, it would do in most matters.

[7] On rereading the section on summary judgment in the most recent edition of *Erasmus, Superior Court Practice*, it came as little surprise to see that the learned commentators have taken essentially the same view; viz. that if the rules of court with regard to pleading have been complied with, the facts relied upon by the plaintiff will already be apparent on the papers when the supporting affidavit is deposed to.⁵ As the commentators also observe, the requirement does not call for or permit the supporting affidavit in a summary judgment application to be used by a plaintiff to ‘*amplify*’ its case.⁶ Yet this, apparently, is what Mr *Oosthuizen* contends the plaintiffs should have done in these cases. I am not persuaded by the argument; more pertinently, I am also of the opinion that there is not a reasonable prospect that another court might be won over by it on appeal. After all, the word ‘identify’ denotes pointing out what is already there, not bringing in something new or additional.

⁴ The adjective used in paras 8.1 and 8.2 of the Rules Board Task Team’s memorandum; see the principal judgment at paras 7 and 8.

⁵ DE van Loggerenberg, *Erasmus, Superior Court Practice* 2ed (Juta), vol. 2 at D1-405 -D1-406 [Service 11, 2019].

⁶ *Id.*

[8] I also do not think that there is a reasonable prospect that another court would be persuaded that the claim for the payment of the accumulated arrears on recurring commissions was not a claim for ‘a liquidated amount in money’.

[9] It is evident from the facts alleged in the particulars of claim that the commissions concerned would have been recurring commissions being paid monthly by the defendant to the plaintiff at the time of the termination of the agency agreements. The amounts involved would have been established at that time and therefore in all probability readily identifiable in both parties’ financial records. The defendant’s principal defence in both actions does not go to the amount of the claim;⁷ rather, it is that the contracts were terminated in terms of clause 6.3.4 thereof, and not in terms of clause 6.1, as pleaded by the plaintiffs.⁸ It pleaded that the plaintiffs had brought the defendant into disrepute because their ‘*workmanship and product installations were defective and/or of an inferior quality which has caused the Defendant to suffer reputational harm*’. No particulars of the defective workmanship or the reputational harm were provided in either its pleas or the affidavits made by its attorney in opposition to the summary judgment application. In the alternative, it averred in its opposing affidavits that if the contracts had been terminated in terms of clause 6.1 (which presupposes a finding that it had not cancelled them by reason of defective workmanship or reputational harm), then the conditions to which the plaintiffs’ entitlement to payment of the recurring commissions was subject had not been satisfied. Again, no meaningful particularity was provided. It is furthermore notable that the alternative defence raised in the opposing affidavits does not appear in the defendant’s pleas.

[10] I think that it is clear in the circumstances that the amount of the alleged debt would be readily ascertainable and capable of speedy and prompt ascertainment, which is the nub of the concept of ‘a liquidated amount in money’. Moreover, nothing in the content of the defendant’s pleas or its opposing affidavits detracts from this assessment. I dealt with this at paragraph 49 of the principal judgment. I am not persuaded that there is a reasonable prospect that another court would hold differently.

⁷ It opaquely pleaded ‘no knowledge’.

⁸ The significance of clauses 6.1 and 6.3 of the contracts is explained in the principal judgment at paragraphs 30-39. The plaintiffs would not be entitled to the payment of recurring commissions if the contract had been cancelled in terms of clause 6.3.4 by reason of their having brought the defendant into disrepute. By contrast, they would be entitled to continuing payment, subject to the conditions set out in sub-clauses 8.3.3.1 to 8.3.3.4 if the contract were terminated on 60 days’ notice in terms of clause 6.1. The defendant’s notice of termination is quoted in full at paragraph 31 of the principal judgment.

[11] As to the last of the three points argued on behalf of the defendant, it is true that there is no other jurisprudence on the import of the amendments to rule 32 that anyone in these cases could find. That does not, in itself, make it a matter deserving, much less ‘compelling’, the attention of another court on appeal. As Mr *van der Merwe*, counsel for the plaintiffs, aptly stressed, the position might be different if there were conflicting judgments on the operation of the amended rule. There are not.

[12] Importantly, Mr *Oosthuizen* conceded, as he was bound to, that the test for determining whether summary judgment should be given remains unaffected by the amendments; viz. that derived from rule 32(3)(b), which he acknowledged remains substantively unaltered. A defendant is able to defeat an application for summary judgment by showing that it has a bona fide defence. It does that by doing what the subrule enjoins: disclosing ‘*fully the nature and grounds of the defence and the material facts relied upon therefor*’. What that entails in practice was set out in Colman J’s classical formulation in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), at 228B-H, which has been consistently endorsed by the late Appellate Division and the Supreme Court of Appeal. Mr *Oosthuizen*, realistically, did not even attempt to argue that the opposing affidavits had met those requirements.

[13] Granting the defendant leave to appeal merely because aspects of the amended procedure are novel would therefore clearly visit an injustice on the plaintiffs in these cases. It would, without good reason, negate the advantage, reduced though it has been by the cost and time delaying effects of the rule amendments, that the remedy of summary judgment was intended to afford them.

[14] In the result, the applications for leave to appeal are refused with costs.

A handwritten signature in black ink, appearing to read 'A.G. Binns-Ward', with a large, stylized initial 'A' and a long, sweeping horizontal stroke extending to the right.

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