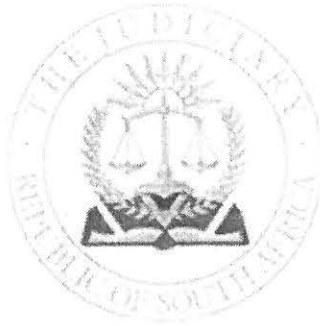




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **7th MARCH 2018** Signature: _____

CASE NO: 2017/40082

In the matter between:

F1 STEEL CC

Plaintiff

and

TBHOKISI LELSIMIBI STEEL BOXES & TANKS (PTY) LTD

Defendant

JUDGMENT

ADAMS J:

[1]. This is an application by the plaintiff for summary judgment against the defendant. The plaintiff's claim against the defendant is for an amount of R1 425 828.80, being in respect services rendered and goods supplied at the special instance and request of the defendant during the period from the

January 2017 to June 2017. The amount claimed was based on the plaintiff's usual charges for the work done and the materials supplied in connection with the services rendered.

[2]. In its affidavit resisting summary judgment, the defendant does not deny that services were rendered and goods supplied at its (the defendant's) special instance and request. Even more telling is the fact that the defendant does not deny that the amounts claimed by the plaintiff, as being the balance due on account, are due and payable. What the defendant does say in somewhat equivocal and vague terms is that '... the plaintiff did not provide proof of the amount it claims to be owing'. In addition, the defendant in a one liner claims that the plaintiff owes it (the defendant) the money owing by the plaintiff to the defendant as 'set out in the statement attached to the resisting affidavit'. This amount of R1 204 488.59, so it is contended for by the defendant, should be set off against any sums which may be owed by the defendant to the plaintiff. This is the sum total of the defences raised by the defendant in its affidavit resisting summary judgment.

[3]. The attachment to the defendant's affidavit resisting summary judgment is a list, styled 'Statement', dated the 31st December 2017, of tax invoices individually dated from the 1st April 2016 to the 1st of October 2017. It is instructive to note that the statement is dated the 31st December 2017, which post – dates the date on which the summons was issued and served. This, in my view, constitutes material to be considered by me in relation to the requirement of *bona fides*. Each row of the list contained the date of the invoice, the reference number, a description as 'Tax Invoice – Shot Blasting Grid' and the amount of that specific invoice. No further details are given in relation to these invoices and what they relate to.

[4]. The defendant also raised a point *in limine* to the effect that the defendant before court, which is a private company, has been incorrectly cited

as a Close Corporation. This compelled the plaintiff to apply, at the commencement of the hearing of the application for summary judgment, for leave to amend the summons and the particulars of claim to correct the citation of the defendant. Factually, the defendant before court was a Close Corporation until the 15th March 2017 when it was formally converted to a private company. The defendant, as per the amended citation, is the correct defendant and the entity against which the plaintiff's claim is directed. The only question is whether the plaintiff is entitled to summary judgment in view of this minor discrepancy, which can best be described as a misnomer.

[5]. It was clear from the opposing affidavit that the defendant is the entity cited as per the intended amendment. The defendant did not object to the proposed amendment, and same was granted at the commencement of the hearing of the application for summary judgment. Mr Britz, Counsel for the plaintiff, referred me to *Standard Bank of SA Ltd v Naude and Another*, 2009 (4) SA 669 (ECP), in support of his contention that the court could treat this as being merely an error or oversight, and that the intention was clearly to refer to the defendant (the correct one and the one presently before court) and to seek judgment against it. In this regard, he also relied upon the statement by Corbett JA in *Maharaj v Barclays National Bank*, 1976 (1) SA 418 (A) at 423H that the court looks at the matter, at the end of the day, on all the documents that are properly before it.

[6]. Looking at all the documents *in casu*, notably the particulars of plaintiff's claim and the defendant's affidavit resisting summary judgment, it is abundantly clear that the defendant is *Tbhokisi Lelsimbi Steel Boxes and Tanks (Pty) Limited*. As I understood the submission, it is that I should treat the reference in the application and the affidavit in support of the application for summary judgment, when referring to a Close Corporation, as being obviously erroneous and intended to refer to the private company defendant. I was urged to do so on the basis that the defendant previously traded as and formerly was a Close Corporation. I find myself in agreement with these submissions on behalf of the

plaintiff. The point *in limine* is of a highly technical nature and, in my view, the incorrect citation of the defendant in no way detracts from the claim being directed against the liable party. One can, in my judgment, simply assume that because the defendant was previously a CC, it must mean that summary judgment is being sought against it. Therefore, the foregoing entitles me to read the application for summary judgment as saying that summary judgment is being applied for against the defendant.

[7]. The situation that arose in the *Naude* matter is no different from that in the present case. There the claim lay against two defendants and the application was brought against both of them. The affidavit verified the cause of action, the allegations in the summons and the amount owing in respect of both defendants. However, the statement of the deponent's opinion was that 'the respondent have' no *bona fide* defence, and that notice of intention to defend had been delivered solely for the purposes of delay. In my view, the fact that the entire application related to both respondents, and the fact that the singular reference to 'respondent' was followed by the plural verb 'have', clearly indicated that this was nothing more than an inadvertent typographical error, and that appears to have been the approach adopted by the court. In other words, the papers, properly construed showed that the application was being brought against both defendants, and the single reference to 'respondent' did not alter this.

[8]. A more pertinent decision is that of *Standard Bank of South Africa Ltd v Roestof*, 2004 (2) SA 492 (W), where Blieden J dealt with an affidavit couched in the plural in a case where there was only one defendant. The learned judge held that a reading of the summons and mortgage bond, together with the affidavit (he did not mention the notice of motion in the application for summary judgment), left no doubt that what was being verified was a cause of action against the defendant alone. Of course, if that was correct, as a matter of the proper interpretation of the documents, then the resulting conclusion would

necessarily be that the affidavit was not defective because it correctly verified the facts on which the cause of action against the only defendant was based.

[9]. As I indicated these cases are comparable to the present one, where there can be little doubt that the intention was to seek summary judgment against only the defendant before court. In those cases the court, as a matter of construction of the documents, held that the plural references were inadvertent errors and that properly construed in the light of all the documents, they should be construed as singular. It is easy to construe plural references as being mere error and intending the singular where the only possible claim is against a single defendant. That is also the situation in the present case. Having regard to the documents before the court, it is easy to construe the reference to the CC as a reference to the defendant. It can safely be said that in this matter the difficulty is due to the fact that the defendant had recently been converted from a CC to a private company. That can be said with a measure of certainty.

[10]. I am further strengthened in my aforesaid view by what was said in the *Roestof* matter. Blieden J had this to say at 496F – H:

'A reading of Rule 32 as a whole makes it plain that, once there is an affidavit by the plaintiff, or someone acting on its behalf, who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, stating that in his opinion there is no *bona fide* defence to the action and that intention to defend was delivered solely for the purposes of delay, the plaintiff is entitled to summary judgment unless the defendant has complied in some way or other with the requirements of Rule 32(3). If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him.'

[11]. I find myself in agreement with this approach. I am of the view that this passage is a correct statement of the position under rule 32(2).

[12]. There is therefore no merit in the defendant's point *in limine*.

[13]. Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that they have a bona fide defence to the plaintiff's claim. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in its affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his 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.

[14]. While it is not incumbent upon the defendant to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiff's claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a *bona fide* defence for the purpose of the rule. If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*.

[15]. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's *bona fides* but it may still, in an appropriate case,

exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable.

[16]. All that the court enquires, in deciding whether the defendants have set out a *bona fide* defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed the defendants appear to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[17]. The defendant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be *bona fide*. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[18]. In terms of subrule (5): '*The court may enter summary judgment.*' The word '*may*' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[19]. Applying these principles *in casu*, I am satisfied that in its resisting affidavit the defendant has not demonstrated a *bona fide* defence on the merits of the plaintiff's claim.

[20]. Rule 32(3)(b) requires that the defendant's affidavit 'shall disclose fully the nature and grounds of the defence and the material facts relied on therefor'. This means that the defendant is at least required, as per *Traut v Du Toit*, 1966 (1) SA 69 (O) at 70 – 71:

'om die Hof breedvoerig in te lig omtrent sy verweer, en die feite waarop dit berus ten minste so volledig uiteen te sit dat die Hof 'n oordeel kan vel of 'n *bona fide* verweer teen die eis by die verhoor uitgemaak kan word'.

[21]. The Court cannot pay regard to general and vague allegations which do not contain specific facts on which the purported defence is based. Cf *Central News Agency Ltd v Cilliers*, 1971 (4) SA 351 (NC) at 353. See too *Maharaj v Barclays National Bank Ltd*, 1976 (1) SA 418 (A) at 426.

[22]. For starters, the first 'defence' of the defendant to the effect that the plaintiff has failed to furnish it with the relevant invoices is not a defence. Not only does the defendant's affidavit not set out any material facts on which this defence can, at least *prima facie*, be sustained but it alleges no defence to the individual amounts claimed. The defendant does not suggest any basis as to why it is not liable for the balance of the amount due by it on account. I am of the view that the defendant's 'defence' that it is entitled to withhold payment because it has supposedly not been furnished with copies of the orders and delivery notes relating to the individual invoices, can and should be rejected out of hand. The point is that the defendant does not dispute the fact that the plaintiff had rendered the services as categorically alleged by the plaintiff. In any event, I find it hard to believe that the defendant would have been paying up to August 2017 on account of his indebtedness to plaintiff, if it honestly believed that it was not liable on the invoices rendered.

[23]. As far as the defendant's alleged counterclaim against the plaintiff is concerned, this contention is not supported by any of the necessary factual details. Nowhere in the affidavit is there any suggestion that this 'defence'

relieved the defendant of the obligation to pay to the plaintiff the amounts due in respect of the individual invoices. The defendant has limited itself to an assertion, unsupported by any material facts, that it has a counterclaim made up of a list of invoices, but has not suggested any basis for holding that this constitutes a legal defence to the plaintiff's claim. I have also alluded *supra* to my reservations regarding the *bona fides* of this counterclaim if regard is had to the fact that the list was compiled on a date subsequent to the date on which the summons was served.

[24]. In my view therefore the contention that the plaintiff did not provide proof of the amount claimed cannot constitute compliance with the first defendant's obligation to satisfy the Court that it has a *bona fide* defence to the claim now before me. The second defence on the merits relates to the defendant's alleged counterclaim, which, as I have indicated is sorely lacking in detail.

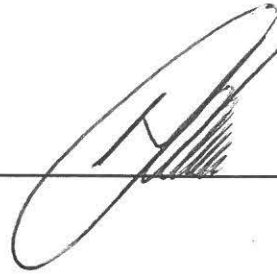
[25]. The plaintiff is therefore entitled to summary judgment.

Order

Accordingly, I make the following order:

Summary Judgment is granted in favour of the plaintiff against the defendant, as follows for:

1. Payment of the sum of R1 145 828.80.
2. Payment of interest on the said amount of R1 145 828.80 at the rate of 10.25% per annum from the 1st September 2017 to date of final payment.
3. Payment of plaintiff's cost of suit.

A handwritten signature in black ink, appearing to be 'L. Adams', is written over a horizontal line.**L ADAMS**

*Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON: 1st March 2018
JUDGMENT DATE: 7th March 2018
FOR THE PLAINTIFF: Adv W S Britz
INSTRUCTED BY: Malherbe Rigg & Ranwell Inc
FOR THE DEFENDANT: Adv E Coleman
INSTRUCTED BY: Mouton & Williams Attorneys