IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA) 06/05/2011

CASE NO: 35615/09

In the matter between:

WELD-CUT EQUIPMENT (PTY) LTD APPLICANT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. 2011/05/06
2011/05/06
DATE SIGNATURE

And

ANTHONY FORRESTER

t/a AMGAS INDUSTRIAL EQUIPMENT RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the defendants, for:

(1) payment in the amount of R371 352, 59;

(2) interest at the rate of 15,5% per annum, calculated daily and compounded monthly in arrears, from 1 November

2008 to date of payment, both dates inclusive from 25 July 2009;

(3) Attorney and client costs.

(4) Further and/or alternative relief.

[2] The plaintiff's claim arises from two written agreements concluded between the parties. The first agreement is a distribution agreement concluded on or about 14 October 2005. This agreement was for the distribution of industrial and medical gasses between the plaintiff and Tony Forrester, the distributors of the aforesaid commodities. A copy of this agreement was attached to the summons as annexure "A", titled "Distribution Agreement".

[3] The second agreement was a credit agreement concluded between the parties on 18 October 2009. A copy of this agreement was attached to the summons as annexure "C" titled "distribution and an oral agreement". The terms of the written agreement are contained in annexure "B". This agreement is titled "Credit Agreement".

[4] In the particulars of claim, the plaintiff alleged, inter alia, that:

"8. The Plaintiff has performed all its obligations arising from agreement in that it has:

8.1 Granted the defendant the facility, and

8.2 Appointed the defendant as a distributor in terms of the Distribution Agreement and the Defendant accepted such appointment as a distributor of the Plaintiff for the re-sale of the gasses.

8.3. Sold and delivered gases and cylinders to the Defendant as the latter's special instance and request.

9. As at 25 September 2008, the Plaintiff was indebted to the Plaintiff in the sum of R371 352, 59 (three hundred seventy-one thousand three hundred and fifty two and fifty nine cents) which indebtedness is confirmed by the Plaintiff statement which is attached hereto as "E".

10. The defendant has breached his obligations arising from the Credit Agreement as well as the Distribution Agreement in that he has failed to make payment to the

plaintiff of the sum of R371 352, 59 (three hundred seventy-one thousand three hundred and fifty two and ninety five cents (sic)) either timeously or at all.

11 Notwithstanding demand, the Defendant has failed to make payments to the Plaintiff of the sum of R371 352, 59 (three hundred seventy-one thousand three hundred and fifty two and ninety five cents (sic))."

[5] The defendant in opposing the summary judgment application, inter alia, denying that it is indebted to the plaintiff in the claimed amount or at all, and has raised a defence *in limine*. The defence is that the plaintiff's particulars of claim are excipiable by virtue of various facts detailed in its opposing affidavit.

[6] In summary judgments applications, what the court need to do is to determine whether the defendant has disclosed fully the nature and grounds of his defence and the material facts upon which it is premised, and (b) whether, on the facts disclosed, defendant is having a *bona fide* defence that is good in law.

The court, in the exercise of its discretion, if it is of the view that the defence raised is not bad in law, and that the case of the plaintiff is not unanswerable, will decline to grant summary judgment; *vide Tesven CC and Another v South African Bank of Athens*[1].

[7] In the matter of *Marsh and Another v Standard Bank of SA LTD,*[2] Blieden J restated the position in summary judgments as follows:

"Before dealing with the merits of the appeal, it is necessary to discuss the provisions of Rule 32(3)(b) and in particular what the Rule, as interpreted by our Courts over the years, requires of a Court in adjudicating applications for summary judgment where a defendant has relied on this subrule.

1. The Rule requires the defendant to set out in his affidavit sufficient facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *District Bank Ltd v Hoosain and Others* 1984 (4) SA 544 (C).

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[1] 2000 (1) SA 268 (SCA) at 277G-278A.
[2] 2000(4) SA 947 at 949B-950B.

2. At the summary judgment stage of the proceedings it is not for the Court to decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false. *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 where at A-E the position is succinctly summarised by Corbett JA (as he then was) as follows:

> '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 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 Rules (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 disclosed a *bona fide* defence . . . . 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.'

3. The subrule does not require the defendant to satisfy the Court that his allegations are believed by him to be true. It is sufficient if the defendant's affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial. *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A.

4. The Court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness so 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.

5. Summary judgment is an extraordinary and stringent remedy and it is always necessary to keep this in mind when exercising a discretion whether to grant or refuse it. *Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1)* SA 298 (C) at 305.

6. A Court must be careful to guard against injustice to the defendant who is called upon at short notice and without the benefit of further

particulars, discovery or cross-examination to satisfy it that he has a *bona fide* defence. *Breitenbach v Fiat (supra* at 227D-H)."

[8] The defence raised by the defendant is a point *in limine.* In the matter of *Lovemore v White* 1978 (3) 254 (ECD) at 260 G-261B it was held that: Where the case in a summary judgment application can be decided on a crisp point of law, there is no reason why the judge who heard the point being argued before him, should not decide that point. That judge can be in no better position that the trial court to decide that crisp point of law.

[9] The point *in limine* is, however, that the plaintiff's particulars of claim are excipiable. In the matter of *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd*[3] Goldblatt J, as he then was, held that: "...summary judgment proceedings are inappropriate for dealing with a clearly arguable questions of law which should properly be dealt with on exception (Edwards v Menezes 1973 (1) SA 229 (NC) and Shingadia v Shingadia 1966 (3) SA 24 (R))."

[3] *1993* (3) SA 574 (WLD) at 576H.

[10] In the *matter of Jowell v Bramwell-Jones and Others*[4] it was stated that: "An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legality: *Trolip and Others v South African Reserve Bank*[5].

An exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception must go to the whole cause of action, which must be demonstrated to be vague and embarrassing."[6]

[11] Rule 18 (6) requires that if the contract relied upon in the pleading is written, a true copy thereof or that part of the contract it is relied upon must be annexed to that particulars of claim.

[12] *In casu,* the plaintiff alleged in its particulars of claim, *inter alia*, that:

"4.21 The defendant agreed that all amounts due and payable to the Plaintiff from time to time may be determined by a certificate issued and signed by a director or manager of the Plaintiff. Such certificate shall be

[4] 1998 (1) SA 836 (WLD) at 899F-G.
[5] 1993 (3) SA 264 (A).
[6] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (WLD) at 899F-G.

prima facie proof of the indebtedness of the Defendant (see clause 12. 8 of the Credit Agreement)."

[13] Annexure "E", which I have referred to herein above, does not come close to the certificate referred to in the previous paragraph. It is also imperative in matters where a contract is relied upon that the materiality thereof be specifically pleaded, and not by reference to a document, as is the case with annexure "E". In *Jowell v Bramwell-Jones and Others (supra)* at 902B-G the Court said:

"It is still a question of fact in each case as to whether sufficient particularity has been given.

When the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires:

(i) either by means of discovery/inspection of document

(ii) by means of a request for further particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial. ...

Rule 18 is restrictive and sets out the bare minimum required of a factual averment, while Rule 23 goes to a vagueness and embarrassment which strikes at the whole of the cause of action pleaded. As Cloete J said in

Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992 (4) SA 466 (W) at 460 J-470, '. . . if a pleading both fails to comply with Rule 18 and is vague and embarrassing, the defendant has a choice of remedies' (i.e. to proceed by way of Rule 23 or Rule 30). I agree with counsel that the crucial distinction between Rules 23 and 30 may be summarised as follows:

(a) an exception that the pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas

(b) Rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action."

[14] It needs mentioning that paragraph 9 of the particulars of claim, deals with the amount for which the defendant is indebted. Such indebtedness is merely confirmed by reference to annexure "E". However, annexure "E" merely details debits and dates and reference numbers. Subparagraph 8.3 merely states that the plaintiff "Sold and delivered gases and cylinders to the Defendant at the latter's special instance and request." There are no details as to the quantity of the gases and

cylinders sold and the dates of such sales. Evidence would have to be led so as to create a link between subparagraph 8.3 and paragraph 9.

[15] The defendant has a choice to decide whether he mounts an attack on the particulars of claim through Rule 30 or Rule 23. In my view, the pleadings as they stand are indeed excipiable. In the event I were to grant summary judgment, the defendant would have been deprived, to his prejudice, an opportunity of resorting to either of these rules. I am of the view that the defendant has demonstrated *bona fides* in opposing the grant of the summary judgment. I need not decide whether the point *in limine* would prevail at the trial. What is of importance is whether it is arguable, which I think it is.

[16] I am of the view that in the circumstances of this case, I should therefore be guided by what was said in *Marsh and Another v Standard Bank of SA LTD (supra)* and exercise my discretion in favour of the defendant and not grant summary judgment. I deem it not necessary to interrogate the rest of the defences

raised by the defendants since these would be better ventilated during trial.

[17] In the result I make the following order:

1. That the application for summary judgment is dismissed;
2. That the defendant is granted leave to defend.
3. That the costs of the summary judgment shall be costs in the course.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	**: 05/05/2011**
APPLICANT`S ATT	**: HAMMOND POLE MAJOLA.**
APPICANT`S ADV	**: R C CHRISTIE**
RESPONDENTS` ATT	**: R.C. CHRISTIE INC**
RESPONDENTS ADV	**: ADV J MINNAAR**