



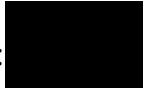
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 30/01/2024

Signature:



Case No: 44155/2018

In the matter between

FIRSTRAND BANK LIMITED

Applicant

and

K AND M INTERNATIONAL TRADING (PTY) LTD

1ST Respondent

FECHNER, MARC HANS GUSTAAF

2ND Respondent

WORTH, MARTIN IAN

3RD Respondent

JUDGMENT

MAHOMED AJ,

The applicant applies for judgment against the respondents jointly and severally, for payment of a balance due on an overdraft facility. Furthermore, it applies for leave to file a supplementary affidavit in which it seeks to correct an error in the

citation of the first respondent in the founding papers.¹ The application is brought in terms of Rule 6(5)(e) of the Uniform Rules of Court, which provides that a court may exercise its discretion and permit the filing of a further affidavit. Both applications are opposed. The debt arises from an overdraft facility ² which was given to the first respondent and the second and third respondents, served as sureties for the facility.

1. Bruinders SC appeared for the applicant and submitted that the error was inadvertent, and genuine, there is no entity by the name of K and M International Pty Ltd, registered in South Africa, and that the correct name of the first respondent is, K and M International Trading (Pty) Ltd, as confirmed by a Windeed online search.³ The applicant further contended that if regard is had to all the supporting documents to the application, the first respondent is correctly cited and set out, all parties knew the entity referred to.⁴ Counsel contended that it would be in the interest of justice to permit the filling of the affidavit and thereby effect the amendment.
2. Mr Bruinders proffered that the applicant tried to amend the error when it served a R28 notice and since no objection was filed, it understood that the amendment was duly effected. Upon further legal advice it noted that given the error was within an affidavit, it can only be amended by the filing

¹ Caselines 079-5 para 5

² Caselines 001-29

³ Caselines 079-12 and 14

⁴ Caselines 001-30

of a further affidavit, with the correction, therefore the current application for leave. It was contended that the respondent suffers not prejudice, no objections were filed and the delay in informing the court of the error was due to the misunderstanding that the R28 notice would have addressed the problem.

3. Counsel submitted that the opposition is merely to delay the payment of the debt and reminded the court that the matter has been in litigation since 2017, it must be finalised.
4. In the main application, the applicant seeks payment of R806 043.61 together with interest at 10.25% per annum and penalty interest at 3% per annum, being the balance due on an overdraft facility it granted to the first respondent. It was contended that the respondent has not denied liability for the amount claimed, the interest and the penalty interest. In correspondence from its attorneys, the respondents acknowledged the debt and their liability,⁵ the defences raised are without merit.
5. It was submitted that that the applicant granted the respondents an extension of time in order to collect monies from its debtors however it was not for an indefinite period. Furthermore, the payment of the overdraft facility was never contingent upon the respondent recovering debt from its debtors. An extension was afforded based only on good customer

⁵ Caselines 001-172 and 054-78 para 5

relations, it is normal business practice, it cannot be construed as an indulgence in which the applicants assumed any risk. The agreement includes a clause regarding indulgences and counsel proffered that nothing to that effect is in writing because it was never the applicant's intention to offer an indulgence.

6. Bruinders SC argued that the respondents raised further substantive defences in its updated heads of argument,⁶ which were not pleaded in the answering papers and consequently the respondents cannot rely on them.
7. The applicant relied on clause 2.4.1 of the overdraft facility agreement and contended that the balance was due on demand, the loan was never advanced for any specific period no due date is set and the respondents' reliance on clause 2.4.2 is misplaced. Furthermore, the allegations that the cession of book debts agreement is unenforceable because it is allegedly contra bonos mores, given that the facility and cession agreement operate as a unitary agreement ⁷ is denied. Mr Bruinders submitted that the cession serves as collateral security only to the extent of the respondent's indebtedness, unlike in Sasfin⁸ where the creditor could continue to collect against all debts due to the bank's debtor, the respondent's debtors are

⁶ Caselines 054-35 to 51

⁷ Caselines 054-38 par 12

⁸ Sasfin v Beukes 1989 (1) SA 1 A

not prejudiced. It was further contended that the cession agreement is accessory to the overdraft agreement and therefor the respondents' liability is not extinguished as it claims. Counsel proffered that as monies were received the amounts were applied to reduce the balance outstanding which was adjusted by issue of a certificate of balance in each instance.

8. In terms of the written agreement payment is due on demand, there is no provision in that agreement for a due date, and the agreement includes the usual non variation clause,⁹ no waiver clause and no indulgences¹⁰ are afforded, unless agreed to and in writing, the applicants rely on the principle in the Shifrin¹¹ judgment , and no variation is before this court.
9. Regarding their defence on a cause of action, the respondent conveniently relied on clause 2.4.2 of the agreement whilst the applicant relies on clause 2.4.1 for payment on demand.¹² Counsel reiterated that the applicant does not rely on the cession for its claim, it relies on the demand provisions of the overdraft agreement. The respondents' attorney's correspondence, referred to earlier confirmed the purpose of the cession of book debts agreement between the parties.

⁹ Caselines 001-42 cl17

¹⁰ Caselines 001-42 cl 18

¹¹ SA Sentrale Ko Op Grannmaatskapy Bpk v Shifren en Andere 1964 (4) SA 760 (A)

¹² Caselines 001-39

10. Advocate Bezuidenhout appeared for the first respondent and submitted that the applicant is obliged to file a further affidavit to correct an error in its affidavit, however it can only do so with the leave of a court and without such leave the court must regard the affidavit as pro non scripto, the applicant failed to tender any explanation for its delay in bringing the error to the court's attention. The applicants were aware of this error since 2019 and only on its own version it obtained a winding report only in January 2023. The rule is clear that when a party files affidavits without leave, the court can regard them as pro non scripto. Counsel argued that the applicant must set out a proper explanation that negates mala fides or culpable remissness, as to why the facts were not put to the court at an earlier stage, he submitted there is a culpable remissness when the applicant only now seeks to correct it in January 2023.
11. Mr Bezuidenhout submitted that if the court permitted the filing of the further affidavit, the respondent is entitled to file a response. The respondent has a bona fide defense, when it will demonstrate that the applicant accepted that "in terms of the cession agreement", it owned the debts ceded and that the respondents had no right to the monies due. The applicant seeks to recover the balance due from the respondents whilst also exercising its right to claim monies from the respondent's debtors.
12. In reply Bruinders SC reminded the court that the applicant relies on clause 2.4.1 of the overdraft agreement, for payment of the balance due on

demand and that the cession is not before this court, the respondents cannot rely on it to delay payment of the debt. It was submitted that none of the defences raised made any inroads into the claim based on the agreement.

13. Counsel referred the court to the judgment in *Ndlebe v Budget Insurance Limited*¹³, where the court held that “there was nothing wrong if the application to file a further affidavit is heard at the same time as the main application.”
14. Counsel submitted there is nothing more that the respondent can aver given its acknowledgment of the debt and its liability thereto. The respondents did not demonstrate any prejudice suffered when a R28 notice was served, when it could have. It was reiterated that based on the applicant’s cause of action, and the respondents’ acknowledgment of their liability, there is no valid defence that can be argued in a further affidavit and it will simply delay the finalisation of this matter.

COSTS

15. The matter was before court on three previous occasions, and costs were reserved, when a joinder application was dismissed , on the next occasion

¹³ 2019 JDR 0506 GJ, at para 11

the matter was removed to be enrolled on the opposed roll and thereafter postponed for applicants to correct its error and to file a further affidavit.

16. The applicant conceded that it is liable for the costs of a postponement occasioned by the amendment to the pleadings, granted by Kuny J, and it was entitled to attorney client costs, as per the agreement, of the other occasions.

JUDGMENT

Filing further affidavits

17. In *Bader v Weston*¹⁴, it was stated, that a court will not reject additional affidavits against the filing of more than one set of affidavits solely upon the basis of any alleged rule of practice. In casu the applicant noted an error in its affidavit which needed to be amended.
18. It is trite that an affidavit may only be amended by the filing of a further affidavit, with the leave of the court. In *Nedbank Ltd v Hoare*¹⁵, regarding a refusal to allow an amendment, the court held that formalism cannot frustrate the court's determination of the true dispute. The general rule in motion proceedings is that only three sets of affidavits may be filed,

¹⁴ 1967 (1) SA 134 C

¹⁵ 1988(4) SA 541 (E) headnote

however a court may apply its discretion and allow a further affidavit to be filed.

“... the court has a discretion to be exercised judicially upon a consideration of facts of each case, and it is a question of fairness to both sides.” ¹⁶

19. I considered the reasons for the filing of the further affidavit and noted that the respondents do not suffer prejudice¹⁷, in casu. The parties have known all along the entity which is referred to, there is no reason why the application should be refused and I am of the view that it is in the interest of justice that the applicant be permitted to correct the error. A CIPC search confirmed the first respondent's identity and accordingly this court will permit the affidavit in the application.
20. I agree with the judgment of Twala J, referred to above and it is cost effective and expeditious in finalising the matter, on the facts before the respondent suffers not prejudice, and the affidavit is admitted.
21. Mr Bezuidenhout's argument that the respondent is entitled to reply, when it will argue based on the terms of the cession agreement will not assist, them as the cession agreement is not before me. Moreover, the agreement includes a non-variation clause which is clear and succinct that the parties intended to impose restrictions on their own power to subsequent variation

¹⁶ Herbstein, Van Winsen, The Civil Practise of the High Courts of SA, vol 1, 3rd ed,p434

¹⁷ Transvaal Racing Club v Jockey Club of SA 1958 (3) SA 599 W

of their contract, it cannot be varied unless reduced to writing and signed on behalf of the bank (by a duly authorised officer) and the client who is duly authorised. There is nothing before me that records any variation to the terms of the overdraft facility.

Pleading in Affidavit.

22. It is trite law that a party must set out the essential averments in its pleadings, the material facts on which it relies. In casu the respondents raise substantive defences in their heads of argument. I agree with Mr Bruinders, that the respondent cannot rely on defences it raised only in its heads of argument, the applicant has not had an opportunity to reply to them. A party stands and falls on its papers.
23. Mr Bruinders has however addressed the defences raised, as I set out earlier, none are meritorious. It is noteworthy that Mr Bezuidenhout in his address argued only the respondents' defence based on the cession agreement, when he proffered that the applicant owned the debt and it confirmed it held the right to recover the debt from the respondents main debtor Triolean Meats, however in correspondence¹⁸ the respondents' attorney is of a different view, the respondents were in the process of collecting this debt.

¹⁸ Caselines 009-24

24. The respondents conceded their indebtedness and liability to the applicant as appears from correspondence dated, 24 July 2018,

- “1. Our client , K & M Intenational Trading (Pty) Ltd, remains fully committed to settling its obligations to yourselves in respect of the above loan facility.*
- 2. Our client wishes to engage with you on a good faith basis, and has instructed us to keep you appraised of its ongoing efforts to settle the debt. ...*
- 3. We seek your kind indulgence to hold your recoveries process in abeyance, to the extent permitted by your internal protocols.*
- 4. ...”.*

25. Furthermore, having regard to the non variation clause and the exclusion of indulgences unless in writing, I am of the view that the application must succeed.

26. The respondents are granted the reserved costs of the postponement occasioned by the necessary amendment to correct the citation of the first respondent.

Accordingly, I make the following order:

1. The late filing of the applicant’s supplementary affidavit is condoned.
2. The applicant is granted leave to file its further affidavit, which is admitted.

3. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant the following:
 - 3.1. The amount of R806 043.61.
 - 3.2. Interest thereon at 10.25% per annum, on the daily minimum balance compounded monthly from 30 September 2018 to date of payment.
 - 3.3. Penalty interest at 3% per annum on the daily minimum balance compounded monthly from 30 September 2018 to date of payment.
 - 3.4. The reserved costs of the postponement and removal on an attorney client scale.
4. The applicant is to pay the respondent the reserved party party costs of 29 April 2021.



MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 30 January 2024.

Appearances:

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