

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case no: **4906/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CAROSPAN (PTY) LTD

t/a NASHUA BLOEMFONTEIN

[Registration number: **20[....]07**]

Plaintiff

and

NEW BEGINNINGS PROJECTS CC

[Previously known as **AMADWALA**

TRADING 363 CC]

[Registration number: **20[....]23**]

First Defendant

PATRICK PHUTI

[Identity number: **8[....]8**]

Second Defendant

HEARD ON: **13 APRIL 2023**

JUDGEMENT BY: **P R CRONJÉ, AJ**

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 19 April 2023

JUDGEMENT

[1] It is trite that the purpose of a summary judgment application is to allow the Court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution of the Republic of South Africa.¹

[2] The essential requirement in summary judgment proceedings remains the same namely whether or not a defendant, be it in the plea or the affidavit opposing summary judgment, has demonstrated the existence of a *bona fide* defence to the action by disclosing fully the nature and grounds of the defence and the material facts relied upon for the defence.²

Background:

[3] The Plaintiff (“Carospan”) instituted action against the First Defendant (“NBP”) as Principal Debtor for payment of R173 785.00 in respect of arrear rental and

¹ See: *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another and 8 other cases* (2019/8153; 2019/6412; 2017/14846X; 2019/12142; 2019/10245; 2019/7918; 2019/14870; 2018/37011) [2019] ZAGPJHC 386; 2020 (1) SA 623 (GJ) (4 October 2019)

² See: *Standard Bank of South Africa Limited and Another v Five Strand Media (Pty) Ltd and Others* (745/2020) [2020] ZAECPHC 33 (7 September 2020) at para [14]

service charges for goods (printers, telephone systems and a surveillance system), pre-estimated liquidated damages of R90 713.16, immediate return of the goods and damages to be quantified later. The Second Defendant (Mr Phuti) is sued as surety. The attorney for the “Defendants” entered appearance to defend, but as it will appear later herein, he cannot continue, contrary to section 133 of the Companies Act³ (the “Companies Act”), to defend on behalf of NBP.

[4] Mr Phuti stood surety for the debt owed by NBP to Carospan in terms of two written Deeds of Suretyship concluded on 6 November 2015 and 20 February 2020 respectively. Carospan’s cause of action against Mr Phuti is based on suretyship. In clauses 2.1 of each of the surety agreements, Mr Phuti bound himself as surety and co-principal debtor for due and punctual payment of “*all monies of whatsoever nature which may become due and owing from time to time by the Principal Debtor to the Creditor arising from any cause of whatsoever nature*”. [my emphasis] Clause 3.5 provides that “*any written Acknowledgement of Debt signed by the Principal Debtor shall be binding on the Surety/ies and this Deed of Suretyship shall be deemed to cover any indebtedness recorded in such Acknowledgement of Debt.*” [my emphasis]

[5] Clause 3.1 and 3.2 states that the suretyship shall operate as a continuing covering security for any present or future indebtedness of NBP to Carospan and shall remain of full force and effect notwithstanding any fluctuation in, or even temporary extinction of such indebtedness.

[6] In terms of Clause 3.7 Carospan shall have the right to appropriate any monies received from Mr Phuti to such indebtedness of NBP.

[7] Mr Phuti renounced the benefits of *non causa debiti*, *errore calculi*, excussion, division, *de duobus vel pluribus reis debendi*, no value received and revision of accounts. In the 2015 suretyship, Mr Phuti selected 10 Fransrand Street, Heuwelsig, Bloemfontein (the Fransrand address), and in terms of the 2020 suretyship, 5 Kenneth Kaunda Road, Bayswater, Bloemfontein as his *domicilium citandi et executandi* addresses. The Deeds of Suretyship and the clauses therein, save for

³ 71 of 2008

jurisdictional points raised in respect of two provisions, are not in dispute.

[8] During March 2021, Mr Phuti in his personal capacity, and also on behalf of NBP, signed an Acknowledgment of Debt, accepting liability for payment of R576 379.03 (exclusive of VAT). The Defendants confirmed that the contents of the acknowledgement was completed, and signed by them, which contents were explained to them and they agreed to the terms and conditions. The Defendants *inter alia* undertook to pay attorney and client fees and interest on the amount at a rate of 7.5% per annum to be calculated from date of default, 14 February 2020. The acknowledgement does not form the basis of the cause of action. Its existence was not denied, the only defence raised in respect thereof was that it is subject to the provisions of the National Credit Act⁴ (NCA).

[9] The Defendants undertook to pay the capital amount in monthly instalments of R40 000.00. The amount includes all rental amounts on all contracts between NBP and Carospan. In terms of Clause 5, the Defendants acknowledged that a certificate setting out the balance outstanding shall be binding and acceptable. They also agreed that should they fail to make prompt payment of the instalments on the due date, the full outstanding balance together with interest and costs will immediately be due and payable.

[10] The Defendants agreed that in the event of them failing to comply with the acknowledgment, Carospan may, without prior notice to them, issue summons against them for monies then due by them, apply for judgment against them for the outstanding balance in terms of the acknowledgment on attorney and own client scale and apply to the relevant Court for payment in terms of their offer as contained in the acknowledgment. Mr Phuti furthermore agreed to the issuing of an emolument attachment order.

[11] On 18 May 2022, Mr Jurie Schoeman of Carospan, issued a Certificate of Balance ("certificate") stating that the arrear account for rental and service charges amount to R173 785.22 (Claim A). A document stating to be a breakdown of the

⁴ 34 of 2005

arrears was appended to the particulars of claim. The total amount in that document corresponds with the amount in the certificate and the amount in Claim A.

[12] In a letter of demand to the Defendants, Carospan stated that the arrear balance is R322 309.92 and future rentals for the unexpired period of the agreement is R109 821.72. In a certificate, also dated 18 May 2022, Mr Schoeman certified that NBP is indebted to Carospan for future rentals for the unexpired period in the amount of R90 713.16 (Claim B).

[13] NBP did not file a plea or oppose the application for summary judgment on the basis of its business rescue.

[14] The pleadings were served on the Defendants on 13 October 2022. In a letter marked “*without prejudice*” dated 27 October 2022, Dlabantu Associates, a firm of attorneys who appeared for the Second Defendant, stated that they have instructions to settle and their client remains committed to amicable resolution of the matter. Lack of service of the papers on Mr Phuti was not raised. In the letter, Mr Dlabantu confirmed that they hold instructions from Mr Phuti to settle the matter and proposed payment of R5 000.00 per month until full and final payment. The letters from the Defendants were all marked “*without prejudice*” but were attached by Mr Phuti to his special plea. In doing so, privilege was in my view, waived.⁵

[15] Mr Phuti pleads that they give Carospan notice of termination of the agreements citing the challenging financial position of NBP which led it to be placed in business rescue.

[16] On the conspectus of the above, it is therefore unquestionable that binding agreements were concluded, performance was rendered by Carospan to NBP, NBP was placed under business rescue and did not comply with its obligations, and that the amount of R173 785.00 for arrear rental and service charges is due and owing.

⁵ Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013)

The suretyship agreements are also not in dispute, nor their terms. Mr Phuti therefore has to show that he has a *bona fide* defence.

Points in *limine*:

[17] Mr Phuti raised points in limine in a Special Plea, which were expanded in the opposing affidavit and which were further expanded during argument. I pause to mention that Mr Phuti did not personally depose to the opposing affidavit, Mr Dlabantu, his attorney did. I entertained these points on the basis that Mr Phuti alleges that this Court does not have jurisdiction. A defendant is entitled in summary judgement proceedings to raise issues relating to the process even if s/he did not file an opposing affidavit.⁶

No service of the summons on Second Defendant:

[18] Although it was not pleaded, Mr Dlabantu, denied this Court's lack of jurisdiction. His references to cases in respect of this point were not included in his heads of argument and I requested Mr Sander to file supplementary heads in respect of the cases, which I received.

[19] Mr Dlabantu referred me to First National Bank of South Africa v Ganyesa Bottle Store (Pty) Ltd⁷. I understood his argument to be that the pleadings were not properly served on Mr Phuti personally as the Fransrand-address is not his *domicilium citandi et executandi* address and that this constitutes a procedural defect in terms of Rule 4 of the Uniform Rules of Court.

[20] The return of service shows that it was served at 10 Frans Rumpff Street and the Sheriff's return states: "*Given address [Fransrand] is believably known as Frans Rumpff Street and not Fransrand as mentioned in the summons*". In the special plea issue was taken with the failure of Carospan to send a notice of *demand* to an email address and not the domicilium address in the 2020 suretyship agreement. No issue was taken with the Sheriff's service on NBP. No issue was taken in the pleadings

⁶ Van Niekerk et al, Summary Judgment – A Practical Guide, Lexis Nexis, Issue 12, p. 11-14(4)

⁷ 1998 (4) SA 565 (NC)

with the return of service on Mr Phuti at 10 Frans Rumpff Street. It was not stated that he no longer resides there. Mr Dlabantu, in his Supplementary heads of argument, states that the relevant address is the one in the 2020 suretyship and that Mr Phuti was entitled to change his domicilium address from 2015.

[21] Carospan, however, referred to both suretyship agreements in the particulars of claim.⁸ Carospan also referred to the letter of demand, dated 16 February 2022, where the Fransrand address as well as the disputed email address reflects. In the special plea, Mr Phuti states that the demand was never sent by *registered post* to the domicile address in compliance with clauses 7 and 8 of the 2020 suretyship agreement but to an unknown email address, which makes the claim premature on the basis of a lack of demand.

[22] Mr Sander argues that Mr Phuti should have raised this as an irregular step in terms of Rule 30, alternatively Rule 23 of the Uniform Rules. Mr Phuti never utilised these Rules and rather pleaded and filed an opposing affidavit.

[23] Mr Dlabantu referred to Interactive Trading 115 CC and another v South African Securitisation Programme and Others⁹. Mr Sander argues that the matter is distinguishable as default judgement was granted in the parties' absence and that there was no proper service. Mr Sander states that the matter is factually and legally distinguishable. Mr Dlabantu also referred to Vidavsky v Body Corporate of Sunhill Villa¹⁰. Mr Sander argues that it pertained to arbitration proceedings and that the absent party did not receive any notice.

[24] From the above I distil that Mr Phuti signed two suretyship agreements. He elected domicile addresses in both. He did not categorically state that he does not reside at the address appearing in the Sheriff's return. I deem this to be a convenient but unsuccessful attempt to escape the consequences of his admission and *inter alia* to make payment of R5 000.00 per month. I am satisfied that Mr Phuti is properly before Court. All the documents, letters, and his failure to deal with the return

⁸ Pleadings, para 14

⁹ (2119/2017) [2019] ZALMPPHC 10; 2019 (5) SA 174 (LP) (29 March 2019)

¹⁰ 2005 (5) SA 200 SCA

singularly or taken together, leaves no doubt that Mr Phuti was properly served.

[25] Mr Phuti did not plead over and prays that the Court grant him leave to plead over in the event that the special pleas are dismissed.

Business Rescue:

[26] He states that NBP was placed in business rescue and Carospan cannot continue against it. Carospan does not presently seek judgement against NBP. That disposes of paragraphs 1 – 2.7 of the special plea.

The action is premature:

[27] He states that Carospan's action is premature. In paragraph 3.4 of his plea he states: "*The Plaintiff never sent a demand to the 2nd Defendant in compliance with clauses 7 and 8 of the deed [of suretyship]. The letter of demand attached and marked "POC12" [to the Particulars of Claim] to the poc [Particulars of Claim] was never sent by registered post to the domicile address of the 2nd Defendant*" and that "*the email address used is unknown to him and not his*". Clauses 7 and 8 of the suretyship agreements read as follows:

"7. *The Surety/ies selects the address set out herein as his domicilium citandi et executandi under this Deed of Surety.*

8. *Any notice or letter which is sent by the Surety/ies to the Creditor or vice versa pursuant to this Deed of Suretyship shall be deemed to have been received by the recipient on the day but one following upon the posting of such letter provided that the same is posted by prepaid registered post."*

[28] The email address does not appear anywhere in documentation. I understand the formulation of this part of his plea to mean that he complains about the method of service of the letter of demand and not the address *per se*. The suretyship agreement does not oblige Carospan to place Mr Phuti in *mora*.

A claim was submitted in business rescue:

[29] Carospan submitted a claim to the business rescue practitioners in the amount of R432 131.64. Mr Phuti appended to his plea a list of creditors of NBP that shows that its creditors' claims in the business rescue amount to R141 926 522.00 (one-hundred and forty-one million, nine-hundred and twenty-six thousand, five-hundred-and-twenty-two rands) the bulk, R74 666 010.63 (seventy-four million, six-hundred-and-sixty-six thousand and ten Rand and sixty-three cents), owing to the South African Revenue Service (SARS). He does not deny that Carospan's claim is due and payable. He could not as he signed an acknowledgement of debt on behalf of NBP to which I shall refer later.

[30] Relying on clause 3.9 of the suretyship, he states that he will only be liable for the balance remaining after Carospan's claim was paid by the business rescue practitioners. He states that his liability is accessory, that Carospan cannot institute action against him alone, that Carospan must prove an enforceable claim, and that he will only then be jointly and severally liable. By referring to the claim already submitted and not raising any doubt about it, his statement that it has to be proven is disingenuous.

[31] Clause 3.9 provides for two scenarios. Clause 3.9.1 provides that the surety undertakes not to prove a claim in the event that NBP is placed under business rescue (the contract refers to judicial management). Clause 3.9.2 provides that Carospan shall be entitled to accept any dividend from the business rescue practitioners "*without prejudice to it's [sic] rights against the Surety/ies under this Deed of Suretyship ...*". Carospan can thus immediately claim from Mr Phuti. Nothing in the suretyship agreements impede Carospan to claim from him apart from NBP.

Discrimination:

[32] Mr Phuti claims that his constitutional right to equality will be infringed if NBP is protected against claims for debt whilst in business rescue¹¹ whereas he does not

¹¹ Section 133 of the Companies Act

enjoy the same protection.

[33] Section 136(1) of the Act caters specifically for employees, shareholders and directors. There exists unique contractual *nexuses* between a company and these persons.

[34] It cannot be *unfair* discrimination/differentiation to secure payment from co-principal debtors, even where their liability is accessory.

[35] Mr Sander, for Carospan, referred me to *Taljaard and Another v Land and Agricultural Development Bank of South Africa and Others*¹² where it was sought that section 1 of the Companies Act be declared unconstitutional in that it allegedly unfairly discriminates between natural persons on the one hand and juristic persons such as companies and close corporations on the other.

[36] In *Taljaard supra* the test in *Harksen v Lane NO and Others*¹³, where the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause, was quoted. The first stage is to determine whether the provision differentiate between people or categories of people and if so, whether the differentiation bear a rational connection to a legitimate government purpose. If it does not then there is a violation of section 8(1)¹⁴. The second stage is to determine whether the differentiation amounts to “unfair” discrimination. If it has been found to have been on a specified ground, then unfairness will be presumed.¹⁵ If on an unspecified ground, unfairness will have to be established by the complainant. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2)¹⁶. Mr Phuti did not advance discrimination on a specified

¹² (1094/2022) [2022] ZANCHC 59 (11 October 2022); See also: *ABSA Home Loans Guarantee Company (RF) (Pty) Ltd and Another v ERF 1404 Dainfern CC and Others* (41403/2019) [2022] ZAGPJHC 490 (28 July 2022)

¹³ (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)

¹⁴ Now section 9 in the 1996 Constitution

¹⁵ The specified grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁶ S 9(2) in the 1996 Constitution

ground and I find that he failed to establish any other ground. The Court in Taljaard *supra* found that it was not unfair discrimination.

[37] In Investec Bank Ltd v Bruyns¹⁷ the Court held:

"18. In my view the statutory moratorium in favour of a company that is undergoing business rescue proceedings is a defence in personam. It is a personal privilege or benefit in favour of the company. As was stated in the SA Fire case (at 310E-F) the essence of a defence in rem is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been extinguished or discharged. A defence in personam, by contrast, arises from a personal immunity of the debtor in respect of an otherwise valid and existing obligation. Clearly the moratorium afforded by s 133(1) falls into the latter class. The obligations of the company as principal debtor are not extinguished nor discharged and their validity is in no way impaired. Indeed, with the consent of the business rescue practitioner or the court the obligations may be enforced."

Non-compliance with the National Credit Act:

[38] Mr Phuti, not having pleaded it in the special plea, for the first time raised non-compliance with the provisions of the NCA in the opposing affidavit. He states that the agreements are credit agreements as Carospan billed NBP periodically and charged a fee and/or interest payable and that the periodic billing was monthly. He states that Carospan was compelled to register and that leases are covered as credit agreements. It is common cause that Carospan is not registered.

[39] Does this Court have to entertain a reference to the NCA when it was not raised in the special plea? I believe this is mandatory. In Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others¹⁸ the Court held:

"[17] It is clear from s 129(1)(a) and (b) that prior to commencing legal proceedings to enforce an agreement, the credit provider must deliver a written

¹⁷ (19449/11) [2011] ZAWCHC 423; 2012 (5) SA 430 (WCC) (14 November 2011)

¹⁸ (499/2015) [2016] ZASCA 98; 2016 (6) SA 102 (SCA) (3 June 2016)

notice to the consumer wherein attention is drawn to the default in repayment, setting out various options open to him or her whereby the pressure of the default could be alleviated. In other words, it is a mandatory requirement which must be satisfied before judgment can be granted for recovery of the outstanding debt." [my emphasis]

[40] Are the agreements on which Carospan relies credit agreements? Section 1 of the NCA defines a lease as:

"'lease' means an agreement in terms of which - (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer; (b) payment for the possession or use of that property is - (i) made on an agreed or determined periodic basis during the life of the agreement; or (ii) deferred in whole or in part for any period during the life of the agreement; (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and (d) at the end of the term of the agreement, ownership of that property either - (i) passes to the consumer absolutely; or (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement." [my emphasis]

[41] The agreements do not afford NBP any rights to ownership during or at the termination of the agreement as required by paragraph (d) of the definition. The rentals were furthermore payable monthly in advance. This does not bring the agreements within the ambit of the NCA.

[42] In Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises¹⁹ it was held:

"12. ... The defendant never acquires ownership of the goods. I pause to mention that this means that the Agreement is not a "lease" for the purposes of s 8(4)(e) because a lease as defined in s 1 of the NCA is an agreement in terms of which,

¹⁹ (2008/28978) [2010] ZAGPPHC 10; 2012 (3) SA 149 (GNP) (2 March 2010); See also: Absa Technology v Michael's Bid a House (212/2012 [2013] ZASCA 10 (26 February 2013) at [27]

amongst other things, ownership of the goods passes to the consumer at the end of the term of the agreement. As has been observed, the lease contemplated by the NCA is not a lease at all (Guide to the National Credit Act, Scholtz et al, 8-9 per JM Otto) but the old hire purchase agreement.

...

33. ... *A common law lease such as the Agreement does not involve the provision of credit either as defined in the NCA or as the term is generally understood in commerce. A lessor who buys goods for the purpose of leasing them to a specific lessee does not extend credit to such a lessee, regardless of how the lessor calculates the rentals he wishes to receive, any more than does a landlord who buys a building not for his own use but for the purpose of accommodating tenants.*

34. ... *The legislature has decided that common law leases not providing for the deferral of an amount owed should not be hit by the NCA. Persons of business are fully entitled to regulate their affairs to take advantage of this legislative decision.*" [my emphasis]

[43] The NCA makes it clear that a surety shall be protected by the Act when the principal debtor is protected.²⁰ In *casu*, this is not applicable.

Non-compliance with the General Law Amendment Act 50 of 1956:

[44] Contrary to his acceptance of the suretyships in the special plea, he now states that the agreements are invalid because they do not comply with the formal requirements of the General Law Amendment Act 50 of 1956. But for stating that they are unenforceable as they do not define the nature and do not set out the amount of the principal debt, the precise basis for this argument is not evident. It is trite that a suretyship agreement can be for a limited or unlimited period, for defined or general performance, in a stated amount, for all debt of whatsoever nature and for an indeterminable period. There is no merit in this defence. This was not pleaded in

²⁰ Section 8(5)

the special plea. There is no defect in the agreements.²¹

Certificates of balance:

[45] Mr Phuti attacks the certificates averring that they purport to be conclusive proof of the amount and that the clause is *contra bones mores*. All the agreements provide that the certificates are *prima facie* proof of all the matters stated therein. There is no provision that it is conclusive proof. Mr Phuti raised no defence to the amounts and his attack is at best bald, vague, and sketchy.

[46] In *Nedbank Limited v van der Westhuizen NO and Others*²² it was held:

"[18] The certificates of balance that constitutes prima facie proof of the amount outstanding cannot be rebutted by bald, vague, or sketchy denials by the defendants which leaves the court guessing as to the basis for the denials. The defendants have failed to set out any factual grounds on which it challenges the amounts set out in the certificates of balance or whether or not the applicant rendered an accurate account. In addition, the defendants have simply ignored the fact that they renounced the benefits of non numeratae pecuniae, non cause [sic] debiti, errore calculi and the revision of accounts. The renunciation of the exception non causa debiti places the onus of proving the non-existence of a causa on the defendants. The defendants have disclosed no facts on which a court may find that they are not bound by their contractual election to renounce these benefits. The defendants have accordingly, failed to disclose material facts which, if proven at trial, would constitute a valid counterclaim to the plaintiff's claim." [my emphasis]

Failing to plead over – "the Cape Practice":

²¹ See: *Hei Way Supply (Pty) Ltd v Simons* (6314/19P) [2021] ZAKZPHC 94 (16 November 2021) [para [12]

²² (31244/2020) [2021] ZAGPJHC 452 (3 March 2021); See also: *Nedbank v Botha and Another*-2016 JOL 36735 FB

[47] Mr Phuti did not plead over “*as to plead over at this stage ... in the absence of the 1st Defendant will be prejudicial to him*”. He prays that his special plea be upheld and that leave to plea over be granted should the special plea be dismissed.

[48] In the affidavit in support of summary judgement, Carospan affirmed the basis of the claims against Mr Phuti and contends that the points in law and facts raised in the special plea does not disclose a defence.

[49] He, notwithstanding his admissions of the agreements and debt due, states that there is a “*serious dispute regarding the amount*” if the amount in the summons and the amount submitted to the business rescue practitioners is compared. It was incumbent on him to set out facts to show that the amount/s are wrong.

[50] Mr Sander submitted that Mr Phuti cannot plead twice. Mr Dlabantu, for Mr Phuti, referred me to “the Cape practice” which provides that pleading over was not necessary when special pleas were raised.

[51] In *R Data (Pty) Ltd v Nordic Light Properties (Pty) Ltd*²³ reference was made to “the Cape practice” of double pleading:

“15. *The practice relating to pleading over has not been uniform. It has been accepted in a number of cases that where a defendant raises a special plea of, for example, arbitration as a condition precedent to the right of action, he is not required to plead over on the merits (see Cilliers et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa (5ed) Vol. 1 at p 603). If the special plea fails to achieve its objective, the court will allow the defendant an opportunity of delivering a plea on the merits. Although this approach has not always been followed in other jurisdictions, in the Western Cape pleading over on the merits has usually not been insisted upon, especially when a defence such as want of jurisdiction or lis pendens has been raised.*”

[52] The “Cape practice” was considered in the Western Cape Division of the High

²³ (17865/2020) [2022] ZAWCHC 137 (6 June 2022)

Court by Binns-Ward J in *Absa Bank Limited v Meiring*²⁴. In that matter, the Defendant also raised a special plea and did not plead over. The Court granted an order refusing summary judgment upon request of and by agreement between the parties but found it necessary to address “the Cape practice”, at least in the context of summary judgment. I quote extensively from the judgement:

“[12] ‘The Cape practice’ originated long before the adoption of the Uniform Rules in January 1965. It was probably inspired by the practice in Roman Dutch law, described in Herbstein and Van Winsen op cit, that ‘it was not necessary to plead over when special defences such as lack of jurisdiction, ... The practice did not exist in a procedural environment that allowed for summary judgment applications (which were introduced in this country only in the early 20th century), and more especially the procedure currently in place in terms of the recently amended Rule 32.

[13] As the title implies, one of the objects of the Uniform Rules was to eliminate or reduce the incidence of differing rules of procedure in the various provincial and local divisions of the erstwhile Supreme Court. The purpose of procedural rules of court has always been, and remains, the efficient administration of justice, and any construction of them that would conduce to a hampering effect would be dubious;

[14] Rule 22 does not make provision for the piecemeal pleading of defences, and it is difficult to conceive how permitting a defendant to disclose its defences in stages might in any contribute to the efficient and cost-effective administration of justice. All the indicators point the other way. ...

[15] If the intention had been to entrench the Roman Dutch procedure mentioned above, one would have expected the rule maker do have done so expressly. ... Rule 23(4), which provides ‘Whenever any exception is taken to a pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary’, suggests that the rule maker did apply its mind

²⁴ (3508/2021) [2022] ZAWCHC 31; 2022 (3) SA 449 (WCC) (14 March 2022)

to the issue of pleading over. It chose to spell out when pleading over was not required.

[16] In the circumstances there was much to be said for the view expressed by Flemming J in *Beckett Construction supra*, concerning the interpretation of Rule 22. It is an interpretation that has enjoyed endorsement by the Constitutional Court in *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24 (2 September 2021); 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC) at para 33, where Mhlantla J stated that ‘(g)enerally, when a special plea is raised, all the defences on which the defendant intends to rely must be raised at the same time. This is so because, should the special plea fail, there would be no further opportunity to plead over on the merits.’ ... In addition to *Beckett Construction*, the Constitutional Court judgment (*loc. cit.*) cited *Thyssen v Cape St Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116G, where O’Hagan J stated ‘If Rules 22 and 23 are read together one gains the impression that Rule 22 envisages the pleading of all defences at one and the same time. It is otherwise in the case of an exception where all the Court is concerned with is the content of the pleading attacked’.

[17] ...

[18] ...

[19] The delay, unnecessarily increased costs and inconvenience occasioned in the current matter by the defendant’s failure to plead over serve to demonstrate that the administration of justice would be better served by interpreting rule 22 to require a defendant to plead over, and by recognising that it does not leave scope for the continuation of ‘the Cape Practice’. The implications of the amended rule 32(2)(b) have made it opportune to spell that out unambiguously, whereas it had previously perhaps not been exigent to do so.

[20] It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant’s failure to have pleaded such defences initially will be material and, in addition to

all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect will be that such a defendant will ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application.

[21] In the current case I was content, against the background of prevailing uncertainty about the continuing acceptability of ‘the Cape practice’, to make the orders agreed to by the parties. The object of this judgment is to signal that will not be the case in the future.” [my emphasis]

[53] R Data *supra* did not refer to Absa Bank Limited v Meiring *supra*.

[54] The “Cape practice” should not be applied in the matter before me as it sets no precedent in this Division. I am unaware of such practice in the Free State and Binns-Ward J clearly had reservations about its application, with which I respectfully agree.

Conclusion:

[55] I conclude that there is no merit in the special pleas or the arguments advanced before me by Mr Phuti’s representative. The special plea is therefore dismissed with costs. Mr Phuti did not plead over and I conclude that he has no *bona fide* defence and that appearance to defend, the filing of the special plea and arguments were presented merely to delay.

[56] I am satisfied that a proper case for payment of R173 785.22 was made.

[57] Claim B is for pre-estimated liquidated damages of R90 713.16. In support of this claim, Carospan relies on the Master Rental Agreement concluded on 20 February 2020; a document with heading Breakdown of Future Rentals for the period 1 June 2022 – 28 February 2023; and a certificate issued on 18 May 2022.

[58] Mr Phuti raised no pertinent defence to the merits of the claim. I am not confident in granting judgment for Claim B and exercise my discretion against granting judgment for this amount.

[59] It is common cause that the *causa* for the possession of the goods exist between Carospan and NBP. As section 133 of the Companies Act impedes litigation against NBP, and as I have no knowledge whether Mr Phuti is in possession of the goods or not, I cannot make an order in respect of Claim C.

[60] Claim D is for the quantification of damages which cannot be adjudicated in summary judgement proceedings. To the extent necessary, I grant leave that Carospan may approach Court on the balance of the claims for which judgment is presently not granted.

Costs:

[61] The Plaintiff asks for costs *de bonis propriis* against Mr Dlabantu as attorney for Mr Phuti. I gave Mr Phuti opportunity to address this in supplementary heads of argument. Having considered the request and the submissions of Mr Dlabantu carefully, I conclude that it would not be inappropriate in the circumstances.

ORDER:

Summary Judgment is granted against the Second Defendant for:

1. The special plea is dismissed with costs.
2. Payment of R173 785.22;
3. Interest on the aforesaid amount at the prescribed rate of interest per annum from date of demand until date of final payment;
4. Cost of suit on attorney and client scale;

5. Claims B, C and D stand over for later adjudication.

P R CRONJÉ, AJ

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