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

Case no: 1249/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MASSMART WHOLESALE (PTY) LTD APPLICANT

and

COUNTRY MEAT MARKET FIRST DEFENDANT/ RESPONDENT
LADYSMITH CC t/a COUNTRY
MEAT MARKET

(Registration Number: 2006[...])

HAROLD ADRIAN LEACH SECOND DEFENDANT/ RESPONDENT
(Identity Number 75[...])

PETER JAMES VICKERY THIRD DEFENDANT/ RESPONDENT
(Identity Number 75[...])

GRAIG JOHN ANNANDALE FOURTH DEFENDANT/ RESPONDENT
(Identity Number 70[...])

HEARD ON: 24 AUGUST 2023

DELIVERED ON: 15 SEPTEMBER 2023

Introduction

[1] On 24 August 2023, I made an order dismissing summary judgment application against the Third and Fourth Respondents with costs. I reserved reasons therefor. These are my reasons.

Brief Background

[2] The Plaintiff, Massmart Wholesale (Pty) Ltd (Massmart), issued combined summons against the First Defendant, Country Meat Market Ladysmith CC trading as Country Meat Market (Country Meat Market), Harold Adrian Leach (Second Defendant), Peter James Vickery (Third Defendant) and Graig John Annandale (Fourth Defendant). Plaintiff sued for the amount of R954 643.20 plus interest on the capital amount at the prime rate as charged by ABSA bank limited from time to time plus 2.5 % per annum, from due date to date of final payment.¹ From the Particulars of Claim, it is germane that the debt arises from a written contract entered into between Shield Buying and Distribution (PTY) LTD (Shield), and Country Meat Market for supply of goods. The Second, Third and Fourth Defendants signed deeds of suretyship in which they bound themselves co-principal debtors for Country Meat Market's indebtedness to Shield.

[3] Upon service of summons on them, the Third and Fourth Defendants (the Defendants) entered intention to defend and subsequently filed a plea in which is raised several special pleas as well as a plea on the merits. The First and Second Defendants did not defend the matter. The case against them thus falls outside the ambit of this judgment.

[4] Subsequent to receiving the plea on behalf of the Defendants, and notwithstanding the defences raised in the plea, Plaintiff filed an application for

¹ See Plaintiff's Particulars of Claim, page 42 of the bundle

summary judgment against them. The application for summary judgment was opposed by them.

Plaintiff's Summons and Application for Summary Judgment
The Particulars of Claim

[5] Without convoluting issues, I deem it relevant that I pause, at this stage, to explain that I will refer to relevant portions of the Particulars of Claim as I proceed along with my reasons. I trust the importance for doing so will become apparent later on in this judgment.

[6] The following allegations appear from the Particulars of Claim²:

1. The above Honourable Court has jurisdiction to hear this matter by virtue of the fact that, in terms of clause 18 of the written agreement, the parties' consent to the jurisdiction of the Magistrate's Court. Further, the First Defendant's principal place of business.(sic) Alternatively, the whole cause of action arose within the courts area of jurisdiction.

[7] The deed of suretyship Plaintiff relied on for its claim against the Third Defendant, was signed by the Third Defendant on 9 March 2009 at Newcastle, KwaZulu- Natal and countersigned on behalf of Shield by its duly authorised representative on 1 April 2009 at Johannesburg, Gauteng³. The deed of suretyship the Plaintiff relied on for its claim against the Fourth Defendant, was signed by the Fourth Defendant, on 10 March 2009, at Harrismith, and countersigned on behalf of Shield by its duly authorised representative on 1 April 2009 at Johannesburg, Gauteng⁴. The facts outlined in this paragraph and paragraph 6 of this judgment are among those put forth by the Defendants in attacking the Plaintiff's claim on the grounds of this court's lack of jurisdiction.

²Page 36 of the Bundle, Paragraph 6 of the Particulars of Claim

³Page 95 – 104 of the Bundle (annexure CM5 to the Particulars of Claim)

⁴ Page 106 – 115 of the Bundle (annexure CM6 to the Particulars of Claim)

[8] In paragraph 7 of the Particulars of Claim the Plaintiff continues to allege that:

On or about 01 April 2009, at Johannesburg, the Plaintiff, duly represented by an authorised employee, and the first defendant represented by the third defendant, entered into a written agreement (“the Agreement”) A copy of the Agreement is annexed hereto and marked as annexure “CM2” and the Plaintiff prays that the terms thereof be incorporated herein as if specifically pleaded.⁵

[9] Annexure CM2 however, is a copy of a contract entered into between Shield and Country Meat Market⁶. From what appears *ex facie* annexure CM2 to the Particulars of Claim, the current Plaintiff was not a party to this agreement. This too, is among the various grounds on which the action was defended and an application for summary judgment opposed by the Defendants.

[10] In paragraphs 21 and 22 of the Particulars of Claim the following is alleged:

1. The Plaintiff was previously known and traded as Shield Buying and Distribution (Pty) Ltd and on 30 November 2020 and at Sandton, Massmart Wholesale and Shield Buying & Distribution (Pty) Ltd (both duly represented) concluded a Merger Agreement in terms of which inter alia the shares, assets and businesses of Massmart Wholesale and Shield Buying & Distribution (Pty) Ltd were merged.

2. The contents of the Merger Agreement are confidential and a copy thereof is accordingly not attached to this (*sic*) particulars of claim.

[11] What is stated in these preceding paragraphs also forms part of the Defendants’ grounds for opposing the Plaintiff’s claim.

⁵ Page 36 of the bundle.

⁶ Page 50 of the bundle.

Summary Judgment Application

[12] Rule 32 of the Uniform Rules, provides that:

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.

[13] The following appears from paragraphs 3 and 4 of the Founding Affidavit in the summary judgment application:

3. I verify the cause of action as contained in the Applicant's Summons and ⁷Particulars of Claim and confirm that the Respondent is indebted to the Applicant in the amount of R954 643,20 (nine hundred and fifty- four thousand six hundred and forty-three rand and twenty cents) as set out in the Particulars of Claim annexed to the Summons in this matter.

4. I say this as in my capacity as aforesaid, I have been involved in the Applicant's claim against the Respondents. I have in my possession and under my control *inter alia*, the Applicant's outstanding statements of account relating to this matter which I attach hereto as Annexure "A" (own emphasis)

⁷ Page 12 of the Bundle.

[14] Annexure A to the Particulars of Claim comprises, on the fore of it, a tax invoice in the amount of R129, 987.22. On the next page, a debtors reconciliation of open items. From these appear comments indicating that some amounts were credited twice; to be reversed; duplicated and some already paid. On the page that follows is what is termed analysis of reconciled balance. On this, appears comments such as, *“Member says invoice total are incorrect-supplier invoices and pod’s have been requested from supplier”* and so annexure A continues.⁸

[15] Advocate Swanepoel on behalf of the Defendant’s argued, and correctly so, that annexure A, relied upon by the Plaintiff in its summary judgment application is neither a liquid document nor the amounts reflected therein liquidated amounts of money. Only during argument did Counsel for the Plaintiff allude that she had some form of liquid document that was handed to her on the morning of the application. Whatever document that was or whatever its nature, remains irrelevant because it did not form part of the summary judgment application papers before this court.

[16] Annexure A, on the face of it, is not a liquid document nor the amount reflected on it as claimed by the Plaintiff, a liquidated amount of money. These amounts are neither agreed upon nor capable of speedy and prompt ascertainment.⁹ Although replete with issues already highlighted in the body of these reasons, and objected to by the Defendants in their plea and opposing papers; I find it unnecessary to deal with the merit or demerit of each and every aspect raised by the Defendants. Suffice to say, Plaintiff failed to comply with rule 32(1)(a) and 32(1)(b) of the Uniform Rules. For these reasons the application for summary judgment against the Defendants was dismissed with costs.

⁸ Page 70 – 83 of the Bundle.

⁹ *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C); *Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T). In *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD) Corbett J put the test as follows: ‘[A] claim cannot be regarded as one for “a liquidated amount in money” unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.’ See also *Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia)* 1992 (2) SA 66 (NmHC) at 72–3; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 186E–H; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 437H; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 166D–E; *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at 240D–241C.

MS THAMAE, AJ

On behalf of Plaintiff/ Applicant: Advocate A Swanepoel

Instructed by: TALBOT ATTORNEYS

On behalf of Third and

Fourth Defendants: Advocate D. Hattingh-Boonzaaier

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