



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 37618/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 29 APRIL 2022

SIGNATURE

In the matter between:

RIDGE LINE ROOFING CC

Plaintiff

and

DEVAN 01 (PTY) LTD

First Defendant

BARRY FAIRLIE

Second Defendant

Summary: Summary judgment – Rule 32(2)(b) – explanation by plaintiff why a defence pleaded does not raise an issue for trial.

Summary judgment – Rule 32(3)(b) – failure to disclose a *bona fide* defence – failure to fully disclose the material facts relied upon therefor.

ORDER

Summary judgment is granted against the First and Second Defendants, jointly and severally, the one paying the other to be absolved, for payment to the Plaintiff of the following:

1. Payment of the sum of R897 542, 02.
2. Interest from 11 August 2021 to date of final payment.
3. Costs of suit on the scale as between attorney and client.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

In this opposed application for summary judgment the plaintiff has supplied trusses and rooftiles and has installed roofs at a certain property development in Ferndale. The action and the summary judgment application is for payment of the outstanding balance due to the plaintiff. The defendants contend that another company and not the first defendant is the actual contracting party and furthermore pleaded that the calculation of the amount claimed is excipially vague.

[2] The plaintiff's case

- 2.1 The plaintiff's pleaded case is that it had an agreement with the first defendant to supply and install roof structures and roof covering (the roofs). This was achieved by way of a written application for incidental credit,

providing inter alia for the furnishing of a certificate of balance for the amount/s due from time to time and including an agreement to pay costs on the scale as between attorney and client in respect of any legal proceedings, which application for credit had been accepted by the plaintiff.

- 2.2 The claim against the second defendant (Mr Fairlie) is based on a written deed of suretyship.
- 2.3 At the first defendant's instance and request, the plaintiff has manufactured, installed and delivered roofs in respect of "the Rubix Development" situated at stand 2122 Ferndale (the property).
- 2.4 The first defendant had provided the plaintiff with a snaglist in respect of which the plaintiff has completed remedial work by 2 July 2021.
- 2.5 A statement of the first defendant's account has been annexed to the particulars of claim, reflecting an outstanding balance due as at 5 July 2021 of R897 542,02. The statement further reflects the particulars of a tax invoice as a first claim in the amount of R 1 081 296.14, dated 23 February 2021, a second tax invoice as a second claim in the amount of R121 793, 41 dated 30 April 2021 and two credit notes of the same date in the amounts of R 45 622,80 and R9 924,73 respectively and an interim payment of R 250 000,00 dated 3 May 2021.

[3] Defendants' plea

- 3.1 The defendants pleaded that the written application for incidental credit facilities was only for a "once-off" development known as Farhills Manor on a property in Sandton.

- 3.2 The defendants further pleaded that it was not in fact the first defendant that the plaintiff had contracted with in respect of the Rubix development, but that the plaintiff had “... *entered into a written agreement with Fericit (Pty) Ltd (Fericit) represented by the first defendant on 21 January 2021 in terms whereof the plaintiff would manufacture for Fericit goods in respect of the Rubix development*”. It was further alleged that Fericit was the owner of the erf in Ferndale where the development is situated and that a copy of the written agreement is annexed as Annexure BF1 “... *with its own terms and conditions ...*”.
- 3.3 Based on the aforesaid, the defendants also pleaded that the plaintiff’s case suffers from a fatal non-joinder of Fericit.
- 3.4 The delivery and installation of the good are not disputed but it was pleaded that this was delivered to Fericit. The same allegations of wrong identity is made in respect of the production of the snaglist.
- 3.5 The denial of the correct party sued as first defendant, led the defendants to dispute Mr Fairlie’s liability as surety.
- 3.6 In respect of the quantum of the claim, the defendants pleaded that, should the court find that they are bound by the incidental credit agreement and the deed of suretyship respectively then “*the statement does not provide sufficient details in respect of how the plaintiff’s claim is made up, is not descriptive and provides no particulars in order for the defendants to properly ascertain how the plaintiff’s claim is made up*”. Despite no exception having been taken, the plea itself and counsel for the defendants in her argument in opposition to the application for summary judgment, labelled the plaintiff’s particulars of claim “vague and embarrassing”.

[4] The application for summary judgment

- 4.1 The plaintiff's application for summary judgment, which timeously followed on the delivery of the plea as provided for in Rule 32(1) (as amended with effect from 1 July 2019) was accompanied by the prescribed supporting affidavit. In this affidavit, the plaintiff's cause of action and the amount claimed, have been properly verified.
- 4.2 In terms of the amended Rule 32(2)(b) the plaintiff is entitled to, in this affidavit, "*explain briefly why the defence as pleaded does not raise any issues for trial*".
- 4.3 In respect of the issue of a written contract between the plaintiff and Fericit, not only is this denied but in relation to the alleged existence of such a written contract (as pleaded by the defendants), the plaintiff has, prior to the application for summary judgment delivered a notice in terms of Rule 30A pursuant to the defendants' failure to annex the alleged written agreement to their plea. No such annexure nor any written agreement was produced by the defendants in response hereto.
- 4.4 In the Rule 30A notice, the defendants were also requested to comply with Rule 18(6) and to state who they allege had acted on behalf of the plaintiff when this alleged written agreement had been entered into and where this would have taken place. The defendants have not responded to this request, rendering their plea in this regard deficient.
- 4.5 In "briefly explaining" why this portion of the defendants' plea does not raise a triable issue, the plaintiff referred to a quotation directed to Mr Fairlie in respect of the roofing for the development in Ferndale on 13 January 2022. Objecting to the annexing of this quotation, the defendants relied on the wording of Rule 32(4). This wording has been left unamended

since before the time that Rule 32 provided for an opportunity for a plaintiff to “briefly explain” why a pleaded defence raises no issue for trial. Rule 32(4) provides that, save for the plaintiff’s affidavit provided for in Rule 32(2)(b), “no evidence may be adduced by the plaintiff”.

- 4.6 Differing views have been expressed by this court in respect of the apparent conflict between allowing a plaintiff to provide an explanation in respect of a pleaded defence in terms of Rule 32(2)(b) and limiting the production of evidence by way of Rule 32(4). See *ABSA Bank Ltd v Mashinini NO and Another* (32016/2019; 32014/2019) [2019] ZAGPPHC 978 (22 November 2019) paragraph 3.11 and *ABSA Bank Ltd v Mphahlele NO and Others* (45323/2019; 42121/209) [2020] ZAGPPHC 257 (26 March 2020) [2020] JOL 47649 (GP) paragraph 33 as also referred to in *T-Systems (Pty) Ltd v BDM Technology Services (Pty) Ltd* (In liquidation) (2019/39986) [2020] ZAGPJHC 7 October 2020.
- 4.7 In *Tumileng Trading CC v National Security and Five (Pty) Ltd* 2020 (6) SA 624 (WCC), without considering the restrictions apparently imposed by Rule 32(4) the court found that a plaintiff “*is now required to engage with the contents of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purpose of delay ...*” (at 22).
- 4.8 I need not consider, in this case, whether the plaintiff has gone too far in having annexed the quotation, because the defendants have themselves annexed it to their opposing affidavit (with which I shall deal shortly hereunder), thereby obviating any prejudice and by placing it before the court in any event, despite the wording of Rule 32(4).

- 4.9 In explaining briefly why the plea that the agreement was indeed with the first defendant (and not with Fericit), the plaintiff referred to and annexed a written acceptance of the quotation, dated 18 January 2021. This acceptance refers to the plaintiff, its representative by name (Werner Beukes), the quotation reference number and states that it serves as confirmation of an order. Insofar as the mischief to which Rule 32(4) may be directed might be the presentation of evidence which may lead the summary judgment procedure to turn into a “mini trial” as referred to in *Absa v Mashinini NO* above, or insofar as the mischief might be to prevent prejudice to the defendants, both those aspects do not feature in this case as the annexure has been admitted in the defendants’ subsequent opposing affidavit. Mr Fairlie however, stated that despite its obvious content, he “used the wrong letterhead” and did not intend to bind the first defendant.
- 4.10 In respect of the issue whether the written application for incidental credit by the first defendant was a “once-off”, limited to a development in Sandton, at the hearing of the application, it was pointed out that the application itself refutes this by referring to at least two further developments in North Riding, subsequent to the one in Sandton (the form only provided space for three “project names” to be listed).
- 4.11 In respect of the alleged vagueness of the quantum calculation, the plaintiff, “briefly explained” why this defence is not “genuinely” raised (in the words used in *Tumileng Trading* at paragraph 21), by referring to the fact that the two claims referred to in the statement annexed to the particulars to claim, each consisted of a detailed written exposition of how the claims had been calculated, referring to amount of work done, units completed, extent of material on site and quantities in respect of each. After having received the second of such claims and expositions, the first defendant

made payment of R250 000.00. The amounts in these claims and the payment, save for the two credit notes in favour of the first defendant, accord with the statement annexed to the particulars of claim.

- 4.12 In response to the plea and the issue of the calculation of amount, the plaintiff has, in addition to what has been stated above, issued a certificate of balance as provided for in the written incidental credit application and annexed that to the affidavit supporting the application for summary judgment. The certificate could validly have been issued earlier but it did not form part of the plaintiff's cause of action. The issuing and annexing thereof therefore served to confirm or "prove" the plaintiff's claim rather than to indicate why the pleaded defence is not good. It might be that in this fashion legitimate objection could be raised against the annexing or production of the certificate thereby constituting impermissible evidence in terms of Rule 32(4) but, as will be seen in my later analysis, in this case, nothing turns on this. To all intents and purposes the certificate can, insofar as the annexing thereof may breach Rule 32(4), be ignored.

[5] The defendant's resistance to the summary judgment application:

- 5.1 In terms of Rule 32(3)(b), should a defendant choose not to furnish security or to avail himself of presenting oral evidence with the leave of the court, but to deliver an affidavit in opposition to the application for summary judgment, such a defendant must, by affidavit "*satisfy the court ... that he has a bona fide defence to the action*".
- 5.2 While the earlier cases prior to the amendment of Rule 32 in 2019 (such as *Maharaj v Barclays National Bank Ltd* 1974 (1) SA 418 (A)) did not expect from a defendant "*... to formulate his opposition to the claim with the precision that would be required of a plea*" the defendant is still, now that

a plea has indeed been formulated, required to fully disclose the nature and grounds of his defence and the material facts relied upon therefor “*as has always been the position*” (see *Tumileng Trading* above at paragraph 24).

- 5.3 The first issue of significance, is that neither the Rule 30A notice nor the call for production of the written agreement between the plaintiff and Fericit which the defendants had pleaded exists, had been responded to.
- 5.4 The consequence of this is firstly that the defendants persist with an irregular pleading, which it should not be allowed to do but the second, more fundamental consequence is the unavoidable negative inference that the written agreement as pleaded, does indeed not exist.
- 5.5 The result is that the defendants’ principal plea (and their attendant special plea of non-joinder) does not disclose a genuine, and therefore, triable defence.
- 5.6 The alleged “error” contained in the letterhead of the acceptance of the plaintiff’s quote, which is inherently questionable in the circumstances, must suffer the same demise. In the absence of a quote directed to Fericit and in the absence of the written agreement as pleaded between the plaintiff and Fericit there is no room to conclude that the acceptance was not, as it appears on the face thereof, an acceptance by the first defendant. If Mr Fairlie had intended the court (and the plaintiff) to believe that his detailed acceptance of the quote was indeed by Fericit, then one would have expected no less than a correction of the acceptance, but also that all other subsequent steps, such as the acceptance of claims, the interim payment and all the rest of the steps until action was instituted, would have been in the name of Fericit, which it was not.

- 5.7 The best the defendants could do, was to refer to a single email message where Fericit featured in the subject-line (and nowhere in the body of the email letter) but the explanation is to be found in the defendants' own plea, namely that Fericit is the landowner. Mr Fairlie had corroborated the ownership in the opposing affidavit by annexing a single-page extract from Fericits' title deed. There is, incidentally no explanation why the whole title deed is not furnished nor what Mr Fairlie's relationship with Fericit is. The best that he does is to allege that the bookkeeping is done "in the same office". Being coy with the court about relevant facts in summary judgment proceedings result only in serious doubt being cast about the *bona fides* of a defendant or the "genuineness" of his defence.
- 5.8 Similarly, where the plea complains of an alleged vagueness about the actual amount claimed but when the absence of a real triable issue in this regard is "explained" in the plaintiff's affidavit in terms of Rule 32(2)(b) as set out in paragraph 4.11 above and the matter is taken no further in the opposing affidavit, then the consequences are twofold: firstly, it has then sufficiently been established that no triable defence had been raised and, secondly, where it has been demonstrated that the plea in this regard is contradicted by facts of which the defendants must have been aware of prior to the delivery of their plea, then the complaint about vagueness was a sham and not raised *bona fide*.
- 5.9 The best Mr Fairlie does in an attempt to resist summary judgment being granted in the amount prayed for, is thereafter to allege that the snaglist was not attended to. He annexes emails which does not fully corroborate this version. At best they show that there was no joint final inspection or "walk-through" but they say nothing of what happened thereafter. Instead, he attempts to rely on a quotation for remedial work obtained by him in the

name of Fericit for an amount exceeding R 1 million. This was dated 30 August 2021 and pre-dates the plea, yet there is no mention of this in the plea itself nor is any counterclaim based thereon delivered with the plea.

5.10 Reliance on this quotation as an alleged defence should be impermissible. Firstly, the defendants cannot attempt to raise a defence of this nature for the first time in their opposing affidavit. I say “attempt to raise a defence” because the quotation of 30 August 2021 is merely referred to in the affidavit like a balloon floating in the air. It is not raised as an actual defence such as a non-fulfillment of a contract or a *non-adimpleti contractus* defence, nor as a *quantum meruit* (a reduction of a contract price) nor, as already stated, a counterclaim. It is simply referred to. The quotation has also been obtained on 30 August 2021, yet Mr Fairlie in his affidavit dated 5 November 2021 says nothing about what was done subsequent to the obtaining thereof. Were remedial work performed? What did it cost? Was the quotation accepted or acted on or not? The fact that no reliance was placed thereon in the plea delivered thereafter on 17 September 2021 leads one to the conclusion that the quotation was nothing more than a proverbial ball tossed in the air. It is a statement made without the defendants relying thereon in their plea which is the trigger-mechanism entitling the plaintiff to apply for summary judgment.

5.11 This brings me to the second reason why the defendants should not be entitled to rely on the quotation in their opposing affidavit (in the event that such reliance could be elevated to a defence) and it is this: the structure of Rule 32 after the amendment thereto in July 2019 contemplates the following sequence of events – action is instituted, a defendant not only delivers a notice of intention to defend, but delivers an actual plea. The plaintiff, in applying for summary judgment thereafter, is required to not

only confirm the cause of action, but to engage with the plea and to “explain” why it has not disclosed any triable issue which would justify leave to defend to be granted. After the plaintiff has delivered its affidavit, then the defendant can deliver an affidavit resisting summary judgment. Clearly, should a defendant be permitted to raise a new defence for the first time in this lastmentioned affidavit, without seeking to amend its plea and granting the plaintiff the opportunity to deal therewith as contemplated in Rule 32(2)(b), it would impermissibly prejudice the plaintiff and circumvent the amendments to Rule 32(1).

- 5.12 The defendants raised some peripheral issues such as that the incidental credit agreement not having been accepted in writing, there having been no further “orders”, save for the acceptance letter and that the Rubix development has not been listed in the agreement. Taken with the substantial lack of both merits and *bona fides* in respect of the principal issues already dealt with above as well as the argumentative rather than factual manner in which the opposing affidavit has been formulated, I am satisfied that no real and *bona fide* defences have been raised in this regard.

[6] Conclusion

The conclusion is that the two principal attempted defences, namely the identity of the contracting parties and the quantum of the claim, are not genuine triable defences. The plaintiff is therefore entitled to summary judgment against both defendants on the basis as claimed in its particulars of claim. This includes costs on the agreed scale as between attorney and client.

[7] Order

Summary judgment is granted against the First and Second Defendants, jointly and severally, the one paying the other to be absolved, for payment to the Plaintiff of the following:

1. Payment of the sum of R897 542, 02.
2. Interest from 11 August 2021 to date of final payment.
3. Costs of suit on the scale as between attorney and client.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 26 April 2022

Judgment delivered: 29 April 2022

APPEARANCES:

For Plaintiff:	Adv S Mulligan
Attorney for Applicant:	Nixon & Collins Attorneys, Pretoria
For Defendants:	Adv L Oken
Attorneys for Defendants:	Casper le Roux Inc., Johannesburg c/o BPG Attorney Inc, Pretoria