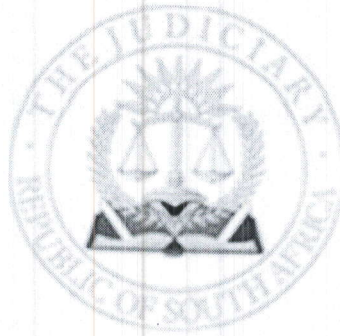




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

DATE: 7 AUGUST 2021

SIGNATURE OF ACTING JUDGE:

Case number: 20/35336

In the matter between:

EXPOLANKA FREIGHT (PTY) LTD

Plaintiff

and

CZ ELECTRONICS MANUFACTURING (PTY) LTD

Defendant

JUDGMENT

SLON AJ

1. The plaintiff applies for summary judgment against the defendant in the sum of R1 820 714.52, with ancillary relief.

2. The plaintiff's claim arises out of a 'Payment Agreement', which to all intents and purposes is an acknowledgement of debt, signed by the parties on 30 July 2020 ('the AoD'). In terms thereof, *inter alia*:
 - 2.1. the defendant undertook to pay the plaintiff the sum of R3 168 086.97 (in four instalments with interest at 3% per month) which 'comprised the balance due ... by operation of an acceleration clause in respect of a prior agreement between [them] concluded in March 2020';
 - 2.2. any prior agreement 'in relation to' the payment of the debt thus acknowledged was novated ('substituted') by the terms of the AoD;
 - 2.3. should the defendant breach its payment obligations under the AoD, payment of the full balance of the debt would be accelerated with interest then calculated at 5% per month;
 - 2.4. the defendant was 'not entitled for any reason whatever to withhold or defer any payment stipulated in [the AoD]';
 - 2.5. the defendant renounced the benefit of *error calculi*.
3. The summons and particulars of claim are dated 28 October 2020, and the summons was issued on 30 October 2020. The amount claimed therein was R2 166 069.10. A plea, together with a counterclaim, was delivered by the defendant on or about 25 January 2021. The application for summary judgment is dated 11 February 2021, as is the affidavit in support of summary judgment, in which the deponent for the plaintiff:

- 3.1. verifies the plaintiff's cause of action and the amount claimed as required by the provisions of rule 32(2)(a);
 - 3.2. deals with aspects of the defendant's plea and counterclaim, presumably as envisaged by the provisions of rule 32(2)(b);
 - 3.3. states that the amount of R500 000 was paid by the defendant after issue of summons; that appears to have occurred on or about 29 October 2020, but it was at any rate after the summons and particulars of claim had been drafted;
 - 3.4. applied such payment to the amount claimed in the summons to the credit thereof, and adjusted its claim on summary judgment to R1 820 714.52, which also took into account a calculation of the interest claimed under the AoD.
4. In response to the application for summary judgment the defendant raised a counterclaim, alleging facts which, it contends, precludes the granting of summary judgment:
- 4.1. The counterclaim is one based on an alleged damages claim against the plaintiff, pleaded in contract and in the alternative in delict, which arises, on the defendant's version, out of an alleged breach by the plaintiff of the very same prior agreement referred to in the AoD, as quoted in paragraph 2.1 above.
 - 4.2. The crux of the counterclaim is that the plaintiff, in performing the prior agreement, failed in a proper and workmanlike manner to complete certain

documentation which it was required to submit to SARS and failed to apply the correct freight tariffs, and accordingly caused the defendant a loss.

- 4.3. The defendant does not dispute that the counterclaim is not a liquidated claim, or that it does not exceed the plaintiff's claim. What it does, effectively, is calculate the quantum of its alleged damages claim, set off the amount which it calculates is correctly owing by it the plaintiff under the AoD, and tenders to pay the balance outstanding to the plaintiff in the sum of R291 000.
- 4.4. The defendant furthermore relies on certain statements issued by the plaintiff from which it emerges that the plaintiff itself credited the defendant with amounts equal to certain SARS refunds which the plaintiff received after the issue of summons and which the plaintiff should have applied so as to reduce the debt owing by the defendant under the AoD as claimed in the application, but did not.
- 4.5. It points out that one of these credits, in the sum of R430 888.60, had already been received by the plaintiff and credited to the account of the defendant on 2 February 2021, which was *prior* to the signature of the affidavit in support of summary judgment.
- 4.6. For that reason, maintains the defendant, the oath of the plaintiff's deponent, verifying the amount claimed in the summons, is not to be trusted.
5. As I understand the authorities binding on me, the assertion of an illiquid counterclaim, and one which, moreover, does not exceed the plaintiff's claim, would not ordinarily assist a defendant in resisting summary judgment if the claim founding

the latter cannot be otherwise disputed, although the mere fact alone that the counterclaim is illiquid is not determinative in every case.¹

6. What troubled me materially in relation to the defendant's alleged counterclaim, however, was that the AoD itself is a binding instrument which the defendant signed expressly:

6.1. on the basis that the prior agreement was novated;

6.2. for the very purpose of codifying its liability in terms of that agreement;

6.3. renouncing any rights it may have had to withhold or defer payment thereunder for any reason whatsoever, which, in my view, would include set-off.

7. Added to that concern is the significant fact which I raised during argument with Messrs Iles and Williams, the parties' respective counsel, that in the counterclaim itself the defendant pleads at paragraph 3.6 thereof (at pages 030-12 & 13 of the papers uploaded onto Caselines) that –

'3.6 in concluding [the AoD] the plaintiff and the defendant were aware that:

3.6.1.1. [sic] the plaintiff had breached the [prior] services agreement in that [it] failed to complete the

¹ See generally in this regard *Muller & Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA) at para [8]

documentation in a proper and workmanlike manner and failed to apply the correct tariff;

3.6.1.2. the defendant, as a consequence of the plaintiff's breach, suffered damages in the sum of R3 615 536.60 representing the amount overpaid to SARS for duties ...'

8. That being so on the defendant's own version, and quite apart from the legal questions mentioned in paragraph 5 hereof, in my view the AoD clearly precludes the defendant from raising the counterclaim in these proceedings to the extent that the amount undertaken to be paid under the AoD might otherwise be reduced by the SARS credits. Put differently, in concluding the AoD in those terms, at the time and in the amount stated, the defendant bound itself to accept that any amounts claimable by it by reason of any SARS credits would nevertheless not affect the quantum of its liability under the AoD, the risk of such a predicament resting upon its shoulders alone. The SARS credits are accordingly irrelevant in this forum, and no fault could be found with the plaintiff's deponent's verification under oath of the amount now to be paid on the basis of a calculation excluding entirely the matter of the SARS credits.
9. Had the matter ended there, I would have had but little hesitation in granting summary judgment. But that is not the end of the story. If I were to grant summary judgment on the strength of my conclusion above, in what amount would I do so?
10. This question arises since, on both parties' versions, two amounts were paid by the defendant toward the liquidation of the amount of the AoD. I have already mentioned

the amount of R500 000, which was taken into account in the affidavit in support of summary judgment. In addition thereto, I was told that a further R384 354.37 was paid by the defendant in March 2021. It is not simply a matter of deducting these amounts since the manner in which the plaintiff has always quantified its claim includes interest calculated on the basis of the AoD from different dates and running for different periods.

11. Without making a finding either way as to the matter before me, but in the attempt to solve the question of the quantum in a manner which would in no way prejudice the defendant, I requested Mr Iles for the plaintiff to procure a draft calculation and breakdown of the amount which the plaintiff now contended was owing by the defendant, and stood the matter down for two days to enable his attorney to prepare it and to furnish it to the defendant's representatives for their consideration.
12. I then received a draft order from Mr Iles, setting out a breakdown of the claim from as early as 30 July 2020, and terminating on 25 March 2021 when the payment of the amount of R384 354.37, referred to above, was made. The breakdown also included two SARS credits of R77 074.80 on 30 November 2020 and the amount of R430 888.60 (received on 2 February 2021) referred to above, respectively. The ubiquitous interest calculations similarly made an appearance. The total amount came to R1 395 526.13 (including the applicable interest owing until that date, viz 25 March 2021).
13. When the hearing resumed, Mr Williams for the defendant pointed out what he claimed were certain inaccuracies or irregularities in the calculation contained in the

draft order, into which I need not now venture. Mr Iles wisely refrained from defending these objections.

14. In summary, then, it became clear that the amount now alleged to be owing by the defendant, howsoever calculated by the plaintiff on the strength of the draft order, was not safe; and the reason why rule 32(2)(b) requires a plaintiff to verify under oath the amount claimed became plainer than ever.

15. The moral of the story is this. There can be no logical or reasonable basis, in my view, to preclude a plaintiff from:

15.1. stating in its affidavit in support of summary judgment, or

15.2. advising the Court from the bar,

that certain amounts were paid by the defendant after the service of summons (in the first case), or (in the second case) after delivery of the application for summary judgment (or even after the delivery of the affidavit resisting summary judgment) in liquidation of debt claimed, and requesting the Court to take account thereof.² I would go so far as to say that the plaintiff is in fact possessed of a positive duty to do so and the Court a duty to enquire into such a matter if raised. It would be difficult to

² I do not read *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) at 453I-J such as to preclude this, concerned as the Court was in that case with entirely different facts and, moreover, prior to the amendment in 2019 of rule 32, although rule 32(4) was admittedly left intact by such amendment. The prohibition against the plaintiff's adducing further evidence in the affidavit supporting summary judgment must surely mean further evidence *in support of the plaintiff's own cause of action*, not facts which inure to the benefit of the defendant regarding such a matter as the quantum of the plaintiff's claim, in the absence of the mention of which there is a risk that summary judgment may be granted in an amount both excessive and erroneous.

imagine that counsel for the plaintiff in these circumstances could stand up honestly before a Judge and fail to bring these matters to his or her attention.

16. Nevertheless, this case is an example where the amounts to be credited to the defendant in reduction of the amount claimed cannot, in these peculiar circumstances, with certainty lead to the calculation of a clearly established balance. That attempt, in this case, has proven to be too sanguine a hope to be accommodated within the strictures of the provisions of rule 32.

17. It follows that summary judgment must be refused.

18. I make the following order:

18.1. Leave to defend the action is granted to the defendant.

18.2. The costs of the application for summary judgment will be costs in the cause.



B M SLON

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. 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.

HEARD ON: 2 August 2021

DECIDED ON: 7 August 2021

HANDED DOWN ON: 10 August 2021

For the Plaintiff:
Instructed by:

Mr K Iles
Peter le Mottee Attorneys

For the Defendant:
Instructed by:

Mr D L Williams
Malherbe Rigg & Ranwell