



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 19533/2018

In the matter between:

TSWALU KALAHARI RESERVE (PTY) LIMITED

Plaintiff/Applicant

v

CANE TIME MANUFACTURERS CC

Defendant/Respondent

Coram: Justice J I Cloete

Heard: 13 May 2019

Delivered: 28 May 2019

JUDGMENT

CLOETE J:

- [1] This opposed application for summary judgment can be determined on the two points *in limine* raised by the defendant. The first is that the deponent to the affidavit filed in support of the application, Mr Arnold Meyer, lacked the requisite

knowledge for purposes of uniform rule 32(2). The second is that, in any event, Mr Meyer could not have verified a cause of action when the pleading itself fails to disclose one and is excipiable.¹

- [2] The plaintiff ("Tswalu") issued summons against the defendant ("Cane Time") for repayment of a deposit of R2 077 849.05. It is alleged in the particulars of claim that during March 2018 Tswalu concluded an agreement with Abelheim Lee Duncan (Pty) Ltd ("ALD") in which ALD undertook to renovate Tswalu's game lodge known as "The Motse".

- [3] The terms of the agreement allegedly included that ALD would provide Tswalu with a cost estimate of R15 157 242 (which Tswalu subsequently approved) and that ALD required from Tswalu, upon such approval, payment of a 50% deposit to enable ALD in turn to pay deposits to its suppliers to secure goods and services.

- [4] It is also alleged that the 50% deposit was duly paid by Tswalu to ALD. However ALD breached the agreement in that it failed to pay over to its suppliers all of the deposits for which it had invoiced Tswalu, and retained R3 149 189.34. This led to Tswalu cancelling its agreement with ALD on 13 June 2018.

- [5] Tswalu's claim against Cane Time is pleaded as follows:

‘12. ALD had undertaken to supply certain imported Dedon woven outdoor furniture as part of the FF & E² renovation for The Motse, for which ALD placed an order with the defendant.

¹ Complaints were also made that the pleading is in various respects vague and embarrassing, but for present purposes, it is not necessary to consider these.

13. *No written agreement governed the ordering by ALD of the furniture from the defendant, but the defendant issued a sales order dated 12 April 2018 to ALD, a copy of which is annexed hereto marked POC2.*
14. *The defendant's sales order sent to ALD, provided for payment terms of a 50% deposit which was required on confirmation of order and the balance prior to despatch of the goods.*
15. *ALD duly paid the defendant the sum of R2 077 849.05, being the 50% deposit amount, from monies paid by the plaintiff to ALD.*
16. *On or about 13 June 2018, the plaintiff cancelled the contract with ALD and required as part of the cancellation, that all monies paid to ALD including the deposit paid to the defendant be refunded to the plaintiff.*
17. *On or about 10 August 2018, the plaintiff, represented by its chairman, Mr Arnold Meyer, and ALD, represented by its director, Ivor Abelheim, concluded at Johannesburg, a settlement agreement and a cession agreement in terms of which:*
 - 17.1 *The ALD agreement was confirmed as cancelled;*
 - 17.2 *ALD was, in turn, to issue formal notices of cancellation to its suppliers, including the defendant;*
 - 17.3 *ALD would instruct its suppliers, including the defendant, to refund the deposit paid by the plaintiff; and*
 - 17.4 *The claim of ALD in and to the agreement with its suppliers, including the defendant, was ceded to the plaintiff.*
18. *A copy of the settlement agreement is annexed hereto marked POC3 and a copy of the cession agreement is annexed hereto marked POC4.*
19. *On or about 20 July 2018, the defendant disputed the right of ALD to cancel the supply agreement and the defendant's Mr Steve Arelisky advised that he did not consent to the cancellation of the contract on the part of the defendant and would retain the deposit paid. An email recording same is annexed hereto marked POC5.*
20. *The express, alternatively implied, further alternatively tacit terms of the cession agreement concluded between the plaintiff and ALD, provided:*

² In terms of paragraph 4.1 of the particulars of claim 'FF & E' refers to the furniture, fixtures and effects.

20.1 *The Cane Time claim was defined in clause 1.2.7 as the right of the cedent, ALD, to the repayment of R2 077 849.05 arising from the cancellation of the supply agreement entered into between Cane Time and the cedent, ALD.*

20.2 *In terms of clause 2.1... the cedent, ALD, ceded and transferred to and in favour of the cessionary, the plaintiff, as an out and out cession, all of the ceded rights which cession and transfer the cessionary accepted subject to the warranties contained in paragraph 4 thereof.³....*

21. *Accordingly, arising from the payment of the deposit and the cancellation of the agreement with ALD and the cession of ALD's claim to the plaintiff, the defendant is obliged to repay the 50% deposit paid in the sum of R2 077 849.05 to the plaintiff...'*

[6] Having alleged in paragraph 13 of the particulars of claim that no written agreement was concluded between ALD and Cane Time, Tswalu failed to plead the terms of the agreement upon which it relied, other than the oblique reference to Cane Time's sales order, annexure POC2 thereto. It also failed to plead ALD's acceptance of the terms of the unspecified agreement, save for the allegation at paragraph 15 that ALD duly paid over the deposit stipulated by Cane Time in the sales order.

[7] Having alleged in paragraph 17.2 that one of ALD's obligations in terms of the settlement agreement was to issue formal notices of cancellation to its suppliers (including Cane Time), Tswalu failed to even allege that ALD had duly complied therewith, let alone where and in what manner such cancellation occurred, or on what grounds ALD (or Tswalu as cessionary) is entitled to repayment of the deposit upon cancellation, notwithstanding that the Cane Time claim pleaded at

³ The reference to 'paragraph 4' is meant to be a reference to clause 4 thereof.

paragraph 20.1, and purportedly ceded by ALD to Tswalu, was defined in the cession agreement as ALD's right to repayment '*arising from the cancellation of the supply agreement between Cane Time and ALD*'.

[8] Instead the opposite is pleaded at paragraph 19, namely that Cane Time did not consent to cancellation and would retain the deposit paid if cancellation occurred. Annexure POC5, which is relied upon for this averment, is dated 20 July 2018 and is also an annexure to the cession agreement. It is an email from Mr Abelheim of ALD to Mr Arelisky of Cane Time which records the latter's refusal to cancel and its retention of the deposit in the event of cancellation, but continues '*...at this stage the possibility exists that my company will have to cancel its order with your company...*'.

[9] Paragraph 20.2 of the particulars of claim refers to clause 2.1 of the cession agreement which records that the ceded rights are accepted by Tswalu subject to the warranties contained in clause 4 thereof. These warranties, provided by ALD to Tswalu, include:

9.1 In clause 4.1.2, that ALD has not cancelled the supply agreements (including the Cane Time agreement) nor will it cancel them; and

9.2 In clause 4.1.6, the specific, allegedly "sole" terms of the agreement between ALD and Cane Time, from which it is clear that, according to ALD, there were further terms than those pleaded at paragraph 13 of the particulars of claim; and they do not make reference to the basis upon

which ALD is entitled to repayment of the deposit in the event of cancellation at its instance.

- [10] These aspects, which go directly to the averments necessary to sustain a cause of action, appear to form the crux of the fourth and fifth grounds of complaint contained in Cane Time's notice in terms of uniform rules 23 and 30 served on Tswalu's attorneys on 7 November 2018, a week before Tswalu applied for summary judgment.
- [11] In *Onyx Distributors CC v Jenta Couriers*⁴ Binns-Ward J dealt with the granting of summary judgment on an excipiable pleading as follows:

*'[8] In a supplementary written submission, furnished with the leave of the court, the defendant's counsel submitted that the aforementioned defect in the particulars of claim rendered the pleading excipiable and argued that summary judgment could not be given on an excipiable summons. He cited the following judgments in support of that contention: Ritz v Katzeff **1950 (1) SA 584** (C); Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd & Another **1998 (1) SA 679** (O) following Northern Cape Scrap and Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk **1974 (3) SA 788** (NC) and Threeball Construction (Pty) Ltd v Lipshits **1987 (2) SA 633** (W).*

*[9] I should preface my consideration of this argument by recording that it is evident from this court's judgment in Arend & Another v Astra Furnishers (Pty) Ltd **1974 (1) SA 298** (C) at 314 that the excipiability of a claim is a matter that properly falls to be considered in the context of weighing a plaintiff's compliance with rule 32(1) and (2). Once that much is acknowledged it is axiomatic that summary judgment cannot be granted on a claim that is excipiable on the grounds that it is bad in law or does not disclose a cause of action.'*

⁴ (25277/09) [2011] ZAWCHC126 (3 February 2011).

[12] In *Arend and Other v Astra Furnishers (Pty) Ltd*⁵ it was held that:

'Where the attack is upon the ground that the plaintiff's particulars of claim do not substantiate a valid cause of action, then, in my view, this is not strictly a defence and it does not fall within the ambit of Rule 32(3)(b) regarding the defendant's obligation fully to disclose his defence. It raises rather the question as to whether plaintiff has complied with Rule 32(1) and (2) relating to the requirements of an application for summary judgment...'

[13] As was held by Steyn J in *Ritz v Katzeff*:⁶

*'This is not the proper stage in the proceedings to adjudicate on the merits of the exception, save perhaps for the purpose of determining whether there is any substance whatsoever in the exception as taken. For that purpose I have scrutinised this exception, and I cannot say that the exception by itself is without substance.'*⁷

[14] Given what has been pointed out above, I am persuaded that the fourth and fifth grounds of complaint contained in Cane Time's notice in terms of rules 23 and 30 cannot be regarded as having no substance. Of course, it will be up to the court hearing the exception itself to make a definitive finding in this regard. Accordingly, I am able to conclude that summary judgment must be refused on this ground.

[15] I have dealt with Cane Time's points *in limine* in reverse order because the first follows to a certain extent upon the second. Turning now to the contention that Mr Meyer lacked the requisite knowledge for purposes of rule 32(2), in *Stamford*

⁵ Referred to by Binns-Ward J at para [9] *supra* – at 314A.

⁶ Referred to by Binns-Ward J at para [8] – at 584.

⁷ The same approach appears to have been followed in *Gulf Steel and Threeball Construction* referred to by Binns-Ward J at para [8].

*Sales & Distribution (Pty) Ltd v Metraclark (Pty) Ltd*⁸ the Supreme Court of Appeal summarised the degree of knowledge required for purposes of the subrule as follows:

*[9] As pointed out in Maharaj v Barclays National Bank Ltd **1976 (1) SA 418** (A) at 423G-H one of the aids to ensure that the claim of the plaintiff is unimpeachable and that the defendant's defence is bogus or bad in law is that the verifying affidavit should be deposed to by the plaintiff "or by someone who has personal knowledge of the facts". If however, "the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court. . . The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it. . ."*

*[10] This court in Dean Gillian Rees v Investec Bank Limited (330/13) **[2014] ZASCA 38** (28 March 2014), in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:*

"As stated in Maharaj, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj." (My emphasis.)

In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.

[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to

⁸ (676/2013) [2014] ZASCA 79 (29 May 2014).

justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in Maharaj.

*[12] An insistence upon personal knowledge by a deponent to a verifying affidavit of all of the material facts forming the basis for the cause of action, where the cessionary of a claim seeks summary judgment against the debtor, in most cases would effectively preclude the grant of summary judgment. The consequences of this narrow approach is illustrated by the decision in *Trekker Investments (Pty) Ltd v Wimpy Bar* **1977 (3) SA 447 (W)**. It was held that it had to appear from the verifying affidavit that the facts relating to the claim of the cedent against the debtor were within the knowledge of the deponent who was able to swear positively thereto. The deponent in such a case was *prima facie* making the affidavit on behalf of a cessionary and there was nothing in the affidavit to indicate that the deponent had any connection with the cedent, which presumably would have enabled him to acquire this knowledge. To insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism.'*

[16] In his affidavit in support of the application Mr Meyer alleged that:

- '1. I am the Chairman of the Board of Directors of the plaintiff... and the facts herein contained are within my own direct personal knowledge and are both true and correct.*
- 2. I am duly authorised to depose to this affidavit on behalf of the plaintiff and applicant and am the signatory on behalf of the plaintiff to both the agreements of settlement and cession which are annexures to the plaintiff's particulars of claim.*
- 3. I hereby verify both the plaintiff's cause of action and the amount claimed by the plaintiff in its summons and particulars of claim.*
- 4. I can and do swear positively to the facts set out in the plaintiff's summons and particulars of claim.*

5. *The defendant which is the respondent in this summary judgment application is indebted to the plaintiff and applicant in the amount and on the grounds set out in the summons and particulars of claim...*

[17] It is evident from the cession agreement itself that the source of Mr Meyer's knowledge of Cane Time's alleged indebtedness to ALD is based squarely on warranties furnished by ALD to Tswalu. If Mr Meyer had himself been in a position to verify the cause of action based on his personal knowledge, such warranties would presumably not have been necessary. Nor would it have been necessary to include clause 3.1 of the cession agreement which provides that:

'The Cedent shall deliver to the Cessionary all documents and/or instruments that evidence title, or otherwise relate, to the Ceded Rights on the Signature Date or forthwith after any such documents and/or instruments come into existence...'

[18] One of the annexures to the cession agreement is an email from Mr Abelheim to Mr Arelisky dated 28 June 2018 in which ALD gave Cane Time '*...our authority to disclose details of your supply contract with us...*' to Tswalu. In *Stamford* the deponent to the verifying affidavit declared that she was in possession of, and fully conversant with, the contents of the file pertaining to the cession, including proof of the cessionary's claim against the cedent.

[19] However in the present matter, despite the obligation imposed upon ALD in clause 3.1 of the cession agreement, and the authorisation furnished by ALD to Cane Time in the email of 28 June 2018, there is no mention in Mr Meyer's affidavit that he has perused documents and/or instruments evidencing title, or otherwise relating, to the ceded rights. It would have been a simple matter for him to have

made this allegation if that were the case. Moreover, nowhere in Tswalu's particulars of claim is it alleged that Mr Meyer himself represented it in concluding the agreement with ALD in March 2018.

[20] Given the foregoing, I am not persuaded that the contents of Mr Meyer's affidavit, taken together with the other documents properly before the court, are such as to enable me to conclude that his positive affirmation is sufficiently reliable to justify the grant of summary judgment. For this reason also, the application must be refused.

[21] Turning now to costs. *Mr Dickerson SC*, who appeared for Cane Time, urged me to refuse the application with costs on a punitive scale as envisaged in uniform rule 32(9). He submitted that Tswalu clearly knew that Cane Time relied on a contention which would entitle it to leave to defend before the application for summary judgment was launched. On the other hand, *Ms Grenfell SC*, who appeared for Tswalu, submitted that there was nothing compelling to indicate that there was any "culpable" conduct on Tswalu's part in launching and persisting with the application.

[22] That may have been the case had Cane Time failed to deliver its notice in terms of rules 23 and 30 before Tswalu launched the application. It seems, however, that Tswalu was entirely undeterred thereby and that the actual purpose behind this application was to force Cane Time to depose to a defence on affidavit for tactical purposes. Not only was Cane Time forced to do so, but it had to raise defences to a pleaded case which I have already accepted may well turn out to be lacking in

the averments necessary to sustain a cause of action. In these circumstances, I believe that a punitive costs order is indeed warranted.

[23] **The following order is made:**

1. **The application for summary judgment is refused with costs.**
2. **Such costs shall be paid on the scale as between attorney and client, including the costs of two counsel where employed, as well as any reserved costs orders.**

A handwritten signature in dark ink, appearing to read "J. I. Cloete", is written over a horizontal line.

J I CLOETE