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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
DATE _____
SIGNATURE _____

23/2/18

Case No: 50593/2017

In the matter between:

FASKEN MARTINEAU t/a BELL DEWAR INC

PLAINTIFF

and

ROUX CONSOLIDATED INVESTMENTS (PTY) LTD

DEFENDANT

JUDGMENT

NGOBENI, AJ:

- [1] The Plaintiff in this matter is Fasken Martineau trading as Bell Dewar Inc, a personal liability company duly incorporated and registered (Registration No.1995/004675/21) in terms of the company allows of the Republic of South Africa, having its principal place of business at Building No.2, Inanda Greens Office Park, 54 Wierda Road West, Sandton, Gauteng.
- [2] The Defendant is Roux Consolidated Investments (Pty) Ltd, a private company duly incorporated and registered (Registration No. 2004/011530/07) in terms of the company laws of the Republic of South Africa, having its registered address at 5 Alexandra Road, Irene, Centurion.
- [3] The Plaintiff in this matter brought a summary judgment application in terms of section 32 of the Uniform Rules of the High Court pursuant to an action he instituted against both the Defendant in the amount of R1 484 665, 74 being the balance due, owing and payable in respect of professional legal services rendered and disbursements incurred by the

plaintiff for an on behalf of the defendant, at the latter's request, over the period November 2014 too much 2017.

[4] In view of the allegations made by the plaintiff per the particulars of claim which are not denied, as well as averments made by the defendant in its opposing affidavit and the submissions by the counsels during argument of the matter, the following appears to be common cause:

4.1 The parties entered into an agreement during the period mentioned that inter alia the plaintiff was to draft a sale agreement in respect of the farm Groothoek 106 KS (HEREINAFTER CALLED THE PROPERTY), attend to transfer the property, and to attend to the cancellation of any bonds over the property.

4.2 The plaintiff performed as agreed to in paragraph 4.1 above.

[5] It appears from the particulars of claim that the plaintiff relies on a written agreement coupled with written service terms which have not been signed by the defendant. The plaintiff submitted further that the defendant failed to comply with the provisions of rule 32(3) read with ... in that its affidavit is defective thereby rendering the application unopposed for the commissioner of oaths failed to state his designation and the area for which he holds his appointment or the office held by him in circumstances where he holds his appointment ex officio.

[6] In its defence the defendant challenges the existence of the written agreement coupled with the return service terms however alleges that there was a verbal agreement between the parties subject to fees chargeable by the plaintiff being taxed by the law society of South Africa.

[7] In the main the defendant avers that the plaintiff's claim does not comply with the provisions of rule 32(1) in that the claim is not liquidated for the plaintiff is a firm of attorneys who supplied untaxed professional fees to a lay client.

- [8] Rule 32 (1) (b) of the Uniformed Rules of the High Court provides that:
“Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only - (b) for a liquidated amount in money;”
- [9] A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. The decision is a matter left to the discretion of the court in each particular case. *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (c).
- [10] There is a dispute of fact as to what the terms of agreement were regarding payment of the plaintiff’s claim.
- [11] In deciding whether the plaintiff as a liquidated claim or not I am guided by the fact that the agreement and service terms attached to the particulars of claim relied upon by the plaintiff is unsigned by the defendant. The last but one paragraph of the unsigned contract reads as follows: “please sign and return a copy of this letter to confirm your

agreement to the terms of this letter". Just above where the representative of the defendant Mr Roux Shabangu was supposed to have signed the following words have been endorsed: "We confirm our agreement to the terms of this letter:"

[12] It is clear that the terms of agreement as averred to by the plaintiff in its particulars of claim were not agreed upon. Any performance by the plaintiff is not subject to the said agreement.

[13] I am not satisfied that the plaintiff has a liquidated claim against the defendants and in particular that his claim is due.

[14] I am satisfied that the facts presented by the defendant, if they were presented at the trial they will constitute a defence or an answer to the plaintiff's claim.

[15] It cannot be said that the defendant entered appearance to defend to delay the process. It is clear that the defendant intends paying the plaintiff as soon as the bill has been taxed by the law society.

[16] I return to a consideration of the argument that the affidavit is defective.

[17] Rule 32 (3) "Upon the hearing of an application for summary judgment the defendant may – (b) Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which application is to be heard) or with the leave of the court by oral evidence of himself or of any other who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[18] The point raised involves a consideration in the first place of the regulations governing the administration of an oath or affirmation. They are published under Government Notice R1258 in Government Gazette Extraordinary of 21 July 1972. The empowering legislation is s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. It was common cause that the more recent regulation, as published under Government Notice R1648 in Government Gazette Extraordinary 5716 of 19 August 1977, namely reg 4 (2), which substitutes the old reg 4 (2), is not applicable to the present matter.

[19] The regulations make provision for broadly two types of declarations. The one is where the contents of the declaration are sworn (by means of an oath) to be the truth. The other is a declaration which is affirmed to be correct. These matters are dealt with in ss 1 and 2 of the regulations. Section 3 requires that the deponent shall sign the declaration in the presence of the commissioner of oaths and it also provides for those cases where a deponent cannot write. Then follows s 4 which provides: "(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration. (2) The commissioner of oaths shall sign the declaration and state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."

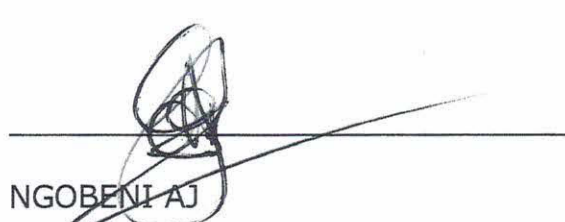
[20] The requirements as contained in regulations 1, 2, 3 and 4 of Government Notice R.1258 of 21 July 1972 and published in terms of section 10 (1) of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, are not peremptory but merely directory. In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been a substantial compliance with the requirements (*S v Msibi* 1974(4) SA 821(T)). Whether there has been such 'substantial compliance' is a

matter of fact, not of law. It is in this light that the Court has, in my view, 'discretion' to refuse to receive an affidavit attested otherwise than in accordance with the regulations, depending upon whether substantial compliance with the regulations has been proved or not.

[21] The doors of the Court should be closed to a defendant only if 'there is no doubt that the plaintiff has an unanswerable case'. Having regard to what I have pointed out above I think that the court should condone a failure to comply with a technical requirement that the commissioner of oaths failed to state his designation and the area for which he holds his appointment or the office held by him in circumstances where he holds his appointment *ex officio*.

[23] I accordingly make the following order:

1. The application for Summary judgment is dismissed;
2. The Defendant is granted leave to defend the action; and
3. The Defendant must submit its plea within 5 business days of this order, failure which it will be barred from doing so; and Costs of this application are costs in the cause.



NGOBENI AJ

ACTING JUDGE OF THE HIGH COURT