IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Not Reportable

Case No: 12043/2016

In the matter between:

BIDVEST BANK LIMITED **PLAINTIFF**

and

JACOBS CAPITAL (PTY) LIMITED **DEFENDANT**

JUDGMENT

Delivered on: 29 June 2018

Gorven J

[1] There are two matters before me. The first is an exception to the plaintiff's particulars of claim (the particulars). The second, which arises only if the exception does not succeed, is an application for summary judgment. This is one of two matters with identical issues. I have been informed by counsel that the parties agree that only one judgment is necessary. There are three agreements involved. I shall use the same description of the agreements as is used in the particulars. I shall refer to the parties as the plaintiff and the defendant respectively.

[2] The particulars refer to three written agreements. The first of these was concluded between Tradeflow (Pty) Limited (Tradeflow) and the defendant (the trading agreement). The second was between the plaintiff and Tradeflow (the receivables purchase agreement). The third was between the plaintiff and the defendant (the customer agreement). There is no dispute that these three agreements were concluded and govern the contractual relationship between these three entities.

[3] The essence of the trading agreement is that Tradeflow would make payment on behalf of the defendant to suppliers nominated by it. The defendant would reimburse Tradeflow for those amounts along with an agreed commission and charges. I shall refer to this composite amount as the claim for reimbursement. The essence of the receivables purchase agreement was that the plaintiff would 'purchase' and take cession of certain of the claims for reimbursement from Tradeflow. That of the customer agreement was that the defendant would open a designated account with the plaintiff and could post on a secure platform information concerning amounts to be paid in respect of claims for reimbursement.

[4] The plaintiff claims payment from the defendant of claims for reimbursement. The exception is to the following effect. The plaintiff's claim is founded on the trading agreement, to which it was not a party. In order for a claim for reimbursement to be payable under the trading agreement, Tradeflow was obliged to draw a bill of exchange on the defendant for the amount claimed. Without such a bill of exchange, a claim for reimbursement was not payable. The plaintiff sues as cessionary of Tradeflow's claims for reimbursement under the trading agreement. The plaintiff has not pleaded that Tradeflow drew bills of exchange on the defendant for the amounts claimed. On the particulars, accordingly, Tradeflow cannot demand payment of any claims for

reimbursement from the defendant. As cessionary, the plaintiff can have no better rights than Tradeflow. As a consequence, the particulars of claim do not contain averments necessary to sustain the cause of action relied upon.

[5] It is correct that the particulars of claim do not contain any averments that Tradeflow drew bills of exchange. The plaintiff submitted that it does not rely for its claim only on the trading agreement. Whilst it pleads the terms of each of the three agreements, its claim is founded on the customer agreement. It submits that, properly interpreted, the customer agreement creates a right to payment. The defendant submits that the customer agreement should be construed to create a right to payment only once bills of exchange have been drawn by Tradeflow.

[6] Since the exception rests of the interpretation of the terms of the customer agreement, the approach set out in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,[1] applies:

'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability". Dealing with an interpretation issue, he added:

"Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be

[1] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."'[2]

Since *Telematrix*, the general approach to interpretation of documents has been clarified in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[3]

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[4]

[7] I have set out this approach fully. This is because the outcome of both the exception and the application for summary judgment depend, at least to an extent, on the interpretation of the agreements. The particular aspect requiring interpretation is clause 3.2 of the customer agreement and some of the terms used in that clause. When I quote the clauses and terms of the agreements, I shall substitute the actual names of the parties for their description in the agreements for convenience sake.

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[2] The reference is to *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 715H.
[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[4] References omitted.

[8] Clause 3.2 of the customer agreement reads as follows:

'When and each time Jacobs posts a Payment Assurance, Jacobs creates and assumes, in respect of the Account Receivable to which such Payment Assurance relates, an independent, irrevocable, unconditional, legal, valid, transferable and binding obligation in favour of Tradeflow (or, in the event of a Transfer, in favour of Bidvest) to pay to the relevant Designated Account on the relevant Maturity Date an amount equal to and in the same currency as the relevant Certified Amount without deduction or counterclaim and without exercising any right of set off under the Underlying Relationship to which such Payment Assurance relates or otherwise, and such amount shall be due and payable by Jacobs on the Maturity Date.'

[9] The crisp issue on the question of interpretation of this clause is whether it must be interpreted to require bills of exchange to be drawn under the trading agreement by Tradeflow. The plaintiff argues that this is not necessary whereas the defendant argues the contrary. The basis of the contrary argument arises from the reference in the clause to the words 'in respect of the Account Receivable to which such Payment Assurance relates'. The words 'Account Receivable' are defined in the customer agreement as follows:

'[T]he right to receive any and all present and future payments of money due and payable, whether due now or payable in the future . . . as a result of an Underlying Relationship, whether or not earned by performance.'

The receivables purchase agreement contains a definition which, for present purposes, is identical. The trading agreement contains neither such definition nor any reference to the words 'account receivable'.

[10] The defendant submits that, in terms of clause 2 of the trading agreement, bills of exchange must be drawn by Tradeflow on the defendant before any 'account receivable' arises. That being so, clause 3.2 of the customer agreement requires the existence of an 'account receivable' before the defendant can post a payment assurance which creates the independent obligation of the

defendant to pay Tradeflow or the plaintiff. Clause 2 of the trading agreement reads:

'In respect of each transaction Tradeflow will draw a bill of exchange on Jacobs for the amount of each invoice paid to Jacobs's suppliers by Tradeflow, which shall include commission due to Tradeflow, and all additional charges as provided for in clause 7 below. Jacobs shall forthwith sign and deliver each bill of exchange to Tradeflow for acceptance purposes and agrees to pay the bill in the manner prescribed by Tradeflow. Tradeflow may, in its discretion, require the drawing and delivery to it of the bill of exchange before making any payment, or entering into any commitment to pay, Jacobs's supplier. Tradeflow will raise its invoice on Jacobs for its commission and other costs within two business days of payment or commitment to pay Jacobs's supplier.'

[11] It seems to me that there are a number of fallacies in the defendant's submission. First, clause 2 of the trading agreement does not say that the drawing of a bill of exchange creates an 'account receivable'. As I have pointed out, there is no reference to those words in the trading agreement. It is pleaded that the trading agreement and the customer agreement were concluded one day apart. It is pleaded that the receivables purchase agreement was concluded about ten months earlier. Since the three agreements form a suite governing the contractual conduct of the three entities, it is inconceivable that, if it had been intended that clause 2 of the trading agreement was to be the basis on which an 'account receivable' referred to in the customer agreement was to come into existence, this would not have been specified.

[12] Secondly, the interpretation of clause 2 of the trading agreement does not specify that, before a claim for reimbursement can be made, Tradeflow has to draw a bill of exchange. What is envisaged is the generation of an invoice setting out the particulars of the claim for reimbursement. In this context, the bill of exchange would provide a liquid document to enforce payment of the invoiced amount. If, however, the invoice sets out accurately the payment made

on behalf of the defendant and the charges and commission allowed for in the trading agreement, it would give rise to a claim for reimbursement.

[13] Thirdly, clause 3.2 of the customer agreement does not support such an interpretation. It is significant that clause 3.1 provides that the defendant 'may, but is not obliged to, Post Payment Assurances.' Given that situation, if the defendant had any concern as to whether an 'account receivable' had come into existence, it would simply not post a payment assurance. Put another way, the defendant need only post a payment assurance if it was satisfied that an account receivable existed. The posting of a payment assurance removes any basis for challenging whether an 'account receivable', or, in the language or this judgment, a claim for reimbursement under the trading agreement, is payable. If no such account receivable existed, the defendant would clearly not post a payment assurance. If it does so, in the light of clause 3.2, this 'creates . . . an independent, irrevocable, unconditional, legal, valid and binding obligation' to pay Tradeflow or the plaintiff on the date posted by the defendant as the maturity date in the amount posted by the defendant as the certified amount. It obviates the need to prove that the amount posted is in fact due under the trading agreement.

[14] The customer agreement forms a contract in terms of which the defendant, if it posts a payment assurance on the platform to which it is given access under that agreement, renders itself obliged to make payment to Tradeflow or the plaintiff as the case may be. It is clear that the posting of a payment assurance itself creates the obligation if it sets out a certified amount and a maturity date upon which that amount is due and payable to Tradeflow or the plaintiff as the case may be.

[15] It was faintly argued that evidence could clarify the interpretation of clause 3.2 of the customer agreement. But no submissions were made as to the 'further facts affecting interpretation' that could reasonably exist.[5] *Endumeni* envisages the interpretative enterprise drawing on the context of the term of the agreement relied upon.[6] Reference must be had to the circumstance in which it came into existence. The two other agreements provide some context beyond that of the customer agreement. Their conclusion also indicates some of the circumstances under which the customer agreement came into effect. Under the trading agreement, payment to the defendant's designated suppliers is to be made on behalf of the defendant by Tradeflow. Those amounts, plus agreed commission and charges, are to be reimbursed by the defendant. This amounts to an extension of credit by Tradeflow to the defendant. Under the receivables purchase agreement, certain of the claims for reimbursement of Tradeflow may be assigned to the plaintiff. As to immediate context, clause 3 of the customer agreement is headed 'The Payment Obligation'. The purpose to which clause 3.2 of the customer agreement is directed is the creation of an obligation to pay amounts specified by the defendant on dates specified by the defendant which is not open to challenge by the defendant. This interpretation takes account of language, context and the purpose of the provision as well as the background to the preparation and production of the customer agreement and, in particular, clause 3.2 thereof.

[16] The particulars of claim contain all the necessary averments for payment of the amounts posted as payment assurances to be due to the plaintiff under the customer agreement. They therefore disclose a cause of action on the usual basis that, if proved, the plaintiff would be entitled to judgment. The exception must accordingly be dismissed.

[5] See *Telematrix* para 3, footnote 1 supra.
[6] Paragraph 18, footnote 3 supra.

[17] That then leaves the summary judgment application. The formalities of the application are not challenged. The defendant does not challenge the averments of the plaintiff which base its claim on clause 3.2 of the customer agreement. In other words, it is not challenged that the defendant posted a payment assurance in respect of each respective account receivable in a certified amount with a maturity date as reflected in the annexure in question and that the plaintiff had taken cession and transfer of those amounts.

[18] The basis of the defence set out in the affidavit opposing summary judgment is twofold. First, that bills of exchange purportedly drawn pursuant to the provisions of the trading agreement are stripped of legal validity. Since, the defendant averred, this was required in order for Tradeflow to have a claim for payment against the defendant, the plaintiff has no better claim. This defence does not require any further attention. It raises the same argument as does the exception. I have held that an obligation is created by clause 3.2 of the customer agreement which does not require the drawing and signing of bills of exchange. This does not afford a basis for resisting summary judgment.

[19] The second line of defence is the contention of the defendant that it has a counterclaim arising from the conduct of Tradeflow or the plaintiff. Unless the counterclaim relied upon by the defendant constitutes a basis for opposition, the plaintiff has made out a case for summary judgment. It is thus necessary to examine whether the counterclaim raises a basis for resisting summary judgment. If no such basis exists, a court is nevertheless given a discretion as to whether or not to grant summary judgment.

[20] The averment is made that Tradeflow repudiated its obligations to the defendant. It will be helpful to quote the averments in the opposing affidavit in this regard:

> ‘The repudiation . . . instantaneously stripped [the defendant] of trade finance and directly and immediately caused it to suffer damages by reason of its loss of profits. Further damages were caused by the withdrawal causing the Defendant to breach its contractual obligations to its customers who now have claims against the Defendant. These damages are yet to be conclusively quantified . . .’.

The defendant was said to have accepted the repudiation and cancelled all three agreements. The deponent estimated that the quantum of the damages sustained by the defendant exceeded the claim of the plaintiff. This is the basis of the counterclaim.

[21] The defendant delivered two sets of heads of argument in the summary judgment application. In neither set did it deal at all with the counterclaim. It confined itself to submissions concerning the first defence concerning the bills of exchange. Before me, at most very faint submissions were advanced concerning the counterclaim. This is probably because the plaintiff's heads referred to clauses 3.2 and 3.3 of the customer agreement. Clause 3.2 creates the obligation to pay ‘without deduction or counterclaim’. Clause 3.3 provides that the defendant shall not ‘present any Adverse Claim against a Payment Assurance.’ The words ‘adverse claim’ are defined in the customer agreement to include a counterclaim. On these bases, the counterclaim is excluded as a defence to a claim for payment under clause 3.2 of the customer agreement.

[22] In addition and in any event, Rule 32(3)*(b)* requires a defendant to ‘disclose fully the nature of the grounds of its defence and the material facts relied upon therefor.’ Where the only opposition to summary judgment is that a counterclaim exists which will extinguish either partly or in full the claim of the plaintiff, those grounds and the material facts on which the counterclaim is based must be fully disclosed.[7]

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[7] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B-H.

[23] Absolutely no factual particularity has been furnished by the defendant concerning the two heads of damages relied upon for its counterclaim. Identical averments were made in a letter sent by the defendant's attorney to the plaintiff in September 2015. The affidavit opposing summary judgment was deposed to on 14 March 2017. At the very least, by then, trading trends would have been apparent as would at least some indication of any loss of profits. Likewise, the defendant would undoubtedly have been able to list the contractual obligations to its customers which the repudiation and cancellation had caused it to breach and the amounts due to those customers as a consequence. It was surely possible to provide some particularity at that stage or, at least, to explain why this could not be done. Despite the effluxion of more than 18 months, none of this was addressed. Of course all of this assumes, without deciding, that the defendant could prove that the plaintiff or Tradeflow repudiated the agreements.

[24] All in all, the affidavit opposing summary judgment is silent as to what factual situation arose from the alleged repudiation. In my view, this is not sufficient when attempting to raise a counterclaim as a basis for avoiding summary judgment. The position echoes that referred to in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*.[8] In the result, the affidavit cannot be said to fulfil the requirements of disclosing fully the nature and grounds of the alleged counterclaim and the material facts relied upon so as to resist summary judgment.

[25] The question then arises whether I should exercise my overriding discretion in favour of refusing summary judgment. No specific submissions were made on this aspect. Granting summary judgment in no way disqualifies the defendant from launching any claim against the plaintiff. When the

[8] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) paras 22-24.

counterclaim alleged by the defendant is so speculative and lacking particularity as is the present one, and appears to be excluded by the terms of the customer agreement, I can see no proper basis for exercising my discretion against granting summary judgment.

[26] Although this was not raised in argument, only amounts certified in the annexure in question where a maturity date is given in the payment assurance are payable. One of the amounts has no maturity date reflected in the annexure and cannot accordingly be said to be payable. In addition, the total claimed differs from the total of the amounts (including that one sum) in the annexure. The total of the amounts payable is R6 080 549.83 and not the claimed R6 622 596.68. Summary judgment will be given for the lesser amount and must be refused for the balance. It was agreed by both parties that, where two counsel had been employed, any costs order should include those costs.

In the result:

A. The defendant's exception is dismissed with costs, such costs to include the costs consequent on the employment of two counsel where this was done.

B. Summary judgment is granted in favour of the plaintiff against the defendant for:

1. Payment in the sum of R6 080 549.83.

2. Interest on the following sums at the rate allowed under the Prescribed Rate of Interest Act 55 of 1975 calculated from the respective dates to date of payment:

   (a) R126 781.59 from 10 April 2015;

   (b) R61 234.56 from 10 April 2015;

   (c) R109 871.79 from 10 April 2015;

   (d) R161 462.34 from 10 April 2015;

   (e) R89 074.39 from 14 April 2015;

(f) R759 411.96 from 16 April 2015;

(g) R169 372.89 from 21 April 2015;

(h) R118 557.99 from 21 April 2015;

(i) R131 775.39 from 22 April 2015;

(j) R649 655.45 from 22 April 2015;

(k) R175 583.77 from 22 April 2015;

(l) R44 913.85 from 21 May 2015;

(m) R47 896.27 from 26 May 2015;

(n) R78 861.55 from 28 May 2015;

(o) R44 239.93 from 29 May 2015;

(p) R202 192.47 from 29 May 2015;

(q) R50 073.13 from 29 May 2015;

(r) R30 696.46 from 29 May 2015;

(s) R118 718.82 from 29 May 2015;

(t) R72 213.05 from 29 May 2015;

(u) R34 561.47 from 29 May 2015;

(v) R219 262.25 from 29 May 2015;

(w) R30 059.73 from 29 May 2015;

(x) R41 816.59 from 29 May 2015;

(y) R503 237.70 from 29 May 2015;

(z) R40 858.69 from 29 May 2015;

(aa) R48 970.46 from 29 May 2015;

(bb) R139 277.98 from 29 May 2015;

(cc) R163 904.02 from 29 May 2015;

(dd) R67 979.04 from 29 May 2015;

(ee) R150 961.34 from 29 May 2015;

(ff) R69 011.68 from 2 June 2015;

(gg) R35 291.30 from 2 June 2015;

(hh) R798 006.65 from 3 June 2015;

(ii) R112 536.27 from 9 June 2015;

(jj) R140 988.74 from 19 June 2015;

(kk) R50 535.18 from 3 July 2015;

(ll) R59 761.52 from 9 July 2015;

(mm) R77 851.97 from 14 July 2015;

(nn) R53 089.60 from 17 July 2015.

3. Costs of suit, including reserved costs and the costs of the summary judgment application, such costs to include the costs consequent on the employment of two counsel where this was done.

C. In respect of the balance of R542 046.85 claimed, summary judgment is refused and the defendant is given leave to defend.

Gorven J

Date of Hearing:	21 June 2018
Date of Judgment:	29 June 2018

Appearances

For the Plaintiff:	LN Harris SC (with him D Ramdhani), instructed by Norton Rose Fulbright South Africa Incorporated
For the Respondents:	AWM Harcourt SC (with him SK Dayal), Instructed by Maharaj Attorneys