



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

|                              |        |
|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case no: 824/2016

In the matter between:

**MZIYA GENERAL SERVICES CC**

**PLAINTIFF**

and

**THE FREE STATE DEVELOPMENT CORPORATION**

**DEFENDANT**

---

**HEARD ON:** 5 MAY 2016

---

**DELIVERED ON:** 12 MAY 2016

---

**MOCUMIE, J**

- [1] The plaintiff and the defendant were involved in a dispute which is not relevant for purposes of this application. Suffice to state that the plaintiff alleges that it suffered damages as a result of a breach of the contract between it and the defendant. When the dispute could not be resolved, the matter was referred for

adjudication. On 2 December 2015, whilst the adjudication was still pending, the defendant tendered an offer to settle the matter in the amount of R3 200 000(Three million two hundred thousand rand) plus a costs contribution of R100 000(One hundred thousand rand).The plaintiff alleges that it accepted the offer tendered. The defendant failed to pay as it undertook despite several reminders sent to it. The defendant delivered a notice of intention to defend the action. The plaintiff, as provided for by Rule 32 of the Uniform Rules of the Court, applied for summary judgment. Thus this application which is opposed by the defendant.

- [2] The procedure for summary judgment is designed to enable the plaintiff whose claim falls within certain defined categories to obtain judgment without the necessity of going to trial, in spite of the fact that the defendant has intimated ,by delivering notice of intention to defend, that he intends raising a defence.<sup>1</sup>
- [3] The plaintiff is entitled to seek summary judgment if only his or her claim is
- (a) based on a liquid document;
  - (b) for a liquidated amount in money;
  - (c) for delivery of a specified movable property
  - (d) for ejectment<sup>2</sup>
- [4] In an application of this nature he plaintiff is required to deliver a notice of the application, accompanied by an affidavit.<sup>3</sup>The affidavit must be made by himself or herself or by any other person who can swear positively to the facts, verifying the cause of action and the amount, if any claimed, and stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of

---

<sup>1</sup> *The Civil Procedure Of the Supreme Court Of South Africa*, Van Winsen et al,4<sup>th</sup> ed,434.

<sup>2</sup> Rule 32 (2).

<sup>3</sup> See *Engineering Requisites Pty Ltd* 1976 (1) SA 418 (A) at 422E-423A.

delay.<sup>4</sup> Ordinarily only one affidavit is filed in support of a claim except with permission of the court but under very rare circumstances. The plaintiff may not annex any evidence to his or her affidavit, nor may (s)he file supplementary affidavits or a replying affidavit. However if the claim is founded on a liquid document, a copy of the document must be annexed to the plaintiff's affidavit.

[5] The affidavit filed by the defendant must set out his or her defence fully. This means while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, (s)he must at least disclose his or her defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.<sup>5</sup>

[6] The defendant opposes the application on the following grounds set out in the opposing affidavit:

6.1. The application for summary judgment falls entirely short of what Rule 32 (1) requires; particularly with regards to the allegations set out in the particulars of claim read with the unnumbered annexures thereto. Thus, no proper case appears to have been made in the plaintiff's particulars claim to be regarded as one of a liquidated amount.

6.2 The particulars of claim, read with the unnumbered annexures thereto properly construed and if the allegations set out are accepted as true, for purposes of these submissions:

(i) do not comply with Rule 18(4) – which provides that every pleading must contain a clear and concise statement of the material facts which the pleader relies on for his claim for summary judgment; particularly to enable the opposite party to reply thereto.

(ii) the unnumbered annexures were not properly presented to enable

---

<sup>4</sup> Rule 32(2).

<sup>5</sup> *Maharaj vs Barclays National Bank Ltd* 1976(1) SA 418 (A).

defendant to ascertain what case it has to meet.

(iii) the unnumbered annexures on their own do not contain sufficient information to sustain a cause of action.

- [7] Mr Sibeko, SC, on behalf of the defendant submitted that the deponent to the affidavit of the plaintiff stated that he verifies the amount owed and the cause of action. Yet the plaintiff failed to append the liquid document on which its cause of action is based. Thus no cause of action has been pleaded. He submitted further that, in any event, the purported offer on which the plaintiff seeks to rely was conditional upon the acceptance of such offer on a particular day and time as per annexure B to the papers. There is no objective averment supported by any documentation that the purported offer was accepted before it lapsed. In the absence of any such averment, it can safely be accepted that, on the plaintiff's own version; regard been had to the email dated 12 January 2016 that purported to form the letter of acceptance, no settlement agreement came into existence on 4 December 2015 as alleged by the plaintiff.
- [8] Mr Sibeko submitted on reliance of amongst others *Mosehla v SANCOR CC*<sup>6</sup> that in an application of this nature the defendant's affidavit is not subject to strict compliance as opposed to the plaintiff's affidavit. In other words the defendant's affidavit is not assessed as strictly as the allegations in the affidavit of the plaintiff. As long as such affidavit discloses a triable issue, it is sufficient. No consideration is given to the probabilities of that defence being successful. He submitted further that the purported offer of 4 December 2015 did not pass the muster of what an offer and acceptance is in our law.<sup>7</sup> Thus it can never succeed in any court. If anything the particulars of claim were so poorly drafted they were excipiable on the basis that they did not disclose a cause of action.
- [9] Mr Jagga, on behalf of the plaintiff, admitted that the liquidated document on which the cause of action was based was not attached to the particulars of claim and could not be found anywhere in the papers. It was not there. He

---

<sup>6</sup> *Mosehla v SANCOR CC* 2001 (3) SA 1207 (SCA).

<sup>7</sup> Christie's *The law of contract in South Africa*: 6th Edition, 2011.

however argued on the strength of *Coetzee*<sup>8</sup> that the deficiency in the particulars of claim was a technicality which this court should not uphold to the point that it should dismiss the application for summary judgment. He contended that the defendant's affidavit in itself lacked the details expected of the defendant. *i.e.* to disclose more than it did, such as whether it denied that an agreement was concluded on the basis that the plaintiff alleged.

[10] Summary judgment proceedings are no longer 'extraordinary'. The rule must just be applied properly.<sup>9</sup> From a simple reading of the particulars of claim of the plaintiff and on any other reading, the particulars of claim do not disclose any cause of action. The purported acceptance of the offer tendered by the defendant on 2 December is nowhere to be found. It cannot be generated because it does not exist. It is as Mr Sibeko correctly contended that if the plaintiff's case is to be believed, the purported offer was accepted after the expiration of the date and the time on which it was to be made. Upon it not being accepted by end of business on 4 December, it lapsed. No court can interpret this otherwise but as contended by the defendant.

[11] In respects of costs, Mr Sibeko submitted that when the plaintiff applied for summary judgment it knew very well what the defendant's defence to the action was and was well aware that on the basis of its contention it was fully entitled to defend the action. In *Flamingo General Centre v Rosburgh Food Market*<sup>10</sup> the court stated:

'A plaintiff should not apply for summary judgment in a case in which he knows that the defendant intends to defend the action upon grounds that, if accepted by the trial court, would constitute a good defence, and that the courts should not encourage a plaintiff to embark upon a summary judgment application in the hope that it might give him [or her] some special tactical advantage which he would not otherwise have had, such as forcing the defendant to put his defence on oath.'

<sup>8</sup> *Coetzee and Others v Nassimov* 2010 (4) SA 400 (WCC) at 402F-G.

<sup>9</sup> See *Joob Joob Investments Mavundla Zek JV* [2009] All SA 407 (SCA) para 32; 2009(5) SA 1 (SCA) at 12A-D.

<sup>10</sup> *Flamingo General Centre v Rosburgh Food Market* 1978(1) SA (D & CLD) 586.

[12] The same court continued at 588 to hold that :

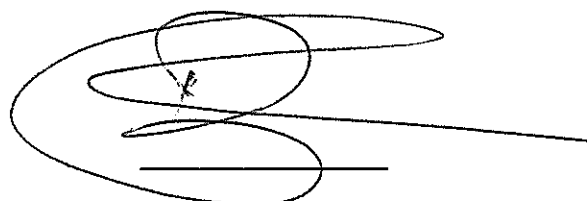
'If the plaintiff makes improper use of Rule 32 then it seems that he should be penalised in costs for his conduct, irrespective of whether he ultimately wins or loses the trial action; he incurs the penalty because he has misused the Rule and if no penalty were exacted in such a case the Rule would be increasingly abused.'

[13] In this case, the plaintiff proceeded with the application for summary judgment despite knowing very well that it did not have the document it relied upon for its cause of action. Without which it has no leg to stand on to prove its case, except if it led some evidence, if available, in attempt to do just that. There is no reason whatsoever that obliged the plaintiff to go this far with the application for summary judgment. The plaintiff ought to have granted the defendant leave to defend the action. This court is bound to show its displeasure with the unreasonable persistence and thus the misuse of the Rule through an appropriate cost order in order to discourage similar conduct in the future.

[14] In the result, the following order is granted.

**ORDER**

- '(a) The application for summary judgment is dismissed with costs on attorney and client scale.
- (b) The defendant is granted leave to defend the main action.
- (c) The main action to be stayed in terms of Rule 32 (9) of the Uniform Rules of court pending taxation by the defendant of its costs and payment thereof.'

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line through it, and a long horizontal stroke extending to the right.

B.C.MOCUMIE, J

On behalf of Applicant:

Adv N. Jagga

Instructed by:

Lovius Block Attorneys

31 First Avenue

BLOEMFONTEIN

On behalf of Respondent:

Adv L. T. Sibeko SC

Instructed by:

NW Phalatsi & Partners

2<sup>nd</sup> Floor, Metropolitan Building

96 Henry Street

BLOEMFONTEIN