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. 3068/2016

In the matter between:

FINTECH RECEIVABLES 2 (RF) LIMITED	1st Applicant
FINTECH UNDERWRITING (PTY) LIMITED	2nd Applicant

and

BONGAZ SUPPLIERS AND TRADING CC	1st Respondent
SIBONGILE KATRINA MTHETHWA	2nd Respondent
ISRAEL NGAZANS MTHETHWA	3rd Respondent

JUDGEMENT BY: MOLITSOANE, AJ

HEARD ON: 15 SEPTEMBER 2016

DELIVERED ON: 13 OCTOBER 2016

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[1] This is an application for summary judgment against the three respondents. It is opposed by the respondents on various grounds, raising both points of law and procedural issues.

[2] This application for summary judgment is opposed by the respondents on the following grounds:-

2.1 That the first applicant lacks *locus standi*;

2.2 That the respondents are not indebted to the first applicant, and even if it could be found that they were indebted to anyone (which they still deny), it would be to the second applicant only;

2.3 That the combined summons with reference to the particulars of claim may be expiable in terms of rule 23 of the Uniform Rules of this court;

2.4 That the amount claimed by the first applicant is a pre-estimate of the damages which is elevated by the Conventional Penalties Act 15 of 1962;

2.5 That the respondents cancelled the agreement with the second applicant during March 2016 and that as a result they deny any liability.

[3] Rule 32(3)(b) of the Uniform Rules of court requires the defendant to set out in an opposing affidavit the nature and grounds of its defence and to set out the material facts sufficiently fully to satisfy the court that the defence is *bona fide*.

[4] The approach which the court must follow in deciding an application for summary judgment has been set out as follows in **Maharaj v Barclays National Bank** 1976 (1) SA 418 (A) at 426A-D:

"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his 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."

[5] I will now deal with the grounds of the opposition as follows:

(1) **<u>Lack of *locus standi*</u>**

In order to understand the argument of the respondents, it is necessary to repeat paragraph 3 of the plaintiff's particulars of claim. Plaintiff alleges as follows:-

> **"3. The Plaintiffs are cited in the alternative, their respective locus standi being dependent on the above Honourable Court's finding:**
>
> **3.1 that the First Plaintiff has locus standi by virtue of the existence, operation and compliance with the Restated and Amended Sale Agreement, referred to herein below;**
>
> **3.2 that the Second Plaintiff has locus standi by virtue of the existence, operation and compliance with the Rental Agreement, referred to herein below, and in the event of the First Plaintiff not having locus standi."**

[6] It is important to note that this application for summary judgment is brought by the first applicant only. I hasten to add that in its heads of argument, it is stated that the "first applicant, alternatively, the second applicant applies for summary judgment..." (my own emphasis). However, one can glean from the Notice of Motion as well as on the affidavit of Kuhgen Govender in support of the application for summary judgement that only the first applicant applies for summary judgement.

[7] No affidavit in support of the application for summary judgment was filed by the second applicant. Kuhgen Govender also does

not purport to depose anything on behalf of the second defendant.

[8] I can, therefore, find no merit in the argument that second applicant also applies for summary judgment against the three respondents.

[9] My premise, therefore, in dealing with the grounds of opposition will be on the basis that only first applicant is applying for summary judgment against the three respondents.

[10] First respondent is cited as Fintech Receivables 2 (RF) Ltd, a company of which the Memorandum of Incorporation contained certain restrictive conditions applicable to the company. Prior to its conversion on 15 May 2013 it was cited as Fintech Receivables 2 (Pty) Ltd.

[11] Applicant contends that Annexure "X" annexed to the founding affidavit evidences the the conversion from private company as stated in paragraph [10] above. On the other hand, respondents contend that there is no link between the two and annexure "X" cannot be evidence that Fintech Receivables 2 (Pty) Ltd was converted to Fintech Receivables 2 (RF) Ltd.

[12] Rule 32(4) of the Uniform rules provides, inter alia, as follows:

> **"No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) ..."**

It is therefore abundantly clear that the adjudication of the application has to be done on the documents filed and no evidence extrinsic the said documents should be allowed.

[13] No reference whatsoever is made in Annexure "X" of the company, Fintech Receivables 2 (Pty) Ltd. Counsel for first applicant contends that in terms of section 5 of the Companies Act 71 of 2008, the respondents must be regarded as having knowledge of any provision of a company's Memorandum of Incorporation contemplated in section 15(2)(b) or (c) [of Act 71 of 2008] if the company includes the element "RF" .

[14] This argument, however, loses sight of the fact that according to the papers filed of record, plaintiff is cited as Fintech Receivables 2 (RF) Ltd and annexure "X", which purports to evidence proof of conversion makes no mention whatsoever of the previous company, Fintech Receivables 2 (Pty) Ltd. It might be so that later during the trial the applicants may prove the conversion but on the evidence before me, I can find no nexus between the two companies.

[15] Further, the company Fintech Receivables 2 (RF) Ltd is not a party to the Amended and restated agreement annexed to the summons.

I accordingly cannot find that Fintech Receivables 2 (RF) Ltd has *locus standi* in this lis.

(2) **Failure to comply with rule 18(6)**

[16] The argument of the respondents in this regard is two fold, namely:

(1) In its particulars of claim, it is alleged that first or second plaintiff was duly represented by a *"duly authorised representative"*; and

(2) That reference is made in paragraph 13 of the particulars of claim to a written agreement allegedly entered into in October 2013 and that such an agreement was not annexed to the summons.

[17] Rule 18(6) provides as follows:

> **"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."**

[18] It is not in dispute that the applicant's particulars of claim do not disclose *"when, where and by whom"* the alleged agreement was concluded nor does it disclose *"when, where and by whom"* the instruction was given and accepted on behalf of the plaintiff and

defendant respectively nor is it in dispute that the underlying agreement was not annexed to the summons.

[19] It is so that in certain circumstances non-compliance with rule 18(6) can be condoned in the absence of prejudice to the other party. In **Charsley v Avbob Begrafnisdienste Bpk** 1975 (1) SA 891 (E) the court had this to say:

> **"... if there is a material defect in any of the formalities required by the Rules of court, the court should not readily grant summary judgment. On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the defendant, I think that the court should condone a failure to comply with a technical requirement of the Rules."**

[20] Much as the rules of the court must be observed and complied with, their non-compliance must not be a bar to matters being ventilated before court, and conversely, their non-compliance should not be raised to frustrate plaintiffs in enforcing their claims.

[21] I am unable to find that the failure to plead "when, where and by whom the contract was entered into", will prejudice the defendants, at least at this stage of the proceedings.

[22] I also cannot find that failure to comply with rule 18(6) in this matter can be defence to the plaintiffs claim as envisaged by rule 32(2) of the Uniform rules of this court.

(3) **Conventional Penalties Act 15 of 1962**

[23] First applicant's claim is for payment of the amount of R144 891,54, being the outstanding balance payable under a rental agreement. According to defendant, this claim is a pre-estimate of damage and therefore not a claim as contemplated in rule 32(1).

[24] My understanding of the argument of the plaintiff is that it does not dispute that the amount claimed, being future rental amounts to damages, as envisaged by Act 15 of 1962. What they, however, contend is that in such a case, the court has a discretion in terms of section 3 of Act 51 of 1962 to reduce penalties owing to lack of proportion between the penalty and prejudice suffered by the creditor. According to the argument therefore, upon reduction of the penalties owing, the court may enter summary judgment.

[25] There are two approaches the courts have followed in matters of enforcement of a penalty clause by way of summary judgment. One approach is that in matters of this nature, summary judgment cannot be decided. – See **Bester v Smit** 1976 (4) SA 751 (C).

[26] On the other hand, the other school of thought is that summary judgment can be entered in these type of applications – See **Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd And Another** 1975 (1) SA 79 (W).

[27] I am of the view that this matter can be decided without having regard to which approach one aligns with.

[28] In claims of this nature, protection is granted to a debtor against an excessive penalty. Section 3 of the Conventional Penalties Act 15 of 1962 provides as follows:-

> **"If upon hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reasons of which penalty was stipulated, the court may reduce the penalty to such an extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditors proprietary interest, but every other rightful interest which may be affected by the act or omissions in question."**

[29] It is therefore clear that the court has discretion in terms of section 3 of Act 15 of 1962 in a claim for the enforcement of a penalty clause.

[30] In terms of this section, the onus lies with the creditor to prove that the penalty is proportionate to the prejudice suffered and to what extent (see **Smit v Bester** *infra*). In the exercise of its discretion the court is obliged to take in consideration the proprietary interest of the creditor amongst others and also every other rightful interest which may be affected by the act or the omission in question. Such evidence was not placed before court and the court could also not allow such evidence to be in

contravention of rule 32(4). Without further evidence in this regard, the court was not in a position to exercise its discretion as envisaged in section 3 of Act 15 of 1962.

[31] It is furthermore my considered view that invocation of the applicability of section 3 of the Conventional Penalties Act will be a valid defence albeit even if for a reduction or otherwise of the penalty.

(4) **Cancellation of Agreement**

[32] Respondents contend that the agreement herein was cancelled in March 2016 and in support thereof they annexed a copy of the bank statement, in which there are clear references to "settlements". In the absence of any contrary evidence as to why the respondents referred to their deposits as such I am prepared to accept that the payments were prima facie made in anticipation of cancellation of the agreement between the Second Applicant and the respondents.

[33] I accordingly find that save to raise the defence of non-compliance with rule 18(6) the respondents have valid bona fide defences to the first applicant's claim.

(5) **Costs**

[34] Respondents argue that the first applicant should have foreseen that the applicability of the Conventional Penalties Act would be

an issue to be raised but that notwithstanding it persisted with the application. Because of this respondents are of the view that I should make a cost order in favour of the respondents.

[35] On the other hand, applicants contend that if I were to refuse summary judgment, I must make an order that costs shall be costs in the cause.

[36] As I alluded earlier, there is no uniformity that where there is a claim for enforcement of a penalty clause, summary judgment cannot be granted. It would in my view be unfair to have expected the applicants to have anticipated that such a defence will be raised.

[37] The plaintiffs are claiming an amount which falls within the qualitative jurisdiction of the regional court. It will be as such prudent that the issue of costs be determined by the court which will be seized with the final adjudication of this matter in view of the fact that this matter should rightly have been brought in the regional Court.

[38] I accordingly make the following order:

1. **The application by the first applicant for summary judgment against the 3 respondents is hereby dismissed;**
2. **The respondents are hereby granted leave to defend ;**
3. **Costs shall be costs in the cause.**

P. E. MOLISOANE, AJ

On behalf of the applicant:	Adv. J. S. Rautenbach Instructed by: Hill McHardy & Herbst Inc BLOEMFONTEIN
On behalf of the Respondents:	Adv. P. du P. Greyling Instructed by: Steenkamp De Villiers & Coetzee Inc. BLOEMFONTEIN

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