IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

19/01/2015

CASE NO. 53672/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

22/01/2015 .... DATE .... SIGNATURE

In the matter between:

FFA ASSETS (PTY) LTD PLAINTIFF

and

ENSPIRE AVIATION (PTY) LTD 1ST DEFENDANT

PAUL MOSELY MOSES 2ND DEFENDANT

JUDGMENT

DE JAGER, AJ:

[1] This is an application for summary judgment against both defendants. The plaintiff instituted action against the first and second defendants for payment in the amount of R2,013,096.57, together with interest and costs, being the balance allegedly due and payable, pursuant to a so-called "*settlement agreement*" entered into between the parties on 19 September 2013.

[2] The settlement agreement relied upon by the plaintiff, emanates from various preceding contracts concluded between the plaintiff and the first and/or second defendants in relation to the sale of an aircraft and aircraft spares.

The pleadings:

[3] The particulars of claim incorporate two claims. Claim 1 is based on contract, and directed against both the first and second defendants jointly and severally. Claim 2 is formulated as an alternative claim and is directed against the second defendant only. The cause of action relied upon in claim 2 is that of personal

liability of the second defendant in his capacity as director of the first defendant.

[4] Both defendants entered appearance to defend the action, whereafter the plaintiff launched the present application.

[5] At the inception of the argument, Mr Stevens, on behalf of the plaintiff, announced that the plaintiff was not proceeding with claim 2 for purposes of the application for summary judgment. I should mention that, in my view, the relief sought in claim 2, is in any event not susceptible of summary judgment, seeing that the declaration of personal liability of a director of a company (which requires a separate investigation), falls beyond the ambit of Rule 32 of the Uniform Rules of this Court.

[6] The result is that the plaintiff only relied on claim 1, i.e. payment pursuant to the alleged settlement agreement concluded between the parties.

[7] The plaintiff alleges that the plaintiff entered into a partly written and partly oral agreement with the first and second defendants on 19 September 2013. The written part of the agreement is contained in annexure "POC1" to the particulars of claim, with the heading *"Acknowledgement of Debt and Settlement Agreement".*

[8] *Ex facie* the document, it would appear that the agreement was entered into between the plaintiff and both defendants. It, however, seems that the document was signed by the second defendant in his representative capacity only, as Chief Executive Officer of the first defendant. It is unclear whether the second defendant also signed the document in his personal capacity. I shall again refer to this issue shortly.

[9] The plaintiff then proceeds to set out the alleged oral terms of the settlement agreement. These terms are set out in paragraphs 5.1 to 5.4 of the particulars of claim. Of importance is the allegation that the parties agreed that the second defendant would become a co-debtor with the first defendant, in respect of the amount due and payable to the plaintiff.

[10] It was also a term of the agreement that the debt amount would be reduced by the sum of payments made to the credit of the plaintiff in respect of the

purchase price of a helicopter. The plaintiff alleges that it was agreed that the exact amount to be deducted in this regard was to be calculated in due course.

[11] It was allegedly also part of the oral agreement that the plaintiff would purchase a set of main rotor blades for a particular helicopter at a purchase price of R350,000.00. The rotor blades have not been delivered and the purchase price has not been paid. The plaintiff tenders payment of the purchase price against delivery of the rotor blades in the particulars of claim under claim 2. Seeing that the plaintiff does not presently rely on claim 2, this part of the oral agreement is irrelevant for purposes of the summary judgment proceedings.

[12] In paragraph 6.1 of the particulars of claim the plaintiff alleges that the exact sum to be deducted in respect of payment of the purchase price of the helicopter referred to *supra*, was calculated to be R973,973.00. In the same paragraph, the plaintiff also alleges that the plaintiff made payment to the credit of the first defendant to Absa Bank in the amount of R175,100.00 after conclusion of the settlement agreement, which should be subtracted from the payments made to the credit of the plaintiff in respect of the purchase price of the helicopter. During argument (and from the papers) it appeared that the accuracy of and/or the fact whether the amount had been paid to Absa Bank, were in dispute. In order to eliminate this dispute and the effect it might have on the quantification and liquidity of the plaintiff's claim, the plaintiff formally abandoned the amount of R175,100.00, reducing the claim amount to R1,837,996.57.

[13] In the affidavit resisting summary judgment, deposed to by the second defendant on behalf of both defendants, no fewer than six points *in limine* are raised, mostly of a technical nature. I intend to deal with these points *seriatim*. Before I do so, I regard it practical to dispose of the position of the second defendant at this stage.

<u>Defence raised by second defendant:</u>

[14] The points *in limine* contained in the affidavit resisting summary judgment, are raised on behalf of both defendants. The second defendant, however, proceeded to raise further defences regarding the merits of the claims against him.

[15] Firstly (essentially also being the subject matter of the sixth point *in limine*), the second defendant disputes the validity of him being bound as a surety for the obligations of the first defendant in terms of the settlement agreement. The plaintiff, however, contended that it is not the plaintiff's case that the second defendant is liable as surety, but indeed as a co-debtor, wherefore the law of suretyship would be inapplicable. On a reading of the particulars of claim and the supporting documentary evidence, I am inclined to agree that the second defendant is not cited as a surety, but rather as a second contracting party and co-debtor. Be that as it may.

[16] The second defendant further states that he signed the settlement agreement merely as a representative for and on behalf of the first defendant. As far as this contention is not supported by the contents of annexure "POC1" itself, it was argued by Ms Balmelli on behalf of the defendants, that the evidence presented by the second defendant, sustains a defence based on rectification of the settlement agreement, alternatively, *error* by the second defendant in signing the document as formulated. The defence therefore boils down to a denial by the second defendant that he ever intended to be bound to the terms of the settlement agreement in his personal capacity. As alluded to earlier, the contents of annexure "POC1" itself are ambiguous in this regard and do not provide a clear answer to whether the second defendant became a party to the settlement agreement or not. This issue should be resolved with the benefit of tested *viva voce* evidence at trial in due course.

[17] The second defendant also presented evidence in opposition to claim 2, i.e. to him being declared personally liable for the debts of the first defendant. (This issue has of course become irrelevant for purposes of this application seeing that the plaintiff does not persist with the claim at this stage. I, however, regard the evidence to be significant.) The second defendant denies having acted recklessly or with the intent to defraud creditors of the first defendant. [See paragraphs 38 to 44 of the affidavit resisting summary judgment.] The second defendant explains that when he signed the settlement agreement on behalf of the first defendant, he was confident that a transaction between a company in which the first defendant is a shareholder, and the Department of Defence, would realize. In paragraph 43 of the affidavit resisting summary judgment, the second defendant concludes as follows:

"43 *Consequently at the time of concluding the settlement agreement I was* *confident that the first respondent would be able to comply with the settlement agreement."*

[18] The argument is therefore that the second defendant never acted recklessly nor intended to defraud the first defendant's creditors.

[19] In passing I should mention that I find it unfortunate that the second defendant failed to expressly disclose what the fate of the transaction with the Department of Defence was. Having regard to the gist of the evidence and the passage quoted above, it is reasonable to infer that the transaction did not realize as expected, resulting in the first respondent being unable to perform in terms of the settlement agreement. This inference of course has bearing on the *bona fides* of the first defendant's defence in these proceedings, which will be dealt with *infra*.

[20] In the circumstances I am satisfied that the second defendant disclosed a *bona fide* defence. Wherefore I intend to grant the second defendant leave to defend the action.

Defence raised by the first defendant (points *in limine*):

[21] This brings me to the defences raised on behalf of the first defendant.

[22] In the **first point *in limine*** the defendants contend that the verifying affidavit in support of summary judgment is materially defective as the deponent thereto failed to verify each cause of action on which the plaintiff relies for its claim. The plaintiff also did not identify or verify a specific cause of action, in that the deponent only states:

"4.

I verify the facts as set out in the particulars of claim and the cause of action."

[23] The relevant portion of the text of Rule 32(2) reads as follows:

"... together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, ..."

[24] The wording of the rule itself, does not require the plaintiff to verify all the

causes of action separately. The exception is where mutually destructive causes of action are formulated against a defendant, which would compel the plaintiff to elect which cause of action the plaintiff relies on for purposes of the summary judgment application. I deal with this scenario in the discussion of the second point *in limine infra*.

[25] In this case the first defendant is faced with only one cause of action. It should be noted that an affidavit resisting summary judgment was filed on behalf of both defendants. Therein both defendants deal with their defences in respect of the respective causes of action.

[26] I therefore regard this point to be overly technical and without merit. The first point *in limine* is dismissed.

[27] The **second point *in limine*** raises an objection to the fact that the plaintiff ostensibly verifies two mutually destructive causes of action, in the absence of a pertinent election of either.

[28] It is in order for a plaintiff to verify a cause of action based on alternative claims that are not mutually destructive. [See **Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd 1992 (2) SA 295 (W) at 297 C – E.**] In the present case only claim 1, based on a contractual cause of action, is directed at the first defendant. The alternative claim formulated in claim 2, is pleaded as an alternative basis for the second defendant's liability towards the plaintiff. The point *in limine* under discussion might therefore very well have been raised successfully on behalf of the second defendant. As against the first defendant, however, the point cannot be upheld seeing that the singular cause of action against the first defendant is straight forward and clearly formulated in claim 1. It cannot be argued that the plaintiff verified two mutually destructive causes of action against the first defendant. It is therefore not required of the deponent, to elect which cause of action he verifies in relation to the first defendant.

[29] The authorities are clear that a plaintiff cannot verify alternative claims that are mutually destructive, i.e. where the *facta probanda* relied upon in the alternative claims, constitute mutually destructive versions. I am not convinced that the *facta probanda* of claim 2 in support of the second defendant's personal liability as a director of the first defendant, are exclusive of the *facta probanda* that

would support the second defendant's alleged contractual liability as formulated in claim 1. So even if it is correct that the plaintiff verified both causes of action, it should not render the affidavit fatally flawed. However, such dual verification would in any event only apply to the second defendant against whom both causes of action are directed.

[30] In **Standard Bank of South Africa Limited v Roestof 2004 (2) SA 492 W at 496 F – H,** it was held that if the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application for summary judgment, especially in cases where a reading of the defendants' affidavit opposing summary judgment makes it clear beyond doubt that the defendants know and appreciate the plaintiff's case against them.

[31] The following passages by Blieden J in the aforesaid matter **at 497 – 498** are apposite:

"There can be no doubt, as has been said in numerous cases, that summary judgment is a harsh remedy which closes the door to the defendant proceeding further with his defence. However, it is an important means of preventing defendants who can demonstrate no bona fide defence or furnish security from taking advantage of the unavoidable delays resulting from a matter going to trial by utilizing the stratagem of entering an appearance to defend. While appreciating the difficulties which any defendant is presented with on receipt of an application for summary judgment, there seems to be no reason for an affidavit made in terms of Rule 32 to be more strictly construed than any other affidavit. If a defendant has difficulty in dealing with the pleadings because they are not technically correct for one or other reason, this should be stated in his affidavit filed in terms of Rule 32(3)(b) as a justification for his inability to present an affidavit disclosing 'fully the nature and grounds of the defence and the material facts relied upon therefore.' However, if there is no doubt as to what the plaintiff's case is, even though there may be some manifest errors in the way it has been presented, which is the position in the present case, it seems to me to be an exercise in futility to non-suit the plaintiff after the defendant has filed an affidavit in terms of Rule 32(3)(b) in which he demonstrates his appreciation of the plaintiff's case and sets out what he perceived to be an answer to it as required by the Rule...

The papers as a whole must be looked at in order for a Court to come to a conclusion as to whether leave to defend should be granted to a defendant or not. The function of a Court should not be to protect dishonest defendants because a plaintiff's pleadings are less than perfect. Each case must be judged on its own facts...

In the present case, as with the first objection in limine, the defendant has not, nor has he claimed to have, suffered any prejudice as a result of the plaintiff's manifest error. To rely on the technical errors in the summons and the plaintiff's Rule 32 affidavit and at this stage deny the plaintiff summary judgment, if it is otherwise entitled to such an order, would, in my view, result in a legal nonsense."

[See also **<u>Charsley v AVBOB (Begrafnisdiens) Bpk</u> 1975 (1) SA 891 E at 893 C – D**.]

[32] Nowhere in the affidavit resisting summary judgment, is it contended on behalf of the first defendant that the first defendant has been prejudiced or that it had any difficulty in dealing with the pleadings as a result of the technical inaccuracies contained therein. On the contrary, it is patently clear from the affidavit resisting summary judgment that both defendants fully appreciate the nature and extent of the proceedings they are opposing and were indeed able to deal with the allegations, in opposing same. This point *in limine* is therefore dismissed.

[33] The **third point *in limine*** relates to the possible excipiability of claim 2 against the second defendant. This point requires no further determination, seeing that I intend to grant the second defendant leave to defend the action for the reasons stated earlier.

[34] The **fourth point *in limine*** raises the issue that the relief sought in claim 2 of the particulars of claim (against the second defendant), is not susceptible of summary judgment. As already stated I am inclined to agree. Similarly it does not require further determination, seeing that I intend to grant the second defendant leave to defend the action.

[35] In the **fifth point *in limine*** the defendants contend that the particulars of claim

in respect of claim 1 are excipiable in that same are vague and embarrassing.

[36] Firstly the defendants submit that paragraph 5 of the particulars of claim is flawed in that the plaintiff alleges that the agreement was concluded with the "*defendant*" without specifying which defendant. It is, however, clear from the remainder of the terms and conditions of the agreement relied upon by the plaintiff, that the settlement agreement was reached with both defendants, on the plaintiff's version. This is indeed one of the contentious issues between the parties, to which the second defendant has responded extensively.

[37] It is clear that this typographical error in paragraph 5 of the particulars of claim, in no way prevents the defendants from pleading to the allegations. In this regard I refer to paragraph 35 of the affidavit resisting summary judgment wherein the defendants record their version regarding the conclusion of the settlement agreement as follows:

> "35 *I acknowledge the fact that I signed the settlement agreement being 'POC1' annexed to the plaintiff's claim as a duly authorised representative acting for and on behalf of the first defendant. However, I deny for the reasons aforesaid that I am personally liable to the plaintiff in my personal capacity for the amount claimed in terms of the settlement agreement and I reiterate what is stated above in this regard."*

[38] It is therefore obvious that the defendants fully comprehend the allegations in respect of the conclusion of the contract and the parties thereto, and are indeed able to express their stance and defence to such allegations.

[39] I therefore find that the defendants are not frustrated in pleading to the allegations in paragraph 5 of the particulars of claim.

[40] Secondly the defendants complain about the fact that it is not stated in paragraph 5.2 of the particulars of claim, with whom, where and when the agreement (that the second defendant would become a co-debtor) was concluded. The absence of these particulars, does not prevent the defendants from pleading to the allegation. All that is required from the defendants, specifically the second defendant, is to admit or deny the conclusion of such an

agreement. The conclusion or not of such an agreement, is certainly within the knowledge of the second defendant and he is no doubt able to react and plead to the allegation as it stands. He has in fact already done so in paragraph 35 of his affidavit quoted above.

[41] Even if the particulars of claim lack absolute clarity, but still convey beyond any doubt the nature of the plaintiff's claim, textual criticism of the summons and the verifying affidavit, will not compensate for the defendant's failure to disclose a defence on the merits. [See **Caxton Ltd v Barrigo** **1960 (4) SA 1 (T) at 4 A;** **Nedcor Bank Ltd v Hennop & Another** **2003 (3) SA 622 (T) at 627 E – H.**] This point *in limine* is therefore rejected.

[42] I have already touched upon the issues raised in the **sixth point *in limine*.** These relate exclusively to the defence raised by the second defendant and therefore do not require further consideration at this stage.

Defences raised by first defendant on merits:

[43] This concludes the technical defences raised. The only evidence I could find in opposition to the merits of the claim against the first defendant, is contained in paragraphs 36 and 37 of the affidavit resisting summary judgment. In paragraph 36 the deponent states as follows on behalf of the first defendant:

> *"36 I deny that the first defendant is indebted to the plaintiff in the amount of R2,013,096.57 and no proof of the amounts ... averred in the particulars of claim has been provided."*

The bear denial quoted above, does not even attempt to provide a *bona fide* defence to the claim. It is not required of a plaintiff to provide evidence in support of the claim formulated in the particulars of claim at the stage of summary judgment proceedings. It is indeed for the defendants to raise a *bona fide* defence with sufficient particularity, and which would be sustainable in law if found to be correct. If the first defendant honestly doubted the accuracy of any calculation, it should at least have provided the basis thereof. I accept that the figures were probably conveyed to the first defendant prior to litigation and that the first defendant had ample opportunity to consider and debate the accuracy therefore. Why not take the Court into its confidence by illustrating where the plaintiff allegedly erred in its calculations?

[44] As was said by Colman J in **Breytenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 T at 228 A – B:**

"All that is required is that the defendant's defence be not set out so boldly, vaguely or laconically that the Court with due regard to all the circumstances receives the impression that the defendant has or may have dishonestly sought to avoid the dangers inherent in the presentation of a further or clearer version of the defence which he claims to have."

[45] This is indeed the position in the present case. The first defendant's version "*lacks the forthrightness as well as the particularity that a candid disclosure of the defence should embody*". [**Breytenbach**-case *supra* at 231 A.]

[46] In paragraph 37 the following evidence is tendered on behalf of the first defendant:

"37 I further specifically deny that the plaintiff is entitled to take into account any alleged payment of R175,100.00 as I have no knowledge of such a payment and no proof has been provided that such a payment has been made."

[47] This denial and the resultant dispute in respect of the said amount, have fallen by the wayside as a result of the plaintiff's abandonment of such an amount to be taken into account when calculating the indebtedness.

[48] The first defendant says nothing more on the merits of the claim.

[49] I therefore conclude that the first defendant presented no *bona fide* defence to the merits of the plaintiff's claim. Keeping in mind the inference drawn from the contents of paragraph 43 of the affidavit resisting summary judgment mentioned earlier, it would rather suggest that the first defendant is simply financially unable to perform in terms of the settlement agreement, due to circumstances beyond the contractual relationship between the parties. This, however, is no defence to the plaintiff's claim.

[50] In the premises the plaintiff is entitled to summary judgment against the first defendant.

[51] In the result the following order is made:

[51.1] Summary judgment is granted against the first defendant in favour of the plaintiff in the following terms:

[51.1.1] The first defendant is ordered to pay the plaintiff the amount of R1,837,996.57;

[51.1.2] The first defendant is ordered to pay interest to the plaintiff on the amount of R1,837,996.57, at the applicable *mora* interest rate from time to time per annum, calculated from 16 October 2013 to date of final payment;

[51.1.3] The first defendant is ordered to pay the plaintiff's costs of suit in respect of the claim against the first defendant.

[51.2] The second defendant is granted leave to defend the action;

[51.3] The costs of the summary judgment application in respect of the second defendant, are costs in the cause.

N.F. DE JAGER, AJ
ACTING JUDGE OF THE HIGH COURT: PRETORIA