IN DIE HOË HOF VAN SUID-AFRIKA
VRYSTAATSE AFDELING, BLOEMFONTEIN

Saaknommer : 4724/2013

In die saak tussen:-

ABSA INSURANCE COMPANY LIMITED Eiser

en

JACO PELSER MOCKE Verweerder

CORAM: VAN ZYL, R

GELEWER OP: 29 MEI 2014

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[1] Hierdie is `n aansoek om summiere vonnis waarin eiser die betaling van die bedrag van R 368 055.00, tesame met rente en koste, vanaf verweerder vorder.

[2] Voormelde vordering is voortspruitend uit die sluiting van drie versekeringskontrakte tussen eiser, wie ‘n behoorlik geregistreerde versekeraar is, en verweerder, ten opsigte waarvan eiser beweer dat verweerder aan hom die premies ten opsigte van sodanige versekeringskontrakte verskuldig is. In die verband het die verweerder aan eiser ‘n tjek oorhandig ter betaling van die

tersaaklike premies, welke tjek gedishonoreer is met die verwysing "*refer to drawer*".

[3] In sy opponerende verklaring erken verweerder dat hy die drie versekeringskontrakte met eiser gesluit het en dat hy die tersaaklike tjek oorhandig het ter betaling van die verskuldigde premies. Verweerder beweer egter dat vanweë die redes in die opponerende verklaring vermeld, eiser nie sy verpligtinge in terme van die versekeringskontrakte nagekom het nie, waarop verweerder die versekeringskontrakte regsgeldig gekanselleer het en derhalwe betaling van die tjek gestop het.

[4] In die opponerende verklaring is 'n aantal punte *in limine* geopper ten opsigte waarvan verweerder beweer dat eiser se aansoek om summiere vonnis nie aan die tersaaklike bepalings van Reël 32(2) voldoen nie. Hierdie punte *in limine* is deur Mnr Burger, namens verweerder, in sy betoogshoofde herhaal en ook gedurende sy mondelinge betoog geopper. Vanweë die gevolgtrekking waartoe ek in hierdie uitspraak gaan kom wat betref die meriete van eiser se aansoek om summiere vonnis, meen ek dat dit onnodig is om met die tersaaklike punte *in limine* te handel.

[5] Na my mening is dit duidelik dat eiser se vordering, soos uiteengesit in die besonderhede van vordering, gebaseer is op die sluiting van drie verskillende verskeringskontrakte voortspruitend waaruit die drie onderskeie versekeringspremies, as synde likiede bedrae, beweerdelik deur verweerder aan eiser verskuldig is. In die verband het eiser in sy besonderhede van vordering 'n afsonderlike bewering gemaak ten opsigte van die sluiting van elk van die drie onderskeie versekeringskontrakte en dan die beweerde terme en voorwaardes van elk van sodanige versekeringskontrakte afsonderlik uiteengesit. Dit is opgevolg deur die volgende bewerings in paragraaf 7 van die besonderhede van vordering:

> "Pursuant to the conclusion of the aforesaid first, second and third insurance policies the defendant was indebted to the plaintiff in the amount of R368 054-81, being the sum of the premiums payable under the first, second and third insurance policies respectively."

Ten opsigte van elk van die voormelde versekeringskontrakte is daar dan ook beweer dat "a copy of the ..... insurance policy document is attached hereto and marked Annexure '....' " en is daar dan inderdaad drie afsonderlike dokumente bestaande uit twee of drie bladsye elk aangeheg tot die besonderhede van vordering, onderskeidelik gemerk Aanhangsels “A1”, “A2” en “A3”.

Daaropvolgend is die volgende bewerings in paragraaf 8 van die besonderhede van vordering gemaak:

> “On 29 May 2013, defendant delivered to the plaintiff a cheque as payment of the aforesaid amount of R368 055-00.”

Daarna het die bewerings gevolg met betrekking tot die wanbetaling van die tersaaklike tjek en is ‘n afskrif van die tjek ook aangeheg tot die besonderhede van vordering.

[6] In die onderhawige geval kan dit nie in dispuut wees dat die onderskeie drie vorderings likiede vorderings is nie, aangesien die bedrag van die premie ten opsigte van elk van die drie onderskeie versekeringskontrakte, uitdruklik ooreengekom is.

[7] In die beregting van ‘n aansoek om summiere vonnis, is die Hof beperk tot die wyse waarop eiser sy saak aangebied het. In die verband word dit as volg gestel in <u>SUMMARY JUDGMENT, A PRACTICAL GUIDE,</u> S J Van Niekerk *et al*, op p. 11-10, par

11.2.3:

> "The whole procedure of summary judgment was created to benefit plaintiffs. At the very least, therefore, it is expected of a plaintiff, in presenting his case, to place himself squarely within the four corners of the remedy. Any defects in the presentation of his case which are not merely technical and, for that reason, cannot be condoned, will have as their consequence a refusal of summary judgment, even if no *bona fide* defence has been disclosed by the defendant. A court will not assist a plaintiff by breathing life into a poorly presented case – on the contrary, the court will consider itself bound to the terms in which the plaintiff has elected to formulate his claim."

[8] Wat die onus in bogemelde verband betref, rus dit op die eiser, soos blyk uit die volgende aanhaling uit <u>SUMMARY JUDGMENT, A PRACTICAL GUIDE,</u> *supra*, op p. 11-25, para 11.4.3:

> "Owing to the fact that summary judgment is a drastic remedy, in the sense that a plaintiff may obtain a final judgment without a trial, the point of departure in determening such an application is to ascertain whether the plaintiff has placed himself squarely within the strict requirements of the rule. He must stand or fall by the presentation of his case. The onus is on the plaintiff to make out a valid and complete cause of action – if he fails to do so, summary judgment

> must be refused, in which event the defendant's opposing affidavit is not even considered."

[9] Dit is geykte reg dat die party wat die bestaan van 'n kontrak beweer, die terme van die kontrak wat hy poog af te dwing, moet bewys. SIEN McWILLIAMS v FIRST CONSOLIDATED HOLDINGS (PTY) LTD 1982 (2) SA 1 (A).

[10] In GULF STEEL (PTY) LTD v RACK-RITE BAR (PTY) LTD AND ANOTHER 1998 (1) SA 679 (O) het die volgende tersaaklike feite en beginsels geblyk:

> "In accordance with the provisions of Rule 18(6) of the Uniform Rules of Court a party who in his pleadings relies upon a contract must 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 of it or the part relied upon in the pleadings must be annexed thereto. Paragraph 5 of the plaintiff's particulars of claim reads as follows:
>
> > 'On or about 3 June 1992 and at Selosesha the plaintiff and the first defendant herein represented by the second defendant entered into a written agreement in terms whereof the plaintiff sold and delivered goods to the first defendant on an open account. Seen (*sic*) annexure A attach (*sic*) hereto.'

The plaintiff then goes on to refer to various provisions of the said annexure in the further allegations made in its particulars of claim. However, when regard is had to the annexure itself it is quite clear that the application for credit was signed on 3 June 1991, and not on or about 3 June 1992 as pleaded by the plaintiff. It is of course conceivable that this may be due to a typing error and quite capable of being amended without in any way prejudicing the application for summary judgment but, more importantly, without compromising the defendant in establishing a *bona fide* defence that is required in terms of the Rule which would enable this Court to refuse summary judgment. However, there is a further material contradiction between the pleaded particulars of claim and the annexure A annexed thereto, in that it is quite clear, *ex facie* the annexure, that the defendant was represented by S Gerber in his capacity as general manager whereas the plaintiff has pleaded that the first defendant was represented by the second defendant. Apart therefrom it is noticeable that the plaintiff seeks 'judgment against the first and second defendants in the amount of R193 902,13'. This is clearly not correct. The second defendant's liability under the deed of suretyship is joint and several with the first defendant, and accordingly the plaintiff ought to have claimed payment from the first and second defendants jointly and severally, the one paying the other being absolved. If regard is had to the application for summary judgment which reads:

> '. . . for an order in the following terms: *(a)* that summary judgment be granted against the defendant in terms of the summons for payment of the sum R193 902,13;
>
> *(b)* . . .',

as well as the supporting affidavit which is not strictly in accordance with the requirement of the Rules, it is quite apparent that the quality of the plaintiff's pleadings leaves much to be desired. At the hearing of this matter there was no formal or any kind of application to attempt to amend either the summons or the application for summary judgment, even though there were two defendants before the Court and just one application for summary judgment against 'the defendant'.

Mr *De Wet*, who appeared on behalf of both defendants at the hearing of this matter, correctly conceded that the defence raised on behalf of the first defendant was sketchy, bold and vague. It is trite law that the affidavit filed by the defendant must set out his defence fully. Whilst a defendant need not deal exhaustively with the facts and the evidence relied upon in support thereof, the least that is required of a defendant is to disclose his defence and the material facts upon which it is based with sufficient particularity and completeness so that the Court can decide whether the affidavit disclosed a *bona fide* defence. A defendant must do so in a manner that is not inherently or seriously unconvincing and the defence must of course be one that is valid in law. I am quite satisfied that the defendant in this matter has not discharged the *onus* upon it to avoid summary judgment in view of its failure to convince the Court that the defence raised is *bona fide*.

Having found that the affidavit raised no defence to the claim for goods sold and delivered, the only aspect which remains in the affidavit is the allegation by the second defendant that the suretyship he signed was intended not for the obligations of the first defendant, but for another company bearing the same name. I am satisfied that it is improbable, having due regard to common commercial practice, that a company such as the plaintiff would obtain a suretyship from a director of a company in respect of one of his companies and not in respect of another. The second defendant does not state in his affidavit that the plaintiff was aware of the existence of the second company. There is no explanation why the deed of suretyship does not bear the registration number of either of these two companies. Accordingly I hold the view that I am entitled to draw an adverse conclusion against the second defendant on the probabilities of this matter, particularly if regard is had to the remainder of the affidavit which contains a point *in limine* which was devoid of all substance and a defence which does not meet the test that is required of a defendant with regard to the claim for goods sold and delivered.

In the matter of *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793C--D the learned Judge quotes with approval:

> 'It will therefore be seen that summary judgment is an extremely extraordinary and drastic remedy. It shuts the mouth of the

> defendant finally. A party who seeks to avail himself of this drastic remedy must in my view strictly comply with the requirements of the Rule.'

In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a *bona fide* defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a *bona fide* defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court.

I have highlighted some of the shortcomings in the plaintiff's pleadings. I am of the view that these pleadings were prepared without proper consideration of the relevant issues, and leave the impression that those responsible for the drafting of these pleadings certainly did not properly apply their minds thereto. Mr *Williams*, who represented the plaintiff at the hearing, tried his very best to explain the shortcomings in the plaintiff's pleadings, but failed to convince this Court, as the problems he was confronted with were not capable of easy explanation.

Even though I am of the view that the defendants have not presented an affidavit to the Court with sufficient particularity and detail which would entitle this Court to refuse the application for summary judgment on the strength of such affidavit, I am nevertheless obliged, in view of the extraordinary nature of the remedy sought, namely summary judgment, to dismiss the plaintiff's application for summary judgment on the basis of the various defects in its own pleadings."

[11] Die eerste twee aangehegte versekeringskontrakte is gesluit op 11 Februarie 2013. Ten opsigte van elk van hierdie kontrakte is die volgende soortgelyke bewerings gemaak as synde van die wesenlike terme van die kontrakte:

"....The premium of .... would be paid by the defendant to the plaintiff within 45 days of conclusion of the ...policy contract;

.....The premium of ..... therefore became due and payable on or about 18 April 2013."

Twee soortgelyke bewerings is ten opsigte van die derde versekeringskontrak gemaak, behalwe dat beweer is dat dit gesluit is op 12 Februarie 2013 en dat die premie derhalwe opeisbaar en betaalbaar geword het op 19 April 2013.

[12] Wanneer voormelde berekening van 'n 45-dae tydperk gemaak word, bereik dit nie die datums van 18 April 2013 en 19 April 2013, onderskeidelik, nie. Hierdie bewerings ten opsigte van die opeisbaarheid en betaalbaarheid van die onderskeie versekeringspremies, synde wesenlike terme van elk van die beweerde kontrakte, kan dus na my mening nie korrek wees nie.

[13] Addisioneel tot voormelde, is daardie bewerings in ieder geval totaal teenstrydig met die tersaaklike bepaling wat in die verband op elk van die drie kontrakte wat aangeheg is tot die besonderhede van vordering, voorkom en wat as volg lees:

> "Ek bewus is van my verpligting om die premie soos hierbo uiteengesit te betaal, dat die premie opeisbaar en betaalbaar word <u>by ondertekening hiervan</u> tensy uitstel skriftelik deur die versekeraar se Produksiebestuurder: Agri Oes verleen is ..."

Indien daar sodanige uitstel vir betaling verleen was en dat dít die verwysing na 45 dae tot gevolg gehad het, moes sodanige bewering in ieder geval in die besonderhede van vordering gemaak gewees het. Na my mening voldoen eiser se besonderhede van vordering dus nie aan die bepalings van Reël 18(6) nie en is die omstandighede in die onderhawige geval baie soortgelyk aan die in voormelde *GULF STEEL* - beslissing .

[14] Verdermeer tot voormelde teenstrydighede, bevat elk van die drie kontrakte die volgende bewoording:

> "Ons, die ondergetekendes, kom hiermee ooreen dat die versekeringsbesonderhede, sertifikaat, polisvoorwaardes en sketskaart die basis van hierdie polis tussen Absa Versekeringsmaatskappy en die versekerde sal wees."

Elkeen van die kontrakte bevat ook 'n verklaring deur die versekerde dat "ek die polisvoorwaardes ontvang en nagegaan het.".

Die eerste twee kontrakte bevat ook die volgende verklaring deur die versekerde:

> "Ek is bewus dat hierdie polis in werking tree soos uiteengesit in die gedeelte van die polisbewoording wat handel oor die AANVANG VAN DEKKING."

[15] Na my mening blyk dit dus verdermeer dat eiser se vorderings gebaseer is op versekeringskontrakte waarvan die volledige polisvoorwaardes, wat juis ooreengekom is die basis van die polis tussen eiser en verweerder sal vorm en waarop klaarblyklik gesteun word in die besonderhede van vordering, nie aangeheg is tot die besonderhede van vordering nie. In MOOSA AND OTHERS NNO v HASSAM 2010 (2) SA 410 (KZP) op 413 B tot 414 B, is hierdie beginsel as volg gestel:

> "Rule 18(6) speaks of a party who in his pleading 'relies' on a contract or 'part' thereof. A party clearly 'relies upon a contract' when he uses it as a 'link in the chain of his cause of action'. *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 953A; and *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 193H.
>
> Although both of these cases were decided at a time when rule 18(6) made no provision for a true copy of the written agreements to be annexed to the pleading, the views of the learned judges, as to

the meaning to be attached to the phrase in question, are still relevant and instructive.

[18] In the present case the respondents base their cause of action against the applicants upon the written agreement. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear *ex facie* the pleadings.

[19] An allegation that a party is not in possession of the written agreement relied upon, constitutes an acknowledgment that the basis for the cause of action advanced is lacking, or that a link in the chain of the cause of action advanced is missing. Consequently, such an allegation as made in the present case does not constitute compliance with the requirements of rule 18(6), nor does it excuse their non-compliance. In addition an allegation that the party has taken steps to obtain a copy, without success, or to annex an incomplete, or unsigned, draft thereof, would not for the same reason constitute compliance with the demands of rule 18(6), nor would it excuse their non-compliance.

[20] It is therefore clear that a party who bases its cause of action upon a written agreement should obtain a true copy of the agreement before advancing its claim. However, this is not to say

that a failure to annex a written agreement relied upon may never be condoned in terms of rule 27(3).

[21] Good cause would have to be shown why the party concerned is unable, at that stage, to annex a copy of the written agreement relied upon. Relevant considerations would be the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being obtained in the future. That a true copy will be available before the issues arising therefrom have to be determined will be of particular importance in this regard. In addition any prejudice to the opposing party caused by the failure to annex the agreement to the pleading would have to be considered. Of significance in this regard would be whether the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based, and is not excipiable."

Sien ook ABSA BANK LIMITED v NICHOLAS AND ANOTHER; ABSA BANK LIMITED v NICHOLAS AND ANOTHER [2013] JOL 30256 (WCC).

[17] Gevolglik is ek van mening dat eiser hom nie van sy onus gekwyt het om 'n volledige en geldige skuldoorsaak teen verweerder uit te maak nie. Soos blyk uit die regspraak reeds aangehaal, in besonder die bogemelde *GULF STEEL*-uitspraak, moet summiere vonnis dus geweier word sonder dat ek eers die inhoud en meriete

van verweerder se opponerende verklaring oorweeg.

[18] Mnr Zietsman, namens eiser, het betoog dat summiere vonnis steeds toegestaan behoort te word, deurdat die gedishonoreerde tjek, welke tjek `n likiede dokument is, op sigself `n volledige skuldoorsaak daarstel. Ek kan egter nie met hierdie submissie saamstem nie, aangesien dit nie is hoe die skuldoorsaak in die besonderhede van vordering geformuleer en uitgemaak is nie.

[19] Wat die koste betref, is ek van mening dat daar geen rede bestaan waarom die sogenaamde gebruiklike kostebevel ten opsigte van onsuksesvolle aansoeke om summiere vonnisse, nie ook in hierdie geval gelas behoort te word nie.

[20] Gevolglik word die volgende bevele gemaak:

1. Eiser se aansoek om summiere vonnis word van die hand gewys.
2. Verlof word aan verweerder verleen om die aksie te verdedig.
3. Koste van die aansoek om summiere vonnis is koste in die geding.

C. VAN ZYL, R

Namens die Eiser:	Adv. P.J.J. Zietsman In opdrag van: Honey Prokureurs Bloemfontein
Namens die Verweerder:	Adv. A.H. Burger SC In opdrag van: Kramer Weihmann & Joubert Ing. Bloemfontein