IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA CASE NO: 2223/11

Heard on: 01/12/11

Delivered on: 26/01/12

In the matter between:

AFROPULSE 497 (PTY) LTD Applicant

and

LAMAN (PTY) LTD Respondent

JUDGMENT

NHLANGULELA J:

[1] This judgment concerns an application for summary judgment in terms of Rule 32 of the rules of this Court.

[2] The applicant brought an action against the respondent for the payment of R783 624,00 together with interest thereon calculated at the legal rate of interest a *tempore morae* to date of payment. This claim arises from a breach of the sale agreement by the respondent, which was duly accepted by the applicant, who failed to deliver certain cement blocks in terms as agreed between the parties on 07 February 2011. A notice to defend the action which was delivered by the respondent on 27 October 2011 provoked the application for summary judgment.

[3] The following allegations were made by the applicant in the particulars of claim. The applicant is described as Afropulse 497 (Pty) Ltd (Registration No. 2010) 000683/07), a company with limited liability and duly registered as such according to the laws of the Republic of South Africa, with its registered office at 80 Bonza Bay, Beacon Bay, East London and which trades under the name and style of Profit Partners. The respondent is also described as a limited liability company, Registration No. 2001/011648/07, with registered address at Gotyibeni Location, Tsolo.

[4] It is common cause that the respondent is the maker and distributor of cement blocks and other related materials.

[5] It is alleged by the applicant that on 07 February 2011 the parties concluded a written agreement of purchase and sale of, *inter alia,* sizes M4 and M6 building blocks at a price of R4,70 and R5,50 per block respectively. The applicant would spend a total sum of R2 000 000,00 for M4 blocks and R2 500 000,00 for M6 blocks. The applicant would pay a 40% deposit sum of R1 526 323,66 including VAT. The blocks would be delivered by the respondent from Tuesday 08 February 2011 at 2 x crane trucks per day up until Wednesday 09 February 2011, 4 loads crane trucks on Thursday 10 February 2011 and then from Friday 11 February 2011 the respondent would deliver 6 x crane trucks per night until final delivery. The remainder of the money would be payable on completion of the full delivery.

[6] Accordingly, the applicant paid a deposit of R1 526 323,66 and the delivery of blocks was then commenced with as agreed. However, the respondent failed to deliver six trucks per day and repudiated the agreement on 28 March 2011 by adjusting the price of the blocks. The repudiation was accepted by the applicant. At the time 71 400 of 184 100 M6 blocks and 62 700 of 69 432 M4 blocks had not been delivered. The total cost of those blocks is calculated at R783 624,60, which the applicant seeks to be refunded by the respondent out of the deposit sum of R1 526 323,66 that had

been paid to it. In essence, the cause of action arises from the failure by the respondent to refund R783 624,60 being the value of cement blocks which it did not deliver to the applicant.

[7] The documents issued by the applicant to support its claim are a Memorandum drawn by the respondent setting out the salient terms of the agreement (annexure "A" to the particulars of claim) and the application for credit facilities (annexure "B"). Annexure "C" is the schedule drawn by the applicant in which there is set out the detailed particulars of the number and cost of deliveries including the shortfall giving rise to the amount claimed by the applicant.

[8] In terms of Rule 32 (3) respondent has a choice to make between either giving security to the applicant for any judgment including costs which may be given if it is not successful in the trial or satisfying the Court by affidavit or such evidence stating that it has a *bona fide* defence to the action. The affidavit filed and evidence adduced shall disclose fully the nature and grounds of the defence and the material facts relied upon. The respondent has elected to file an affidavit.

[9] The obligations of a party who seeks to oppose the grant of summary judgment by means of an affidavit have been stated by Corbett JA in the case of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-D as follows:

> "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."

[10] I proceed to examine the contents of the opposing affidavit to see if it complies with the provisions of Rule 32 (3)(b).

[11] The identity of the applicant is not disputed by the respondent pertinently. However, in paragraphs 5 and 7 of the opposing affidavit, it states that it never entered into a contract with Afropulse 497 (Pty) Ltd but did so with Profit Partners as a separate business entity. The respondent has given no particulars to demonstrate that Profit Partners is a separate business entity from the applicant. Therefore, it must follow that the denial of the applicant as a contracting party is not a valid defence. In this regard the case of *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226(T) at 227G-228B is apposite. There the court stated as follows:

> "One of the things clearly required of a defendant by Rule 32 (3)(b) is that he set out in his affidavit facts, which, if proved

> at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. **...**There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit. It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. <u>It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner in which is not inherently and seriously unconvincing</u>."
>
> (The underlining is mine for emphasis).

The defence raised by the respondent is not inherently and seriously convincing in my view.

[12] The respondent raises a further defence in paragraph 9.3 of its opposing affidavit, which reads:

> "Goods like cement and other material including blocks were supplied up until the advanced amount was exhausted. Invoices and proof of deliveries are with the Respondent and can be supplied at any given time if they are so needed. They have not been attached in this application

because they are bulky."

No attempt was made by the respondent to discover the bulky invoices and proof of deliveries as alluded to in the affidavit. The respondent ought to have known that such documents were needed on the day of argument of the application; if such documents have to be taken into account by the Court. It was argued strenuously by *Mr De La Harpe* that an allegation of the existence of such documents cannot found a valid defence in terms of Rule 32 (3)(b) as it is no more than a bare denial or the equivalent of an assertion of payment without proving any particularity. I agree.

[13] For some strange reason, the respondent makes no attempt to deal with the critical issue of undiscovered "invoices and proof of deliveries" in the heads of argument. Neither did counsel for the respondent make submissions on the issue during arguments. Instead, the respondent was content with raising technical defences in the heads that Mr Booyens, the deponent to the applicant's affidavit, failed to swear positively to the facts verifying the cause of action as stated in the summons and that the particulars of claim do not sustain a cause of action in that they are vague and embarrassing. These submissions have no basis. Mr Booyens did make the necessary allegation in paragraph 4 of the founding affidavit that

he was swearing positively to the facts which were peculiarly known to him.

[14] The submission that the particulars of claim are vague and embarrassing cannot hold water. Firstly, the respondent does not dispute the existence of a contract of sale and delivery of goods as such. Its defence is that Profit Partners was a contracting party, not the applicant. Secondly, the next defence was that the deliveries were made until the sum of R1 526 323,66 deposited was exhausted. That said, the submission raised in the heads that the main contract has not been correctly pleaded is at odds with the contents of the affidavit. For these reasons the technical defence that the particulars of claim does not sustain a cause of action is not valid. I may add that, in any event, the particulars of claim do sustain a claim for a refund of money advanced in a contract for goods sold and delivered which both parties later on cancelled. All the particulars which were relevant to that cause of action were alleged by the applicant in an adequate manner.

[15] It is my view that all the defences raised by the respondent are bad in law to the extent that they do not comply with the provisions of Rule 32 (3) (b). The discretionary power which is vested in the Court in terms of Rule 32 (5) to refuse summary judgment is not merely there for the taking. The respondent would have had to persuade the Court on solid grounds, not just

on conjecture and speculation, that a discretion may be exercised in its favour. In this case, the respondent did not ask the Court to exercise discretion in its favour. Consequently, the application for summary judgment must succeed with costs.

[16] I interpose here to reflect on a matter which must be of concern to both the Court and practitioners who appear before it. *Mr Singqumba*, the attorney of Mvuzo Notyesi Incorporated, argued this application on behalf of the respondent despite the fact that the attorneys of record were V. Gwebindlala & Associates. At the end of arguments I asked him to prepare and deliver heads of argument. He did not do so. Instead, the Court was favoured with heads drawn by Advocate P.D. Quinlan. One would hope that no material prejudice will be caused to the respondent due to the manner in which it has been legally represented in this case. Be that as it may I have to state that V. Gwebindlala & Associates still remain the attorneys of record for the respondent because they did not withdrawn as the attorneys legally representing the respondent in the matter.

[17] The following order shall issue:

> **"Summary judgment be and is hereby granted against the Respondent to pay a sum of R783 624,00 with interest thereon calculated at the legal rate plus costs of suit."**

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv. D.H. DE LA HARPE
Instructed by	:	Drake Flemmer & Orsmond Inc c/o J H Heunis & Associates MTHATHA
Attorney for the respondent	:	Mr Singqumba
Instructed by	:	V. Gwebindlala & Associates MTHATHA