

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 2223/1

Heard on: 25/06/12

Delivered on: 08/08/12

In the matter between:

LAMAN (PTY) LTD

Applicant

and

AFROPULSE 497 (PTY) LTD

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NHLANGULELA J:

[1] On 26 January 2012 I granted summary judgment against the applicant to pay the respondent a sum of R783 624.00, being a refund arising from payment for certain building blocks which had not been

delivered. The applicant now applies for leave to appeal that judgment.

[2] The grounds of appeal are set out in the notice of application for leave to appeal. Briefly stated, the grounds are that I erred in failing to appreciate that:

- (a) the contents of paragraph 2 of the plaintiff's affidavit in support of the summary judgment application failed to establish that the deponent had personal knowledge of the facts.
- (b) the deponent failed to establish in the affidavit that he could swear positively to the facts verifying the cause of action.
- (c) the dispute raised by the applicant in the opposing affidavit that the respondent was not Profit Partners could only have been resolved in a trial, not in the application for summary judgment.
- (d) the question of discovery of documents does not arise in summary judgment proceedings and that, in any event, it was not incumbent upon the defendant to produce all the evidence in support of its defences as raised in the opposing affidavit.
- (e) the test for summary judgment is not whether the defence raised by the defendant was: "not inherently and seriously convincing."

(f) the particulars of claim are excipiable in that they are vague and embarrassing to the extent that:

- (i) paragraph 3 of the particulars of claim refers to annexure “A” as being a written agreement of sale of building blocks whereas that annexure is a copy of the credit application form.
- (ii) the Standard Conditions of Sale (annexed to the particulars of claim) was not referred to, pleaded or explained, and yet the respondent relied upon it in its application for summary judgment.
- (iii) for the respondent to make a case for the applicant’s repudiation of the agreement, it was necessary for it to plead that the adjustment to the prices which the applicant made was not agreed to by the parties.
- (iv) the pleading by the respondent in paragraph 4 of the particulars of claim that it completed a credit application form, marked as annexure “B”, was erroneous because annexure “B” is annexed to the particulars of claim as being the Standard Conditions of Sale.
- (v) the respondent failed to properly plead and show how it arrived at the amount of R783 624,00 as claimed in the particulars of

claim.

- (vi) the Memorandum and a schedule of deliveries which the respondent put up in the particulars of claim and relied on in the application for summary judgment as being part of a written agreement of sale (annexure “A”) and/or the Standard Conditions of Sale (annexure “B”) could not have been part of those instruments because they were not marked and not referred to in the particulars of claim.

[3] In my understanding of the grounds for leave the attack against the judgment is simply that the finding that the provisions of Rule 32 (2) of the rules of this Court were satisfied by the respondent is wrong. Further, the applicant for leave says that the Court erred in finding that the contents of the opposing affidavit raises no *bona fide* defence.

[4] Subrule 13 (2) has been construed by the courts to mean that:

- (a) The affidavit in support of an application for summary judgment should be made by the applicant herself/himself or by any other person who can swear positively to the facts;
- (b) it must be an affidavit verifying the cause of action and the amount, if

any, claimed, and

- (c) it must contain a statement by the deponent that in her/his opinion there is no *bona fide* defence to the action and that the intention to defend has been delivered solely for the purpose of delay.

These are the jurisdictional factors which an applicant for summary judgment must meet in order to succeed. In my judgment I found that the respondent met all of them. It would certainly not have met them if the applicant had presented a defence(s) which is valid. I would agree with the applicant that the term: “not inherently and seriously convincing” is not the test used to measure success or failure of the application for summary judgment.

[5] At this stage the Court is being called upon to decide the application for leave. The test that is applicable at this stage of the proceedings has been stated to be whether reasonable prospects of success on appeal exist. See the cases of *Capital Building Society v De Jager And Others*, *De Jager And Another v Capital Building Society* 1964 (1) SA 247 (A); *S v Magadla* 2010(2) SACR 316 (ECM) at 318-319, paras. [5] and [6]. Further, it must be shown that the amount in dispute is not trifling; the matter is of substantial

importance to one or both of the parties concerned; and that a practical effect or result can be achieved by the appeal. See: *Herbestein And Van Winsen, The Civil Practice of the High Court*, Volume 2 at page 1212. The latter requirements are common cause. The former necessitates debate in this matter.

[6] On grounds (a) and (b) in paragraph 2 above, *Mr Quinlan*, counsel for the applicant for leave, submitted that Mr Booyens' deposition in the affidavit for summary judgment on behalf of the respondent shows that he had no personal knowledge of the facts stated therein in that he acquired knowledge of the matter from accounting records and, for that reason, he was disqualified from deposing to the affidavit on behalf of the respondent as he could not swear positively to the facts giving rise to the claim as envisaged in Rule 32 (2). *Mr Quinlan's* submission is predicated on the statement by Mr Booyens which is encapsulated in paragraph 2 of the particulars of claim.

For this submission he relies on the case of *Shackleton Credit Management v Microzone Trading* 88 CC 2010 (5) SA 112 (KZN) at 115F, para. [7] where following is stated:

“The requirement that the founding affidavit be deposed to by the applicant or some other person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of those facts is purely a matter of hearsay. Thus a person who deposes to such an affidavit on the basis that their information comes from another source, whether another person or from documents, is not a person who can swear positively to the facts giving rise to the claim. It is for that reason that the application for summary judgment in *Raphael & Co v Standard Produce Co (Pty) Ltd* [1951(4) SA 244 (C)] was held to be defective. The deponent to the affidavit was the applicant's Cape Town attorney and the court said (at 245D):

'There is nothing from the circumstances of his making of this affidavit which can lead the Court to the conclusion that it is within his knowledge. The ordinary presumption would be that they are facts which have come within his knowledge through his acting for the applicants in this matter.'

An affidavit by an attorney based on information given to the attorney by the client does not comply with the rule because the attorney is not in a position to swear positively to the facts. Such an affidavit is nothing more than an

affidavit of information and belief, containing inadmissible hearsay. An application founded on such an affidavit is as a result defective.”

[7] Indeed if it was so that Mr Booyens’ knowledge of the matter was based solely on the documents whose existence did not involve him, his statement in paragraph 2 would be, purely and simply, an inadmissible hearsay. But *Mr De La Harpe* contended that a focus on paragraph 2 to the exclusion of the statements by Mr Booyens in paragraphs 1, 3 and 4 of the affidavit is not an approach that is prescribed in Rule 32 (2). He argued that the entire affidavit of Mr Booyens should be considered, and that if read properly it will reveal that Mr Booyens had personal knowledge of the facts that gave rise to the cause of action on which the application for summary judgment was based.

[8] I quote hereinbelow the contents of paragraphs 1, 2, 3 and 4 of the affidavit of Mr Booyens that was filed towards the application for summary judgment:

“1. I am an adult male businessman and the managing director of the Applicant. I am, by virtue of my aforementioned capacity and by virtue of a

resolution passed by the Applicant at East London on the 1st November 2011, authorized to depose to this Affidavit. A copy of the aforementioned resolution is annexed to this affidavit marked “JBB1”.

2. I have the Applicant’s accounting records which relate to the Respondent’s indebtedness to the Applicant to which this matter relates under my direct control and supervision;
3. The facts deposed to herein are within my personal knowledge and are both true and correct.
4. I do hereby swear positively to the facts verifying the cause of action as stated in the Summons, particulars of claim and annexures thereto and verify in particular that the Respondent is indebted to the Applicant in the sum of R783 624.00 together with interest thereon and legal costs as stated in the Summons, particulars of claim and annexures thereto.”

[9] The reading of Mr Booyens’ affidavit is plain. He is a managing director of the respondent, he is duly authorized to represent the respondent in the matter and that he has personal knowledge of the facts verifying the

cause of action as stated in the summons, particulars of claim and annexures thereto. He states further in a language that brookes of no extra- ordinary interpretation that he has knowledge that the applicant is indebted to the respondent in the specified sum of R783 624.00. The annexures to his affidavit are the Memorandum (setting out the terms of the agreement of sale), Application for Credit Facilities, Standard Conditions of Sale, letter by the applicant committing itself to deliver building blocks, a letter by the respondent asking for an invoice in order to effect payment of R1 526 323.66 and a schedule of deliveries. In all these annexures there is a name of Mr Booyens imprinted on them, and he is cited therein as a contracting party who represented the respondent during negotiations and making of the contract. Consequently, Mr Booyens very obviously deposed to facts on affidavit which emanated from his personal knowledge.

[10] It appears from the case of *Maharaj v Barclays National Bank Ltd* 1976(1) SA 18 (A) at 423D-E; and *Standard Bank of S.A. Ltd v Secatsa Investments (Pty) Ltd* 1999(4) SA 229 (C) at 235A-B that where the plaintiff is a corporate entity the deponent may well legitimately rely on his/her personal knowledge of at least certain of the relevant facts and his/her ability to swear positively to such facts on record in the company's possession.

What the annexures show is that Mr Booyens is not just a representative director of the respondent, but he was also involved in the negotiations leading up to the making of the agreement of sale and delivery of the building blocks.

[11] The case of *Shackleton, supra*, is distinguishable from the present matter on the facts. There an attorney who had no knowledge of the affairs of a company (*Shackleton*), his client, deposed to an affidavit placing reliance on the documents of the company. The connection of the attorney to the application for summary judgment was only the documents of the company which were given to him during consultations for the purpose of making an affidavit in support of the application for summary judgment. He was never involved in the making of the documents. He testified on matters in the document which were foreign to him. The court held that such an attorney could not swear positively to the facts as such facts were based on documents which fell outside his personal knowledge. For that reason an application for summary judgment was refused; and rightly so in my view.

[12] Consequently, it cannot be said that the finding I made that the affidavit by Mr Booyens complied with the provisions of Rule 32 (2) is

wrong.

[13] The grounds of appeal which are stated in paragraph (c) and (d) above are equally without merit. I remain unpersuaded that the opposing affidavit filed by the applicant complies with the provisions of Rule 32(3)(b). The applicant did not disclose fully the nature and grounds and material facts on which its defence was based. I reiterate the reasons that I gave in the main judgment. Save to state that it was disingenuous of the applicant to deny knowledge that Profit Partners were the names of the respondent, not more requires to be said.

[14] It appears very clearly in the Memorandum, annexure “A”, that the parties concluded an agreement of sale based on fixed prices of, *inter alia*, the building blocks. It is common cause that the supply of blocks, which were already priced, stopped at the time when both parties agreed to cancel their agreement. In the circumstances, the issue of a different price of blocks ruling at the time of despatch could not arise; hence the claim for the refund of R783 624.00 for blocks paid for but not delivered. Put differently the dispute sought to be raised by the applicant that the correctness of the amount claimed required to be assessed against some ruling prices has no

basis. The alternative defence that the amount paid and/or the delivery of a correct number of blocks ordered was exhausted was yet again inappropriate if one has regard to the schedule, annexure “C”, put up by the respondent reflecting a detailed account of short deliveries of blocks for which the claim was made. In my view, a mere reference to documents in the opposing affidavit for use later on at the trial was not a full disclosure as required in Rule 32(3)(b). An honest litigant would have told the Court on affidavit, without any documents for that matter, the number of blocks delivered, the price paid for them and when exactly the alleged delivery and payment were exhausted.

[15] I can do no better than quoting the words of Coleman J in *Breitenbach v Fiat SA (Edms)(Bpk)* 1976(2) SA 226 (T) concerning the consequences of non disclosure in the opposing affidavit. The learned Judge said at 228-229:

“Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's

claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with the suggestion by MILLER, J., in *Shepstone v. Shepstone*, 1974 (2) SA 462 (N) at pp. 466-467, that the word 'fully' should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides. I would refer, in that regard, to the decision in *Herb Dyers (Pty.) Ltd. v. Mahomed and Another*, 1965 (1) SA 31 (T), and to the dictum of WATERMEYER, A.J., as he then was, in *Chambers F v. Jonker*, 1952 (4) SA 635 (C) at p. 638...

What I have set out in that regard is not a demand for, or an encouragement to present, lengthy and prolix affidavits in summary judgment cases. All that is required is that the defendant's defence be not set out so baldly, 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 fuller or clearer version of the defence which he claims to have.”

[16] The lesson to be derived from the case of *Breitenbach, supra*, is that the defendant resisting an application for summary judgment is required to set out on affidavit a defence(s) that is not bald, vague, sketchy or laconical giving the Court the impression that he/she has something to hide which would frustrate the plaintiff in achieving resolution of a dispute with necessary expedition. The applicant filed an opposing affidavit heedlessly of the warning as issued in the case of *Breitenbach*. And I rightly rejected the invitation to circumvent the application by willy nilly referring the matter to trial on a mere hope that some documents will present a defence to the respondent’s claim at the trial in due cause.

[17] I proceed to deal with the ground that the particulars of claim were excipiable. I still do not agree. In my view *Mr Quinlan’s* submission that the reading of the particulars of claim together with documents annexed thereto led to the cause of action being vague and embarrassing has no

substance. I say so for the following reasons:

- (1) There are two sets of indexed and paginated papers which were placed before me during the hearing of the application for summary judgment. One set comprises the original bundle of pleadings. The second set has the annexures paginated in a mixed up sequence, albeit created out of the original papers.
- (2) Attached to the original particulars of claim are: a Memorandum, annexure "A", on which the terms of the sale agreement are set out. Following annexure "A" there are two papers: one is a document written on the letterheads of the applicant and signed by Mr Van Wyk of the applicant and Mr Booyens. It is not marked and contains an undertaking by the applicant that it will deliver certain goods on the next day. The second document is a fax transmission made by Mr Booyens and addressed to the applicant asking for a tax invoice so that payment of R1 526 323.66 could be made. A document marked annexure "B" is entitled: Application For Credit Facilities. This is made on a letterhead of the applicant. It shows that the respondent applied for credit facilities of the applicant, and was granted the same on the strength of this document. The document incorporates a deed of suretyship, a second section, made by Mr Booyens for the due

payment of debts arising from the agreement of sale. There is also incorporated in annexure “B” a third section entitled: Standard Conditions of Sale. Mr Booyens signed all these documents on behalf of the respondent.

- (3) The Memo (annexure “A”) refers to annexures “A” and “B” that were required to be completed by Mr Booyens.
- (4) In annexure “B”, reference is made, below the section on suretyship, to the Standard Conditions of Sale that must be initialed by Mr Booyens.
- (5) It seems to me that the Suretyship Agreement and Standard Conditions of Sale are the sections of annexure “B”. They are not separate documents from that annexure.
- (6) Annexure “B” is referred to in paragraph 4 of the particulars of claim, and by association a reference is made to the Suretyship agreement and Standard Conditions of Sale.
- (7) Annexure “C”, is the Schedule on deliveries of building blocks. It is referred to in paragraph 7 of the particulars of claim.
- (8) It is, therefore, not correct that the Memorandum was not referred to, pleaded or explained by the respondent in the particulars of claim as contended for on behalf of the applicant. The cause of confusion of

the annexures attached to the copy of the particulars of claim seems to me to have been caused by bad pagination.

[18] The ground that the claim amount of R783 624.00 was not properly pleaded has no merit. The particulars of claim and the annexures thereto support the amount claimed.

[19] I was convinced during the hearing of the application for summary judgment, just as at the present stage, that the net effect of the opposing affidavit is that the applicant did not disclose the nature and grounds of the defences raised, and the material facts upon which the defences were based. It was obligatory for the applicant to bring its opposing affidavit within the purview of Rule 32(3)(b) as is shown in the following cases: *Central News Agency v Cilliers* 1971(4) SA 351 (NC) at 353; *Caltex Oil SA Ltd v Webb And Another* 1965(2) SA 914 (D) at 916; and *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004(6) SA 29 (SCA) at para. 25. The applicant failed to discharge this obligation. As a result there was no room for exercising discretion in favour of the applicant in terms of Rule 32(5).

[20] I am not persuaded that the application for leave carries any prospects of success on appeal. The application must fail. The costs will follow such a result.

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

- 1. The application for leave to appeal is refused.**
- 2. The applicant for leave to pay costs of the application.**

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

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