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IN THE HIGH COURT OF SOUTH AFRICA

[Northern Cape High Court, Kimberley]

Case no: 1131/08
Date heard: 2009-04-17
Date delivered: 2009-04-24

In the matter of:

ABSA BANK LIMITED **APPLICANT**

versus

WOULEC TOERUSTING TRUST **DEFENDANT**

Coram: **MAJIEDT AJP**

JUDGMENT

MAJIEDT AJP:

1. The Plaintiff applies for summary judgment, having issued summons against the Defendant, a trust, for the delivery of 110 chemical toilets.

2. The Defendant has opposed the summary judgment application and has raised a number of preliminary defences additional to its defence on the merits. I propose dealing with the preliminary defences first and foremost before deciding whether the Defendant has raised a valid *bona fide* defence/s to the claim.

3. The Plaintiff's claim is based upon a credit agreement, which is Annexure B to the particulars of claim. Annexure A to the summons is a description of the goods, namely the 110 chemical toilets. I shall allude to this particular matter later again herein.

4.1 An aspect which I must emphasize at the outset is the fact that the Defendant has the tendency of putting up its defence in heads of argument rather than in its opposing affidavit. Rule 32(3)(b) requires a defendant to "satisfy the court by **affidavit** (of its defence)".

4.2 Any submissions in heads of argument not supported by averments in an opposing affidavit must, in my view, simply be regarded as *pro non scripto*.

4.3 So, for example the Defendant:

(a) did not allude at all to any prejudice which it has suffered due to the early setdown of the application; instead a vague and unconvincing complaint of lack of time to fully prepare a proper defence is made in the heads of argument;

(b) introduced facts with regard to the identification of the goods (the chemical toilets) in the heads of argument, whereas nothing at all was adduced in that regard in the opposing affidavit; and

(c) broached a point *in limine* not taken at all in the opposing affidavit, namely that the summons was not signed by an attorney admitted and enrolled to practise in this Division, for the first time in the heads of argument.

4.4 The approach which I have taken in this judgment is to disregard **in toto** those contentions raised in the written heads of argument and in oral argument, which are not supported by averments in the opposing affidavit.

5.1 The first preliminary aspect raised by the Defendant in its opposing affidavit, is that the Plaintiff has not complied with the provisions of Uniform Rule 32(2), having set the matter down nine days from date of delivery, instead of 10 days as required by the Rule.

Rule 32(2) provides that:

> "The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, 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 and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof."

5.2 Courts are empowered to condone non-compliance with the Rules. In **Papenfus v Nichas and Son (Pty) Ltd** 1969(4) SA 234 (O) the Court condoned a short period of setdown in circumstances similar to the present, namely where the matter was set down one day short calculated from the date of service of the application. In the papers before me there is an affidavit by a clerk employed by the Appellant's attorneys, who alluded to the fact that she had attempted to deliver the application to the Defendant's attorneys on 26 September 2008 during the afternoon, but was unable to do so, since the office was closed. The application was therefore delivered at 08:15 am on 29 September 2008. As a consequence the application was, as I have stated, set down nine days after date of delivery.

6. I am of the view that this defect has not caused any prejudice to the Defendant and that I should consequently condone the non-compliance with the Rule with regard to the days of setdown of the summary judgment application. No prejudice has, in any event, been averred by the Defendant – it merely records in the opposing affidavit the fact of the early setdown.

7. The second point *in limine* taken by the Defendant is that the description of the movable goods lacks particularity so as to enable the Defendant to identify it. This point actually impacts on the very merits itself. I was referred by Mr. Anderson for the Defendant to the decision of **All Purpose Space Heating Co. of SA (Pty) Ltd v Schweltzer** 1970(3) SA 560 (D) at 564-5. With regard to the provisions contained in Rule 32(1)(c), the summons must specify with sufficient particularity for purposes of identification from the description given in the summons, the movable property which is sought to be delivered. In the present instance, the goods were described in Annexure A to the summons as follows:

"<u>THE GOODS</u>

2006 110 CHEMIESE TOILETTE
SERIAL NUMBER : TBA"

When one examines Annexure B to the summons, namely the tax invoice in respect of the written credit agreement between the parties, relied upon by the Plaintiff, the goods are described as follows:

> "Beskrywing van goedere: 110 CHEMIESE TOILETTE
> Jaar van eerste registrasie: 2006
> Reeksnommer: TBA"

8. On behalf of the Plaintiff, Mr. Wijnbeek has argued that this description of the goods is sufficiently compliant with Rule 32(1)(c). I disagree. I find it hard to imagine how a Sheriff, acting on a writ of execution in respect of this claim, would be able to identify which chemical toilets he/she would have to attach to satisfy the writ. To illustrate: how would the Sheriff distinguish these 110 toilets from other toilets of similar appearance? The serial number "TBA" is quite unhelpful and so too is the year of manufacture. In his heads of argument Mr. Anderson has submitted that these chemical toilets are mounted on trailers which are registered road users with a chassis number and registration numbers and letters. As I have already stated in par. 4.4 above, I have completely disregarded these contentions, since they were not contained in the opposing affidavit. Having said that, I am satisfied that the goods are not described adequately so as to comply with Rule 32(1)(c). It is a basic requirement of the *rei vindicatio* (for this is really what the Plaintiff's claim entails) that the property sought to be vindicated must be identifiable and identified.
   See: Badenhorst, Pienaar & Mostert: **Silberberg & Schoeman's Law of Property**, 5th ed. at 244.
   This decision makes it unnecessary to deal with the further aspects, but for the sake of completeness I intend dealing with them in the judgment as well.

9. The next point *in limine* is the question of the citation of the trust.

Mr. Anderson submitted that the Plaintiff should have cited the trustees for the time being of the trust and not the trust itself as the Defendant.

10. While it is better to cite the trustees for the time being on behalf of a trust, there is no bar in law in citing a trust by its name.
See in this regard:
I.A. Essack Family Trust v Kathree;
I.A. Essack Family Trust v Soni 1974(2) SA 300 (D).
The general rule is that a trustee can act on behalf of a trust if he or she is fully authorised to do so; such authority is usually proved by way of a resolution duly signed by all the trustees of the particular trust.
See in this regard:
Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd 1989(4) SA 985 (C) at 988 D-E;
Rossner v Lydia Swanepoel Trust 1998(2) SA 123 (W) at 127C;
Mariola and Others v Kaye-Eddie N.O. and Others 1995(2) SA 728 (W) at 731 C-F.

11. An insurmountable problem for the Defendant is that its averments in the opposing affidavit was self-defeating of this particular argument. In the opposing affidavit, the deponent, one of the trustees of the Defendant, namely Mr. George le Clerc Katz, stated as follows:

> "I am duly authorised to oppose this application and to depose to this affidavit on behalf of the Defendant in my capacity as the

trustee of the Defendant."

The deponent attached letters of authority from the Master reflecting that the trust has two trustees. It is abundantly clear that the deponent states under oath that he is duly authorised to act on behalf of the trust. Accordingly it must be assumed that he was authorised to represent the trust in the summary judgment proceedings. It consequently does not behove the Defendant to raise the citation of the trust as a point *in limine* and it can consequently not be upheld.

12. On the merits the Defendant also disputed the authority of the person who had concluded the agreement with the Plaintiff. It was further alleged that no proof of delivery of the goods had been provided. In this regard the Defendant pointed out that it was not clear on the papers whether the Plaintiff had delivered all of the goods described in the annexures. With regard to the goods that were in fact delivered, he alleged that they were defective and that the trust had a potential counterclaim in this regard against the Plaintiff.

13. A further defence was raised with regard to the provisions of the National Credit Act, 34 of 2005. This defence was, rightly so, expressly abandoned and it is therefore not necessary to deal with it further.

14. With regard to the other defences set out in par. 12 above, the question arises whether these constitute a *bona fide* defence in respect of the summary judgment. In the leading case of **Maharaj v Barclays National Bank Ltd** 1976(1) SA 418 (A) at 423 F-G Corbett JA alluded to the “extraordinary and drastic nature” of the

remedy of summary judgment. Later, at 426A – 426E the learned Judge of Appeal said the following:

> "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."

See further: **Tesven CC and Another v South Africa Bank of Athens** 2000(1) SA 268 (SCA) at par. [22], 275H – 276E.

15. I am of the view that there is sufficient detail provided by the

Defendant to pass muster in this regard. Quite obviously, the Defendant would be required to amplify these allegations further at the trial. At this juncture, however, I am satisfied that the issues have been raised with sufficient particularity as is required in the Rule. I need not even be satisfied at this stage that these defences would in all probability succeed at the trial.

See: **Eisenberg's v OFS Textile Distributors (Pty) Ltd** 1949(3) SA 1047 (O) at 1055.

It is well established that a defendant's opposing affidavit in summary judgment proceedings is not to be assessed with the precision required of a plea and a Court must adopt an accommodating approach in that regard.

See: **Maharaj v Barclays National Bank Ltd** *supra* at 426 E; **District Bank Ltd v Hoosain and Others** 1984(4) SA 544 (C) at 547 G-H.

16. Having regard therefore to my finding relating to the inadequate description of the specified movable goods and with regard to the Defendant's *bona fide* defence, I am of the view that this is not a case where summary judgment should be granted and where, effectively, the doors of the Court should be shut to the Defendant. I am of the view that the Defendant has an arguable case on the merits and summary judgment should therefore be refused.

17. I issue the following order:

17.1 The application for summary judgment is refused.

17.2 The Defendant is granted leave to defend the action.

17.3 The costs for the application for summary judgment are left over for determination by the Trial Court.

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SA MAJIEDT
ACTING JUDGE PRESIDENT

FOR THE APPLICANT	:	ADV DH WIJNBEEK
INSTRUCTED BY	:	DU TOIT – BOMELA
FOR THE PLAINTIFF	:	MR WW ANDERSON
INSTRUCTED BY	:	MJILA AND PARTNERS