

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 825/2008

In matter between:

MBT PETROLEUM (PTY) LTD

Plaintiff

And

PIETER FREDERIK MEYER

Defendant

HEARD ON:

8 MAY 2008

JUDGMENT BY:

K.J. MOLOI, AJ

DELIVERED ON:

29 MAY 2008

[1] The plaintiff is a private company based in Pretoria doing business as a supplier of diesel products. The defendant is a dealer in diesel products and operates a filling station from premises leased from one Frikkie Albertse outside Bloemfontein on the N1 road.

[2] The plaintiff issued a provisional sentence summons against the defendant based on an acknowledgement of debt

allegedly signed by the defendant on 7 December 2007 attached to the summons as annexure "A". The claim was for payment of an amount of R530 098,77 being in respect of goods sold and delivered at the defendant's instance and request. According to the acknowledgement of debt the amount was to be paid in two instalments interest-free, namely R200 000,00 on date of signature and the balance of R330 089,77 on 19 December 2007.

[3] The summons called upon the defendant to pay the said amount to the plaintiff failing which to appear before court personally or through a legal representative on 20 March 2007 to admit or deny his liability and that if he denied liability, he should file an affidavit by 19 March 2008 wherein he should set out the grounds of his defence. The summons also stated the consequences of his failure to do so.

[4] On 14 March 2008 defendant filed the required affidavit wherein he indicated his intention to oppose the granting of provisional sentence and set out his defence. He raised two points *in limine* relating to the defects in the summons, namely:

- “(a) that the summons did not require him to admit or deny his signature on the said acknowledgement of debt nor call upon him to admit or deny the authenticity of the signature or authority of his agent;
- (b) that the summons did not state that the amount claimed was due and payable.”

[5] The affidavit further sets out the grounds of defence namely that the claim has been extinguished by the conclusion of an oral agreement in terms of which the defendant “made over” his lease agreement with Frikkie Albertse to the plaintiff. A copy of a letter dated 7 December 2007 addressed to Mr Frikkie Albertse was attached as annexure “A” to the defendant’s affidavit to confirm the purported verbal agreement and read as follows:

“Mnr Frikkie Albertse

Plaas Avenham

Bloemfontein

Oom

Na aanleiding van ons gesprek gister asook oom se gesprek met Mnr Johan Fouche van MBT Petroleum PTY Ltd vandag net die volgende.

1. Ek is onder verpligting om voor einde van besigheid op Woensdag die 12de Desember 2007 R 300 000 aan MBT te betaal.
2. Sou ek in gebreke bly met die bogenoemde staan ek die huurkontrak wat tussen myself en u ten opsigte diesel depot af.
3. Verder verleen die afstandoening van die depothuurkontrak die reg aan MBT Petroleum om met die huurkontrak voort te gaan en besigheid vanaf die perseel te bedryf.

Geteken te Bloemfontein op 07 Desember 2007

PF Meyer

Mnr Frikkie Albertse”

It must be mentioned that the said letter was signed by two officials of the plaintiff, namely, J Fouche and C E Pietrie as witnesses.

- [6] In its reply the plaintiff denied the existence of the alleged oral agreement and, consequently, the alleged extinction of the debt.
- [7] After receiving the defendant's opposing affidavit the plaintiff filed a notice of intention to amend its summons to address the points raised *in limine*. The notice was delivered on 7 April 2008 and did not mention that the defendant, if he intended objecting to the intended amendment, should do so within ten (10) days of the service of the notice upon him as required by Rule 28 of the Uniform Rules of Court. The amendment itself was, in fact, delivered on 18 April 2008, i.e. two (2) days before the expiry of the prescribed ten-day period calculated from the 7th April 2008.
- [8] The summons was signed by the applicant's Pretoria-based counsel and attorney Smith of the firm Du Plessis Phukubye Smith also of Pretoria. It was furthermore signed by the registrar of this court, though she was indicated on the summons as the Registrar of the High Court, Pretoria.

[9] At the hearing of this matter on 8 May 2008 the following points were raised by the defendants:

1. that the summons was a nullity as it was signed by an attorney who is not practising within the area of jurisdiction of this court as required by Rule 18 and was purportedly issued by the Registrar of the High Court, Pretoria;
2. the amendment was meant to rectify the fact that the summons failed to call upon the defendant to verify his signature on the acknowledgement of debt and to introduce the allegation that the debt was due and payable. The amendment did not comply with the requirements of Rule 28 and there was no application made to condone this defect;
3. the signing of the letter of the 7th December 2007 by the two officials of the plaintiff, one of whom had been acting as its representative throughout, made the plaintiff a party to that agreement and consequently constituted an agreement extinguishing the debt owed to the plaintiff by the defendant; and
4. there was no allegation that the defendant had defaulted with the payments in terms of the

acknowledgement of debt, making the debt amount due and payable.

[10] It was argued on behalf of the plaintiff, on the other hand, that the insertion of the word Pretoria where the registrar of this court was meant to sign is simply an error and that the word must be read as referring to Bloemfontein and that this alone cannot nullify the summons. An affidavit by one Barbara Cordier, an attorney attached to the plaintiff's Bloemfontein correspondents was handed in and she confirmed having attended to the issuing of the summons at this court before service. I personally verified that the registrar or someone authorised by her duly issued the summons and signed it. Cordier, however, did not say, who signed the summons as an attorney.

[11] As regards the points *in limine*, it was contended on behalf of the plaintiff that the plaintiff was entitled to amend the summons and that the court cannot refuse the same unless the summons was incurably defective. This is, indeed correct. Furthermore, it was argued that the proposed amendment was not objected to and it could consequently

not be contended that the court should not grant the same. This is not entirely correct as will be seen hereunder. It was further argued that as the acknowledgement of debt was not disputed it consequently established a *prima facie* case against the defendant. This is not correct as this would be the case only upon proof or admission by the defendant that the signature on the acknowledgement was, in fact, his.

- [12] As regards the alledged oral agreement in terms of which the lease agreement was “*made over*” to the plaintiff, it was argued that the force of an oral agreement cannot supersede that of a written agreement and that defendant still had to prove the existence of the oral agreement, which was, at any rate, disputed. Moreover, so it was argued, it is improbable that the plaintiff would enter into an agreement in terms of which he would write off an amount of R530 089.77 for the mere “*making over*” of a lease agreement. The defendant had stopped operating the business as the plaintiff had ceased the supply of diesel products and the plaintiff could directly negotiate a lease agreement of the premises with Albetse if needs be. It was also argued that the plaintiff, as a

wholesaler of diesel-products, may, by law, not operate a filling station. These are issues for another day.

[13] Provisional sentence proceedings are extra-ordinary and drastic by nature and are regulated by rule 8 of the Uniform Rules. The Rule requires the summons to contain the following for validity:

- “(a) a call upon the defendant to pay the amount claimed or to appear (personally or represented) to admit or deny liability;
- (b) a day for the said appearance in court;
- (c) a proper cause of action set out with sufficient particularity and clarity;
- (d) a call upon the defendant to file an affidavit setting forth the grounds of his defence;
- (e) a call upon him to admit or deny his own or his agents’ signature;
- (f) informing the defendant of the consequences of his failure to pay the amount claimed and of his right to receive security *de restituendo* if he should pay the claim:

Civil Procedure in the Supreme Court, Harms,
Butterworth B79 Issue 35.”

- [14] The attack against the validity of the summons for failure to call upon the defendant to admit or deny his or his agent's signature is a material one. See **Van Rensburg v De Lange** 1947 (1) SA 664 (W) at 665 where the following was stated:

“It is quite clear that a plaintiff is not entitled to provisional sentence on a summons not containing these words, which are absolutely vital as they represent the whole theory and practice on which provisional sentence is based.”

See also **Gordon, N.O. v Mc Donald**, 1958 (1) 713 (N) at F-H and **CRC Engineering (Pty) Ltd v J.G. Dunbar & Sons (Pty) Ltd**; 1977 (1) SA 710 (W) at 7123 B-C.

- [15] Since provisional sentence is for the benefit of the plaintiff it is imperative that the plaintiff ensures that he / it complies strictly with the requirements in order to be entitled to that benefit which is drastic for the defendant and extraordinary by nature.

- [16] In terms of Rule 28 an amendment is effected in two ways: Firstly, when a party served with a proper notice fails to

deliver an objection within the ten-days period. He is then deemed to have consented to the amendment: R 8 (5). This consideration steps in, however, only after the expiry of the prescribed period of ten (10) days and not before. Secondly, when he has delivered an objection within the prescribed period, the party seeking the amendment may lodge an application to court for leave to amend. This application must be made like all the other applications the rules of which have crystalised. It is in the latter circumstances that the court has a discretion to allow or disallow an amendment and the court's discretion to allow an amendment is, *"limited only by considerations of prejudice or injustice to the defendant"*: **Supreme Court Practice: Erasmus** on p. 72.

The court cannot interfere where the plaintiff, in disregard of the rules, proceeded to file an amendment before the expiry of the ten-days period and argue that defendant has not objected to the notice.

- [17] *In casu*, the notice of the contemplated amendment was served on 7 April 2008. The amendment itself was served on 18 April 2008 when the ten days period would only expire

on 21 April 2008. It was argued on behalf of the plaintiff that the defendant had not filed an objection and therefore the amendment ought to be granted. This despite the fact that no application was made to the court in terms of the rule. The amendment was served two days before the expiry of the ten-day period during which the defendant had the right to object. The service of an objection by the defendant at that stage would fall outside the ambit of the provisions of Rule 28 and would itself be improper as he is expected to object to the notice of intention to amend and certainly not to the “amendment” itself.

- [18] The rules of court require compliance therewith as far as is possible. Deviation from the provisions thereof can only be condoned where the circumstances justify it and without causing prejudice or injustice to the other party. This is particularly so in extraordinary and drastic processes such as provisional sentence, amendment of pleadings and summary judgements. See **Maharaj v Barclays National Bank Ltd** 1976 (1) AD 418 at 423 E-F where the following was stated:

“While undue formalism in procedural matters is always to be eschewed, it is important in summary judgement applications under Rule 32 that, in substance, the plaintiff should *do* what is required of him by the Rule. The extra-ordinary and drastic nature of the remedy of summary judgement in its present form has often been judicially emphasised.”

See also cases quoted therein.

[19] In this case the plaintiff not only omitted a material aspect in his summons, namely, to call upon the defendant to admit or deny his signature on the alleged acknowledgement of debt without which the said document cannot be a liquid document entitling the party relying on it to provisional sentence, but also flouted the provisions regarding the amendment of the summons in terms of Rule 28. The summons was consequently fatally defective.

[20] In view of the finding above, I do not deem it necessary to deal with the other issues raised in this judgment.

[21] **The provisional sentence summons is consequently dismissed with costs.**

K.J. MOLOI, AJ

On behalf of the Plaintiff:

Adv. B.J. Coetzee
Instructed by:
Du Plessis Phukubye Smith
Attorneys
c/o Coetzees Prokureurs
BLOEMFONTEIN

On behalf of the Defendant:

Adv. H.J. Cilliers
Instructed by:
Kramer Weihmann & Joubert
Inc.
BLOEMFONTEIN

/ms