

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A211/2023  
COURT *A QUO* CASE NO: PTA REGIONAL COURT-964/2022

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

6 May 2024

In the matter between:

**AIR CYCLE ENGINEERING CC**

Appellant  
(Defendant *a quo*)

and

**ATW CONSTRUCTION (PTY) LTD**

Respondent  
(Plaintiff *a quo*)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 May 2024.

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**JUDGMENT**

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**HASSIM J**

1. The appellant, the defendant in the court *a quo*, appeals the summary judgment granted by the Regional Court on 6 June 2023 in the amount of R259 752.57, together with interest and costs. The parties shall be referred to as *a quo*.

2. The plaintiff's cause of action is the *locatio conductio operis* (the letting and hiring of work). The appeal rests on two issues, namely whether the plaintiff's affidavit complies with the requirements of rule 14(2)(b) of the Magistrates' Court Rules and whether the defendant has demonstrated a *bona fide* defence to the plaintiff's claim.

### **Amendments to the rules – Summary judgment**

3. The Magistrates' Court rules as well as the Uniform Rules of Court ("URC") dealing with summary judgments were amended in 2020. Rule 14 of the Magistrates' Court Rules (which came into effect on 9 March 2020), largely mirrors rule 32 of the URC (which came into effect on 1 July 2019). The decisions on the latter rule would hence apply to rule 14 of the Magistrates' Court Rules.
4. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd*,<sup>1</sup> Binns-Ward J held-

"[13] ..., our procedure, ..., even in its amended form, remains true to that in which summary judgment was originally introduced in the English civil procedure in the mid-19th century. Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in *Maharaj* and *Breitenbach v Fiat SA* as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or *bona fide*, summary judgment must be refused. The defendant's prospects of success are irrelevant."

5. Hence, although the requirements for an affidavit supporting summary judgment have changed, the requirements for an affidavit resisting summary judgment have not, nor has its purpose. The affidavit must "disclose fully the nature and grounds of defence and the material facts relied upon therefor" to demonstrate that the defendant "has a *bona fide* defence to the action". However, because the plaintiff's supporting affidavit must engage the content of the plea,<sup>2</sup> the defendant has to deal with the plaintiff's averments regarding the pleaded defence.

<sup>1</sup> 2020 (6) SA 624 (WCC) at para 13.

<sup>2</sup> See paragraph 7 below.



6. Binns-Ward J further considered the effect of a plea preceding an application for summary judgment. He found –

“[15] What the amendment requiring an application for summary judgment to be brought only after a plea has been delivered is identifiably directed at achieving, and should succeed in doing, is the avoidance of speculative summary judgment applications. Under the previous regime, a plaintiff might bring the application in the genuine belief that the defendant had entered an appearance to defend only for the purpose of delay, only to learn that the defendant was able to make out a bona fide defence when the defendant’s opposing affidavit was delivered. ...Under the new rule, a plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the pleaded defence is not bona fide; in other words, by showing that the plea is a sham plea.”<sup>3</sup>

[16] Of primary interest ..., are the changes in the stated requirements for –

- (i) the content of the plaintiff’s supporting affidavit, and
  - (ii) in relation to (i), the effect, if any, of the aforementioned changes on what is expected of a defendant in respect of its opposing affidavit.”
7. The requirement that the plaintiff’s supporting affidavit must “identify any point of law relied upon and state the facts upon which the plaintiff’s claim is based and explain briefly why the defence as pleaded does not raise any issue for trial”, does not require a detailed affidavit on the merits of the plaintiff’s pleaded claim. The requirement that the plaintiff must identify any point of law relied upon, would be satisfied if the plaintiff’s pleaded claim is not excipiable.<sup>4</sup> The plaintiff’s supporting affidavit should explain briefly why the pleaded defence “does not raise an issue for trial” and why it contends that the pleaded defence is a sham.<sup>5</sup> The plaintiff must engage with the content of the plea to substantiate its averments that the defence is not *bona fide* and that it has been raised merely for purposes of delay.<sup>6</sup>

### **The pleadings - particulars of claim**

8. The plaintiff, as the contractor, and the defendant, as the employer, entered into a partly written partly oral construction contract. The plaintiff undertook to renovate parts of an immovable property (“the property”). The plaintiff issued a

<sup>3</sup> My underlining.

<sup>4</sup> Cf. *Tumileng Trading* at para 18 and para 19.

<sup>5</sup> *Tumileng Trading* at para 18.

<sup>6</sup> *Tumileng Trading* at para 19.

written quotation in an amount of R278 921.93 for the work it had been requested to undertake (“**the contract price**”).

9. The quotation listed the work to be done and itemised the costing, which included, the swimming pool, the trampoline, the main bathroom, the children’s bathroom, the spare bathroom, and to supply materials. It is not evident whether the plaintiff had undertaken to supply the building material as well as materials such as pipes, tiles, windows, and paint, to mention a few. The particulars of claim are somewhat ambiguous but suggest that the quotation included materials but excluded VAT.<sup>7</sup> This is supported by the purchase order which was issued by the plaintiff after the defendant had accepted the quotation.<sup>8</sup>
10. The oral terms of the agreement pleaded by the plaintiff were:
  - 10.1. The plaintiff was appointed by the defendant as a contractor to renovate a property situated in Queenswood, Pretoria.<sup>9</sup>
  - 10.2. The work listed on the quotation would be done within a reasonable time, however the completion date depended upon additional services rendered by the plaintiff.<sup>10</sup>
  - 10.3. Additional services and materials as the project progressed had to be approved by a representative of the defendant after which the plaintiff would issue invoices and those invoices were immediately payable.<sup>11</sup>
  - 10.4. Amounts due to the plaintiff were immediately payable upon the completion of the plaintiff’s services and the rendering of invoices for additional services.<sup>12</sup>

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<sup>7</sup> Paragraph 5.2 of the particulars of claim reads as follows:

“The written part of the Agreement as per the Plaintiff’s quote which is excluding VAT for the services that will be rendered and material to be purchased.”

<sup>8</sup> The purchase order which was issued is for R278 921.93 plus vat reflected as R41838.29. The total value of the purchase order is R320 760.22.

<sup>9</sup> Para 5.1 of particulars of claim.

<sup>10</sup> Para 5.5 of particulars of claim.

<sup>11</sup> Para 5.6 of particulars of claim.

<sup>12</sup> Para 5.7 of particulars of claim.



11. The plaintiff avers additionally that (i) at the behest of the defendant's representative, work commenced three weeks later than it ought to have; (ii) numerous additional services were requested and they were discussed with, and approved by, the defendant's representative; (iii) the defendant's representative was part of a team managing the project and was therefore aware of the progress on the work and the additional services contracted for; (iv) the defendant had insisted that the plaintiff employ sub-contractors identified by the defendant under circumstances where the plaintiff had not previously worked with these subcontractors and could not guarantee their workmanship or the time frames within which the work would be completed.
12. The plaintiff pleaded that it "duly performed" the services and supplied the material. However, when the defendant denied the plaintiff access to the property, the plaintiff was not able to "finalize the services and the material to be supplied as agreed".<sup>13</sup>
13. It conceded that there was in fact outstanding work, namely the bath, taps and shower head had not been fitted, and two square meters of tiles (2m<sup>2</sup>) in the "maid's room" had not been laid. This according to it was the extent of the outstanding work and would have been finalised by the plaintiff within a week.
14. It averred that on 3 May 2021, the defendant summarily cancelled the contract without informing the plaintiff that it had not complied with its obligations and without calling on the plaintiff to remedy the non-compliance. The cancellation was conveyed in a letter from the defendant's attorney dated 3 May 2021 (Annexure "F"). Due to the defendant's failure to allow the plaintiff access to the property and its failure to comply with its obligations, the plaintiff cancelled the contract, in the alternative it pleaded that in the event of a dispute, the summons constituted the cancellation. In the premises, the plaintiff claimed payment of R289 597.29 for services rendered including additional services and materials supplied in accordance with the agreement between the parties.

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<sup>13</sup> Para 8 of the particulars of claim.

### The defendant's plea and counterclaim

15. The defendant does not dispute the written quotation, the purchase order nor that it paid a deposit of R138 220.43 on 11 March 2023. It however disputed that amounts were payable to the plaintiff immediately upon the completion of the services and the rendering of invoices for the additional works. Furthermore, it was pleaded, that the agreement was subject to three further terms:
  - 15.1. The work would be done within a reasonable period of its commencement.
  - 15.2. it would be performed in a good and proper workmanlike manner, and free from defects.
  - 15.3. Payment for work done would be due and payable only after the defendant had approved the works and was satisfied that the works were completed in a good and proper workmanlike manner, and free of defects.
16. Consequently, the defendant raised the *exceptio non adimpleti contractus*. It disputed that the plaintiff performed the work as undertaken. It pleaded that the work was incomplete, not executed in a good and proper workmanlike manner and not free of defects.
17. In the counterclaim the defendant listed the work that the plaintiff failed to complete which included the children's bathroom and the spare bathroom; and the main bedroom.<sup>14</sup> Furthermore, the plumbing works were not executed in a good proper workmanlike manner. It claimed compensation for the unfinished work in an amount of R29 844.72 (being the amount it paid to a third party to complete the work).
18. The defendant attached to its plea and counterclaim five (5) "pro-forma invoices" from a third-party provider for plumbing services, which are identified with specific job numbers. Additionally, proof of payment to the third-party for the services rendered was also attached. According to these invoices the work was

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<sup>14</sup> The defendant had failed to install the stainless shower waste, shower floor and walls, cement concrete basin slab and floor, any of the accessories, and had failed to apply a brick sealer.



done by the third-party over the period 29 April 2021 to 19 May 2021 as well on occasions thereafter.<sup>15</sup>

19. The plea and counterclaim were followed with an application for summary judgment.

### **The parties' affidavits**

20. The affidavit in support of summary judgment –

- 20.1. Identified the plaintiff's cause of action as a contractual claim based on a partly written, partly oral, agreement in terms of which the defendant appointed the plaintiff to carry out renovations to the property.
- 20.2. Verified the cause of action and the amount claimed in the summons.
- 20.3. Confirmed that the sum claimed (i.e., R289 597.29) was a liquidated amount and was immediately due and payable.
- 20.4. Stated that the plaintiff performed its obligations under the agreement until the defendant's representatives unlawfully denied the plaintiff access to the property resulting in the plaintiff not being able to "finalize the agreement" and the plaintiff then cancelled the contract.
- 20.5. It repeated the defences set out in the plea.
- 20.6. Averred that the defendant cancelled the agreement without calling upon the plaintiff to rectify the "non-performance". (Incidentally, the plaintiff did

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<sup>15</sup> The work executed was detailed in the invoices:

1. Pro-forma Invoice dated 21 May 2021, relates to Job No 0041336/150506 which was for replacing a leaking "Galv pipe in the roof with copper pipe".
2. Pro-forma invoice dated 31 May 2021, relates to Job No 0041577 for a burst pipe. A leaking pipe inside the shower wall was repaired.
3. Pro-forma Invoice dated 19 June 2021, relates to Job No 0042118/151806/151810 to unblock a basin.
4. Pro-forma invoice dated 1 July 2012, relates to Job No 0040844 for the installation of a toilet pan, a free-standing bath with a mixer, shower mixer handles and shower heads, "sit on basins" with mixers, and the supply of copper tubing for electrical wiring. This work was done over the period 29 April 2021 – 19 May 2021. The taps and sanitaryware were supplied by the defendant.
5. Pro-forma invoice dated 10 August 2021 relates to Job No 0043363 for the replacement of drain pipes over two days.

not plead that the defendant's cancellation constituted a repudiation which it elected not to accept and the agreement was therefore *extant*).

20.7. Its case for summary judgment was premised on the following:

- (a) In the opinion of the deponent the defendant did not have a *bona fide* defence to the action and had defended the action solely for purposes of delay.
- (b) The plea "most certainly [did] not raise issues for trial".
- (c) The defences which the defendant raised were not substantiated because prior to the delivery of pleadings, the defendant had not complained that the work had not been performed in accordance with the terms of the contract, nor had the defendant placed the plaintiff in *mora*.
- (d) The defendant hindered <sup>16</sup> the completion of the work. By that time the agreement was almost finalised and "costs accumulated".<sup>17</sup>
- (e) The defendant was not entitled to cancel the contract and had no right to hinder the performance of the work by the plaintiff.
- (f) The amount which the plaintiff was claiming is for "actual services rendered, and material supplied to which the plaintiff [was] entitled".
- (g) The defendant's damages claim was limited to R29 844.72 for the completion of the works. The plaintiff thereby suggested that the value of the incomplete work was R29 844.72.
- (h) The defendant had failed to provide documentary proof of the plaintiff's failure to execute its obligations timeously, or at all.

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<sup>16</sup> The plaintiff expresses this as "The defendant refrained the plaintiff from performing its duties in terms of the agreement."

<sup>17</sup> The plaintiff does not disclose what these "accumulated" costs are. It might be that the plaintiff had "costs incurred" as opposed to "costs accumulated" in mind.



### Defendant's defence

21. Not surprisingly, the defendant contended in its opposing affidavit that the application for summary judgment was defective for want of compliance with rule 14(2)(b) of the Magistrates' Court Rules in that the plaintiff firstly, failed to identify the point of law relied upon and secondly, failed to "briefly explain why the defence as pleaded, [did] not raise any issue for trial". On this basis it sought the dismissal of the application for summary judgment together with the costs thereof.
22. The defendant's complaint is not without merit. It is correct that the plaintiff did not identify any point of law relied upon.
23. Rule 14(2)(b) calls on the plaintiff to "explain" why the defence as pleaded does not raise any issue for trial. "Explain"<sup>18</sup> means something more than "state". The rule itself differentiates between "state" and "explain". It requires the plaintiff to "state" the facts upon which its claim is based, and to explain "why"<sup>19</sup> the defence pleaded does not raise an issue for trial.
24. In this instance, the plaintiff's supporting affidavit does not explain why the defences raised are a sham. There is no explanation why the defendant's claim that the work was incomplete, and defective, is not genuine. Apart from repeating the facts pleaded in the particulars of claim and the plea, there are no factual averments in the plaintiff's affidavit which cast doubt on the *bona fides* of the defences raised by the defendant.
25. Considering that the defendant attached the *pro forma* invoices to the plea and counterclaim, one would have expected the plaintiff to address the contents of the invoices and explain why they do not support the defendant's claim that the work was incomplete, or defective.

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<sup>18</sup> The dictionary meaning of the word "explain", when used as a transitive verb, means to "make known in detail (thing, that, how, etc)". See The Concise Oxford Dictionary.

<sup>19</sup> According to The Concise Oxford Dictionary the word "why" is an interrogative adverb. It is an interrogative "on what ground? For what reason? With what purpose?".

26. The plaintiff gave no explanation why it is implausible that the agreement was subject to the additional terms considering that the onus rested on the plaintiff to prove that the defendant's obligation to pay was not conditional.<sup>20</sup>
27. I am mindful that the plaintiff's failure to explain why the pleaded defence does not raise any issue for trial is not fatal to its application and is not a formal requirement which goes directly to the validity of the application for summary judgment.<sup>21</sup> However, an explanation from a plaintiff is one of the elements that a court considers when assessing whether there is a triable issue.<sup>22</sup>
28. This brings me to the defendant's affidavit. The defences raised in the plea and counterclaim were repeated by the defendant in its affidavit. The defendant pointed out that on the plaintiff's own version the work was not completed. The plaintiff's response to this was that prior to the delivery of pleadings, the defendant had not complained that the work had not been done in accordance with the agreement.
29. In the letter dated 3 May 2021, the plaintiff was notified that it had failed to perform its obligations under the agreement and that while the defendant was willing to pay for work done, it refused to pay for work not done.
30. In the counter claim, the defendant identified the defective work,<sup>23</sup> and the incomplete work.<sup>24</sup> As mentioned above, four (4) pro forma invoices detailing the work that was done by a third-party were attached to the plea and counterclaim. The incomplete and defective work can be discerned from these invoices.
31. Even on the plaintiff's version, performance was incomplete. This means that it would not be entitled to payment of the contract price. Notwithstanding this, its pleaded case is for the payment of the full contract price. While the court may, in the exercise of its discretion award a reduced contract price, the contractor must plead this, as well as facts why, despite the contractor's failure to complete the

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<sup>20</sup> *Pillay v Krishna and Others* 1946 AD 946 at 960.

<sup>21</sup> *Gauteng Refinery (Pty) Ltd v Eloff* 2023(2) SA 223 (GJ) at para 15.

<sup>22</sup> *Ibid.*

<sup>23</sup> Paragraph 3.2 of the counterclaim.

<sup>24</sup> Paragraphs 3.1.1 to 3.1.5, 3.1.6 and 3.1.7 of the counterclaim.



work contemplated by the parties in the contract, it would be fair and reasonable for the defendant to remunerate the plaintiff.

32. In my view the plea discloses a defence to the action, although it lacks the details contained in the plea. It, read together with the supporting documents particularises the defective and incomplete performance sufficiently for the plaintiff to refute them in its affidavit.
33. This gives rise to the question whether it is permissible for the court to have regard to the averments in the plea and counterclaim notwithstanding that those are not made under oath. In other words, is the court restricted to the defendant's affidavit in its assessment of whether a *bona fide* defence is disclosed, or may it consider the averments in the plea and counterclaim, notwithstanding that those averments are not made under oath.
34. Seen in isolation, the affidavit is sketchy. It invites the criticism that it is "needlessly bald vague and sketchy". But is it "needlessly" sketchy? After all, the defences identified are valid in law. However, the material facts are not set out in the affidavit. They are set out in the plea and counterclaim, and the annexures thereto.
35. The one defence referred to in the defendant's affidavit is that the contract was subject to additional terms. The two additional terms of relevance for present purposes being (i) payment was conditional upon the defendant having approved the work and being satisfied that it had been completed in a good and proper workmanlike manner, and free of any defects; and (ii) the work being done in a good and proper workmanlike manner, and free of defects.
36. The onus does not rest on the defendant to prove that the agreement was subject to the additional terms. It rests on the plaintiff at the trial to prove that the contract was not subject to the additional terms.<sup>25</sup>

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<sup>25</sup> Cf. *Pillay v Krishna* at 960, *Kriegler v Minitzwer* 1949(1) SA 498 (A)

37. The other defence referred to in the defendant's affidavit is that the work was not completed, and was defective (i.e., the *exceptio non adimpleti contractus*). In this regard too, the onus rests on the plaintiff. To obtain the contract price it will have to prove at the trial that it completed the work as it had undertaken to do.<sup>26</sup>
38. As indicated earlier the defences raised by the defendant are valid in law. The requirement that the affidavit resisting summary judgment must set out the nature and grounds of the defence and the material facts relied upon is aimed at assessing whether the defence is valid in law and that the defendant is *bona fide* in raising it. For a court to make such an assessment sufficient particularity must be provided by a defendant to satisfy a court that the statements of fact, if found to be correct at the trial, should result in a judgment for the defendant.<sup>27</sup> If a defendant is *bona fide* in the defence pleaded, it should be willing, and able, to set out the material facts upon which its defence is based. The unwillingness or refusal to do so, could be an indication that the defence is not *bona fide*. Therefore, a valid defence in law which is set out in a needlessly bald, vague, or sketchy manner places the *bona fides* of a defendant into question.
39. In the context of considering whether the plaintiff's affidavit complied with the requirements of rule 32(2) of the Uniform Rules of Court, Corbett JA (as he then was) remarked in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423 H—
- “Where the affidavit fails to measure up to [the requirements of rule 32(2)] the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before Court (see *Sand and Co Ltd v Kollias supra* at p.165). The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter ‘at the end of the day’ on all the documents that are properly before it (ibid. p 165)’”.
- [my underlining]
40. The intention of the summary judgment procedure was reaffirmed by the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint*

<sup>26</sup> It is worth remembering that the plaintiff has admitted that the work was not completed, it claims the full contract price and a reduced contract price.

<sup>27</sup> *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303H-304A.



*Venture*.<sup>28</sup> Considering that the summary judgment procedure is aimed at preventing a defendant from raising sham defences and thereby delaying the plaintiff from enforcing its rights. It is not intended to deprive a defendant with a triable issue, or a sustainable defence, the opportunity to fully ventilate the dispute at a trial. In the circumstances, the principle referred to by Corbett JA that a court “look at the matter ‘at the end of the day’ on all the documents that are properly before it”,<sup>29</sup> applies in this instance to a defendant’s affidavit.

41. The defendant is obliged to file a plea and the plaintiff’s supporting affidavit must engage the averments therein. Consequently, the plea and counterclaim and the annexures thereto are properly before the Court, and should not be disregarded.
42. Moreover, there are three reasons peculiar to this case why it would be harsh to disregard the plea. The first is that in its particulars of claim the plaintiff concedes that the work was not completed. Notwithstanding this, it claims the full outstanding contract price, not a reduced contract price. The plaintiff’s own averment supports the defendant’s case that the work was not completed.
43. The second is that the onus rests on the plaintiff to prove that the contract did not include the additional terms contended for by the plaintiff. Additionally, the onus rests on the plaintiff to prove that the work was complete and was free of defects.
44. The third is that *prima facie* the defendant’s defence for non-payment has been consistent. At all relevant times, the plaintiff was informed that the work was incomplete and defective. The defence does not appear to be an afterthought, nor contrived.
45. Consequently, on all the documents before the court; the plea, counterclaim and the *pro forma* invoices attached thereto, I cannot conclude that the defences raised by the defendant are a sham. The fact that the plaintiff elected not to respond to the various defects referred to in the plea and counterclaim, and the pro-forma invoices suggests that there is a triable issue. If there was not, then the plaintiff

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<sup>28</sup> 2009 (5) SA 1 (SCA).

<sup>29</sup> Cf. *Maharaj v Barclays National Bank Limited* at 423 H. See para 39 above.

would have explained why the defences raised were a sham. I am satisfied that the facts are sufficiently full to conclude that what the defendant has alleged, if proven at the trial, will constitute a defence to the plaintiff's claim.<sup>30</sup>

46. I can therefore not agree with the court *a quo* that the defendant's defences are "bald and inexplicably opaque for lack of any detail."
47. The court *a quo* found that the plea to paragraphs 11 and 16 of the particulars of claim was contradictory and therefore doubted whether the defences raised were genuine. On a proper reading of the defendant's response to these paragraphs, I find no contradiction. The defendant admitted the averment in paragraph 11 of the particulars of claim<sup>31</sup> that the plaintiff received from the defendant's attorney the letter which is annexure "F" to the particulars of claim. The defendant denied the averments in paragraph 16 of the particulars of claim which related to the same letter. While both paragraphs 11 and 16 deal with the same letter, the averments are not the same.
48. The averment in paragraph 11 of the particulars of claim is that a letter (annexure "F" to the particulars of claim) was sent by the defendant's attorney to the plaintiff. The contents of the letter are summarised. The defendant admitted the averments.
49. In paragraph 16 the plaintiff relies on the letter to make out a case that by tendering to pay for work done by the plaintiff, the defendant admitted liability to the plaintiff and that despite the admission, it failed to make payment and is liable to the plaintiff. The defendant does not dispute the letter; it disputes that it is liable to pay the plaintiff. It pleads that it is not liable because the plaintiff had not completed the work.
50. In my view the averments in the plea are not inconsistent. They are responses to different averments.

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<sup>30</sup> Cf. Breitenbach v Fiat S.S (Edms) Bpk 1976 (2) 226 at 228D-E

<sup>31</sup> "On 3 May 2021 the plaintiff received a letter from the defendant's attorneys cancelling the agreement with immediate effect and informed the plaintiff that it failed to perform on its obligations as settled in the agreement. Attached hereto marked Annexure 'F' a copy of said letter."



51. The court *a quo* referred to other anomalies in the plea read against the *pro forma* invoices. The anomalies, if any, are best challenged at the trial. There is no reference to these anomalies in the plaintiff's affidavit. Had the plaintiff dealt with them in its affidavit, the defendant would have had an opportunity to deal with them. This brings to mind, the following remarks of Colman J in *Breitenbach v Fiat S.A. (Edms) Bpk* –

“What a defendant can reasonably be expected to set out in his affidavit, depends, to some extent, upon the manner in which the plaintiff's claim which he is seeking to answer, has been formulated.”<sup>32</sup>

52. Had the applicant complied with the requirements of rule 14(2) regarding the supporting affidavit, and the defendant thereby given an opportunity to respond, that may have exposed the defence as not being *bona fide*. But the plaintiff elected not to do so.

53. In the result, I propose the following order:

- (a) the appeal is allowed with costs.
- (b) The order of the court *a quo* is set aside and substituted with an order in the following terms:

“Summary judgment is refused with costs, and the defendant is granted leave to defend the action.”

  
S.K. HASSIM  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.

  
H. KOOVERJIE  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

<sup>32</sup> At p.299.

Appearances:

Counsel for the appellant:

Adv. R Kriek

Instructed by: Stroebel Singh Theuissen Inc

Counsel for the respondent:

Adv. W Steyn

Instructed by: MW Nothnagel Attorneys

Date heard:

13 February 2024

Date of Judgment:

6 May 2024