

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A2024-028155

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
30 August 2024	
DATE	SIGNATURE

In the matter between:

LIQUOR NETWORK AGENCY CC

First Appellant

HYLTON RICHARD SMITH

Second Appellant

and

SKYLIM BEVERAGES CC

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 August 2024.

Headnote: Summary Judgment Proceedings: Whether the plaintiff must establish a competent and valid claim before the Court must consider whether the defendant's defence is bona-fide. Whether the approach in *Gulf Steel (Pty) Ltd v Rack-Hire Bop (Pty) Ltd* 1998 (1) SA 679 (O) and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 ZAKZPHC is to be preferred over the

approach in *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] 4 All SA 895 (FB)

Order: Appeal upheld. Order of the court a quo is substituted with an order refusing summary judgment, leave to defend granted with costs in the cause.

JUDGMENT

MUDAU J, MAIER-FRAWLEY J and GOVENDER AJ

Introduction

- [1] This is an appeal against the judgment of Mpofu AJ in which the learned Judge granted summary judgment in the sum of R 891 167, 56 against the appellants (*Liquor Network* and *Smith* respectively). This appeal is with the leave of the court a quo.
- [2] The court a quo held that the respondent's (*Skylim's*) claims were prosecuted in terms of an agreement concluded between it and Liquor Network. For reasons that appear later in this judgment, this was incorrect.

An aetiology of Skylim's claims

- [3] Skylim alleges that in October 2016 it and Liquor Network entered into an oral agreement, which was reduced to writing albeit that the written document was not signed by the parties ("*the Skylim agreement*"). Skylim annexed the unsigned document which reflected the terms of the Skylim agreement and it pleaded its claim in accordance with the terms thereof.
- [4] The Skylim agreement relates to the rendering of services by Liquor Network to Skylim. The services entailed inter alia the transport of Skylim's product by

Liquor Network from Skylim's warehouse to its customers as well as the accounting to Skylim for the delivered product.

- [5] The Skylim agreement was for the period 1 November 2016 to 31 October 2017. It was conceded by counsel for Skylim, rightly so, that no renewal of the agreement was pleaded. The import of this is that on the pleadings, the Skylim agreement came to an end on 31 October 2017.
- [6] Skylim, in terms of the Skylim agreement, advanced four claims. The first claim is for the period 30 June 2017 to 31 July 2018 for "duplicating invoices" in respect of delivery charges. The second claim relates to a breach of the Skylim agreement which occurred on 13 November 2017 and it is for "overcharging for product". The third claim is for the period August 2017 to May 2018 and it relates to invoicing for delivery charges where no delivery services were rendered. The fourth claim is for the period July 2018 for "product sold and delivered" to Liquor Network.
- [7] All of the claims, except for the fourth claim, is accompanied by an alternative enrichment claim. It is unnecessary for us to deal with the enrichment claim. This is because in the affidavit in support of the summary judgment application Skylim made it plain that it was seeking summary judgment in terms of the Skylim agreement. It was the only cause of action that it purported to verify and prosecute. No mention is made of the enrichment claim.
- [8] In addition, Skylim annexed an acknowledgement of debt and suretyship (*"the AOD"*). The AOD features in the affidavit insofar as it ties in Smith. The deponent to Skylim affidavit says *"by virtue of the provisions of the AOD, the second respondent (Smith) was indebted jointly and severally with the first respondent (Liquor Network) for the amounts claimed"* under claims 1 to 4.

- [9] It is plain that the claim that Skylim sought to establish, was in terms of the Skylim agreement. And it is equally plain that the AOD featured in the claim because it established liability against Smith.

An overview of the defences

- [10] In response to Skylim's claim, Liquor Network asserts and appends a different written agreement to the Skylim agreement to its plea (*"the LN agreement"*). The import of this is that the appellants say that if the LN agreement regulated the relationship between the parties, there naturally can be no establishment of the breaches of the Skylim agreement. What is more, is that the appellants allege conduct that it says constitutes a repudiation of the LN agreement.
- [11] Liquor Network also (1) denies that there were duplicating invoices; (2) denies that it overcharged for product; (3) denies charging for deliveries in circumstances where no delivery services were performed and (4) denies that goods were purchased and delivered, more particularly Liquor Network amplifies its denial by saying that it never received the product that was alleged to be sold and delivered to it.
- [12] Apart from these defences, the appellants also instituted a counter claim in terms of the LN agreement seeking a statement and debatement of account in respect of the distribution services rendered and leave to quantify the damages suffered by it.

Principles applicable to summary judgment

- [13] The body of law which dealt with the approach to summary judgment pre-amendment to the Rule is mostly extant as observed by Binns-Ward in

*Tumileng Trading CC v National Security and Fire (Pty) Ltd*¹. The Supreme Court of Appeal in the as yet unreported judgment of *Cohen NO v D*² endorsed *Tumileng* (See paragraph 29 of *Cohen NO*).

[14] In *Meek v Kruger*³ the Court emphasised that summary judgment is not intended to shut a defendant out from defending unless it was very clear indeed that the defendant had no case in the action. The remedy should be resorted to and accorded only where the plaintiff can establish his or her claim clearly and the defendant fails to set up a bona fide defence. As stated by Corbett JA in *Maharaj v Barclays National Bank*⁴, “the grant of the remedy is based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law.”

[15] Can summary judgment be granted where the plaintiff’s claim has not been established? Should this be the first consideration before a Court even begins to consider the question of a *bona fide* defence? This is an issue in the present appeal. It is thus necessary to answer this question.

[16] There are divergent views.

The first view

[17] In *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd*⁵ it was held that, before even considering whether the defendant has established a bona fide defence, the court must be satisfied that the plaintiff’s claim has been clearly established and

¹ 2020 (6) SA 624 WCC.

² (368/2022) [2023] ZASCA 56 (20 April 2023).

³ 1958 (3) SA 154 (T).

⁴ 1976 (1) SA 418 (A) at 423F-G.

⁵ 1998 (1) SA 679 (O) at 683H-684B.

that his pleadings are technically in order; if either of these two requirements is not met, the court is obliged to refuse summary judgment, even if the defendant has failed to put up any defence or has put up a defence which did not meet the standard required to resist summary judgment.

- [18] *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd*⁶ appears to have sided with the dictum in *Gulf Steel*. In *Velocity* Laing J stated that:

“[19] ... it could well be said that wherever a court focuses its enquiry, be it on either the plaintiff’s case or the defendant’s defence, there is no reason to exclude the basic principle that the plaintiff’s case must properly disclose a cause of action. His or her pleadings cannot be excipiable. This assumes even more importance within the context of a procedure that does not allow the benefit of a reply or the advantages of cross-examination.”

The second view

- [19] In *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality*⁷ Moloi J and Daffue J held the *Gulf Steel* “has put the bar a bit too high for a plaintiff” and that prejudice to a defendant resulting from a defective application is a material factor to be taken into account by a court in deciding to refuse summary judgment.

- [20] Apart from these decisions, the Supreme Court of Appeal, in *Cohen NO* alluded to this issue.

“[24] In *Standard Bank of South Africa Ltd v Roestof (Roestof)*, it was held that a technical defect due to some obvious and manifest error which causes no prejudice to the defendants, can be overlooked. Wallis J did not follow this

⁶ 2023 JDR 1853 (ECMA).

⁷ [2016] 4 All SA 895 (FB).

decision in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another (Shackleton)*. Also dealing with the old rule 32(2), he stated that the suggestion that a defective summary judgment application could be cured if the defence dealt with the merits of the claim, was incorrect. The fact that a defence has been set out and argued, does not cure the defect in the particulars of claim or the summary judgment application. Such a view, he stated, would amount to saying that defects would be overlooked if the defence deals with the merits of the claim. This was not tenable.

[25] Paragraph 25 of *Shackleton* sets out why the approach in *Roestof* should not be adopted:

'Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point with the concomitant risk that if the technical point is rejected they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective then cadit quaestio. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.'

[26] It is noteworthy that the learned authors in Erasmus Superior Court Practice preferred the *Shackleton* decision over the *Roestoff* decision. They suggested that the principles in *Shackleton* should be applied when dealing with the amended rule 32(2)(b).

[27] In the present matter, it is immaterial whether one follows the *Roestoff* or the *Shackleton* approach. The defect in the particulars of claim is not merely some technical defect. The reliance on the incorrect trust deed, and therefore on the incorrect clauses, goes to the heart of Ms D[...]’ claim. There is no evidence that the trustees were aware of this defect in the particulars of claim until the day of the hearing. But even if they had been, it was not incumbent on them to ‘interact’ with Ms D[...] in this regard, as found by the high court. Nor does it assist Ms D[...] that both parties may have argued on the basis that clause 15 of the original trust deed was applicable. This was not the case that the trustees came to court to meet.”⁸

- [21] The Supreme Court of Appeal in *Cohen NO* considered it unnecessary to resolve the discord between *Roestoff*⁹ and *Shackleton*¹⁰. It is necessary to clarify *Roestof* to understand whether there is in fact a discord. We do not consider that there is.
- [22] *Roestof* is not authority for the proposition that “a defective application can be cured because the defendant has dealt in detail with its defence”, nor does it say that. There are three requirements posited by *Roestof*. First the defect must be a technical defect not a substantial defect. Second the technical defect must be obvious and manifest. In other words, it would be plainly apparent as opposed to esoteric. Third there must be no prejudice to the defendant.
- [23] That being said, *Shackleton* in our view sides with *Gulf Steel* and *Velocity* and is to be preferred over *Buttertum*. A defective application, and by this we mean an application which does not establish the plaintiff’s claim, cannot be remedied by the defendant’s response. It is either valid on its own merits or it is not. If it

⁸ Above n 2.

⁹ 2004 (2) SA 492 (W).

¹⁰ 2010 (5) SA 112 (KZP).

is not, in that it does not establish the plaintiff's claim, then it is unnecessary to consider whether a *bona fide* defence has been established. As observed by Wallis J (as he then was) in *Shackleton*, the defects do not disappear because of the defendant's response. The application remains defective.

[24] *Buttertum* allows for the grant of an application which is on its face defective and it is too widely stated. Unlike in *Roestof*, the finding in *Buttertum* allows for a defective application to still result in the grant of the application for summary judgment and it elevates prejudice of the defendant as a material consideration. This is not consistent with *Roestof* in as only manifest and obvious technical defects may be overlooked not defects generally.

[25] It is necessary to elucidate the proper approach to an application for summary judgment. A Court must be careful to guard against injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross-examination to satisfy it that he has a *bona fide* defence.¹¹ While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence, on the other hand it ought to be reluctant to deprive the defendant of his normal right to defend, except in a clear case.¹²

[26] The following remark by Van Den Heever J in *Edwards v Menezes*¹³ is apposite:

"Our Courts have approached the Rule from diametrically opposed views.

On the one hand it has been stressed that defendant must show, not that he is *bona fide*, but that he has a good defence; that defendant must show a

¹¹See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D-H. See also *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (VV) at 950A-B.

¹²See *Maisel v Strul* 1937 CPD 128. See also *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767.

¹³1973 (1) SA 299 (NC) at 304A-E.

defence which, assuming the alleged facts to be true, is good in law; or defendant's duty in terms of sub-rule (3) (b) has been emphasised. See, e.g., *Spring and van den Berg Construction (Pty.) Ltd. v. Banfrevan Properties (Pty.) Ltd.*, 1968 (1) SA 326 (D) at p. 327; *Wright v. Van Zyl*, 1951 (3) SA 488 (C) at p. 495E - F; *Nichas & Son (Pty.) Ltd. v. Papenfus*, 1970 (2) SA 316 (O); *Frank Keevey (Pty.) Ltd. v. Koos van der Merwe Beleggings (Kroonstad) (Edms.) Bpk en 'n Ander*, 1970 (3) SA 429 (O); *Herb Dyers (Pty.) Ltd. v. Mohamed and Another*, 1965 (1) SA 31 (T); *Traut v. Du Toit*, 1966 (1) SA 69 (O); *H. K. Gokal (Pty.) Ltd. v. Muthambi*, 1967 (3) SA 89 (T) at p. 90.

The other approach stresses that it is only where the Court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that plaintiff has an unanswerable case, that summary judgment is granted.

See *Visser v. Visser*, 1937 (2) P.H. F147; *Mowschenson and Mowschenson v. Mercantile Acceptance Corporation of SA Ltd.*, 1959 (3) SA 362 (W); *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft v. African Frozen Products (Pty.) Ltd.*, 1967 (4) SA 105 (C); *Bentley Maudesley & Co., Ltd. v. 'Carburol' (Pty.) Ltd. and Another*, 1949 (4) SA 873 (C).

In my view the latter approach is to be preferred."

- [27] The learned authors of Erasmus, Superior Court Practice agree with the preferred approach of Van Den Heever J.

- [28] The following principles are also useful in deciding what a defendant is required to do to satisfy the Court that he or she is *bona fide* in his or her defence. All that the court enquires into, in deciding whether the defendant has set out a *bona fide* defence, is: (a) whether the defendant has disclosed the nature and grounds of his defence; 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 *bona fide* and good in law; (See *Maharaj v Barclays National Bank Ltd* supra). The defendant is not at the stage of summary judgment required to persuade the court of the correctness of the facts stated by him or, where the facts are

disputed, that there is a preponderance of probabilities in his favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The Court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. (See *Maharaj supra* and also *Marsh and Another v Standard Bank of SA Ltd*¹⁴). There must be a sufficiently full disclosure of the material facts 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. On the one hand, it is not required of the defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence; on the other hand, the defence must not be averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy.¹⁵

- [29] Finally, even were a defendant's affidavit to fall short of that which is required, the Court retains a discretion to refuse summary judgment: The discretion to refuse summary judgment is triggered inter alia where it is *reasonably possible* that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. (See Erasmus Superior Court Practice D1- 418).

Why summary judgment ought to have been refused?

The plaintiff has not established its claim

- [30] The Skylim agreement, on the pleadings and on its own terms came to an end in October 2017. All of the claims extend beyond this period. No renewal is pleaded. It is thus unclear how the agreement was still extant beyond October 2017. Claims 1 to 4 could not, on the pleadings, be prosecuted under the Skylim

¹⁴ 2000 (4) SA 947 (W).

¹⁵ See *Breitenbach v Fiat SA (Edms) Bpk* above n 11.

agreement. This is a substantial defect, in that no cause of action is disclosed.

[31] What is more, in relation to Claim 4 -- which is the most significant of the claims from a monetary perspective -- the Skylim agreement does not at all deal with goods sold and delivered. It deals only with the services which we described above. This much was, again rightly, conceded by Skylim's counsel. The argument put forward as a counter was that the AOD was a basis for Claim 4. This submission cannot be accepted, simply because that is not how the particulars of claim were drawn and importantly the affidavit for summary judgment does not make out that case.

[32] Skylim, on its own pleadings as well as the affidavit in support of summary judgment, did not establish a claim. The application ought to have been dismissed on that basis alone.

There is a bona fide defence

[33] We also find that the appellants have adduced facts, which if accepted at trial, would constitute a defence.

[34] Two examples disclose patently triable issues. The first relates to the contention that the Skylim agreement is not the operative agreement but rather the LN agreement governed the relationship. If this is the case, the breaches complained of by Skylim may not arise. The second relates to Claim 4, where the appellants say that they did not receive the goods as alleged by Skylim. This fact, if proved at trial, would constitute a defence as well.

[35] For the remainder, the denials of overpayment, duplicating invoices as well the charging for services not rendered all give rise to triable issues. The appellants, given the nature of claim, need not say more. They are not obliged at summary

judgment stage to disclose all of the evidence which underpins these denials.

Costs

[36] As to costs, Skylim's counsel sought to persuade us that in relation to costs of the appeal each party ought to bear its own costs.

[37] The reason for this submission was that a number of the arguments raised were new and if it were raised earlier it may have influenced whether Skylim opposed the appeal. This is not persuasive.

[38] The claim presented by Skylim (more particularly its deficiencies) could and should have been considered by it even before embarking upon an application for summary judgment. This is consistent with the cautionary note sounded in *Maharaj* that the remedy should only be resorted to where the plaintiff can clearly establish his or her claim.

[39] In short, the application ought not to have been prosecuted given the obvious deficiencies.

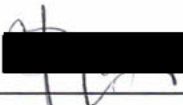
[40] In the result, we make the following order:

- (1) The appeal is upheld.
- (2) The respondent is to pay the costs of the appeal.
- (3) The order of the court a quo is replaced with the following:

Summary judgment is refused and leave to defend is granted with costs to be costs in the cause.


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T P MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG



A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
JOHANNESBURG



A GOVENDER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

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Instructed by:

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Kaveer Guinness Incorporated

Date of Judgment:

30 August 2024