

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NUMBER: D6326/2023

In the matter between:

RENZO ANGELO SCRIBANTE
(Identity number 7[...])

FIRST PLAINTIFF

REMBROTHERS (PTY) LTD
(Registration Number 2020/836629/07)

SECOND PLAINTIFF

and

THE 47 CLUB TRADING (PTY) LTD
(Registration Number 2020/836629/07)

FIRST DEFENDANT

KDE HOLDINGS
(Registration Number 2017/007830/07)

SECOND DEFENDANT

GIBSON MTHEMBU
(Identity Number 8[...])

THIRD DEFENDANT

ORDER

The following order is made:

1. The application for summary judgment is refused.

2. The defendants are granted leave to defend the action.
3. The costs of the summary judgment application are reserved for decision by the trial court.
4. This matter is, subject to the provisions of Practice Directive 21, to be placed on the expedited trial roll.

JUDGMENT

PLOOS VAN AMSTEL AJ

[1] This is an application for summary judgment. The first plaintiff and the third defendant, both businessmen, were business partners. The genesis of this dispute is two oral loan agreements, in terms of which funds were transferred from the second plaintiff's bank account into the first and second defendants' bank accounts respectively.

[2] The plaintiffs in this matter claim the repayment of the sum of R2 216 211 20, together with interest and costs, against the first and third defendants (with the second defendant having been placed under business rescue) jointly and severally, the one paying the other to be absolved.

[3] Rule 32 was amended on 1 July 2019. It permits a summary judgment application to be brought within 15 days after the defendant has filed a plea. The Full Court in *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters*¹ held that the purpose of the amended rule 32 is to:²

¹ *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters* 2020 (1) SA 623 (GJ).

² *Ibid* para 16.

'...allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice... '

[4] Whilst the purpose of the amended rule 32 is to dispense with actions that ought not to proceed to trial, and while undue formalism in procedural matters is always to be eschewed, however, as emphasised by Corbett JA in *Maharaj v Barclays National Bank Ltd*³ it is important in summary judgment applications that, 'in substance, the plaintiff should do what is required of him by the Rule'.⁴

[5] The main issue for determination is whether the affidavit which accompanies the application complies with the requirements of Uniform rule 32(2)(b). Rule 32(2)(b) reads as follows:-

'(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and 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.'

[6] The particulars of claim consists of three claims, each claim containing a pleading in the alternative, with the second claim headed "IN THE ALTERNATIVE TO CLAIM 1" and the third claim headed "IN THE ALTERNATIVE TO CLAIMS 1 AND 2". I am required to detail the manner in which the plaintiffs have pleaded their claim/s, the relevance of which will be dealt with hereinunder.

[i] Under claim 1, it is claimed that during or about August 2021, and at Durban, the first plaintiff and the first defendant, alternatively, the third defendant, concluded an oral agreement in terms of which the first plaintiff agreed to loan and advance the sum of R750 000,00 to the first defendant, alternatively, the third defendant, and during or about September 2021 and at Durban, the first plaintiff and the second defendant, alternatively, the third defendant concluded an oral agreement in terms of which the first plaintiff

³ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

⁴ *Ibid* at 423E-F.

agreed to loan and advance the sum of R2 000 000,00 to the second defendant alternatively the third defendant;

[ii] Under the heading of claim 2, it is claimed that during or about August 2021 the second plaintiff and the first defendant, alternatively, the third defendant concluded an oral agreement in terms of which the second plaintiff agreed to loan and advance the sum of R750 000,00 to the first defendant, alternatively, the third defendant and during or about September 2021 and at Durban, the first plaintiff and the second defendant, alternatively, the third defendant, concluded an oral agreement in terms of which the first plaintiff agreed to loan and advance the sum of R2 000 000,00 to the second defendant, alternatively, the third defendant;

[iii] Under the heading of claim 3, it is claimed that during or about August 2021 the first plaintiff, alternatively, the second plaintiff and the first and third defendants concluded an oral agreement in terms of which the first plaintiff, alternatively, the second plaintiff agreed to loan and advance the sum of R750 000,00 to the first and third defendants, and during or about September 2021 and at Durban, the first plaintiff and the second and third defendants concluded an oral agreement in terms of which the first plaintiff agreed to loan and advance the sum of R2 000 000,00 to the second and third defendant.

[7] In summary, and to demonstrate the difficulty which arises from the pleadings, the plaintiffs plead that during or about August 2021, an oral agreement was concluded between the first, alternatively, the second plaintiff and the first, alternatively, the third defendant, alternatively, the first and third defendants, in terms of which the first, alternatively, the second plaintiff agreed to loan and advance the sum of R750 000 to the first, alternatively, the third defendant, alternatively, the first and the third defendants and that during or about September 2021, an oral agreement was concluded between the first plaintiff and the second, alternatively, the third defendant, alternatively, the second and the third defendants, in terms of which the first plaintiff agreed to loan and advance the sum of R2 000 000 to the second, alternatively, the third defendant, alternatively, the second and the third defendants.

[8] Whilst it is not disputed that the sum of R750 000 which forms the subject matter of the August 2021 oral agreement was earmarked for the payment of the first defendant's supplier, and that the sum of R2 000 000 which forms the subject matter of the September 2021 oral agreement, was earmarked to settle the second defendant's debt or liability to the South African Revenue Services, it is unclear from the particulars of claim, pleaded as aforementioned, which plaintiff/s concluded the August 2021 and/or the September 2021 oral agreements with which defendant/s.

[9] The affidavit in support of the application for summary judgment, deposed to by one Shalimar Rupu, goes no further to narrow the wide extent of the pleadings. Shalimar Rupu described himself as 'the nominated and appointed agent of the first plaintiff in terms of a special power of attorney signed by the first plaintiff on 23 June 2023' employed by the second plaintiff as its financial manager stated following: 'I hereby swear positively to the facts set out in the Summons and Particulars of Claim and confirm that the Defendants are indebted to the First and Second Plaintiffs in the amount and on the grounds set forth in the Summons and Particulars of Claim.'

[10] When Mr *Prinsloo*, who appeared on behalf of the plaintiffs, was asked whether it was competent to seek summary judgment in circumstances where the plaintiffs' claims are pleaded in the alternative, such as they have been, with reference to *the Cape Business Bureau (Pty) Ltd v Van Wyk and Another*⁵ he sought an opportunity to consider the judgment and deliver short supplementary heads of argument on the issue. Having received these supplementary heads of argument, they do not address the aforesaid judgment, nor do they address the competency or otherwise of summary judgment proceedings in circumstances where the plaintiff is evidently uncertain as to with which defendant it contracted.

[11] An explanation for the multitude alternative claims as contained in the pleadings was proffered in the plaintiffs in their supplementary heads of argument. Mr *Prinsloo* explained that the "particulars of claim set out three claims in the alternative, all which stem from a considered effort to employ a cautious approach to

⁵ *Cape Business Bureau (Pty) Ltd v Van Wyk and Another* 1981 (4) SA 433 (C).

pleading. This is primarily due to the oral nature of the loan agreement". The supplementary heads of argument explains further that the defendants could easily have challenged the construction placed on the loan agreement in claim 1, and all it would have taken was an allegation that, in concluding the loan agreement, the first plaintiff was not acting personally but only on behalf of the second plaintiff, hence the plaintiffs pleaded alternative constructions of the loan agreements in claims 2 and 3.

[12] Unfortunately the plaintiffs' cautious approach to pleading operate to defeat their right to sue any of the defendants for summary judgment.

[13] The plaintiffs, by way of a draft order delivered with the aforesaid supplementary heads of argument, have elected to seek judgment against the first and third defendants only, jointly and severally the one paying the other to be absolved. In support of their election, the plaintiffs seek to rely on the third claim pleaded in their particulars of claim read with the defendants plea thereto. This approach unfortunately fails to take into account the plea as a whole, wherein the defendants surprisingly admit all six variations of the loan agreement as pleaded by the plaintiffs, whilst denying that the amounts in question were transferred in terms of a loan agreement.

[14] Notwithstanding the plaintiffs' election during argument to only seek summary judgment against the first and third defendants, they are bound by the pleadings as they stand at the time of the institution of the summary judgment application read together with the allegations contained in the affidavit in support thereof. The aforementioned summary of claims pleaded by the plaintiffs demonstrate that the particulars of claim contain mutually destructive versions of the loan agreements, as not all three variations pleaded can be true and correct at the same time.

[15] It has been held in *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd*,⁶ cited with approval in this division in the unreported judgment of *Liberty Group Ltd v Sonitis and Another*,⁷ that whilst it is in order in a verifying affidavit to verify a cause

⁶ *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W) at 297C-D.

⁷ *Liberty Group Ltd v Sonitis and Another* (2013) ZAKZDHC 39 para 7.

of action based on alternative claims, it is objectionable to verify 'a cause of action based on two mutually destructive alternative versions of the cause of action'.

[16] In *Cape Business Bureau (Pty) Ltd v Van Wyk and Another*⁸ the court specifically held that if the identity of the defendant is uncertain, for example where there is more than one defendant and the plaintiff does not know which one concluded a certain contract with him, that uncertainty would operate to defeat the plaintiff's right to sue any particular one of them for summary judgment.

[17] This manner of pleading, and a subsequent application for summary judgment based thereupon, was discussed in *Barclays National Bank Ltd v Smith*⁹, where Booyesen AJ (as he then was) concluded that a summons containing alternative claims and mutually destructive allegations does not prohibit the plaintiff from applying for summary judgment on one of those claims, provided that the verifying affidavit, in order to be effective, would have to verify only those allegations which support that claim.

[18] The verifying affidavit herein does not verify only the allegations which support claim 3 as pleaded therein, but rather verifies all claims as pleaded.

[19] In *Threeball Construction (Pty) Ltd v Lipschitz*,¹⁰ the court differentiated between pleading in the alternative, and confirming claims in the alternative in the affidavit in support of summary judgment, in the following terms:¹¹

'Pleading inconsistent versions in the alternative is, of course, entirely proper. The pleader knows the limitations of the evidence available to him, and that it may be found not to go far enough to establish the *facta probanda* on which the first cause of action is based. He therefore pleads in the alternative that the available evidence is sufficient to make out a somewhat different cause of action with elements inconsistent with the cause of action first set out. The pleader's alternatives are as to the conclusions of law that are to be drawn from the available evidence.

⁸ *Cape Business Bureau* fn 5 above at 439A-B.

⁹ 1975 (4) SA 675 (D) at 682E and G.

¹⁰ *Threeball Construction (Pty) Ltd v Lipschitz* 1987 (2) SA 633 (W).

¹¹ *Ibid* at 634I-635D.

A witness is in a different position. He does not testify about conclusions of law but about facts. If he purports to testify that he met the defendant at a particular time and place and expressly agreed on a stated price, he cannot expect to be believed if he also testifies that he did not meet the defendant, and that they did not expressly agree on the stated price. That seems to me to be the effect of the affidavit filed on behalf of the plaintiff in the present matter. In the present matter it is not clear that the alternatives are complementary to each other (as they may be), and that they are not mutually destructive.'

[20] The aforesaid reasoning by the court has been held to be correct and applies equally to the present matter. Where mutually destructive versions are verified, there has not been a proper verification of the cause of action relied on 'because an essential allegation has in the same breath been verified and contradicted'¹². The deponent to the verifying affidavit confirms that the defendants are indebted to the plaintiffs "in the amount and on the grounds set forth in the Summons and Particulars of Claim" and notably does not purport to verify the allegations only in support of the claim relied upon by the plaintiffs at this stage, being claim 3.

[21] In my view, the deponent's confirmation as aforesaid renders the application defective because of the uncertainty that it creates. A similar view was taken by Wallis J in *Shackleton*¹³, as referred to more recently by Mossop J in *Sanlam Life Insurance Limited v Africhick Trading (Pty) Ltd t/a Africaz and Others*¹⁴ in dealing with a situation where it was not clear from the affidavit in support of summary judgment against which defendant summary judgment was being sought, he stated:

'... where the applicant's affidavit is confusing and does not make clear against whom judgment is being sought and on what basis, the application is defective and must fail.'

¹² *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 682G-H.

¹³ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP).

¹⁴ [2024] ZAKZDHC 12.

[22] In light of what I have stated above summary judgment cannot be granted. This is so regardless of whether or not the plea, or the affidavit opposing summary judgment, sets out a defence¹⁵ as there can be no need to consider a defence raised by a defendant if the summary judgment application is itself defective. For as Wallis J further stated in *Shackleton* and cited with approval in *Sanlam Life Insurance Limited*

'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.'

[23] I am of the view however that *ex facie* the defendants' plea, wherein all six iterations of the oral agreements pleaded by the plaintiffs are admitted, and the only defence raised pertains to whether or not such funds were transferred in terms of an oral agreement as a loan, it is evident that no substantial point of law will require determination and that the whole of the matter can be disposed of in not more than one day. Accordingly, it would be in the interests of justice to direct that, subject to the provisions of Practice Directive 21, this matter be placed on the expedited trial roll.

[24] As the plaintiffs' non-compliance with rule 32(2)(b) was not an issue raised by the defendants in their affidavit opposing summary judgment, and as it may well be that the defendants have no defence to the action, I am of the view that the usual order reserving costs for decision by the trial court is appropriate in the circumstances.

Order

[25] In the result, the order which I make is as follows:

1. The application for summary judgment is refused.
2. The defendants are granted leave to defend the action.
3. The costs of the summary judgment application are reserved for decision by the trial court.

¹⁵ *Gull Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd* 1998 (1) SA 679 (O) at 683 H *Sanlam Life Insurance Limited v Africhick Trading (Pty) Ltd t/a Africaz and Others* [2024] ZAKZDHC para 16.

4. This matter is, subject to the provisions of Practice Directive 21, to be placed on the expedited trial roll.

Case information

Date of Hearing: 19 November 2024

Date of Judgment: 05 December 2024

For plaintiffs / applicants: Adv Prinsloo

Instructed by: Eversheds Sutherland (KZN) Inc.
Plaintiffs' attorneys
1st Floor
29 Richefond Circle
Ridgeside
Umhlanga
(Ref: D Avenant/N Naidoo/MAT7878)
Tel: 031 940 0501
Email: donovanavenant@
evershedssutherland.co.za

For respondent: No appearance

Instructed by: