

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-056319

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

DATE

SIGNATURE

In the matter between:

GENCODE SOFTWARE CONSULTING CC

Plaintiff

and

PB MTHEMBI MEDICAL LABORATORY PTY LTD,

First Defendant

PHILLIP MTHEMBI

Second Defendant

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 13 March 2025

DE OLIVEIRA, AJ

Introduction

- [1] This is an application for summary judgment in which the plaintiff seeks judgment against the defendants for a reduced sum of money apparently admitted in their amended plea filed of record.
- [2] The applicant is opposed by the defendants.
- [3] On 22 August 2023, pursuant to the institution of proceedings and the subsequent delivery by the defendants of a plea, the plaintiff instituted an application for summary judgment in terms of rule 32 of the Uniform Rules of Court. Subsequent to the institution of the application for summary judgment, the defendants gave notice of their intention to amend their plea in terms of rule 28(1). No amended pages were, however, delivered pursuant to this notice of intention to amend.
- [4] Following the summary judgment application, the defendants alleged that it was delivered late, after which the plaintiff instituted a condonation application, which was granted on 1 November 2023.
- [5] Subsequently, the defendants delivered another notice of intention to amend their plea and, in due course, delivered their amended pages pursuant thereto. This had the effect of rendering the application for summary judgment, as it presently stood, academic. As a result, on or about 5 December 2023, the plaintiff instituted an application for leave to supplement its summary judgment application with the contents of a supplementary affidavit dealing with the defendants' amended plea. Whilst the defendants contend that this interlocutory application is not before me, in light of the view that I take of the matter in its entirety, I am prepared to accept that the interlocutory application is before me and that the plaintiff's summary judgment application is supplemented in accordance therewith.

The Plaintiff's Case

- [6] The plaintiff's case (as pleaded) is premised on an acknowledgement of debt concluded on 23 July 2021 between the plaintiff, on the one hand, and the defendants on the other in terms of which the defendants (the first defendant as principal debtor and the second defendant as a surety) acknowledged their

indebtedness to the plaintiff in the sum of R513 849.89. I shall refer to this acknowledgement of debt as “the second AoD”.

- [7] In terms of the second AoD, the defendants were obliged to make certain upfront, and certain monthly payments in order to reduce their indebtedness to the plaintiff. Notably, in the event of the defendants effecting the upfront payment provided for in the second AoD, their total outstanding indebtedness would be discounted. The plaintiff alleges, however, that the defendants breached the second AoD by, *inter alia*, failing to make payment of the upfront payment.
- [8] The plaintiff further alleges that, in terms of the second AoD, and in the event of breach, the total outstanding indebtedness thereunder (that is, without the offered discount), would become immediately due and payable by the defendants to the plaintiff. Notwithstanding demand, so the plaintiff alleges, the first defendant has failed to make payment of the total outstanding indebtedness to the plaintiff. It accordingly seeks judgment for the sum of R513 849.89, together with interest thereon as well as a further sum of R47 635.16, which the plaintiff claims as service fees in terms of the second AoD.
- [9] I point out that the above is a summary of the plaintiff's *pleaded* case. Its application for summary judgment, to which I will return shortly, is brought on different grounds.

The Defendants' Case

- [10] In terms of the defendants' amended plea, the validity of the second AoD is challenged on the somewhat dubious basis that it was entered into under duress. In light of the view that I take of this matter, however, and considering that the plaintiff appears to concede that this purported defence raised an issue for trial. I need not determine whether, as a matter of fact and law, the defendants' defence in relation to the second AoD is sustainable.
- [11] As an aside, the defendants also dispute the existence and validity of the plaintiff's alleged right and entitlement to the monthly service fees.

- [12] More importantly, the defendants allege that, during or about November 2017, the plaintiff quoted the first defendant for the provision and delivery of a laboratory information management system and ancillary services, which after various amendments was accepted by the first defendant. It is these services, so say the defendants, that gave rise to an earlier acknowledgement of debt, annexed to the defendants' amended plea. I shall refer to this acknowledgement of debt as "the first AoD".
- [13] In terms of the first AoD, the first defendant acknowledged itself to be indebted to the plaintiff in the sum of R349 410.00. As an aside, the defendants contend that the first AoD is inaccurate in that it did not reduce the first defendant's capital indebtedness to the plaintiff in accordance with the revisions that were made to the plaintiff's initial quotation. The actual indebtedness in terms of the first AoD, according to the defendants, was R308 940.00. No counterclaim for rectification was instituted.
- [14] The defendants plead that, whilst the validity of the second AoD is placed in issue, they did indeed make payment of the upfront payment and thereby triggered the discounted indebtedness to the capital sum of R250 000.00 (of course this contradicts their pleaded defence in relation to the second AoD).
- [15] Apart from the validity of the second AoD, the second defendant disputes that he bound himself as a surety in terms thereof because he (i) did not intend executing a suretyship in favour of the plaintiff (ii) the single clause purporting to impose surety liability on the second defendant was not signed or initialled by him and (iii) such clause was not acknowledged by the second defendant in any way or form. Furthermore, so the second defendant points out, the second AoD does not, at the signature page, provide for signature by a purported surety, but rather only by a "debtor". Accordingly, the second defendant contends that he did not sign the second AoD as a surety, but rather in his capacity as a director of the first defendant.
- [16] The defendants go on to dispute the quantum claimed by the plaintiff on the basis of various payments effected by the defendants to the plaintiff between February 2018 and February 2023. As a consequence of the payments effected by the

defendants to the plaintiff, they plead that the maximum true outstanding amount that may be due to the plaintiff is an amount of R53 415.08 (“the first admitted amount”). This is the difference between the true outstanding amount¹ and the amounts that the defendants say they paid to the plaintiff. Alternatively, the defendants say that the maximum sum for which they may be liable is R92 885.08 (“the second admitted amount”), which is the difference between the payments made by the defendants to the plaintiff and the amount of the indebtedness as actually reflected in the (un-rectified) first AoD.

Analysis

- [17] The plaintiff’s approach to the matter is rather peculiar but not surprising: it effectively concedes that the defences raise triable issues, chooses not to deal therewith in its application for summary judgment (despite being obliged to do so in terms of rule 32) and applies for summary judgment in either the first or second admitted amount, with the remainder of the matter to be tried in due course.
- [18] Unsatisfactory as my view may seem, including to myself, I do not consider the plaintiff’s approach to the matter to be competent. I am not told, for example, in terms of precisely what I would be granting summary judgment or what binding effect, if any, my judgment would have on a trial court in due course. By way of example, when I put to Ms. Van Niekerk, who appeared before me on behalf of the plaintiff, what interest rate would be applicable, she argued that either the rate provided for in the first AoD should apply (which would presuppose the existence and validity of the first AoD), or that the rate prescribed by law should apply. Both submissions appear to me to be equally unconvincing, however: on the one hand, granting judgment for, *inter alia*, the interest rate provided for in the first AoD, as already mentioned, presupposes its validity and may have the effect of waiving the plaintiff’s rights to continue with its case on the second AoD. On the other, the interest rate prescribed by law applies in instances where the parties have *not* agreed to an interest rate *inter partes*, whereas *in casu* the plaintiff itself contends that the parties did precisely this.

¹ See para 13 above.

[19] This is not to mention that, in terms of the first AoD, the second defendant is not cited as a surety, as a result of which Ms. Van Niekerk was constrained to ask me to grant judgment against the first defendant only.

[20] I agree with Ms. Mouton, who appeared before me on behalf of the defendants,² that what the plaintiff seeks to do is incompetent in terms of rule 32. In this regard, Ms. Mouton points out that judgment was initially sought by the plaintiff in terms of the second AoD. Whilst the defendants may, on the face of it, concede a certain liability to the plaintiff, they do so in terms of the first AoD. In essence, therefore, and despite its pleaded case, the plaintiff now claims summary judgment on the basis of the first AoD. This AoD is, however, not the cause of action that is verified by the plaintiff in its application for summary judgment, i.e., it is not the cause of action upon which the plaintiff's claim against the defendant is based.

[21] As Ms. Mouton further submitted, the second AoD contains a standard non-variation clause, which the plaintiff must, I suspect, concede precludes reliance on a prior acknowledgement of debt, at least in so far as it pertains to the same underlying *causa*. In essence, therefore, the plaintiff in this summary judgment application seeks to rely on a claim based on a separate cause of action, which it has not pleaded or verified in terms of rule 32.

[22] Notwithstanding that the second AoD is disputed by the defendants, and specifically the suretyship by the second defendant, the plaintiff nonetheless seeks judgment for what it perceives to be an admitted amount against both defendants.³ In my view, the plaintiff cannot simply abandon the cause of action as pleaded by it, and rely on a perceived acknowledgment of indebtedness in the defendants' plea, but still seek to hold both defendants jointly and severally liable for the alleged indebtedness owing to the plaintiff in terms of the second AoD.

[23] I accordingly agree with the defendants that:

² The heads of argument being drawn by Ms. K Howard.

³ Subject to Ms. Van Niekerk's concession when I debated para [19] above with her.

- (a) the plaintiff has not addressed the defendants' plea insofar as it relates to the second AoD at all;
- (b) the plea raised against the second AoD has been ignored in its entirety; and
- (c) the plaintiff has not sought to persuade me that the amended plea does not raise an issue for trial (which, on the face of it, appears to be the case).

[24] On the contrary, the plaintiff appears to concede that the amended plea raises certain triable issues in that, in its own affidavit in support of the summary judgment application, the plaintiff concedes that "...defendants only have a defence to a portion of the plaintiffs action." By making such a statement, the plaintiff concedes that it believes that the defendants in fact have a valid defence on the remainder of the plaintiff's claim, which relates exclusively to the second AoD, being the plaintiff's cause of action as pleaded. On this score, Ms. Mouton pointed out, correctly so, that in order to comply with rule 32(2)(b), the affidavit must contain a brief explanation as to why the defence does not raise any issue for trial. This the plaintiff neglected to do.⁴

[25] The outcome of this application appears, from a lay perspective at least, to result in an injustice. When I asked Ms. Mouton why the defendants have not simply paid their admitted indebtedness to the plaintiff, she was unable to answer. Whilst I find the defendants' conduct in not paying an admitted debt deplorable,⁵ I feel that I am constrained by the peculiar facts of this matter.

[26] I reluctantly find that the summary judgment application falls to be refused. In the circumstances, I make the following order;

- (a) The summary judgement application is dismissed.
- (b) The defendants are granted leave to defend the plaintiff's action.

⁴ In *Cohen NO v D* (unreported SCA case number 368/2022 dated 20 April 2023), the Supreme Court of Appeal held that the requirements of rule 32(2)(b) are peremptory. See also *Standard Bank v Rahme* and similar cases (unreported GJ, 17/46904; 27740/2018; 27741/2018; 3765/2019; 11912/2018 dated 3 September 2019) at [8].

⁵ And which may give rise to other remedies in law.

- (c) The costs of the application for summary judgment shall be costs in the cause of the main action.

A handwritten signature in black ink, appearing to be 'A', is written over a solid black rectangular redaction box. The signature is positioned above a horizontal line.

DE OLIVEIRA AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Counsel for the Plaintiff:

Adv. P Van Niekerk

Instructed by:

Munthali Mojapelo Attorneys

Counsel for the Defendants:

Ms. Mouton (Attorney)

Instructed by:

Vermeulen Attorneys

