IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not Reportable

Case no: **3369/2024**

In the matter between:

IDWALA INDUSTRIAL HOLDINGS PROPRIETARY LIMITED	Plaintiff
and	
JB LIME DISTIBUTORS PROPRIETARY LIMITED	Defendant

Coram: De Kock AJ

Heard: 25 February 2025

Delivered: 11 March 2025 This judgment was handed down in court and electronically by circulation to the parties' representatives by email and released to SAFLII.

Summary: Leave to file – supplementary affidavit to summary judgment – technical defences must not frustrate the purpose of summary judgement applications. Summary judgement was refused because of the existence of *bona fide* defences.

ORDER

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The cost of the summary judgment application and the cost of the application for leave to file a supplementary affidavit shall be cost in the cause.

JUDGMENT

De Kock AJ

Introduction:

[1] The plaintiff, who issued summons on 21 June 2024, applies for summary judgment against the defendant in respect of four claims contained in the plaintiff's particulars of claim. After service of the summons, the defendant gave notice of intention to defend and later pleaded, albeit under the notice of bar. The plaintiff then applied for summary judgment.

[2] The defendant opposed the application for summary judgment attaching thereto an intended amended plea. The amendment was effected and the amended plea now serves before me. This led to the plaintiff issuing an application seeking leave to file a supplementary affidavit in support of its application for summary judgment, whereupon the defendant consequently filed a supplementary summary judgment opposing affidavit.

[3] Claim 1 is based on an outstanding balance under an acknowledgement of debt, termed 'the October 2019 acknowledgment of debt' and is certified by way of a certificate of balance. Claim 2 is based on outstanding balance under an

acknowledgment of debt, termed 'the July 2020 acknowledgment of debt' and is certified by way of a certificate of balance. Claim 3 is for products sold and delivered at the defendant's special instance and request and lastly, claim 4 is based on stock not returned when the consignment agreement was cancelled.

Averments contained in the pleadings and affidavits:

[4] In the particulars of claim, the plaintiff claims an amount of R794,837.93 in respect of claim 1. The plaintiff relies on the following averments in its particulars of claim in support of claim 1:

'4.1 On or about 8 July 2018 the plaintiff and the defendant entered into a written consignment agreement.

4.2 In terms of the consignment agreement:

4.2.1 the plaintiff appointed the defendant as a non-exclusive distributor of the product;

4.2.2 the defendant would place purchase orders with the plaintiff in respect of the supply of the product, which purchase orders will form part of the consignment agreement;

4.2.3 the plaintiff would ensure that the product meets the specifications and/or standards with which the product must comply and that the required volumes of the product are delivered to the defendant as per the requirements communicated to the plaintiff in the purchase orders;

4.2.4 the defendant would promptly upon delivery of the product at the premises inspect the product as to the quality and quantity in respect of the specifications;

4.2.5 on or before the last day of every month, the defendant shall submit a written report to the plaintiff specifying the quantity of the product that it has consumed or sold. On receipt of this report the plaintiff would issue an invoice to the defendant in respect of the product so consumed or sold, which invoice would become due and payable thirty days after receipt thereof by the defendant.

4.3 The defendant did not comply with all its obligations in terms of the consignment agreement in that it failed to make payment of all amounts due, owing and payable by it to the plaintiff.

4.4 On or about 20 April 2019 the plaintiff and the defendant entered into a written settlement agreement the purpose of which was to confirm the outstanding amounts owing to one another in terms of various written and oral agreements, concluded between them.

4.5 In terms of the settlement agreement the parties agreed the defendant is indebted to the plaintiff for an amount of R906,292.80 which amount would be discharged by the defendant by paying to the plaintiff an additional R120.47 per ton for 7 000 tons of product sold by the defendant.

4.6 On or about 16 October 2019 the parties entered into a written addendum to the settlement agreement, the purpose of which was to clarify certain portions of the settlement agreement.

4.7 On 16 October 2019 the parties also entered into a written agreement, the October 2019 acknowledgment of debt.

4.8 In terms of the acknowledgment of debt the balance of the first capital sum of R1,864.225.94 would be paid by way of *inter alia*, instalments equal to R100.00 per ton of product sold by the defendant equating to 8 640 tons of product on or before 31 December 2020.

4.9 On or about 27 July 2020 the parties entered into a written addendum to the October 2019 acknowledgment of debt.

4.10 On 11 March 2021 the parties entered into a second written addendum to the October 2019 acknowledgment of debt.

4.11 On 19 January 2023 the parties entered into a third written addendum to the October 2019 acknowledgment of debt. The payment terms in respect of the R1,864,225.94, i.e. the first indebtedness, was amended to read 'payment from 1 October 2022 of the balance of R1,864,000.00 by way of instalments equal to R150.00 per ton of KuluPrill product sold by the defendant on or before 31 December 2023.

4.12 By 31 December 2023 the defendant had managed to sell sufficient product to ensure that R1,069,388.01 of the first indebtedness had been repaid, but the defendant failed to make payment of the balance amounting to R794,837.93.

4.13 The plaintiff claims an amount of R3,021,708.00 in respect of claim 2.

4.14 The plaintiff relies on the following averments in its particulars of claim in support of claim 2:

4.14.1 During the period 1 October 2019 to 28 February 2020 the defendant continued to purchased products from the plaintiff in terms of the consignment agreement.

4.14.2 By 31 March 2020 the defendant was indebted to the plaintiff for product sold and delivered in the amount of R3,021,708.00.

4.14.3 On 27 July 2020 the parties entered into a written agreement termed 'the 2020 acknowledgment of debt'.

4.15 In terms of the July 2020 acknowledgment of debt the defendant acknowledged that it was indebted to the plaintiff in the sum of R3,021,708.00, the second capital sum.

4.16 The second capital sum would be settled by way of *inter alia* instalments equal to R100.00 per ton of product sold by the defendant on or before 31 December 2022.

4.17 The defendant acknowledged that the arrangement entered into in terms of the July 2020 acknowledgment of debt was premised on the condition that the defendant enters into an exclusive distribution agreement in terms of which the defendant agrees to distribute KuluPrill products produced by the plaintiff for a commission.

4.18 On 19 January 2023 the parties entered into a written addendum to the July 2020 acknowledgment of debt in terms of which the second capital sum would be settled by way of instalments equal to R150.00 per ton of KuluPrill product sold by the defendant on or before 31 December 2023.

4.19 By 31 December 2023 the defendant had not sold any products, resulting in no portion of the second capital sum being repaid.

4.20 The plaintiff claims an amount of R1,448.725.21 in respect of claim 3.

4.21 In support of claim 3 the plaintiff avers that during the period of 1 April 2020 to 31 March 2023 the defendant continued to purchase products from the plaintiff in terms of the consignment agreement.

4.22 The plaintiff claims an amount of R364,845.98 in respect of claim 4.

4.23 In support of claim 4 the plaintiff alleges that after the termination of the consignment agreement, the final stock count revealed stock shortages and that the plaintiff issued the defendant with an invoice for R364,845.98, being the value of the products that remain unaccounted for by the defendant.'

[5] The defendant relies on, *inter alia*, the following averments in its amended plea in support of its defence to claim 1:

'5.1 the plaintiff breached the terms and conditions of the consignment agreement in that the plaintiff delivered products of poor quality to the defendant which did not meet the specifications and/or standards with which the products had to comply;

5.2 the plaintiff also breached the terms and conditions of the consignment agreement in that the plaintiff failed to deliver generation 1 granular lime to the defendant as was specified and/or ordered;

5.3 the plaintiff allowed its agents to solicit clients of the defendant to the detriment of the defendant;

5.4 in terms of the acknowledgment of debt the amounts due to the plaintiff would have been paid through the sale of products of the plaintiff;

5.5 it was an express, alternatively implied, alternatively tacit term of the acknowledgment of debt that the plaintiff would deliver products of good quality to defendant;

5.6 the plaintiff breached the terms and conditions of the acknowledgment of debt in that the plaintiff delivered defective goods of poor quality to the defendant which caused the defendant to lose customers and sales which had a detrimental effect on the income of the defendant;

5.7 the plaintiff's obligation to deliver products of good quality to the defendant was reciprocal to the defendant's obligation to make payment to the plaintiff;

5.8 because the obligations of the parties were reciprocal, there was no obligation on the defendant to pay the plaintiff as the plaintiff failed to perform its obligations.'

[6] The defendant relies on *inter alia* the following averments in its amended plea in support of its defence to claim 2:

'6.1 the plaintiff breached its obligations in terms of the July 2020 acknowledgment of debt in that the plaintiff delivered products of poor quality to the defendant and allowed its agents to solicit the customers of the defendant and to unlawfully compete with the defendant;

6.2 in terms of the acknowledgment of debt the amount due to the plaintiff would have been paid through the sale of KuluPrill product;

6.3 it was an express, alternatively implied alternatively tacit term of the acknowledgment of debt, as amended, that the plaintiff will deliver products of good quality to the defendant;

6.4 the plaintiff breached the terms and conditions of the acknowledgment of debt as amended in that the plaintiff delivered defective goods of poor quality to the defendant which caused the defendant to lose customers and sales which had a detrimental effect on the income of the defendant;

6.5 the plaintiff's obligation to deliver products of good quality to the defendant was reciprocal to the defendant's obligation to make payment to the plaintiff and the defendant is therefore excused from making payment to the plaintiff due to the plaintiff's breach.'

[7] The defendant denies in terms of its amended plea being indebted to the plaintiff in respect of claim 3, but relies, *inter alia*, on the following averments in support of its defence to claim 4:

'7.1 the plaintiff was required to conduct stock counts, which the plaintiff failed to do;

7.2 the defendant denies that stock shortages as alleged by the plaintiff;

7.3 the defendant denies being indebted to the plaintiff in the amount claimed or any other amount at all in respect of any alleged stock shortages.'

[8] In the opposing affidavit the defendant raised the point *in limine* that the

plaintiff's application for summary judgment is defective because the plaintiff failed to annex a copy of the liquid document to the affidavit despite stating that its claim is based on a liquid document. The plaintiff annexed the liquid documents to its supplementary affidavit. Thereafter, the defendant further raised a second point *in limine* indicating that the plaintiff did not comply with the provisions of rule 32(2)*(b)* in that the plaintiff only verified one cause of action.

[9] The defendant, in its opposing affidavit in respect of claim 3, avers that it denies being indebted to the plaintiff in the amount claimed and in support of such denial, the defendant relies on the fact that it was excused from making payment to the plaintiff because of the plaintiff's breach of the consignment agreement. The plaintiff breached the consignment agreement in that it delivered products of poor quality to the defendant. The plaintiff, furthermore, allowed its agents to unlawfully compete with the defendant.

[10] The plaintiff, in its supplementary affidavit, averred that the October 2019 acknowledgment of debt had no express, implied or tacit terms relating to the obligation that the it should deliver products of good quality to the defendant. The plaintiff repeated the latter averments pertaining to claim 2. It further averred that prior to the filing of the amended plea, the defendant has never advised it that its inspection of the product revealed that the product did not comply with the quality and quantity in respect of specifications. The plaintiff, also in its supplementary affidavit, averred that it had the right to conduct physical stock counts of the product and that it was not an obligation of the plaintiff to do so.

[11] The defendant in the supplementary opposing affidavit avers that the deponent to the opposing affidavit reported the defects as indicated in the amended plea and the opposing affidavit to the representatives of the plaintiff on numerous occasions. The defendant further in its supplementary opposing affidavit, averred that the plaintiff's allegation that the acknowledgment of debt contained no express, implied or tacit terms relating to the obligation that the plaintiff should deliver products of good quality to the defendant, is shocking. The plaintiff, being the manufacturer and/or supplier of the products, had the duty to deliver products of

good quality to the defendant. The duty was even more applicable in that the defendant would repay the amounts due to the plaintiff by way of sale of products. Therefore, the defendant's obligation to pay was reciprocal to the plaintiff's obligation to deliver products of good quality.

The law:

[12] In *SA Taxi Development Finance (Pty) Ltd v Mako*[1] the court held that on the facts, it was not only permitted, but compelled to file a supplementary affidavit.[2] This was based on the view that the court must be satisfied that each of the requirements in rule 32(2)*(b)* has been fulfilled before it can hold proper compliance with the subrule.[3]

[13] In *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another*[4] the court held:

'[18] In the case of the amendment of the plea after the filing of summary judgment application, the plaintiff is decidedly 'a party affected' by the amendment. Thus, the provisions of the rule 28(8) apply to it and so affords it the right to adjust the founding affidavit without leave, provided the adjudgment is consequential. The consequential adjustment in this instance would be the amendment of the affidavit filed in terms of rule 32(2)(a) to take account of the amendment. I do not read rule 32(4) to preclude such an adjustment.

[19] As long as the adjustment is strictly consequential on the amendment, there is, to my mind, no reason why the affidavit, although supplemented, should not be read to conform to the description of subrule (2)(a) affidavit, the purpose of which is to provide information as to the plaintiff's case in a way that "explain(s) briefly why the defence pleaded does not raise any issue for trial."'

In *WM Mentz and Seuns (Edms) Bpk v Katzake*[5] (*Mentz*) the court held to give effect to purely technical defences in an application for summary judgment would frustrate

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[1] *SA Taxi Development Finance (Pty) Ltd v Mako* [2022] ZAGPJHC 839.

[2] Ibid para 16.

[3] *Mpfuni v Segwapa Inc and Another* [2022] ZAGPJHC 181 paras 5-6.

[4] *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another* [2022] ZAGPJHC 81; 2022 (3) SA 458 (GJ).

[5] *WM Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 311.

the purpose of rule 32. In *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of South Africa Ltd*[6] (*Mowschenson*) the Court held that '[i]f 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.'[7]

[14] In *Van den Berg v Wiener*[8] the full bench endorsed the view of Boshoff J in *Mentz* that the passage in *Mowschenson* was never intended to allow a defendant to raise any technical point, no matter how insignificant, and thereby defeat the granting of summary judgment. It was never the intention to give weight to purely technical defences because that would defeat the object of summary judgment proceedings.

[15] A tacit term or term inferred from the facts was described in *McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*[9] to be the following:

'. . . an unexpressed provision of the contract which derives from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances.'[10]

In *Adhu Investments CC v Padayachee*[11] it was held that '[a] sole testimonial clause or non-variation clause does not necessarily of itself exclude the existence of a tacit term.'[12]

[16] In *Maharaj v Barclays National Bank Ltd*[13] it was held:

'All that a court enquires into is:

(a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded 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 both *bona fide* and good in law.'[14]

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[6] *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of South Africa Ltd* 1959 (3) SA 362 (W).
[7] Ibid at 366F.
[8] *Van den Berg v Wiener* 1976 (2) SA 297 (T) at 300B-C.
[9] *McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).
[10] Ibid 531-532.
[11] *Adhu Investments CC v Padayachee* [2019] ZASCA 63 (SCA).
[12] Ibid para 17.
[13] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).
[14] Ibid at 426.

Similarly, it was held in *Breitenbach v FIAT SA (Edms) Bpk*[15] that:

'Another provision of the subrule which causes difficulty, is the requirement that in the defendant's affidavit the nature and grounds of his defence and the material facts relied upon therefore are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant a duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim in a trial. It is inconceivable, however, that the draughtsman of the rule intended to place that burden upon the defendant. I respectfully agree subject to one addition with the suggestion by Miller J in *Shepstone v Shepstone* 1974 (2) SA 462 (N) at pp. 466 – 467 that the word 'fully' should not be given its literal meaning in rule 32(3) and that no more is called for than that the statement of the material facts be sufficiently full 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.'[16]

Evaluation and analysis:

[17] During the hearing of the application for summary judgment I granted the plaintiff leave to file its supplementary affidavit. I did so in line with the authority quoted *supra*. It is in the interest of justice to permit the plaintiff to file its supplementary affidavit, and the defendant is by no means prejudiced, as the defendant filed an opposing affidavit to the plaintiff's supplementary affidavit.

[18] In line with the authorities quoted *supra*, my considered view is that the application for summary judgment ought not to be dismissed based on the points *in limine* raised. The defendant suffers no prejudice by virtue of the plaintiff's failure to expressly confirm all four agreements. It is quite clear from a reading of the initial affidavit in support of the application for summary judgment that the plaintiff seeks summary judgment against the defendant in respect of all four of the claims pleaded in the particulars of claim. The defendant had an opportunity, and in fact, dealt with its alleged defences pertaining to all four claims in the plea, amended plea and supplementary opposing affidavit. I, therefore, condone the plaintiff's non-compliance with rule 32 in this respect. The plaintiff was not permitted to annex the liquid documents to its supplementary affidavit, as it does not constitute consequential amendments. The plaintiff's application for summary judgement is, however, not only

[15] *Breitenbach v FIAT SA (Edms) Bpk* 1976 (2) SA 226 (T).
[16] Ibid at 228.

based on the existence of liquid documents, but also the assertion that the claims are for liquidated amounts.

[19] The defendant submitted that, in terms of the October 2019 acknowledgement of debt and the July 2020 acknowledgment of debt, and addendums thereto, that the amounts indicated therein would be paid through the sale of goods delivered to the defendant by the plaintiff. It was submitted that, therefore, it was an express, alternatively implied, alternatively tacit term and condition of the acknowledgments of debts and addendums thereto that the plaintiff will deliver products of good quality to the defendant so that the defendant could make payment in terms thereof. It was submitted that the defendant was accordingly excused from making payment to the plaintiff in that the obligation to deliver products of good quality to the defendant was reciprocal to the defendant's obligation to make payment to the plaintiff.

[20] The acknowledgments of debts do not contain express terms that products of good quality will be delivered and that the defendant's obligation to pay is bound to the delivery of good quality products. I further noted that both the acknowledgments of debts contain non-variation clauses. The authority referred to herein, however, dictates that it is possible for a tacit term, in my view, evenly an implied term, to exist regardless of the non-variation clause. Both the acknowledgements of debts were concluded with due refence to the consignment agreement which expressly provides in clause 5.2 that the plaintiff shall ensure that the product meets the specifications and that the required volume of the product is delivered to the premises as per the requirements communicated to the plaintiff in the purchase orders. I am persuaded, with due regard to the content of the consignment agreement, content of the acknowledgements of debts and surrounding circumstances, that the defendant has a *bona fide* defence with its averments that it was an implied, alternatively tacit, term and condition of the acknowledgments of debts and addendums thereto that the plaintiff will deliver products of good quality to the defendant so that the defendant could make payment in terms thereof and that the defendant is excused from making payment in that goods of poor quality were delivered. I am persuaded that that the defendant fully disclosed the nature, grounds and material facts upon which its *bona*

fide defence is based. The defendant did not merely aver that products of poor quality were delivered, it is averred that the goods that were delivered was substantially below the required IS09001 and IS014001 standard as required for products, and that the plaintiff failed to deliver generation 1 granular lime to the defendant as was specified and/or ordered. Chunks and/or powder were delivered which was a clear indication that the product was old.

[21] The defendant is only required to plead the *facta probanda* and not the *facta probantia*. It is my considered view that, at this stage, the defendant does not need to prove that it, in fact, reported the defects as indicated in the amended plea and the opposing affidavit to the representative of the plaintiff and also not any documents supporting its *bona fide* defence. I therefore find that in respect of claims 1 and 2, the averments contained in the amended plea read with the opposing affidavit and the supplementary opposing affidavit raises issues which are fit for trial.

[22] The consignment agreement as already stated herein expressly in clause 5.2 determines that the plaintiff shall ensure that the product meets the specifications and that the required volume of the product is delivered to the premises as per the requirements communicated to the plaintiff in the purchase orders. I consequently find that the defendant in respect of claim 3 has a *bona fide* defence.

[23] In respect of claim 4, the defendant's *bona fide* defence is based thereon that there were no stock shortages, and the defendant is consequently not indebted to the plaintiff. In my considered view, the denial of stock shortages is an issue which is fit for trial and thus the defendant disclosed a *bona fide* defence in respect of claim 4.

[24] In terms of rule 32(9), the court may make such order as to costs as it deems just. The usual order is costs in the cause. I find no reason to deviate from the usual cost order.

Orders:

[25] In the result the following orders are granted:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.

3. The cost of the summary judgment application and the cost of the application for leave to file a supplementary affidavit shall be cost in the cause.

[redacted]

De Kock AJ

Appearances for the plaintiff:

J.W. Steyn

Instructed by:

NLA Legal Inc, c/o E G Cooper Majiedt Inc.

Appearances for the defendant:

J Els

Instructed by:

Harrington Attorneys, c/o Blair Attorneys.