

SOUTH AFRICA / JUDGMENT

ACDC Dynamics (Pty) Ltd v Elucidation Pro (Pty) Ltd (2022/032799) [2024] ZAGPPHC 963 (2 October 2024) [2024] ZAGPPHC 963

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Merwe

CASE / FILE NUMBER

2022/032799

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: 2022/032799

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

2 October 2024

In the matter between:

AC-DC DYNAMICS (PTY)
LTD
APPLICANT / PLAINTIFF
and
ELUCIDATION PRO (PTY)
LTD
FIRST RESPONDENT /
DEFENDANT
SHERI-LEE
KRIEL
SECOND
RESPONDENT / DEFENDANT
CHRISTIAAN
JACOBUS RABIE
THIRD

RESPONDENT / DEFENDANT

SURIA

RABIE

FOURTH

RESPONDENT / DEFENDANT

This judgment has been handed down electronically by circulation to the parties / legal representatives by email and uploaded to an electronic file of this matter on Caselines. This judgment is deemed to have been delivered on the 2nd day of October 2024 at 10h00.

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. The plaintiff and the first defendant concluded an agreement in terms of which the plaintiff will supply goods to the first defendant from time to time (“the agreement”).
2. The second to fourth defendants bound themselves as sureties and co- principal debtors to the first defendant’s obligations in terms of the agreement. The defendants having failed to make payment in terms of their contractual obligations, the plaintiff instituted an action for payment in the amount of R10,568,44.07, the quantum of which was determined by a certificate of balance, provided for in the agreement.
3. The first and second defendants served a plea on 12 December 2022 and the third and fourth defendants served a plea on 13 December 2022.
4. The plaintiff then subsequently applied for summary judgment against the defendants.
5. The application for summary judgment against the third and fourth defendants is to be postponed by agreement between the parties. The matter then only proceeded against the first and second defendants.
6. At the commencement of the hearing, the counsel on behalf of the Second and Third Defendants attempted to argue an application for postponement, as he contended that the matter was not to be dealt with piecemeal. I did not agree.

COMMON CAUSE FACTS

7. The plaintiff and the first defendant (the principal debtor) concluded the written agreement in terms of which the plaintiff was to supply goods to the first defendant from time to time.

8. The agreement contained a provision which provides that a certificate of balance signed by the plaintiff's manager shall constitute prima facie proof of the amount owing.
9. The second, third and fourth defendants signed a deed of suretyship on 9 October 2018 in favour of the plaintiff wherein they bound themselves as sureties and co-principal debtors for the first defendant's obligations owing in terms of the agreement with the plaintiff.
10. The plaintiff provided goods to the first defendant, whereupon the plaintiff issued a certificate of balance which indicates its outstanding indebtedness to be R10,568,44.07. Despite demand, the defendants have failed to make any payment towards the plaintiff.

ISSUES REQUIRING

DETERMINATION

11. The principal issues that require determination in respect of the first and second defendants are as follows:
 1. Whether the deponent to the verifying affidavit has sufficient personal knowledge to depose to the affidavit;
 2. Whether the first and second defendants' defence of non-joinder constitutes a bona fide defence and whether it is also good in law based on the facts relied upon by the defendants;
 3. Whether the first and second defendants' defence of prescription constitutes a bona fide defence.

FIRST AND SECOND DEFENDANTS' POINTS IN LIMINE

12. The defendants raised several points in limine in respect of the application for summary judgment, they are as follows:
 1. The defendants contend that the deponent to the verifying affidavit did not indicate on what basis he has personal knowledge as to swear positively to the facts of the matter.
 2. The defendant avers that the summary judgment should be refused as the plaintiff verified the cause of action (singular) as opposed to causes of action (plural).
 3. The defendants contend that the plaintiff failed to comply with rule 32(2)(b) by not identifying the points in law that it intends relying on and the plaintiff failed to set out the facts upon which plaintiff's claim is based.

DEFENCES RAISED BY THE DEFENDANT

Non joinder

13. The defendants raise the defence of non-joinder. In support of the defence, they contend that the first defendant concluded an agreement with ACDC Express Franchising CC (the franchising CC) and that the latter did not comply with the agreement. The defendants' defence on the merits relies on a franchise agreement that they concluded with the franchising CC (the franchise

agreement). According to the defendants the franchise agreement forms part of the agreement that serves as the plaintiff's cause of action in these proceedings.

14. The defendants averred that certain payments had to be made by them to the franchise CC. The franchising CC breached the franchise agreement in that it failed to account to the first defendant, and seemingly charged the first defendant double for goods sold and delivered. It allocated payments made by the first defendant to the plaintiff and had failed to deliver certain goods. The defendants allege that the terms of the agreement goes to the crux of the plaintiff's alleged cause of action.

Prescription

15. The defendants contend that the claim against the first defendant has prescribed. The special plea is vague in this regard. In the defendant's answering affidavit they indicate that the principal agreement was concluded during 2018 already and that the current claim was instituted during 2022, but it was never served on the defendants.

LEGAL PRINCIPLES

Summary Judgment and bona fide Defence

16. An applicant for summary judgment is entitled to rely on a plea and consider whether or not to launch an application for summary

judgment.

Where a defendant has failed to disclose a defence in its plea, a plaintiff would be entitled to the relief sought in its claim.[1] Rule 32(3) of the Uniform Rules of Court states as follows:

"The defendant may –

- (a) give security to the plaintiff to the satisfaction of the registrar or clerk of the court of any judgment including costs which may be given; or
- (b) satisfy the court by affidavit (which shall be delivered 5 days before the day on which the application is to be heard) or with leave of the court, by all evidence of himself or herself or any other person who can swear positively to the facts that the defendant has a bona fide defence to the action, and as such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore. One of the things clearly required by defendant by the aforementioned rules is that it needs to set out in its affidavit the facts which, if proven at trial will constitute an answer to the plaintiff's claim. If

it does not do so it could hardly satisfy the court that it has a defence.[2]

17. Moorcroft AJ in the unreported judgment of Vukile Property Fund Ltd v True Ruby Trading 1002 (CC) t/a Postnet and another case number 2020/9705 it was held that the defendant who realises that the defences raised in its affidavit resisting summary judgment go beyond its plea that it should seek to address the deficiency by seeking first to amend its plea so that the plea, once amended were relying on its affidavit resisting summary judgment. Rule 32 does not empower a defendant at any stage amending its plea including after summary judgment proceedings have been launched, but at least before the hearing thereof. Should the defendant leave the plea unamended this may be a lack of good faith for serious intent on the part of the defendant to advance the defence as a triable issue.
18. As stated in Vukile Property Fund supra at paragraph 10 Moorcroft J explained that there must be an explanation by the defendant for the inconsistency between the plea and the affidavit resisting summary judgment if the court is to find that the defendant is bona fide in defending the action. In Nedbank Ltd v Uphuliso Investments and Projects (Pty) Ltd [2022] 4 All SA 827 (GJ) (22 September 2022) at paragraph 37 the following was held:

“The defendants cannot now impermissibly advance defences in opposing summary judgment proceedings that were not raised in the plea to permit them to do so, for the reasons described above, would undermine the amended summary judgment procedure and prejudices the plaintiff that was not entitled to deal with those defences in its supporting affidavit.”

19. The defendant is not permitted to raise a pure technical defence on summary judgment.[3]

POINTS IN LIMINE

First point in limine: Lack of personal knowledge

20. Subrule 2(a) contemplates the affidavit being made by the plaintiff himself or by any other person “who can swear positively to the facts”. In the latter event, such person’s ability to swear positively to the facts is essential to the effectiveness of the affidavit that opposes the summary judgment and a court entertaining the application therefore must be satisfied, prima facie the deponent is such a person. Generally speaking, before a person can swear positively to the

facts

in legal proceedings it must be within their personal knowledge.”[4]

21. In the matter of Reece v Investec Bank Ltd 2014 (4) SA 220 (SCA) at 221I the deponent to the affidavit was found to have sufficient personal knowledge. It was decided that the contract document on which the claim was based had been annexed to the summons and that the deponent appeared to have had access to all other documentation in the ordinary course of their duties and would demonstrate that the deponent has sufficient personal knowledge of the matter to depose to the affidavit. In the current matter, the deponent to the affidavit is

the Chief Financial Officer of the plaintiff who states that the contents of the affidavit are within his personal knowledge. It must also be stated that the certificate of balance must also be signed to the deponent of the affidavit. The certificate of balance is attached as annexure “POC” to the affidavit in support of summary judgment. I do not agree with the defendants’ contention that the deponent to the affidavit lacks the required personal knowledge and would not be entitled to depose to the affidavit.

22. The defendants’ reliance on the matter of Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2020

(5) SA 112 is misplaced and supports my view.

SECOND POINT IN LIMINE

23. The defendants allege that the applicant’s claims are based on different causes of action, namely:

(i) The breach of an alleged trading facilities application, conditions of sale and tender, alternatively

(ii) Breach of the alleged deed of suretyship; alternatively

(iii) The breach of a credit increase application.

24. It is averred by the defendants that the deponent to the affidavit supporting summary judgment only verifies the cause of action (singular) and not the causes of action (plural). The defendants contend that there is not a single cause of action, but rather that there are various agreements constituting different causes of action upon which the applicant’s alleged claim is based. During argument, the defendants’ counsel submitted that each suretyship represents a separate cause of action. I did not understand this contention and I was not referred to any authority supporting this argument.

25. In my understanding of the plaintiff’s cause of action, which is largely common cause between the parties, is that the claim is based on a written agreement entered into by the first defendant duly represented by the second defendant. The agreement is attached to the particulars of claim as annexure POC2.

26. I do not agree with the defendant’s contention that every deed of suretyship and the credit increase application represents a separate cause of action. The defendants’ contention in this regard is misplaced and not supported by any authority. I therefore find that this point in limine should also not be upheld.

THIRD POINT IN LIMINE

27. The defendants contend that the applicant has failed to comply with the provisions of rule 32(2)(b) as the plaintiff did not identify the points in law that it intends relying on and the plaintiff failed to set out the facts upon which the plaintiff's claim is based. The defendants rely on the matter of Itumeleng Trading CC v National Security and Fire (Pty) Ltd supra paragraph 22 thereof:

"[22] What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a "formulaic" supporting affidavit from the plaintiff. The plaintiff is now required to engaged with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay."

28. It is alleged by the defendant that the applicant ignores the various triable issues raised by the first and second defendants. I cannot agree with the defendants in this regard. The plaintiff comprehensively addressed each of the defences separately setting out both facts and points in law as to why the respective defences are legally flawed or not raised in good faith. I therefore cannot agree with the defendants that the plaintiff's affidavit is not in compliance with the provisions of the rules.
29. This point in limine should also be dismissed.
30. I will now discuss the defences raised by the defendants.

NON-JOINDER

31. The defendants raise the issue of non-joinder and in support they contend that the first defendant concluded an agreement with ACDC Express Franchising CC (the franchising CC) and that the latter did not comply with the agreement. When regard is had to the documents annexed to the papers it is clear that the franchising CC is an entity different from the plaintiff. It has its own registration number. It is contended that the issue of non-joinder cannot be separated from the defendants' defence on the merits, as it pertains to the franchising CC. According to the defendants the franchise agreement forms part of the agreement that serves as the plaintiff's cause of action in these proceedings. The plaintiff and the franchising CC are two distinct and separate juristic entities. For the defendants to contend that the franchise agreement forms part of the agreement that serves as the plaintiff's cause of action cannot be sustained.
32. The plaintiff is not seeking any relief against the franchising CC, nor would there be any logical basis to seek relief against it in terms of the agreement attached in the particulars of claim, which forms the basis of the plaintiff's claim. There can just be no basis for the plaintiff to join the franchising CC to this action. The contention of the defendants in this regard cannot succeed. The defendants' reliance on non-joinder is not a triable issue not to mention that this version makes no sense.

PRESCRIPTION

33. The defendants contend that the claim against the first defendant has prescribed and alleges that the principal agreement was concluded

during 2018 and that the claim was instituted during 2022 and therefore the claim has prescribed. It is trite that prescription starts to run only from the date the debt becomes due.[5]

34. It is furthermore trite that the defendants bear the onus to prove prescription.

The defendants have not proven that the claim has prescribed, as alleged.

COSTS

35. The defendants contend that the applicant knew that the defendants relied on points in limine and defences valid in law that would entitle the defendants leave to defend. The first and second defendants are requesting costs in terms of rule 32(9)(a) that the order be stayed until the plaintiff has paid the defendants' costs to be taxed as between attorney and client.

CONCLUSION

36. I am satisfied that the plaintiff has made out a proper case and that the first and second defendants are contractually obliged to make payment to the plaintiff in terms of the agreement.

37. The defendants have not persuaded this court that it has a bona fide defence to the plaintiff's claim. The points in limine raised by the defendants cannot be sustained. I find that the defendants entered an appearance to defend merely to delay the matter and has raised no defence valid in law that

constitutes a triable issue.

38. IN THE PREMISES THE FOLLOWING ORDER IS MADE:

1. Summary judgment is granted against the first and second defendants jointly and severally (with the third and fourth defendants in terms of a judgment that may be granted against the third and fourth defendants in due course), the one paying the other to be absolved for:

1.1 Payment of the sum of R1,056,844.07;

1.2 Interest on the aforesaid payment calculated at 2% per month, from 31 August 2022, to date of final payment;

1.3 Costs of suit on attorney and client scale, including costs of counsel taxable on Scale B.

1.4 By agreement between the applicant and the third and fourth defendants, the application for summary judgment is postponed sine die as against the third and fourth defendants, costs reserved.

VAN DER MERWE, AJ ACTING JUDGE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

For the Plaintiff: Adv Marco de Oliveira Instructed by: Thotharam Attorneys First and Second

Defendants: Adv BC Bester Instructed by: B Bezuidenhout Incorporated

[1] Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd case number 11096/20 (Gauteng Division Pretoria).

[2] Breytenbach v Fiat 1976

(2) SA 226 (T); Marsh and another v The Standard Bank of South Africa Ltd 2000

(4) SA 947 (W).

[3] Van den Berg v Weiner 1976

(2) SA 297 (T); Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Beperk 1979

(3) SA 391 (T); Liberty Group Ltd v Singh 2012

(5) SA 526 (KZD) at 537G-538G.

[4] Maharaj v Barclays National Bank Ltd 1976

(1) SA 418 (A) at 423A-B; Absa Bank Ltd v Le Roux 2014

(1) SA 475 (WCC) at 477B-H and 478A-B

[5] Section 12(1) Prescription Act 68 of 1969

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