

SOUTH AFRICA / JUDGMENT

Adcock Ingram Critical Care Propriety Limited v Tiagen Industrial Proprietary Limited (3900/2018) [2019] ZAECPHC 9 (12 February 2019) [2019] ZAECPHC 9

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

G J Gajjar

CASE / FILE NUMBER

3900/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

Case

No: 3900/2018

Date

Heard: 5 February 2019

Date

Delivered: 12 February 2019

In

the matter between:

ADCOCK

INGRAM CRITICAL CARE PROPRIETARY LIMITED

Applicant

and

TIAGEN

INDUSTRIAL PROPRIETARY LIMITED

Respondent

JUDGMENT

GAJJAR AJ:

[1] This is an opposed application for summary judgment wherein the plaintiff seeks an order in the following terms against the defendant arising from a contract concluded between the parties for the rendering of services:

1.1 Payment of the amount of R548 045;

1.2 Interest at the applicable rate per annum a tempore morae to date of payment;

1.3 Costs of the application.

[2] Prior to the matter being argued, I mero motu raised a preliminary issue with the plaintiff's counsel, Ms Mokale, regarding compliance with the provisions of Rule 32(2). This was with particular reference to the contents of the verifying

affidavit deposed to by the plaintiff's Pharmaceutical Manager, one Sadeck Kader ("Kader") in that nowhere in the affidavit does the deponent state that 'in his opinion' there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purposes of delay.

[3] The relevant portion of Kader's affidavit reads as follows:

"7. I can verify the-

7.1 cause of action set out in the particulars of claim; and

7.2 amount claimed.

8. The Respondent-

8.1 is indebted to the Applicant in the amount of R548 045.00 (five hundred and forty eight thousand forty five rands) on the grounds set out in the summons to the main action under the above case number; and

8.2 does not have a bona fide defence to the Plaintiff's claim and the appearance has been entered solely for purposes of delay."

[4] In addressing me, Ms Mokale fairly conceded that the affidavit deposed to by Kader did not comply with Rule 32(2). She, however, attempted to persuade me that such non-compliance was not fatal to the plaintiff's application by submitting that I needed to adopt a 'civilised and flexible approach', the rules are there for the court and the courts are not there for the rules and further that substance should prevail over form.

- [5] In making these submissions plaintiff's counsel referred me to the decision of the full court in *Standard Bank of SA Ltd v Carports for Africa CC and Others*[1]. In this matter the court was confronted with a verifying affidavit where the deponent stated 'I verily believe' instead of 'in his opinion'. The court rejected the contention advanced on behalf of the defendant that such non-compliance was fatal to the application for summary judgment. In doing so, it rejected adopting a formalistic approach and held that a common sense approach should be adopted and that the basic principles of logic dictated that the words 'in his belief' is the equivalent of 'in his opinion'.
- [6] In my view, the judgment in the *Standard Bank of SA Ltd v Carports for Africa CC and Others* is distinguishable from the present matter as Kader does not even employ the phrase 'I believe' or 'I verily believe' (compare *Afcol Manufacturing Ltd v Pillay*; *Afcol Manufacturing Ltd v Buo*[2]) and it does not thus, in my view, assist the plaintiff.
- [7] In addition, I was referred to an unreported judgment in the matter of *NIC's Joinery Close Corporation v Adlem and Others*[3] where the court was confronted with an unopposed application for summary judgment, where in the verifying affidavit the word 'confirm' as opposed to 'verify' was used in respect of the amount due to the plaintiff. In addressing this non-compliance with Rule 32(2), the court stated the following:

"Strictly speaking, of course, Nagel should have said that he verified the plaintiff's cause of action and the amount of the claim. However legal consequences should not be dependent upon the correct recitation of a jingle, and while slackness in the observance of the rules is not be encouraged, form should not be allowed to triumph over substance and technical imperfections should not stand in the way of the speedy and inexpensive resolution of litigation."

Accordingly, although a court should not readily grant summary judgment where there is a material defect in any of the formalities required by Rule 32, where it is clear that the rule has been substantially complied with and there is no prejudice to the defendant, a slight failure to comply with the technical requirements of the rule should not stand in the way of relief being granted. After all, the function of the court is not to protect a dishonest defendant because the pleadings (or summary judgment affidavit) of a plaintiff are less than perfect." (Footnotes omitted)

- [8] In similar vein I referred was to an unreported judgment in the matter of *Oryx Properties Ltd v Ukuvula Investment Holdings (Pty) Ltd*[4] where the court referred to and endorsed earlier judgments relating to technicalities and dilatory defences and held that such defences did not defeat a summary judgment application.
- [9] The question which arises is whether or not the absence of the phrase 'in my opinion' in a verifying affidavit can be condoned.
- [10] Rule 32(2) provides that an application for summary judgment shall be accompanied by:

“an affidavit made by himself (Plaintiff) or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that the notice of intention to defend has been delivered solely for the purpose of delay” (emphasis added).

- [11] In *Group Areas Development Board v Hassim and Others*[5] the court refused summary judgment as the deponent to the verifying affidavit failed to state ‘in his opinion’ and by implication holding that compliance with rule 32(2) was not a mere formality.
- [12] In *Fischereigesellschaft F Busse & Co. KG v African Frozen Products (Pty) Ltd*[6] the court held that the verifying affidavit must, inter alia, contain a statement by the deponent that in his opinion there is no bona fide defence to the action and that the notice of intention to defend has been delivered solely for the purpose of delay.
- [13] I align myself with the judgments in *Hassim* and *Fischereigesellschaft*. Accordingly I am of the view that non-compliance with Rule 32(2) in the present instance cannot be condoned as compliance therewith is not merely a matter of form but substance.
- [14] For the reasons stated, I am of the view that the admitted non-compliance with Rule 32(2) is fatal to the plaintiff’s application.
- [15] Although I was invited by the defendant’s counsel, Mr Moorhouse, to only deal with the preliminary issue I declined the invitation and asked counsel for both parties to address me on the merits, particularly as the defendant filed an opposing affidavit.
- [16] Thus, to the extent I may be mistaken in my view regarding the consequence of the non-compliance with Rule 32(2), I shall briefly deal with the defendant’s grounds of opposition, which can be summarised as follows:
- 16.1 the plaintiff failed to plead whether the agreement concluded between the parties was oral, in writing, or partly oral and partly in writing;
- 16.2 failure to plead the defendant’s alleged breach; and
- 16.3 the plaintiff is indebted to the defendant.
- [17] Naturally the defendant would only need to succeed in any one of the aforesaid grounds to defeat the application.
- [18] Insofar as the first ground is concerned, the defendant in essence relies on plaintiff’s non-compliance with Rule 18(6), which provides that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

[19] It is trite that where a pleading does not comply with Rule 18 the other party has the option to either proceed in terms of Rule 30 or Rule 23 (see: Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen[7]).

[20] The plaintiff has pleaded the following with reference to the contract:

‘4. At all relevant or material times and in particular during the conclusion of the services agreement (“Services Agreement”), leading to this action, ...

5. On or about 30 October 2017, the plaintiff entered into discussions (“Discussions”) with the view of concluding the Service Agreement.’

[21] Pleading as the plaintiff has, in my view, falls short of the requirements of Rule 18(6) in that there has been no allegation as to whether the agreement was oral, in writing alternatively partly oral and partly in writing and what the precise terms of the contract were and also when and where the contract was concluded. (See Vorster v Herselman[8]).

[22] In light of the afore-going, I am of the view that the first ground of opposition is sustainable and further the plaintiff’s claim is not unanswerable as presently pleaded (see: Edwards v Menezes[9] and generally Soil Fumigation Services v Chemfit Technical Products[10]).

[23] For the reasons stated, the plaintiff’s application for summary judgment cannot succeed.

[24] The following order will thus issue:

24.1 summary judgment is refused;

24.2 the defendant is granted leave to defend;

24.3 the costs of the application shall be costs in the cause.

G J GAJJAR

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv D Mokale instructed by Shandu Attorneys

Incorporated, Sandton c/o BLC Attorneys, Port Elizabeth

For Respondent: Adv A Moorhouse instructed by RJM Attorneys, Port Elizabeth

[1] 1998 (4) SA 811 (W) at 813G-814B

[2]

[1996] 1 All SA 426 (SE) at 432d

[3] ECD, case number 3350/2006 delivered on 2 April 2007

[4] Case No. 2014/2017, Eastern Cape Local Division, Port Elizabeth

- [5] 1964 (2) SA 327 (T)
 - [6] 1967 (4) SA 105 (C) at 107H to 108B
 - [7] 1992 (4) SA 466 (W) at 469J-470J
 - [8] 1982 (4) SA 857 (O) at 861F
 - [9] 1973 (1) SA 299 (N) at 304-5
 - [10] 2004 (6) (SCA) 29 at para [10] and [11]
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