

SOUTH AFRICA / JUDGMENT

Corrigan Investments (Pty) Ltd t/a Kevcor v BMI Driving (Pty) Ltd (3939/2017) [2017] ZAFSHC 204 (9 November 2017) [2017] ZAFSHC 204

COURT

Free State High Court, Bloemfontein

BEFORE

J.J.F. Hefer

CASE / FILE NUMBER

3939/2017

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 3939/2017

In the matter between:

CORRIGAN INVESTMENTS (PTY) LTD t/a KEVCOR Plaintiff

and

BMI DRIVING (PTY) LTD Defendant

CORAM:

HEFER, AJ

JUDGMENT:

HEFER, AJ

HEARD ON: 21 SEPTEMBER 2017

DELIVERED ON: 9 NOVEMBER 2017

- [1] This is an application for summary judgment. The Plaintiffs claim against the Defendant is for payment of the sum of R348 999,53 being in respect of goods sold and delivered by the Plaintiff to the Defendant at the latter's special instance and request during the period March to June 2017 which, according to the Plaintiff, is currently due, owing and payable to the Defendant, but notwithstanding demand, the Defendant has failed and/or refuses to pay same.
- [2] In opposition to the application for summary judgment, an opposing affidavit was filed by a certain David Ireland, a director of the Defendant. According to him, where the deponent to the verifying affidavit to the Plaintiff's application for summary judgment avers that he is "... well aware of the Plaintiffs finances and attended to the financial aspect of the company ...", it is insufficient for purposes of establishing any personal knowledge of the dealings between the Plaintiff and the Defendant and in particular the vague contention that goods were sold and delivered for a particular period. According to the Defendant, whereas it is stated that the goods were sold and delivered during the period "March to June 2017" with no indication of March in which year, such contention is also vague. According to Mr. Ireland, he used to be a director of the Plaintiff. At no stage whatsoever, according to Mr. Ireland, did the deponent to the summary judgment affidavit deal with orders, deliveries or the accounting of the Plaintiff. Mr. Ireland alleges that although the deponent is a director of the Plaintiff, he did not take part in the financial management as alleged by him. The financial management of the Plaintiff was conducted by other employees of the Plaintiff. In addition thereto, according to the Defendant, the Plaintiff's day to day affairs are attended upon by a certain Cathy de Witt, as managing director and not the deponent as alleged. According to the Defendant, the deponent is not part of the everyday running of the Plaintiff and most certainly does not participate in the taking of orders, deliveries, etcetera.
- [3] The Defendant then goes further and states that neither the deponent nor the Plaintiffs attorneys of record are able to provide the Defendant with the requested invoices, delivery receipts or updated statements relevant to the alleged indebtedness. According to the Defendant, in spite of numerous requests to that effect, to date of deposing to the opposing affidavit to the summary judgment, neither Mr. Ireland, nor the Defendant or any of its employees or the Defendant's attorneys have been provided with copies of the requested documents which are required for purposes of pleading and establishing what the Plaintiff's claim is. According to the

Defendant the latter contention is especially relevant in light of the Plaintiffs "scantily pleaded cause of action" in which the Plaintiff merely placed reliance on goods sold and delivered without alleging any agreement albeit written, oral or

tacit, upon which the Plaintiff allegedly performed.

- [4] The Defendant alleges that, because the Defendant is a company with various employees and conduct its business operations practically nationwide, the "Defendant requires these documents". According to the Defendant, the Plaintiff purportedly does not have the

documents which were requested or does not want to provide same to the Defendant and "which in the least would have been expected to have been appended to the Plaintiff's application for summary judgment in order to persuade this Court that goods were in fact sold and delivered." The only inference, according to the Defendant is that the Plaintiff does not have invoices and delivery notes to support its claim and that the cause of action "so scantily pleaded in simple summons form": constitutes an abuse of the Court's processes in an attempt to circumvent having to actually prove a claim in respect of which documents were requested on the same date as the Plaintiff issuing summons against the Defendant. The Defendant then goes further and states that due to a lack of knowledge and the request to which the Plaintiff chose not to respond, the Defendant is not in position to answer to the Plaintiff's claim. It is then further alleged by the Defendant that it is not evident when the alleged orders were placed or delivery took place, bearing in mind the Plaintiff's vague reference to "March", the Defendant has had business dealings with the Plaintiff for four years and it is not apparent when the alleged goods were then ordered by whom and whether or not same were in fact delivered. In addition to the above, the Plaintiff on numerous occasions in the past took, according to the Defendant, several months to deliver orders

and it is therefore disputed that "the amount claimed and the alleged goods ordered and delivered were done in the months alleged". In addition, according to the Defendant, it has also occurred that quotes were given in the past when the Defendant was invoiced, the prices differed which is due to the Plaintiff's internal systems effectively malfunctioning. Without the documents requested by the Defendant, the Defendant is unable to assess what the position is in respect of the prices charged. This is according to the Defendant.

- [5] The Defendant's contention is that in light of its conduct and what was stated in this regard, the Plaintiff's claim is not liquid and the Plaintiff has not complied with the requirements for summary judgment. The Defendant ends of by saying "To the very best of my belief, the Defendant is not indebted to the Plaintiff whether in the amount claimed or at all."
- [6] A liquidated amount for purposes of summary judgment is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. Implied terms in the contract of sale that a reasonable price is intended to be paid, normally do not present difficulties of proof and the quantum can usually be ascertained speedily and promptly. (See *Fatti's Engineering Co. (Pty) Ltd v Vedic Spares (Pty) Ltd* 1962 (1) SA 736 T at 739.) In *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 C, with reference to determining whether an amount or demand is liquidated, Van Winsen AJ said the following at p. 470:

"As is to be expected where, because of the difficulty of formulating precise rules, the matter was left to be decided by the exercise of individual judicial discretion, there is a wide diversion between the reported examples of the exercise of such discretion. While at the one hand some judges have taken a strict view as to the degree of promptness of proof required to permit of a debt qualifying as being liquid, e.g. Ford Brothers v Clayton 1906 TS 205; Lewis and Sacks v Meyer 1904 TSA 898, in other cases the Court has been prepared to conduct an investigation into the question of whether a particular debt

would qualify to be treated as liquid even where the proof of such a debt might be neither free from difficulty nor entirely expeditious. Thus in Highman and Marx v Graham and Smith, 13 CTR 219 the Court treated the claim for the price of a certain number of bricks alleged to have been sold at a fixed price as constituting a liquidated demand.'

- [7] On the same topic, as far as the contents of a simple summons, which is used in matters of a liquidated demand, is concerned, Form 9 to the Uniform Rules of Court, requires the Plaintiff to set out his cause of action in “concise terms”. In *Standard Bank v*

Hunkydory Investments (No. 1) 2010 (1) SA 627 CPD Steyn AJ

said the following:

"As stated herein above, the simple summons (Form 9) intended for use in claims for debt or liquidated demand should contain only an indication of the plaintiff's claim in the most general terms. All that is required is that the claim be set out with sufficient particularity for the Court to decide whether judgment should be granted, and Defendant to be made aware of what is being claimed from him."

- [8] In the present matter the Defendant alleges in its summons that it is claiming an amount for goods sold and delivered during a certain period of time. Defendant's contention that because “March” is not specified, such particulars contained in the summons are vague. It speaks for itself that the period referred to is indeed

March to June 2017. This manner of setting out a period of time is often found in practice and is therefore acceptable. Any attempts to argue that the summons lacks particularity are unfounded to say the least. In this regard it is also trite law that a simple summons is not a pleading and is therefore not excipiable.

- [9] The Defendant goes further and argues that the actions of the Plaintiff affects the liquidity of the Plaintiffs claim. The Defendant alleges namely : “... in light of its conduct and what is stated herein above, is not liquid ...”. It is again difficult to see how the actions of a Plaintiff, after summons had been issued and even before, may affect the liquidity of an amount/demand. I do not consider it necessary to expand on this point, save for confirming that the claim of the Plaintiff as contained in its simple summons is indeed a liquidated demand for purposes of summary judgment.

- [10] Mr. Johnson, on behalf of the Plaintiff, referred me to the principles that in respect of summary judgment applications, the defence which is put up by a Defendant in opposition to the application for summary judgment, must go to the merits of the matter and not merely consists of an attack on the language of the summons or the Plaintiff's verifying affidavit. Furthermore, of course, such defence must be valid in law. It is trite law that a defence need not be proven by a Defendant to avoid summary judgment. The Defendant

must merely satisfy the Court that he has a bona fide defence to the action. Satisfy in this context does not mean prove. Furthermore a Defendant is not required to prove his defence on a preponderance of probabilities. He only has to advance facts which, should they eventually be proven at trial, constitutes a defence. Stated differently the Defendant discharges that onus and avoids summary judgment when he advances a reasonable arguable and triable contention.

[11] In regards to the Defendant's first ground of opposition to the summary judgment, Mr. Sander, on behalf of the Defendant argued that because the deponent to the opposing affidavit, Mr. Ireland used to be in the employment of the Plaintiff, he has grounds to dispute the deponent to the Plaintiff's verifying affidavit, as well as Mr. Corrigan's personal knowledge of the facts verifying the Plaintiff's cause of action in support of the application for summary

judgment.

[12] According to Van Niekerk "Summary Judgment - A Practical Guide" the basic approach is that such a deponent must either state under oath that the facts fall within his personal knowledge, or that personal knowledge was apparent from the other facts. Should such a deponent merely allege that he is a director of the Plaintiff without expressly stating that the facts fall within his personal knowledge, the application will be defective as it does not necessarily follow that the director of a company has knowledge of the business of that company. That description is then

insufficient and cannot remedy the omission of a specific allegation that he does have personal knowledge.

[13] Mr. Corrigan, the deponent to the verifying affidavit, states that he is a director of the Plaintiff, duly authorised to make the affidavit and further that the facts in the verifying affidavit falls within his own personal knowledge. He then states under oath that the Defendants is indebted to the Plaintiff in the amount as claimed and indeed on the grounds therein stated. The fact that he does not deal with deliveries and orders, does not mean that he has no knowledge of the fact that goods were indeed sold and delivered during March to June 2017 by the Plaintiff to the Defendant and that the Defendant is indeed indebted to the Plaintiff in the amount as claimed. He is after all a director of the Plaintiff. It is therefore reasonable to expect that he will in fact have personal knowledge of orders placed by and under the deliveries made to the Defendant which information may be obtained from the relevant documentation. The deponent, Mr. Corrigan's personal knowledge, can therefore not be faulted for purposes of the summary judgment application. This ground of opposition by the Defendant therefore also do not have any substance.

[14] Mr. Sander on behalf of the Defendant, argued further that because the Plaintiff did not append the applicable invoices or at least a statement in corroboration of the amount as claimed, the application for summary judgment should fail. He further argued that

the failure by the Plaintiff to provide the invoices is detrimental to its case and the application for summary judgment should be dismissed on that basis alone where insufficient facts are pleaded in order to enable the Court to ascertain what in fact was delivered over this period.

- [15] Mr. Sander referred me to the matter of *South African Commercial Catering and Allied Workers Union v Kramer Weihmann & Joubert* (3818/2011) (2012) ZAFSHC 39 in support of the Defendant's contention that the failure to, with at least particularity allege how the amount is calculated, is insufficient for purposes of summary judgment. In the matter referred to, it appeared that the Defendant did not dispute its liability towards the Plaintiff for professional services rendered, but that the quantum of such liability was indeed in dispute. That is not the case in the present matter. The Defendant does not for instance say that "I have checked the financial records/statements of the Defendant and according to our records, the Defendant is not indebted to the amount as claimed." The Defendant merely relies on a bold statement to the effect that it has occurred in the past that quotes were given and when the Defendant was invoiced, the prices differed due to the Plaintiff's internal systems malfunctioning. The Defendant does not, however, say that in the present instance that is indeed the fact.
- [16] As stated, the mere omission of "2017" after March does not justify the inference that the Defendant was not able to go and check whether such goods were sold and delivered for the period concerned in the first instance, and secondly whether indeed the goods sold and delivered were indeed in accordance with quotations provided by the Plaintiff to the Defendant.
- [17] In opposition to a summary judgment application, a Defendant cannot merely say that in the past errors have occurred in the calculation of amounts as claimed by the Plaintiff and therefore the current amount being claimed by the Plaintiff may be incorrect as well. Surely there must be some basis and additional facts advanced by such a Defendant to say that in this particular instance, the amounts are also calculated incorrectly and therefore the amount as claimed by the Plaintiff is not correct.
- [18] Mr. Sander further referred me to a judgment of Daffue J of this division in *Absa Bank Ltd v Rene Haynes N.O. and Four Others* (3619/2013) (2013) ZAFSHC 232 (2) 2013 where he indicated that the document relied upon for the cause of action must be attached thereto, otherwise the summons would not disclose a cause of action. However, in this matter, Daffue J had to deal with a summary judgment application where the cause of action was based on a mortgage loan. One of the points in limine which was raised by the Defendant in opposition of the application for summary judgment was that the underlying loan agreement secured by the mortgage bond was not attached to the particulars of claim and furthermore that the requirements of Rule 32(2) and Rule 18(6) of the Uniform Rules of Court were not complied with and that the Applicant's deponent could not under the circumstances verify the cause of action, including every element of the cause of action. Therefore it was contended on behalf of the Applicant that the application for summary judgment was defective and should be dismissed. In this regard Daffue J said that a Plaintiff's

cause of action in a claim based on moneylending is not the registered bond which is nothing more but proof that the Applicant's claim has been secured by way of a mortgage bond over the immovable property of the debtor. Daffue J in effect held that a simple summons can be regarded as a pleading for purposes of Rule 18. Therefore, whereas Rule 18 refers to the requirement that, when an

agreement is in writing, a copy thereof, alternatively, the relevant portions, thereof should be attached to a particulars of claim, in the absence whereof, the summons will not disclose a cause of action, will also be applicable to a simple summons.

[19] In the present matter, however, the Plaintiff merely alleges liability towards the Plaintiff based on goods sold and delivered by the Plaintiff to the Defendant. The cause of action is not as in the case of a mortgage bond, necessarily a written agreement. In fact, in instances where a Plaintiff claims an amount of money based on goods sold and delivered, it is sufficient to merely allege such goods being sold and delivered without referring to any agreement. The invoices pertaining to the amount as claimed, is not documents pertaining to the cause of action by the Plaintiff. Such invoices is nothing more than mere evidence as proof of the quantum of Plaintiff's claim. Had it been otherwise, it would mean that in any contractual matter where, for instance, consequential damages is claimed, each and every invoice proving a litigant's quantum should be attached to a particulars of claim which could never be the case and which is not the object of Rule 18. Such a situation

will be untenable.

[20] As far as Defendant's last point of opposition is concerned, Mr. Sander argued that due to a lack of knowledge and the request for the documents by the Defendant to which the Plaintiff did not respond, the Defendant is not in a position to answer the Plaintiff's scantily pleaded cause of action. I have already dealt with the fact

that the simple summons issued by the Plaintiff need not contain more than what is currently contained therein. The Plaintiff alleges that during a certain period of time goods were sold and delivered to the Defendant for which the Defendant is indebted towards the Plaintiff. I have already dealt with the fact that the omission of 2017 is acceptable and in fact in the event of doubt, the Defendant should have accepted that it was indeed for the period March to June 2017. There is also no indication that in the communication with the Plaintiff's attorneys, there had been any doubt in regards to the period during which such goods were sold and delivered to the Defendant. The natural thing for the Defendant would have been to compare its financial records and check for itself whether any goods were sold and delivered during that particular period. It could also then check whether any payments had been made in regards to such goods and sold and delivered, if any. However, the Defendant has not done so, in the absence of which the Defendant did not advance any defence to the Plaintiff's claim save for the technical points which are, to say the least, ill founded. What the Defendant in fact is trying to do is to create a defence based on the facts after summons had been issued.

[21] It is not surprising that Mr. Ireland, as stated, ends of by saying:

"To the very best of my belief, the Defendant is not indebted to the Plaintiff whether in the amount claimed or at all." The Defendant cannot positively say that the Defendant is not indebted to Plaintiff, because the Defendant did not take the trouble to check its own financial records it this regard. For that reason it uses the words "to the very best of my belief."

In view of the aforesaid, the following order is made:

ORDER:

Summary judgment is granted against the Defendant for:

1. Payment of the amount of R348 999.53;
2. Interest of the aforesaid amount at the rate of 10.25% per annum reckoned as from 3 August 2017 until date of payment;
3. Cost of suit.

J.J.F. HEFER, AJ

On behalf of the Plaintiff:

Adv. JMC Johnson

Instructed by Lovius Block

Attorneys

BLOEMFONTEIN;

On behalf of the Defendant: Adv. A. Sander

Instructed by J L Jordaan

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