

SOUTH AFRICA / JUDGMENT

Fidelity Security Services (Pty) Ltd v Motheo Tvet College (5109/2016) [2017] ZAFSHC 25 (9 February 2017) [2017] ZAFSHC 25

COURT

Free State High Court, Bloemfontein

BEFORE

Mene, AJ

CASE / FILE NUMBER

5109/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: 51092016

In the

matter between:

FIDELITY
SECURITY SERVICES
(PTY)
LTD
Plaintiff
and
MOTHEO
TVET
COLLEGE
Defendant

JUDGMENT

BY: MENE, AJ

HEARD ON:

2 FEBRUARY 2017

DELIVERED ON: 9 FEBRUARY 2017

- [1] This is an application for summary judgment in which the plaintiff claims payment of the amount of R6 343 595, 18 for security services that were rendered in terms of the agreement that was entered into between the plaintiff and the defendant. There is also a prayer for interest on the amount claimed at the prescribed rate of interest from 29 August 2016 until date of payment.
- [2] This application is opposed by the defendant on the basis that a proper case has not been made out in the supporting affidavit of the plaintiff; that the defendant has a counterclaim that it intends to bring against the plaintiff and that the application infringes its right to access to court as enshrined in Section 32 of the Constitution. The Defendant has also raised a point in limine that the application was fatally defective because the affidavit in support of the application was deposed to by a person who cannot

swear positively to the facts. I will start with the point in limine as raised by the defendant.

Verifying affidavit

- [3] The deponent to the supporting affidavit is Mr. Wahl Justice Bartmann who is the Managing Director of the plaintiff. He states as follows in the supporting affidavit:

- "1. I am an adult male businessman and the Managing Director of the Plaintiff herein;
2. I am duly authorised to make this application and depose to this affidavit on behalf of the plaintiff;
3. In my capacity as plaintiff's Managing Director, I have under my control all the books, records, documents and accounts of the plaintiff, relevant to the plaintiff's claim forming the subject matter of this action;
4. I have personal knowledge of the allegations and facts alleged in the plaintiff's summons, particulars of claim and annexures thereto.
5. I can and do swear positively to the

facts

set out in the plaintiff's summons and particulars of claim.

6. I also hereby verify the plaintiff's cause of action and the amount claimed in the plaintiff's summons and particulars of claim and confirm that the defendant is indebted to the plaintiff on the grounds stated in the plaintiff's summons and particulars of claim, in the following amount:

3.1 Payment of the amount of R6 343 595.18.

3.2 Interest on the aforesaid amount at the prescribe rate of interest from 29 August 2016 until date of payment.

3.3 Costs of suit.

3.4 Further and alternative relief.

7. I respectfully submit that the defendant has no bona fide defence to the action and notice of intention to defend has been delivered solely for the purpose of delay."

[4] In response the defendant filed an affidavit deposed to by Ms. Marianna Dipiloane Monyadiwa Phutsisi (Principal of the College) resisting summary judgment. It stated as follows:

"20. It is clear from the affidavit in support of summary judgment that Mr. Baartmann, derives his knowledge of the case solely from all the books, records, documents and accounts of the Applicant, and the relevant claims forming the subject matter.

21. I am advised and accept that it has been held that where a deponent acquires his knowledge solely from documents to which he has access, he cannot swear positively to the

facts.

22. Mr. Baartmann also did not sign any certificate of indebtedness upon which the Applicant bases its claims.

23. Having regard to the case law on this issue, I am advised and submit that the Applicant has failed to comply with the requirements of Rule 32(2) of the Uniform Rules of Court as the deponent to the affidavit in support of the application for summary judgment does not have personal knowledge of the facts of the matter and cannot verify the causes of action and the amounts claimed.

24. I am further advised that Mr. Bartmann is unable to affirm that the Respondent has no bona fide defence to the action.

25. The Applicant has carefully purported to confirm the inaccurate content of the summons that are open to exception and irregular in law, which also does not comply with Rule 32(2), in the sense that the rule requires that deponent should have requisite direct knowledge of the

facts.

26. The affidavit of the Applicant in support of summary judgment, does not state where it was signed by the deponent, it only states the date at which it was signed."

[5] Rule 32(2) provides that the plaintiff's notice of application

for summary judgment shall be accompanied by -

"An affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating 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 purpose of delay."

The applicable law

[6] The Supreme Court of Appeal dealt with the issue of the verifying affidavit in *Rees and Another v Investec Bank Ltd* 2014 4 SA 220 (SCA). The SCA referred to the case of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418

(A) where Corbett JA, in considering the requirement that the affidavit should be made by the plaintiff himself 'or by any other person who can swear positively to the facts', stated as follows:

"Concentrating more particularly on requirement (a) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person who can swear positively to the facts. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, *prima facie*, that the deponent is such a person. Generally speaking, before a person can swear positively to

facts

in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates'

courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated The mere assertion by a deponent that he can swear positively to the facts (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised The grant of the remedy is based upon the supposition that

the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it . . . "[1]

[7] The SCA further referred to the case of Barclays National

Bank Ltd v Love 1975 (2) SA 514 (D) at 516H-517A (quoted with approval in Maharaj at 424B - D) where the following was said:

'We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment.'

Since Maharaj the requirements of rule 32(2) have from time to time occupied the attention of our courts. In Shackleton Credit Management v Microzone Trading it was held in para 13 that:

'(F)irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and . . . where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant

facts

and the ability to swear positively to such facts.'"[2]

[8] Now coming to the affidavit of Mr. Bartmann, firstly his position as the Managing Director strongly suggests that he would

acquire knowledge of the affairs of the company. He would be aware of the commercial contracts that are entered into between the company and other parties such as the defendant in this case.

[9] Secondly and applying the above principles enunciated by the SCA, in addition to averring that the facts are within his personal

knowledge, Mr. Bartmann positively swears to the facts and confirms the cause of action. He further relies on the contract and invoices attached to the particulars of claim. This clearly shows that Mr. Bartmann accessed and perused such documents. I pause to mention that one should be alive to the fact that "first-hand knowledge of every fact which goes to make the applicant's cause of action is not required, and where the applicant is a corporate entity, the deponent may legitimately rely on records in company's possession for their personal knowledge of at least certain of the relevant

facts

and the ability to swear positively to such facts" (see para [7] Shackleton Credit Management *supra*). In this respect I find that the affidavit of Mr. Bartmann meets the requirements of Rule 32(2).

- [10] In respect of the issue raised by the defendant regarding the certificate of indebtedness which was not signed by Mr. Bartmann, it is apposite to refer to what the SCA stated in Rees case *supra* at paragraph 15: "The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in Maharaj, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions or large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj". [My emphasis] I find what has been stated above to be equally applicable in this case.
- [11] I now turn to the grounds advanced by the defendant for opposing summary judgment. Firstly the defendant argues in paragraph 12 of its heads of argument that the claim of the plaintiff is based on a liquid document, but that the plaintiff omitted to attach it. The application for summary judgment is therefore defective. Even though this ground is not stated in the opposing affidavit, I will deal with it in this judgment. The claim of the plaintiff is based on the services rendered in terms of the contract that was entered between the parties. In terms of clause 3 of the contract the service provider (plaintiff) shall submit a monthly invoice for duties rendered to the college (defendant) for payment on the 25th of the month service is rendered. The plaintiff submitted such invoices as is evident from the attachments to the particulars of claim for services that were rendered. In this application the plaintiff also referred to the particulars of claim and annexures thereto in paragraphs 1.4 and 3 of the supporting affidavit. In the attached invoices the exact amounts claimed are stated. These amounts are liquidated and they are not merely unliquidated estimates. It is therefore not correct that a liquid document was not attached. I must further state that this argument, and correctly so, was not pursued during oral argument.

- [12] Secondly, the defendant relies on a counterclaim it intends to bring against the plaintiff. On behalf of the plaintiff Mr. Zietsman argued that it is not clear or stated in the opposing affidavit what the defendant's cause of action would be as it is not disclosed and that the counterclaim is not quantified. It is therefore difficult to say whether the counterclaim would be valid or not and whether the damages to be claimed will exceed or be less than the amount claimed by the plaintiff. As the defendant has failed to fully disclose all the facts before the court, it should be inferred that the defendant does not have a bona fide defence and reference was made to the case of *Traut v Du Toit* 1966 1 SA 69 (0) at 71A.
- [13] Mr. Motebane on behalf of the defendant was at pains to explain what the counterclaim would be based on except to say that there is contractual dispute between the parties relating to the computers and two vehicles that were stolen. The defendant wanted to lodge a claim against the plaintiff for damages relating to the stolen computers and vehicles. He could not say what the amount is that would be claimed. The opposing affidavit also did not assist in stating what the amount will be that will be claimed.
- [14] The submission that the mere fact that there was a contractual dispute and that a counterclaim was contemplated (which claim would be formulated at a later stage) was sufficient to raise the existence of a dispute between the parties ignores the provisions of rule 32(3)(b), which in peremptory terms require the defendant in an affidavit resisting summary judgment not merely to 'disclose fully the nature and grounds of the defence' but also to disclose 'the material facts relied upon therefor' (See in this regard *Appliance Hire (Natal) (Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 2 SA 287 (D) at 290H; *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) at 227F-G). Had the defendant placed in issue what contractual terms of the agreement (dispute) were, the plaintiff would have been obliged to prove its version of the agreement at a trial, and summary judgment would have had to have been refused. But the defendant did not do this. In fact the defendant stated in its opposing affidavit that 'in other instances, the Applicant did not submit the invoices at the agreed time, this culminated in the late payments and the description of the invoices did not correspond with the services rendered, which created audit query on the side of the Respondent'. This averment shows that the plaintiff indeed rendered services and that the defendant was liable to pay such services. The defendant only queried the lateness or invoices which were not submitted on time. On the issue of invoices which did not correspond with the services rendered, the respondent could say which invoices as attached in the particulars of claim did not correspond with the services that were rendered.
- [15] Furthermore and as stated by the defendant that it intends to bring a counterclaim against the plaintiff, I find that there is nothing that precludes the defendant from issuing summons against the plaintiff for the claim which it believes it has against the plaintiff (*Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 6 SA 29 (SCA) at 350-F). The contemplated counterclaim is unquantified and unliquidated. The court is in the dark as to the basis of the alleged claim. In any event the intended counterclaim would

not have the effect of extinguishing the plaintiff's claim with regard to the services that were rendered. Such counterclaim could be heard separately from the plaintiff's claim.

[16] Lastly the defendant relies on its right to access to court as envisaged in the Constitution of the Republic of South Africa. It is worth noting that the constitutionality of Rule 32 is not challenged by the defendant. Even if it was challenged and without making any finding in this respect, I doubt that the Rule would be found to be inconsistent with the Constitution and therefore invalid. It is this Rule which allows litigants to approach the court for speedy recovery of their debts if they believe that defendants have no bona fide defences but only want to delay matters. Defendants are not precluded but are, in fact, allowed to oppose such applications as the case is in the instant matter. So the application for summary judgment cannot be met with the defence that the plaintiff is denying the defendant the right of access to court. The defendant therefore fails on this therefore fails on this ground as well.

[17] In the result the defence put up by the defendant to the effect that the application for summary judgment should not be granted must fail. There will accordingly be judgment in favour of the plaintiff for:

- (1) payment of the sum of R6 343 595.18
- (2) interest on the aforesaid amount at the prescribed rate of interest from 29 August 2016 until date of final payment.
- (3) costs of suit.

B. S. MENE, AJ

On behalf of the plaintiff: Adv.

Instructed by:

BLOEMFONTEIN

On behalf of the defendant: Adv.

[1] At para 10

[2] At para 11.

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