

SOUTH AFRICA / JUDGMENT

# Magnum Packaging (Pty) Ltd v Franchising To Africa (Pty) Ltd (13306/17) [2017] ZAGPPHC 459 (28 June 2017)

**[2017] ZAGPPHC 459****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

Malungana

**CASE / FILE NUMBER**

13306/17

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**Source record****IN****THE NORTH GAUTENG HIGH COURT, PRETORIA****[REPUBLIC****OF SOUTH AFRICA]****CASE****NUMBER: 13306/17****DATE:**

28/6/17

In

the matter between

MAGNUM

PACKAGING (PTY)

LTD Plaintiff

And

FRANCHISING

TD AFRICA(PTY)

LTD Defendant

**JUDGMENT****MALUNGANA AJ**

[1] This is an application for summary judgment against the three defendants. The plaintiff instituted action against the first, second and third defendants for payment of the amount of R 2 323 198-55, together with interests thereon at the rate of 15.5%

per annum, plus costs of suit.

- [2] The cause of action as stated in the summons is for goods and services provided to the defendants pursuant to the Application for Credit Facilities attached to the particulars of claim [ "mp2" ] that was concluded apparently between the parties.
- [3] The application is opposed by the defendants who filed an affidavit in terms of Court Rule 32(3)(b) .
- [4] In opposing the plaintiff's application the defendants set forth the following grounds of defence:

That the plaintiff' s affidavit fails to meet the requirements set out

4.1 under Rule 32(2) of the Uniform Rules of Court, in that the deponent thereof failed to state therein that 'in his opinion' there was no bona fide defence.

4.2 That the plaintiff was uncertain as to who among the defendants is liable for services and goods it provided.

4.3 The defendant intends to institute a counter claim against the plaintiff for damages suffered resulting from the defective packaging of the goods supplied by the plaintiff, and potential losses arising therefrom.

- [5] The defendants further contend in the opposing affidavit that they do have a bona fide defence to the plaintiff's claim, and that appearance to defend was not entered solely in order to delay the finalization of the plaintiff's action.
- [6] It was submitted on behalf of the plaintiff that the defendants have failed to disclose fully the nature and grounds of their defence. Mr. Patel, on behalf of the plaintiff further submitted that the plaintiff has complied with the provisions of Rule 32(2). With regard to citation of the parties he referred this court to various email correspondences exchanged between the parties in respect of which, he submits, demonstrate that the plaintiff communicated with all the defendants involved in the purchase and resale of branded boxes from the plaintiff. He then proceed to say that the plaintiff correctly sues First, Second and/ or Third Defendants respectively as contained in the plaintiff's particulars of claim.
- [7] Before dealing with the points raised in the defendant's affidavits I propose to quote the relevant prayer from the plaintiff' s particulars of claim in full:

"10. Wherefore, judgment against the First Defendant, alternatively and/or the Second Defendant and/or the Third Defendant is prayed for as follows:

10.1 Payment of the sum of R 2 323 198-,55;

10.2 by the First and/or the Second Defendant and or the Third Defendant, the one paying the other /s to be absolved;

10.3Interest on the amount of R 2 323 198-55 at 15.5%per annum tempore morae

#### 10.4 Costs of suit;

#### 10.5 Further and /or alternative relief."

[8] The defendants argue in the opposing affidavit that the applicant at all material times dealt with Franchising to Africa (Pty) Ltd with registration number 2012/030708/07, and not with the Second nor the third respondents.

[9] In this regard counsel for the defendant submits the plaintiff's failure to correctly identify or cite the defendants is fatal to the applicant's application. There appears to be a confusion in the plaintiff's particulars as to which of the defendants contracted

with the plaintiff for the services and goods provided by the plaintiff.

[10] Counsel for the defendant referred to the judgment of Cape Business Bureau (Pty) Ltd v Van Wyk and Another 1981{4} SA 439 (C) where Baker J observed :

"..., if the identity of the defendant is uncertain, where you have more than one and plaintiff does not know which one concluded a certain contract with plaintiff, that uncertainty would operate to defeat plaintiff's right to sue any particular one of them for summary judgment".

[11] There can be no doubt in my mind, that the inelegant manner in which the defendants have been cited in the plaintiff's particulars of claim is open to criticism. The alleged application for credit facility seems to have been concluded between the plaintiff and an entity called 'Franchising to Africa trading under Gold Brands'. The difficulty which this court now faces is which of the defendants

received services and goods provided by the plaintiff. As per its prayer contained in the particulars of claim, the plaintiff also

finds itself in the position of not being able to say who should be held liable for the debt arising for the services or goods provided. Normally it would be expected of the plaintiff to state with a degree of exactitude the identity of the defendant with whom it concluded a written contract, and give facts to demonstrate the terms of the agreement concluded between the parties. In my mind the defendants have raised a triable and arguable issue.

[12] The drastic and final nature of the summary judgment remedy is well known and has led the courts to adopt a cautious and exacting approach to its grant. The approved test is if there is a doubt but that the plaintiff has unanswerable case. If 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. See in this regard Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959

(3) SA 362 (W) at 366.

[13] There is a further defence raised by the defendant that the plaintiff failed to comply with Rule 32(2) in that the deponent therein did not state in his supporting affidavit that 'in his opinion' the defendant has no bona fide defence. This clearly raises a further defense to the

plaintiff's claim. To substantiate his argument counsel for the defendants referred this Court to Visser v De la Rey 1980 (3) SA 147 (T). Furthermore, I am not persuaded that the plaintiff adequately responded to the contention raised by the defendant pertaining to defective packaging of the goods, and the resultant potential loss the defendants allegedly suffered. The contentions by defendants appear to have been bona fide when one has regard to the correspondences attached to the opposing affidavit marked "G", and "H", which seem to suggest that the goods supplied by the plaintiff were not properly coated. Viewing the affidavit as a whole, in the context of

the summons and the submissions made by counsel for the defendants, I am of the view that it does appear to raise a bona fide defence in compliance with Rule 32(3)(b).

[14] The order I make is as follows:

14.1 Summary judgment is refused , and the defendants are granted leave to defend the action ;

14.2 The costs for summary judgment are to stand over for determination by the trial Court .

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P MALUNGANA

ACTING JUDE OF THE HIGH COURT

DATE OF THE JUDGEMENT : 28 JUNE 2017

PLAINTIFF'S COUNSEL : MR PATEL

Instructed By

: ZIYMD E PATEL ATTORNEYS

DEFENDANT'S COUNSEL : ADV ERASMUS SC

Instructed By

: NICK DESTER ATTORNEY

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Prepared on 9 October 2026 · Esheria