

SOUTH AFRICA / JUDGMENT

RSC Avelo (Pty) Ltd v Kenako Concrete (Pty) Ltd and Others (3134/2018) [2018] ZAECPEHC 69 (15 November 2018)

[2018] ZAECPEHC 69

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

T Malusi

CASE / FILE NUMBER

3134/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION – PORT ELIZABETH)

Case

No: 3134/2018

In the matter between:

RSC
AVELO (PTY) LTD
Plaintiff
and
KENAKO
CONCRETE (PTY) LTD
First Defendant
JEROME
WILLIAM PERILS
Second Defendant
MILANO
RUUD FRANCIS
Third Defendant

JUDGMENT

MALUSI J:

- [1] This is an application for summary judgment as provided in Uniform Rule 32. The application was not opposed by the any of the respondents. The parties will be referred as they are cited in the main action.
- [2] Plaintiff issued summons against the defendants on 12 September 2018. The plaintiff claimed against the first defendant for goods sold and delivered at the former's special instance and request. The claim against the second and third defendants was based on a suretyship agreement wherein they had bound themselves as surety and co-principal debtors in solidum with the first defendant. The amount claimed was the sum of R578 755.72.
- [3] The summons and particulars of claim were served on the defendants on 13 September 2018. The defendants filed a notice of intention to defend on 26 September 2018. The plaintiff launched an application for summary judgment on 12 October 2018.
- [4] Rule 32(2) provides in the relevant part that:
- “The plaintiff shall within fifteen days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with 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 not bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay...”*
- [5] The applicable principles relating to the requirements for summary judgment are, to a great extent, settled law. The applicant in a summary judgment application needs to comply strictly with the different, distinct requirements set out in Rule 32(2). The strict approach was confirmed in the locus classicus by Cobbett JA, in what has been described as ‘with customary clarity and elegance’, when he stated:
- “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. There 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

application 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."

[6] At the hearing I raised with Ms Barnard, who appeared on behalf of the plaintiff, the issue whether or not the supporting affidavit complies with subrule 32(2) in that it does not appear therefrom that the deponent is a person able to swear positively to the facts verifying the cause of action and the amount. Ms Barnard pointed out that the deponent had stated the fact that he has a personal knowledge from which it can be inferred that he has insight to the facts. She further submitted that the deponent clearly has had sight of the summons and the particulars of claim. She argued that in such circumstances it is clear that the deponent has personal knowledge of the facts.

[7] In the relevant part of the affidavit the deponent stated as follows:

"1. I am an adult male businessman and the Group Credit Manager of the Applicant, with place of employment situated at 30 Industry Road, Clayville Ext 4, Olifantsfontein, Gauteng.

2. The facts herein contained are, save where otherwise indicated, within my personal knowledge and are to the best of my belief both true and correct."

[8] The above excerpt from the affidavit invites the question whether the deponent had the requisite direct knowledge of the facts. I am alive to the fact that such knowledge could be discerned from the content of the papers as a whole and not necessarily from the content of the affidavit read on its own.

[9] The application concerns transactions which were concluded in Port Elizabeth according to the particulars of claim and the annexures thereto. As apparent from above excerpt the deponent is based in Johannesburg. He described his position as being the Group Credit Manager of the applicant. This appellation conveys the impression that he is a credit manager of a large number of entities within the applicant's company. This begs the question: how would he have known about a transaction in Port Elizabeth? It has been held that it is improbable that an executive of a large company with many branches will have personal knowledge of individual transactions.[1]

[10] There is no averment in the affidavit nor any of the facts in the papers which lend credence to the allegation by the deponent that he has personal knowledge of the alleged debt by the defendants. In my view the facts refute the inference sought to be drawn of the deponent's personal knowledge which is triggered by the description of his office and his allegation of personal knowledge. It has been held that a court will not assist the plaintiff by breathing

life into a poorly presented case – on the contrary the court will consider itself bound to the terms in which the plaintiff has elected to formulate its claim.[2]

[11] In my view a proper consideration of the papers as a whole indicates that the deponent to the verifying affidavit did not have direct knowledge of the facts to be able to swear positively to them. Consequently the application for summary judgment is fatally defective and must fail.

[12] In the circumstances the following order will issue:

12.1 The application for summary judgment is dismissed;

12.2 The defendants are granted leave to defend the application;

12.3 The costs of the application for summary judgment shall be costs in the main action.

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JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:

Adv Barnard instructed by

Pagel Schulenburg Inc

c/o Greyvensteins

St George's House

104 Park Drive

PORT ELIZABETH

For the Defendant:

Le Roux Inc

101 Cape Road

Mount Croix

Heard on:

06 November 2018

Judgment

delivered:

15 November 2018

- [1] Pinepipe (Pty) Ltd v Nolec (Pty) Ltd 1975 (4) SA 932 (W) at 934H- 935A.
- [2] Mowschenson & Mowschenson v Mercantile Acceptance Corporation of S.A. Ltd 1959
- (3) SA 362 (W) at 364 A.
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