

SOUTH AFRICA / JUDGMENT

Visser v Pewter Star Investments CC and Others (100/2014) [2014] ZANWHC 43 (11 September 2014) [2014] ZANWHC 43

COURT

North West High Court, Mafikeng

BEFORE

N. Gutta

CASE / FILE NUMBER

100/2014

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“IN
THE HIGH COURT OF SOUTH AFRICA”
NORTH
WEST HIGH COURT, MAHIKENG
CASE
NO. 100/2014
In

the matter between:

SCHALK
VISSER
PLAINTIFF
and
PEWTER
STAR INVESTMENTS CC
1ST
DEFENDANT
SUSANNA
MARGARETHA
WEISS
2ND
DEFENDANT
IVAN
DOORSAMY MOODLEY
3RD
DEFENDANT

JUDGMENT

GUTTA J

A.

INTRODUCTION

[1] The plaintiff applied for summary judgment against the defendant for the following relief:

“1. Against the First Defendant as follows:

1.1 An Order rectifying the written Joint Venture Agreement, Annexure “A”, by the substitution of the words ‘Pewter Star Trading CC’ by the words ‘Pewter Star Investments CC’ wherever such words occur in the Agreement.

1.2 An Order rectifying the written Joint Agreement, Annexure “A” by substitution of the registration number ‘2006/09672/23’ with the registration number ‘2006/096672/23’.

1.3 The First Defendant is ordered to render to the Plaintiff within 1 (ONE) month from the date of this Order a true and proper statement of account, together with substantiating documents reflecting the current income, assets, expenditure and liabilities of each and every project conducted in terms of the Joint Venture Agreement from date of inception thereof to the date of the accounting.

1.4 The First Defendant is ordered to debate the said account with the Plaintiff from 1 (ONE) month from the date that it was rendered in terms of prayer 1.3 above.

1.5 The First Defendant is ordered to lodge an amended founding statement with the Companies and Intellectual Property Commission reflecting that the Plaintiff owns 30% of the members’ interest in the First Respondent as from 22 September 2010 within 5 (FIVE) days of the days of service upon it of this Order.

1.6 Costs of suit.

2. Against the First and Second Defendants as follows:

2.1 The Second and Third Defendants are ordered to sign and lodge with the Companies and Intellectual Property Commission an amended founding statement reflecting that the Plaintiff owns 30% of the members’ interest in the First Defendant as from 22 September 2010 within 5 (FIVE) days of the service upon them of this Order.

2.2 Should the Second and Third Defendants fail or neglect or refuse to comply with prayer 2.1 above, then and in that event the Sheriff of the above Honourable Court is authorised in rem suam to take all steps in order to give effect to prayer 2.1 above.

3. Against the First, Second and Third Defendants jointly and severally as follows:

3.1 The First Defendant, Second Defendant and the Third Defendant are ordered to pay the costs of the action jointly and severally. ”

[2] The defendants opposed the summary judgment application, wherein they raised two points in limine, namely, the non-compliance with Rule 32(1) of the Uniform Rules of Court (“the Rules”) and prescription. They also raised a defence on the merits.

[3] The plaintiff granted the defendants leave to defend the main action and the costs were reserved by agreement between the parties.

[4] The matter was set down for hearing on costs.

B. ISSUE

[5] The only issue for this Court to consider is which party should bear the costs of the summary judgment application

C. THE DEFENDANT’S CASE

[6] Counsel for the defendant, Mr Maree, submitted the following:

6.1 the plaintiff’s claim against the defendants for rectification of the joint venture agreement, delivery of a statement of account and the debatement of such account, and the lodging of an amended founding statement with the Companies and Intellectual Property Commission (“the Commission”), fell outside the ambit of summary judgment proceedings, specifically Rule 32(1);

6.2 the plaintiff was at all relevant times legally represented;

6.3 the plaintiff, through his legal representatives, was informed in writing by the defendants’ legal representative of the abovementioned irregularity and requested to withdraw the summary judgment application, failing which an appropriate cost order would be sought against the plaintiff;

6.4 the plaintiff failed to adhere to the provisions of Rule 32(1) and notwithstanding this, failed to adhere to the abovementioned request of the defendants;

6.5 in the circumstances, where the plaintiff delivered an abortive application, in the sense that he did not place himself within the ambit of the rule, or the application is defective, for want of compliance with one or other of the requirements for validity of a summary judgment application, the merits or demerits of the defendant’s opposing affidavit become irrelevant. The obvious resultant order is that the application is dismissed with costs. Costs then follow the result. See Summary judgment: A Practical Guide, Van Niekerk, Geyer, Mundell, Chapter 12, pages 12–13, paragraph 12.2; *Misid Investments (Pty) Ltd v Leslie* 1060 (4) SA 473 (W);

6.6 the plaintiff should be ordered to pay the defendant’s costs on a punitive scale and the plaintiff’s action be stayed until such costs are paid to the defendants, as provided in Rule 32(9)(a) of the Rules.

D. THE PLAINTIFF'S CASE

[7] Counsel for the plaintiff, Mr Scholtz, submitted the following:

7.1 the plaintiff sought to rectify the joint venture agreement to reflect the correct trading name and CK number of the first defendant. Such rectification is competent in summary judgment applications. See PCL Consulting (Pty) Ltd t/a Phillip's Consulting SA v Tresco Trading 119 (Pty) Ltd 2009

(4) SA 68 (SCA) at 70H–71E, paragraphs 4 & 5;

7.2 the relief sought against the first defendant, namely, to lodge an amended founding statement, and against the second and third defendants to sign and lodge an amended founding statement with the Commission reflecting that the plaintiff owns 30% of the members' interest in the first defendant are both competent forms of relief in summary judgment proceedings in that it equates to delivery of specified movable property;

7.3 the plaintiff concedes that its claim for the rendering of an account is not susceptible to summary judgment, but this concession does not warrant that the entire application for summary judgment be dismissed and/or the special costs order sought being granted against him arising from the fact that prayers 1.1, 1.2, 1.5, 2 and 3 of the plaintiff's summary judgment application remain competent relief sought in summary judgment proceedings;

7.4 the outcome of the merits of the disputes between the parties and the correctness of the defendant's alleged version will be determined at trial and that is why the appropriate costs order should be costs in the cause so that the costs follow the result.

E.

ANALYSIS

[8] Rule 32(1) of the Rules states that:

“(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.”

- [9] It is a condition precedent to an application for summary judgment that the claim(s) upon which the application is based shall be on one or more of those listed in subrule (1) supra. If the claim is not one listed, the procedure of Rule 32 does not apply. See Erasmus Superior Court Practice, Commentary Rule 32(1), page B1–209.
- [10] A dispute relating to the rectification of documents, whether it be the plaintiff or the defendant who seeks such rectification, cannot be resolved in a summary judgment application. See Summary Judgment: A Practical Guide, Van Niekerk, Geyer, Mundell, Chapter 4, pages 4–5, paragraph 4.6; Malcolmess Scania (Pty) Ltd v Vermaak 1984 (1) SA 297 (W) 299E.
- [11] In the case of PCL Consulting (Pty) Ltd t/a Phillip's Consulting SA v Tresco Trading 119 (Pty) Ltd supra, referred to by Mr Scholtz, the Supreme Court of Appeal ("SCA") held at paragraph 3 that:
- "A prayer for rectification does indeed fall outside the provisions of rule 32. It does so not because it is a claim impliedly*
- excluded by that rule, but because it is not, in the true sense, a claim at all."
- [12] In the PCL Consulting (Pty) Ltd t/a Phillip's Consulting SA v Tresco Trading 119 (Pty) Ltd supra, the plaintiff's claim in the action was for arrears owing in respect of a lease agreement and rectification was sought to enable the plaintiff to prove its claim as there was an error in the description of the premises, that is, it was described as 6th Floor, whereas it should have referred to 4th Floor.
- [13] The parties in the above case were ad idem in respect of their written contract not correctly reflecting the agreement and in those circumstances, the SCA was of the view that rectification was permissible in the summary judgment application. Specifically because in terms of Rule 32(2), the plaintiff is required to verify the cause of action and not to verify that it will be able to prove the cause of action.
- [14] The PCL Consulting (Pty) Ltd t/a Phillip's Consulting SA v Tresco Trading 119 (Pty) Ltd case supra is distinguishable to this case, as the cause of action in casu, is based on the joint venture agreement between the plaintiff and the defendant, which agreement was disputed by the defendant in its opposing affidavit, wherein he alleged that "the plaintiff unilaterally prepared the document annexed to the particulars of claim marked "A" which differed in numerous material respects from the document annexed hereto marked "B" ".
- [15] In the circumstances, the parties were not ad idem in respect of the written agreement and in the circumstances summary judgment on the relief sought for rectification was incompetent and fell outside the ambit of Rule 32(2).
- [16] In respect of the plaintiff's claim for rendering and debatement of account, the plaintiff correctly conceded that the relief it sought falls outside the ambit of Rule 32(2).

[17] Turning to the remaining relief sought in the application for summary judgment, the plaintiff in paragraphs 1.5 and 2.1 of the summary judgment application, sought the following:

17.1 as against the first defendant, that the defendant:

17.1.1 amend the founding statement to reflect that the plaintiff owns 30% of the members' interest in the first respondent;

17.1.2 lodge an amended founding statement with the Commission, the amended founding statement;

17.2 as against the first and second defendants:

17.2.1 to prepare an amending founding statement reflecting that the plaintiff owns 30% of the members' interest in the first defendant;

17.2.2 to sign and lodge with the Commissioner, the amended founding statement.

[18] Mr Scholtz's submission that the above relief falls within the ambit of delivery of movable property under Rule 32(1)(c) is, in my view, without merit and far-fetched as it is clear that the relief sought entails much more than the delivery of a document. It entails an amendment of the founding statement, coupled with a lodgement of the founding statement, and as against the first and second defendants, it also includes the signing and lodging of the founding statement.

[19] Accordingly, the relief sought against the defendants *supra*, is not in my view, a claim for delivery of property as provided in Rule 32(1)(c).

[20] I am accordingly in agreement with Mr Maree that the plaintiff's claim fell outside the ambit of summary judgment proceedings.

[21] Turning to the issue of costs, this Court cannot turn a blind eye to the correspondence delivered to the plaintiff's attorney after it filed its application for summary judgment, wherein the defendant said, *inter alia*, the following:

"2. As you will appreciate, Rule 32(1) provides that a Plaintiff may apply to Court for summary judgment on each of such claim in its summons as is only on a liquid document, for a liquidated amount in money, for delivery of specified movable property, or for ejectment, together with interest and costs. Furthermore, it is trite that the object of summary judgment proceedings is to prevent a Plaintiff's claim, based upon the specified causes of action, from being delayed by what amounts to an abuse of the process of court in circumstances where a Defendant has entered an appearance to defend merely in order to delay the granting of the Plaintiff's rights. The procedure is not intended, however, to shut out a Defendant who can show that there is a triable issue applicable to the claim as a whole from laying its defence before the Court.

3. As you will appreciate further, the relief sought by your client in his particulars of claim, and in the consequent application for summary judgment, concerns a claim for rectification of the alleged joint venture agreement, delivery of a statement of account and the debate of such account and the lodging of an amended founding statement with the Companies and Intellectual Property Commission. It has been held, however, that a claim for rectification of an agreement as in casu is not susceptible to summary judgment. Likewise, it has been held that a claim for delivery of a statement of account could not be considered a claim for a liquidated amount of money and that such claim is therefore also not susceptible to summary judgment.
4. In the premises, we respectfully submit that the Plaintiff's summary judgment application is bad in law and should be withdrawn."

[22] The plaintiff was further advised that the defendant has a sustainable bona fide defence and that their plea to the particulars of claim would be finalised shortly. Notwithstanding, the plaintiff did not

withdraw the application.

[23] This Court cannot ignore the plaintiff's concession that its claim for the debate of account falls outside Rule 32 and notwithstanding, the plaintiff persisted with this relief in its application for summary judgment.

[24] It is clear that what the plaintiff sought to do was to obtain a tactical advantage in that the defendant had to disclose its defence in circumstances where it was not warranted. See Erasmus Superior Court Practice, Commentary Rule 32(1), page B1-209.

[25] Rule 32(9) reads:

"(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if-

- (a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client."

[26] For the reasons stated supra, I am of the view that it will be just to invoke Rule 32(9)(a) and impose costs on a punitive scale.

F. ORDER

[27] In the circumstances, I grant the following order:

- a) The plaintiff is ordered to pay the defendants' taxed costs on an attorney and client scale.
- b) The action is stayed until the plaintiff has paid the defendant costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 04 SEPTEMBER 2014

DATE OF

JUDGMENT

: 11 SEPTEMBER 2014

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COUNSEL FOR DEFENDANTS

: ADV G. MAREE

ATTORNEYS FOR PLAINTIFF

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ATTORNEYS FOR DEFENDANTS

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(Instructed by ADAMS & ADAMS)

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