Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 13903 / 2019

In the matter between:

MASANA PETROLEUM SOLUTIONS (PTY) LTD Plaintiff

(Registration number: 2000/002087/07)

and

PETROX (PTY) LTD First Defendant

(Registration number: 2014/145435/07)

ANET CLAASEN Second Defendant

Coram: Wille, J

Heard: 21st of October 2020

Delivered: 2nd of November 2020

JUDGMENT

WILLE, J;

[1] This is an application for summary judgment, sounding in money, against the first and second defendant, jointly and severally, the one paying the other to be absolved. The first defendant is cited as the principal debtor and the second defendant is cited as the surety.[1]

[2] The defendants filed a plea to the plaintiff's claims as formulated in the plaintiff's particulars of claim. The defendants effectively pleaded no contest to the averments in the plaintiff's particulars of claim, save for denying the *amount* claimed by the plaintiff.

[3] It seems to be common cause; that the plaintiff and the first defendant concluded a *supply agreement* in terms of which the plaintiff undertook to supply to the first defendant certain diesel petroleum products;[2] that the plaintiff complied with its obligations and from time to time supplied the first defendant with the product; that despite having taken delivery of the product, the first defendant failed to pay for certain of the product leaving a balance on account, in the sum of R496 423,68; that in order to secure its position, going forward, the plaintiff concluded an *acknowledgment of debt* with the first defendant in terms of which, the first defendant acknowledged its indebtedness to the plaintiff and undertook to repay the plaintiff, by way of instalments.

[1] The 'defendants'
[2] The 'product'

[4] The first defendant did indeed make some payments in accordance with the terms of the acknowledgment of debt, but thereafter defaulted with the result that the defendants remained indebted to the plaintiff. The plaintiff thereafter instituted action and claimed the sum of R422 731,05 from the defendants. Initially, when the *supply agreement* was entered into with the first defendant, the second defendant bound herself as a *co-principal debtor and surety* for the due fulfilment, by the first defendant of all of its obligations to the plaintiff.

[5] The defendants filed a plea and averred that they had made payments to the plaintiff. These payments were made after the date of the conclusion of the acknowledgment of debt. The only *shield* raised in an attempt to resist summary judgment, was the defence that the *amount* claimed from the defendants was incorrect and is far less than the amount claimed in the particulars of claim. The defendants advance that the proof of these subsequent payments, will be handed up at the trial of the action proceedings.

[6] This pleading by the defendants, no doubt triggered the launching of the plaintiff's application for summary judgment, which application now stands opposed. After a number of postponements, by agreement between the parties, the defendants eventually filed an affidavit resisting summary judgment, coupled with an application for condonation for the late filing thereof. This condonation application was initially opposed by the plaintiff and an answering affidavit was filed by the plaintiff in this connection.

[7] When the application presented itself before me, the application for condonation

was no longer opposed and accordingly, I agreed to determine the main application for summary judgment. That having been said, I remained at liberty to assess and deal with the *material* before me that featured in the condonation application and the opposition thereto. Correspondence was exchanged between the plaintiff's attorneys and the defendant's attorneys, inter alia, in connection with the application for condonation. The defendant's attorneys at some point, informed the plaintiff's attorneys, in writing, that the defendants had now quantified the *maximum possible amount* due to the plaintiff, to be the sum of R192 731,05.

[8] The defendants contend for two defences to the plaintiff's claim, namely, that there exists a dispute as to the *quantum* of the plaintiff's claim and that the plaintiff's claim is not a *liquidated* claim. Further, that the defendants suffered damages in that a load of product which they had ordered, but had subsequently cancelled, was nevertheless delivered to a third party by the plaintiff and (as the defendants never received payment from this third party), this payment falls to be deducted from the outstanding amount claimed by the plaintiff. As I see it, this is not *per se* a damages claim, but rather a claim for a reduction on account.

[9] Initially, when the action was instituted the plaintiff contended for payment in the amount R422 731,05. Following upon a series of exchanges between the respective attorneys, it was discovered that the defendants were claiming that payments had been made to the plaintiff after the summons had been issued. The defendants' attorney described this *discovery* in the following terms;

'*our client tried to provide us with proof of all her payments made after your clients date of his*

> *particulars of claim, but his* [sic] *battling to find all previous payments, which is not reflected in the amount claimed by your client*'

[10] The plaintiff's ultimate re-capitulation statement indeed accords with the defendants' calculation of R192 731, 05. This amount is the precise amount that the plaintiff's finance director verified to be the balance of the debt owing by the defendants to the plaintiff. This amount also exactly accords with the defendants'own ledger calculations.

[11] In addition, the defendants fail to furnish any specific detail about any subsequent payments made by them, on account. There is no information about, when such payments were made, what the amounts were of each payment and how many payments were made. This strikes to the issue of the *bona fides* of the defences raised by the defendants.

[12] The defence raised in connection with the *liquidity* of the plaintiff's claim falls to be dealt with swiftly. I take the following from *Myburgh*[3], in connection with the issue of the meaning of a - *liquidated amount in money* - where it was held, inter alia, as follows;

> *'…that a claim cannot be regarded as one for - a liquidated amount in money - unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation'*

[13] The defendants have not denied any of the terms of either the supply agreement, nor the acknowledgment of debt. The default in payments by the defendants is also

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[3] First National Bank of SA Ltd v Myburgh 2002 (4) SA 176 (C) at 181 G - I

significantly, not the subject of any denial. The only issue raised by the defendants is that they say that they made certain payments on account, after the action proceedings had commenced.

[14] Accordingly, the defendants contend for the position that because of these payments, the plaintiff's application for summary judgment falls to be dismissed. In my view, the payments made by the defendants - *post action* - do not in any manner render the plaintiff's claim to now undergo a chameleonic change, into an illiquid claim. The plaintiff's claim remains for a liquidated amount in money, simply reduced by any payments made on account by the defendants.

[15] Further, I have to consider the issue of whether or not the defence put up by the defendants is indeed a bona fide defence. On this score I do not have to cast my net very far. *Binns-Ward J,* has recently set out the *legal position* when dealing with the amended summary judgment court rules and their impact on applications for summary judgment. I take, inter alia, the following from his judgment in *Tumileng*[4]*;*

> *'Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application'*[5]
>
> and

[4] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 JDR 0747 (WCC)
[5] Tumileng at paragraph 13

'As has always been the position, the opposing affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant has a bona fide defence to the action'

and

'There is thus no substantive change in the nature of the 'burden', if that is what it is, placed on a defendant in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b), will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence'[6]

[16] As far as the *bona fides* issue is concerned, the following is apposite, namely;

'The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which 'the nature and grounds of the defence and the material facts relied upon therefor' have been canvassed out by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words not bona fide. *And the amended subrule 32(3)(b) implies that it should continue to be the indicated method'*[7]

[17] What is clear from *Tumeleng*, is that the test for resisting summary judgment remains the same. In certain circumstances however, depending on the *level of*

[6] Tumileng at paragraph 24
[7] Tumileng at paragraph 25

engagement by the defendant, when a plea is filed, it may be more difficult for a defendant to resist summary judgment if the plea does not engage fully with the plaintiff's formulated claims.

[18] Litigation is not a game and in this case the defendants deny the amount outstanding to the plaintiff. They say that they have made more payments on account, but go no further other than to state that the necessary proof of these payments will be handed up to the court during the trial in the action proceedings. In my view this *formulation and type* of defence is not only *unfortunate* but, also goes to the issue of the *bona fides* of the defendants.

[19] In contrast to this, the plaintiff's finance director confirms under oath and verifies that the sum outstanding is the sum of R192 731,05. The defendants further attempt to bolster their defence by alleging that they proceeded, in the interim, to make payments, but that there were indeed some months - *that they could not make payment* - due to the current pandemic.

[20] It is what the defendants omitted to do in support of their defence which is of significance, namely; that they failed to provide dates for their alleged payments; that they failed to state the amounts of these alleged payments; that they failed to state how many payments were made and they failed to put up any documents in support of these payments. These omissions again go to the issue of the *bona fides* of the defendants.

[21] In order to successfully resist a summary judgment the defendants are required, inter alia, to fully disclose the facts relied upon by them for their defences. This in my view, has not been achieved. The defendants also put up a new defence. This new

defence is absent their plea. The new defence is that there was one load of product that was ordered by the first defendant and then subsequently cancelled by the first defendant, but this notwithstanding, this product was collected by a client of the first defendant and, the first defendant's account was nevertheless debited for the cost of this product.

[22] It is trite law that in order to resist summary judgment that the defence put up by the defendant, must of necessity be sufficiently complete and particularised. It does not have to be precise, but it must be complete. As far as this new defence is concerned, I take the following from *Groenewald*[8], in which it was held that;

> '*…where a defendant in summary judgment proceedings relies on an unliquidated counterclaim but fails to indicate the amount of such counterclaim, and where it appears that the counterclaim is likely to be substantially less than the main claim, such counterclaim does not constitute a* bona fide *defence to the action*'

[23] In as much as the plaintiff was able to engage with the new defence contended for by the defendants, the plaintiff advances that in the event that such counterclaim existed (which is denied), such counterclaim would certainly have been an issue that preceded the agreement concluded under and in terms of the acknowledgment of debt. This, again goes to the issue of the *bona fides* of the defendants.

[24] It is trite law that a defendant must fully disclose the nature and grounds of his defence and the material facts relied upon, which the defendant genuinely desires and intends to adduce at the trial.[9] In my view, the defendants fail to engage with the reduced

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[8] Groenewald v Plattebosch Farms (Pty) Ltd 1976 (1) SA 548 (C) at 550 F-G
[9] Breitendach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (CT))

quantum of the plaintiff's claim to any significant extent. This failure brings me to the final shield put up by the defendants.

[25] The defendants argue that on the papers, that it is evident that they have paid all the amounts due to the plaintiff under and in terms of the acknowledgement of debt. They contend for the position that the plaintiff is accordingly unable to succeed in its application for summary judgment, because the plaintiff's case in its affidavit in support of the application for summary judgment, alleges that the plaintiff's claim is based on the acknowledgement of debt. The defendants' case is that the acknowledgement of debt has now been extinguished, by their payments in terms thereof. I disagree for two reasons.

[26] Firstly, the defendants explicitly concede that there is an amount owing to the plaintiff. They do not squarely dispute that this is the *lesser amount* now claimed by the plaintiff. The defendants in their plea admit the terms of the supply agreement and the acknowledgment of debt. Secondly, the defendants admit that there were indeed some months - *that they could not make payment* - due to the current pandemic.

[27] The defendants are obliged to fully disclose the nature and grounds of their defence and the material facts relied upon which, they genuinely desire and intend to adduce at the trial, so as to defeat the plaintiff's claim for summary judgment. Measured against these requirements, I find that the defendants' affidavit opposing summary judgment does not set out sufficient identifiable facts and admissible evidence to render the quantum of the *reduced claim* by the plaintiff, to be a triable issue. Put in another way, in my considered view, the defendants fail to adduce any facts to refute the plaintiff's now reduced claim, which would result in a triable issue.

[28] In all the circumstances of this matter, it is ordered as follows;

1. That summary judgment is hereby granted against the first and second defendants, jointly and severally, the one paying, the other to be absolved for;

    1.1 Payment of the sum of R192 731, 05.

    1.2 Interest on the said amount, at the legal rate of interest, a tempore morae.

    1.3 Costs of suit (as between party and party), as taxed or agreed.

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E D WILLE
Judge of the High Court