FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

ECJ:

PARTIES**:** **PORT ELIZABETH INNER CITY HOUSING (PTY) LTD**

And

PIETER NIEMAN

(a) Registrar: **2575/08**

(b) Magistrate:

(c) High Court: **SOUTH EASTERN CAPE LOCAL DIVISION**

DATE HEARD: **17/02/09**

DATE DELIVERED: **26/02/09**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV: Scott**
- for the Respondent(s): **ADV: Mey**

Instructing attorneys:

(a) Applicant (s): **BOQWANA LOON & CONNELLAN ATTORNEYS**

(b) Respondent(s): **RUSHMERE NOACH INCORPORATED**

CASE INFORMATION -

1. *Nature of proceedings*: **RULE 32 – SUMMARY JUDGMENT**

Not reportable
In the High Court of South Africa
(South Eastern Cape Local Division, Port Elizabeth) Case No 2575/2008

In the matter between

PORT ELIZABETH INNER CITY HOUSING (PTY) LTD **Applicant**

and

PIETER NIEMAN **Respondent**

SUMMARY: Rule 32 – summary judgment – alternative causes of action may both be verified in the summary judgment affidavit provided that they are not mutually destructive – *bona fide* defence – in setting up the defence to a claim for repayment of a loan (a) that the loan was simulated and that the real nature of the transaction was a joint venture and (b) that he had a counterclaim, the defendant produced a document which contradicted his version of the facts and supported the plaintiff's version – in the absence of any explanation of the contradictions in his own version, the defence was held not to be a *bona fide* defence as contemplated by rule 32(3).

JUDGMENT

JONES J:

[1] The applicant seeks an order for summary judgment in the sum of R290 000-00, together with orders for interest and costs. The capital amount was alleged in the particulars of claim to have been for money lent, advanced and paid over by the plaintiff to the defendant. The money was to have been used for the completion of certain building contracts in Grahamstown.

[2] The particulars of claim alleged that the contract originally relied upon was a written agreement for a loan of R300 000-00 entered into between the plaintiff on the one hand and the defendant and a Mr Mjekula, the lenders, on the other on 17 June 2008. The written agreement was then varied by an oral agreement in terms of which the amount was altered to R290 000-00 (the amount actually paid over) and the money was lent solely to the defendant, Mr Mjekula falling out of the picture entirely. In the alternative, the plaintiff alleged that the oral variation of the original written

agreement was an agreement in terms of which there was (a) a loan of R145 000-00 by the plaintiff to the defendant, (b) a loan of R145 000-00 by the plaintiff to Mr Mjekula, which was in turn lent on by Mr Mjekula to the defendant, (c) that the amount of these two loans, R290 000-00, was paid by the plaintiff directly to the defendant, (d) that Mr Mjekula ceded his claim for repayment of R145 000-00 to the plaintiff, and (e) that the plaintiff was as a result entitled to recover the full amount, R290 000-00, from the defendant.

[3] The summary judgment application was opposed on two bases. First, the defendant contended that the summary judgment application was fatally defective because the deponent to the summary judgment affidavit purported to verify two causes of action which were alternative to each other and mutually destructive. Second, he contended on the merits that the plaintiff relied on an agreement of loan which was simulated, and that the real nature of the transaction between him and the plaintiff was a joint venture to do building work. He also contended that he had a counterclaim against the plaintiff which exceeded the amount of the claim against him.

[4] Rule 32(2) requires that an application for summary judgment must be supported by an affidavit by the plaintiff or any other person who is able to swear positively to the facts verifying the cause of action and the amount, if any, of the claim. The plaintiff's managing director deposed to the affidavit in this case. He alleged that the facts contained in the affidavit were true and correct, that they were within his personal knowledge, that he could swear positively to the facts of the matter, and that he verified the applicant's cause of action as set out in the summons

and the amount claimed. The amount claimed and verified was R290 000-00. With reference to the cause of action, the effect of the affidavit was verification by the deponent of

(d) the original written agreement of loan;

(e) the oral variation of the loan by a reduction in the amount from R300 000-00 to R290 000 by the plaintiff to the defendant, without Mr Mjekula being involved; and

(f) the alternative oral variation alleging two loans, one to the defendant and one to Mr Mjekula in the amount of R145 000-00 each, a loan of Mr Mjekula's R145 000-00 to the defendant, and the cession of Mr Mjekula's claim for repayment to the plaintiff.

Ms *Mey* argued on behalf of the defendant that it was not possible for the deponent to verify both (b) and (c), and that, for that reason, the summary judgment application was fatally defective.

[5] Ms *Mey* correctly submitted that while it is permissible to formulate two claims in the alternative where the causes of action conflict with each other, it is not permissible to verify both of them in one breath for the purposes of getting summary judgment if they are mutually destructive. The plaintiff must choose between them, and, having made his election, that is the cause of action that he must verify. See *Barclays National Bank Ltd* v *Smith* 1975 (4) SA 675 (D) which held at 682D-H that where two mutually destructive versions of the *facta probanda* are relied on in support of alternative causes of action set out in a summons the verifying affidavit of the plaintiff in a summary judgment application must elect between the alternative versions of the facts and that if the deponent purported to verify each of two mutually

destructive alternative versions of the cause of action, he could not be said to have verified either of them. In my view, however, the factual complex in these particulars of claim, read as a whole, permit the alternative allegations to stand side by side. They are not mutually exclusive. On the contrary, they reflect a series of transactions where the basic facts remain constant and consistent; the plaintiff in fact agreed to pay over the sum of R290 000-00 to the defendant for a particular purpose, the money was in fact paid over to him; and the money has not been repaid. The written agreement of loan allegedly involved Mr Mjekula, and so did the alternative oral variation, but not the first alternative claim. The two alternative oral claims are for the same amount, and it is really only the mechanism of how the transactions were arranged that differ. This is not a case where different and mutually irreconcilable facts must be proved to establish them. In my view, the facts fall within the principle of such cases as *Diesel Power Hire CC* v *Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W) 297D), *Adenia Eiendomme (Edms) Bpk* v *LPD Ondernemings Bk* [1997] 3 All SA 85 (T) and *Visser* v *Incorporated General Insurances Ltd* 1994 (1) SA 472 (T) 475 where the plaintiff for summary judgment was held not to have acted irregularly in verifying alternative causes of action which did not involve proof of facts to establish them which cannot co-exist. Here, the facts depend rather for their existence on nuances of one's understanding, for example, of Mr Mjekula's role in the arrangement which might be open to different interpretations or inferences but which are essentially not in conflict.

[6] Turning to the defences on the merits, it is necessary for a defendant to set up facts which make out a good defence in law. If he does so, he must also satisfy the court that his defence is *bona fide.* If he fails on either or both legs, it is still open to

him to make an argument designed to persuade the court to exercise its inherent discretion against ordering the final and drastic remedy of summary judgment.

[7] The main defence on the merits was a denial of liability under an agreement of loan. The defendant's case was that the loan was a simulated transaction, and that the amount was really paid over as part of the preliminary arrangements for a joint venture between the plaintiff, the defendant and Mr Mjekula relating to building contracts and work to be done in the future through the vehicle of a limited liability company to be formed. The defendant's case was that he is not and never was liable to repay the amount. He alleged further that in pursuance of the preliminary joint venture agreement he did consultancy work, feasibility studies and other professional work for the applicant in an amount of R891 879-00, for which he has a counterclaim. This work was done after the joint venture allegedly came to a preliminary stage of near-fruition with the applicant taking up membership in a closed corporation, Man Infracon CC, preparatory to its conversion into the limited liability company contemplated by the parties. But the joint venture did not get off the ground, and it ended in nothing.

[8] Mr *Scott* has conceded that the defendant's allegations, if proved in due course, would make out a legal defence in respect of the merits and the counterclaim. But he submitted that in the light of the information placed by the defendant before the court, the inference is overwhelming that the defence is not *bona fide.* The information to which Mr *Scott* refers is a document containing minutes of a meeting held between the parties and their associates in Port Elizabeth on 26 November 2008, at a time when the relationship between the parties had apparently

already become soured, the joint venture had all but fallen through, and the defendant says that he had terminated his participation in it, or was about to do so. The minutes set out important information which impacts upon the defendant's contention that there never was a loan between the parties. They contain an account of the history of the defendant's closed corporation, Man Infracon CC, which is relevant and part of which is summarized below. The chronological background commences with the statement that on 29 October 2007 the defendant, trading as Man Enterprises, requested a loan from the plaintiff of R245 000-00 to enable him to complete six houses he was in the process of constructing in Grahamstown. Man Infracon CC was registered in November 2007, with the defendant as sole member. By May 2008, the parties had entered into a preliminary arrangement to form a joint venture to be housed in Man Infracon CC, which was to be converted for this purpose into a limited liability company, and through which both parties were to do construction projects for their joint benefit. The minutes record the written loan agreement of June 2008 for R300 000-00 which was intended to enable the defendant, trading as Man Infracon Enterprises, to complete four of the six remaining houses he was in the process of constructing in Grahamstown. Next, there is an entry that between 6 and 17 June 2008 a total amount of R290 000-00 was advanced to Man Infracon CC on the instructions of the defendant, and that the defendant was of opinion that this amount was the consideration paid by the plaintiff for a 60% share in the existing business, Man Enterprises, and that new business would be housed in Man Infracon CC which was to be converted to a company. A few entries further on, the minutes record unequivocally that the defendant confirmed that the +/- R300 000-00 was in fact a loan to himself in this personal capacity. The minute then referred to the invoices in respect of the counterclaim, which were dated

31 October 2008, and continued that ‘at the same time a letter was received from [the defendant] acknowledging liability for the personal loan that was signed jointly with Mike Mjekula. Only R290 000-00 was advanced in terms of this loan . .’. It is quite apparent that these statements by the defendant cannot co-exist with the defence that he now wishes to raise. I am aware that a defendant does not have to prove his defence on a balance of probabilities at the summary judgment stage. But for a defence to be *bona fide* the defendant should at least explain inherent weaknesses which arise in the course of its presentation. These minutes contain statements by the defendant which are so inconsistent with the denial that the defendant personally borrowed the money from the plaintiff as to be destructive of it. He signed the minutes as being correct. After annexing them to the affidavit setting out his defence in terms of rule 32(3)(b) he placed on record that the minutes were not a true reflection of the proceedings and many statements attributed to him were not true and correct. He does not explain why he signed the minutes as correct. He does not say which statements were incorrectly attributed to him, in what respects they were incorrect, what he actually said, or what the correct position is. He does not say who took the minutes or suggest any reason why they were not accurate. The result is that the presentation of his own defence not only flatly contradicts it by revealing that whatever the arrangements for a joint venture may have been, this loan agreement was not part of it; it also does nothing to place a different complexion on that state of affairs in the way of an explanation which only the defendant is able to give. In the absence of an explanation which *prima facie* puts the minutes in a different light, this defence cannot in my opinion amount to a *bona fide* defence in these circumstances. There are, furthermore, no additional facts or considerations of

equity which operate in favour of exercising a discretion in the defendant's favour to refuse summary judgment.

[9] The minutes create another difficulty for the defendant, this time with reference to the defence of a counterclaim. There was a debate at the meeting about whether the defendant should have raised charges reflecting the amounts in the invoices which comprised the counterclaim because of the practice in the building industry that a contractor does certain initial ground work at risk in the hope of being awarded the contract and reaping his rewards at a later stage. The minutes refer to the counterclaim documents as follows:

> '6.14 [The plaintiff] advised that he had received demand from a debt collecting agency for these amounts.
> 6.15 The accounting officer [presumably of the defendant's closed corporation] remarked that the defendant was being unreasonable because
> 1. it is the norm to do such work on a risk basis;
> 2. his claim was highly inflated, and that he was actually trying to make a profit on the non-materialized work at [the plaintiff's] expense;
> 3 should [the plaintiff] also not be able to make a similar claim?
> 6.16 [The defendant] conceded this to be the case and advised that he had only asked for advice and had not instructed them to proceed with the demand. He advised that he would contact the debt collecting agency and advise them to withdraw the debt and issue an appropriate apology to the parties'.

Once against, the defendant does not explain in his opposing affidavit whether these are among the incorrect statements wrongly attributed to him, and does not give them a context in the presentation of his case which makes sense of his counterclaim and enables him to pursue it realistically so that it can be regarded as *bona fide* despite the contradiction. In the result the defendant has failed to satisfy the requirements of rule 32(3)(b) in raising the counterclaim as a defence, and I can see no justification for permitting him to pursue it as a defence to the plaintiff's claim.

This does not preclude him from bringing the claim in separate proceedings in due course if so advised.

[10] In the result the defence to the plaintiff's claim for summary judgment fails. There will be judgment for the plaintiff in the sum of R290 000-00, with interest at the prescribed rate from the date of service of the summons to date of payment, and costs of suit on the scale as between party and party.

RJW JONES
Judge of the High Court
22 February 2009