

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
NORTH GAUTENG, PRETORIA

Case Number: 68600/12

In the matter between

LEGAL AND LAW CC

GEORGE GIDEON PETRUS VAN ZYL

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

DATE

SIGNATURE

First Plaintiff

Second Plaintiff

and

B&B NEEFS KONSTRUKSIE BK

First Defendant

BAREND JACOBUS BESTER

Second Defendant

BAREND VAN DER WALT

Third Defendant

JUDGMENT

BAM AJ

1. An application for Summary Judgment in terms of the provisions of Rule 32, was lodged by the plaintiffs. The Defendants opposed the application.
2.
 - (i) The plaintiffs issued summons against the defendants on 28 November 2012.
 - (ii) The summons was served on the defendants' attorney of record on 6 December 2012.
 - (iii) On 11 December 2012, within 3 court days after filing of the Notice to Defend, the plaintiffs, in terms of Rule 32, served their application for summary judgment on the defendants, notifying the defendants that the application would be enrolled on 5 February 2013.
 - (iv) On 10 January 2013 the defendants served their Notice of Removal of Complaint in terms of Rule 23(1);

- (v) On 30 January 2013 the defendants filed and served the following process:
 - (a) A Notice of Withdrawal of the Notice of 10 January 2013;
 - (b) A new Notice of Removal of Complaint in terms of Rule 23(1) in respect of alleged vague and embarrassing averments. No formal notice of exception subsequent to that notice has as yet been filed;
 - (c) A formal Notice of Exception directed against the particulars of claim stating that it did not disclose a cause of action.
 - (d) The defendant's opposing affidavit to the plaintiffs' application for summary judgment, incorporating all the grounds and points of exception contained in the two notices referred to in (b) and (c) above.
- 3. This Court was not called upon to adjudicate on the exception referred to in 2(v)(c), *per se*, but to consider the grounds thereof as contained in the opposing affidavit as the grounds upon which the defendants based their contention of a *bona fide* defence envisaged by Rule 32.
- 4. The applicants were represented by Ms vd Walt and the defendants by Mr Vermeulen with Mr Bouwer. Extensive and comprehensive heads of argument were filed on behalf of both parties. It was common cause that the proposed *bona fide* defence of the defendants was based on technical grounds and not on the merits.
- 5. For practical purposes I deemed it expedient to request Mr Vermeulen to address the court on the issue of the contended *bona fide* defence of the defendants. Ms vd Walt replied.
- 6. Mr Vermeulen raised several points of criticism against the plaintiff's affidavit in support of the summary judgment. The alleged defects can be summarized as follows:
 - (i) That the verification affidavit did not comply with the provisions of Rule 32 in that instead of only verifying the facts, it contained evidence as well.
 - (ii) The second point was that the affidavit was not properly commissioned.
 - (iii) The third point entailed that all the claims were not verified.

7. I will deal with the issues mentioned in par 6(i), (ii) and (iii) forthwith.
- Ad 6(i): The affidavit adequately verified the cause of action. The fact that that plaintiff repeated the particulars of claim does not affect the validity of the affidavit. Where the plaintiff added anything more than what is contained in the particulars of claim, it will be ignored.
- Ad 6(ii): A mere perusal of the last page of the founding affidavit reveals that the affidavit was indeed properly commissioned.
- Ad 6(iii): The averment that all the claims were not verified, is evenly without substance. When the wording of the affidavit is read in context, it appears that the verification complied with the requisites of the Rule.
- In view of the order I intend to make I deem it unnecessary to elaborate any further on the issues.
8. Mr Vermeulen submitted that the existence of a so called "*technical defence*", established by a defendant, will be sufficient to constitute a *bona fide* defence. This submission was contested by Ms van der Walt. I agree with Mr Vermeulen. Even a so called "*technical defence*", if upheld by the trial court, may result in the claims of any plaintiff be dismissed. Accordingly this issue need not be discussed any further.
9. In considering whether the points taken by the defendants regarding the alleged excipiable parts of the plaintiffs' particulars of claim, I find it unnecessary to deal with each and every point. It suffices to say that if it is found that the particulars of claim are indeed excipiable as contended by the defendants, leave to defend should be granted. I will refer to only a few grounds.
10. One of the grounds relied upon by the defendants against the two claims set out in the plaintiffs' particulars of claim' was that the two claims are actually a duplication based on the same cause of action. It was submitted that the two claims should have been stated in the alternative. Ms vd Walt attempted to rectify this problem by handing up a draft order, which I marked "XX", now reflecting that an order, pertaining to the initial two claims, is sought in the alternative. Ms vd Walt could not explain why the plaintiffs did not amend their particulars of claim after having received the defendants' Opposing Affidavit, containing, amongst others, the complaint, and the notice of exception, against the mentioned duplication of claims as being vague and embarrassing. There was also no explanation why the defendants were not informed of the intention of the plaintiffs to, apparently, amend their particulars of claim in that regard. This ground *per se*, in my view, constitutes a technical *bona fide* defence.

11. A further ground relied upon by the defendants is that the particulars of claim rely on contract as well as delict as basis for the claims. In this regard Ms vd Walt submitted that this Court, in considering that issue, should disregard any reference to delict. Ms vd Walt's submission was without substance. There is no basis upon which any court can just ignore averments contained in particulars of claim where the said averments are objected against by a defendant in matters of this nature. It is clear that the plaintiffs' particulars of claim in that regard were fatally flawed exceptible. The said ground is therefore well founded and constitutes a *bona fide* technical defence.
12. The defendants further relied on the defence that the plaintiffs' averments in respect of the terms of the contract were not substantiated by the terms of the contract. In this regard is not necessary to consider the issue in its fullest detail. In my view this ground is arguably a *bona fide* defence.
13. Ms vd Walt's submitted that the defendants deliberately mislead the court pertaining to the question whether the National Credit Act is applicable and that their claim that they have a *bona fide* defence, should be dismissed *in toto*, on that ground alone. Even if the defendants did mislead the Court in that respect, without deciding the issue, I will not be inclined to, on that point, to dismiss the defendants' *bona fide* technical defences alluded to above. That could never be justified.
14. It follows that the defendants should be granted leave to defend.
15. Regarding the issue of costs, Mr Vermeulen argued that the matter justified costs of two counsel, including the costs of a senior junior. It was further submitted by Mr Vermeulen that costs should be awarded on a penalty scale. In this regard Mr Vermeulen submitted that the plaintiffs were properly forewarned about the excipiable parts of their particulars of claim, but that plaintiffs, nevertheless, persisted with their application for summary judgment. Ms vd Walt submitted that the matter did not merit the attention of two counsel and that costs should be costs in the cause. Ms vd Walt argued that the plaintiff's conduct in applying for summary judgement, was *bona fide* and should therefore not attrack penalty costs.

16. In my view the plaintiffs should have been aware that their particulars of claim were excipiable and that the defendants did have a *bona fide* technical defence to the claims. This is borne out by, amongst others the amendment of the order prayed for in the draft order marked "XX". Accordingly the defendants should be entitled to a costs order in their favour. I am however not inclined to award penalty costs in the circumstances. It cannot be said that the plaintiffs were *mala fide*. The matter was of a sufficiently complex nature to warrant the services of two counsel

17. The following order is made:

1. The summary judgment application is dismissed.
2. The defendants are granted leave to defend.
3. The plaintiffs are ordered to pay the costs, consequent upon the employment of two counsel, including the costs of senior junior counsel.



A J BAM ACTING JUDGE OF THE HIGH COURT.

7 JUNE 2013