



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:96119/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ☒ YES/☐ NO
(2) OF INTEREST TO OTHERS JUDGES: ☒ YES/☐ NO
(3) REVISED

17/6/2016

DATE

[Signature]
SIGNATURE

17/6/2016

In the matter between:

MACSTEEL SERVICE CENTRES SA (PTY) LTD APPLICANT

and

PROFIN TRADING 35 CC t/a VIKING FASTENERS AND	FIRST RESPONDENT
INDUSTRIAL SUPPLIES	SECOND RESPONDENT
FRANCOIS DU PLESSIS	THIRD RESPONDENT
MALCOLM BEST	

JUDGMENT

RANCHOD J

[1] This is an opposed summary judgment application in action based on goods sold and delivered to the first respondent. The second and third respondents are sued in their capacities as sureties for the first respondent.

[2] However, the present application for summary judgment before me is only in respect of the third respondent who entered an appearance to defend and filed an opposing affidavit.

[3] The third respondent in essence admits his suretyship for the debts of the first respondent. However, he says he has not been involved in the business affairs of the first respondent since March 2010 in terms of an exit contract whereby he sold his interest in the first respondent to the second respondent. Since then he has not been involved in the affairs of the first respondent. Hence he is unable to answer at this very early stage in the litigation process to the applicant's claim. He therefore seeks leave to defend firstly so that he can query the claim amount and determine whether he may have defences to the claim such as, e.g. that the members of the first respondent may have been trading recklessly and negligently through the medium of the first respondent in which event they may be liable personally for the former's debt. Secondly, a part or whole of the claim may have prescribed by the time summons was issued and thirdly the claim amount is not set out in sufficient detail.

[4] Before dealing with these issues I have to consider two points raised by the plaintiff. One relates to the commissioning of the opposing affidavit and the other is the filing by the third respondent of a supplementary affidavit by the commissioner of oaths who explains how the alleged defect in the commissioning of the opposing affidavit came about.

[5] The applicant takes issue with the fact that the opposing affidavit is deposed to by a male person (the third respondent) but the certificate of the Commissioner of Oaths reads as if the deponent is a female. Hence, says applicant, the opposing affidavit is defective and the application effectively stands unopposed. I was referred to *ABSA Bank Ltd v Botha and Others Case No. 39228/12* a judgment in this Division by Kathree-Setiloane J (which appears to be as yet unreported) which dealt with this issue. There the defendant objected to the plaintiff's verifying affidavit in support of the application for summary judgment in that although the deponent was a

female, the commissioner of oaths certified that she was a male. The defendant filed a notice in terms of Rule 30 objecting to the filing of the affidavit as an irregular step. The learned Judge upheld the objection. It was held at para [5] that the verifying affidavit represents the cornerstone of the summary judgment procedure under Rule 32(2), which permits the grant of a final judgment or order in a defended action without full pleadings or a trial. It would appear thus that a strict standard of compliance was applied as against the plaintiff.

[6] The question is whether the same strict standard should be applied in the case of the defendant as well. However, the first point that distinguishes the present case before me from the Absa Bank case is that here no objection has been made by the applicant in terms of Rule 30 calling upon the third respondent to rectify the alleged defect. It has been raised in argument.

[7] It is also to be noted that in terms of Rule 32(4) the plaintiff is confined to the affidavit in support of summary judgment. "No evidence may be adduced by the plaintiff otherwise than the affidavit referred to in sub-rule 2...".

[8] In contrast the defendant can either file an affidavit resisting summary judgment or, with the leave of the court, lead oral evidence either by himself or herself or by any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action. (See Rule 32(3)(b)). In *Breintzenbach v Fiat SA (Edms) Bpk 1976(2) SA 226(T)* a judgment of the Full Court of this Division it was held, at 227 E-F:

'If the requirements of sub-rule 32(3)(b) are too stringently applied, a defendant who has a defence to the action brought against him may be denied, unjustly, an opportunity of establishing that defence by the ordinary procedure of a civil suit.'

[9] In my view the Absa case, insofar as it dealt with a defective affidavit by the plaintiff is concerned can be distinguished from the instant case where the defendant's affidavit is defective in the manner referred to earlier. To

close the doors of the court to the defendant in these circumstances would mean adopting a highly technical approach to the affidavit. (*W.M. Mentz & Seuns (Edms) Bpk & Katzake 1969(3) SA 306(T) at 311*). In any event, the third respondent says in his affidavit that he is a male and has signed it as such. It is the commissioner of oaths who made the error.

[10] The next point is the filing by the respondent of a supplementary affidavit by the commissioner of oaths explaining his error. It is contended by the plaintiff that the supplementary affidavit is inadmissible as Rule 32 does not permit it. In my view, the submission cannot be sustained. In Erasmus, Superior Court Practice, the authors say at B1-228 [Service 36, 2011]:

'In superior court practise a defendant has been allowed to supplement his or her affidavit by a further affidavit, where, for instance, the first affidavit was defective, even though the supplementary affidavit was out of time.' (See *Gain v Crescent Finance Corp P/L 1961(1) SA 222 (W)*).

In my view the filing of the supplementary affidavit should be allowed in this instance.

[11] I turn then to the main issue raised by the third respondent. As I said, he says he had left the first respondent in 2010 already. He had to investigate the circumstances relating to the debt claimed by the plaintiff, which may reveal a defence or defences to the claim. It was also submitted in argument that the plaintiff issued a simple summons and has not annexed any document substantiating the claim amount and how it is arrived at. In *Mowchenson & Mowschenson v Morcantile Accepance Corp of SA Ltd 1959 (D) SA 362 (W)* the court held that if there is doubt as to the evidence tendered by the plaintiff; the doubt should be resolved in favour of the defendant.

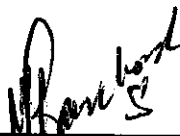
[12] Here it must also be borne in mind that the third respondent is being sued in his capacity as a surety. In *Gruhn v M Pupkewitz & Sons P/L 1976 (3) SA 49 (A)* it was held:

"That a purchaser as against a seller normally knows what the case is

about must be accepted, but it is not necessarily so that a surety, ...
 knows what the case is about.'

That seems precisely to be the case here where the third respondent has not
 been involved in the business of the first respondent since 2010.

[13] In all the circumstances the third respondent is granted leave to defend
 with costs in the cause.



RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv G Jacobs
Instructed by	: Kasimov & Associates
Counsel on behalf of third Respondent	: Adv L Keijser
Instructed by	:STBB – Smith Tabata Buchanan Boyes
Date heard	: 7 June 2016
Date delivered	: 17 June 2016