REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case number: 34741/19

DELETE WHICHEVER IS NOT APPLICABLE **(1) REPORTABLE: YES / NO.** **(2) OF INTEREST TO OTHER JUDGES: YES / NO.** **(3) REVISED.** **DATE** **SIGNATURE**

In the matter between

Smooth Seas Trading II (Pty) Ltd — Plaintiff/Applicant

and

Lengau Group (Pty) Ltd — Defendant/Respondent

JUDGMENT

Maumela J.

INTRODUCTION.

1. This is an application for Summary Judgement, brought by the Applicant, (Smooth Seas Trading II (Pty) Ltd), against the

Respondent, (Lengau Group (Pty) Ltd). The application for summary judgment is for money owed in terms of an acknowledgement of debt agreement (AOD). The Applicant is claiming the sum of R9 930 000.00. It alleges that it has complied with the agreement. It stated that the Respondent is in breach of the agreement in that it failed to make timeous payment in terms of the AOD.

2. The Respondent opposes the application, stating that it has a *bona fide* defence to the Plaintiff's claim in that the Defendant entered into a coal take-off agreement with a third party, which agreement was negotiated by the Plaintiff. The defendant contends that the coal take-off agreement payments made by the third party to the Plaintiff's Attorney of record would be used to set off the Defendant's indebtedness to the Plaintiff.

THE LAW.

3. Rule of Court 32(3)(b of the Uniform Rules of Court provides as follows:

"Upon the hearing of application for summary judgment the defendant may -

(b). satisfy the court by affidavit (which shall be delivered before noon on the court day by but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

4. This rule clearly provides that a defendant is required to satisfy the court by affidavit, (which shall be delivered before noon on the court day but one on which the application is to be heard) or with the leave of the court by oral evidence of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action and that such evidence of affidavit shall disclose fully the nature and grounds of the

defence and the material facts relied upon therefor.

5. In the case of *Steel CC v Tbhokisi Lelsimibi Steel Boxes & Tanks (Pty) Ltd*[1], the court stated: *"Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in its affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.*[2]*"*

6. The court stated further: *"While it is not incumbent upon the defendant to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiff's claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. …*
'All that the court enquires, in deciding whether the defendants have set out a bona fide defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed the defendants appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. The defendant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavor to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the

[1]. [2018] ZAGPJHC 37 (7 March 2018).
[2]. [2018] ZAGPJHC 37 (7 March 2018), [13] - [14].

defendants constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.'[3]

THE NATIONAL CREDIT ACT:

7. The defendant/applicant alleges, under the heading of *bona fide* defence[4], that it relies on the provisions of the National Credit Act[5] as a basis from which to allege that the plaintiff failed to comply with the provisions of the Act before launching the action and that the acknowledgement of debt ("*AOD*") constitutes reckless credit.

8. In paragraph 33, the defendant alleged that its annual turnover is less than R1 million. In confirmation thereof, a confirmatory affidavit is attached by the chief financial officer and reference is made to the financial statements. However, these financial statements are withheld from the court's purview. No explanation is given why this vital piece of corroborating evidence is not disclosed.

9. Accepting for the moment that the defendant's annual turnover is less than R1 million, the enquiry in the context of the National Credit Act does not end there. In terms of Section 4(1)(b) of the Act, a large credit agreement, (where the principal debt is more than R250 000.00), concluded with a juristic person such as the defendant, whose asset value or annual turnover is less than R1 million, is not covered by the provisions of the National Credit Act: Section 4 (1) (b) provides

[3]. [2018] ZAGPJHC 37 (7 March 2018) [16].
[4]. Page 42, paragraph 31 onwards.
[5]. 34 of 2005.

the following:

4. (1). Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except….

(b). A large agreement as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1)[6]."

10. Plaintiff contends that although the defendant denies that the agreement is a large agreement as envisaged in the National Credit Act, this only amounts to a bare, vague unsubstantiated denial which can only be described as an attempt at demonstrating the existence of a dispute. It contends that a defendant must go beyond the mere formulation of disputes and must disclose the grounds upon which he disputes the plaintiff's claim with reference to the material facts underlying the disputes raised[7].

11. The applicant argues that the defendant's reliance on the National Credit Act must fail[8]. It contends further that *Ex abundante cautela*, if the agreement is found not to be exempted as contended for in the proceeding paragraphs, at best for the defendant the AOD could potentially constitute a 'catch all credit agreement' as contemplated in Section 8(4)(f)[9] of the Act.

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[6]. The threshold for a large agreement is currently R250 000.00

[7]. Van Niekerk et al, *Summary Judgement: A Practical Guide*, para 9.5.1.2. *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) 249F–G.

[8]. *Metmar Trading (Pty) Ltd v Summer Sun Trading 99 (Pty) Ltd* Unreported KZD case nr 6010/11 at para 15. See also *Rodel Financial Service (Pty) Ltd v Naidoo* (unreported KZD case nr 13335/2009).

[9]. Scholtz, *Guide to the National Credit Act*, para 12.17.

12. Section 8(4)(f) of the National Credit Act provides as follows:

> 8. (4). An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is:
> (f). any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-
> (i) the agreement; or
> (ii) the amount that has been deferred.

13. However, in the decision of *Ratlou v Man Financial Services SA (Pty) Ltd*[10] Dambuza JA, in a unanimous decision for the Supreme Court of Appeal stated the following which, in the plaintiff's submission puts beyond any doubt the conclusion that the AOD is not subject to the provisions of the Act:

> *"[21] A purposive interpretation and not a literal interpretation of s 8(4)(f) of the NCA is required because it is quite clear that the NCA was not aimed at settlement agreements. Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation. …. and*
> *[27] Having found that the legislature never had the intention that the NCA be applicable to all settlement agreements in terms which accord with the determination of credit transactions, in particular to the agreement concluded by the parties in this case, it is not necessary to deal with the alternatives to MAN's main argument. I may, however indicate, in respect thereof as well, that the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA and the chill effect that would have on settlement of disputes would still hold considerable weight. As was submitted on behalf of MAN, parties who were never credit providers, such as a once off lesser, would suddenly find themselves unable to enforce the terms of their settlement agreement, for want of registration or due assessment or*

[10]. [2019] ZASCA 49 (1 April 2019). See pars 19–28.

a lessee for creditworthiness."

14. Applicant also contends that should the Court be of the view that the National Credit Act is applicable, it argues that the defendant bears the *onus* of showing a *bona fide* defence on the merits and as such, the principles enunciated in *Breitenbach v Fiat*[11] are no less applicable when a defendant relies upon defences based on the National Credit Act. He made the point that bald allegations of being "over-indebted" or that "reckless credit" was extended will not be sufficient[12].

EXCIPIABILITY OF THE PARTICULARS OF CLAIM.

15. The defendant alleges that the particulars of claim is exipiable. Plaintiff makes the point that at the outset, a simple summons is not susceptible to exception because it is not a pleading[13]. If a simple summons could be subjected to exception, the first basis from which the defendant alleges that the particulars of claim is excipiable is because the plaintiff fails to disclose the three alleged earlier agreements, or versions thereof, and the coal off-take agreement[14]. Applicant contends that it cannot be concluded that this complaint is without merit.

16. Applicant points out that the actual AOD annexed to the simple summons as Annexure "SS1"[15] specifically indicates in the recordals, (page 15 & 60), that earlier versions of the AOD are no longer relevant: The following passage is worthy of consideration: *"The parties have agreed to cancel and revoke the terms*

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[11]. 1976 (2) SA 226 (T).

[12]. *ABSA Bank Ltd v De Beer and Others 2016* (3) SA 432 (GP); *Firstrand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP) pars. 60 and 61, per D. Pillay J.

[13]. The summons is a simple summons as referred to in Rule 17(1) of the Uniform Rules of Court. The particularity of a combined summons and particulars of claim are not required. A simple summons cannot be attacked by exception as it is not a pleading. *Icebreakers No 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at 131F - H and 134E - G;*Absa Bank Ltd v Jansen van Rensburg* 2013 (5) SA 173 (WCC) at 175G-176F and 180D.

[14]. Page 41, paragraph 21.

[15]. Also attached as Annexure SP3 to opposing affidavit, page 59.

and conditions of the first acknowledgement of debt agreement and have agreed to enter into the following agreement, (freely and voluntarily), in which the debtor will repay all amounts currently due and payable to the creditor."

17. Clause 6, read with clause 8.2 contains what is commonly referred to as a *Shifren* clause which means that the AOD attached to the simple summons is the only relevant agreement between the parties. Plaintiff states that any earlier versions, to the extant they exist and are relevant, would have no bearing on the AOD. According to the plaintiff, one must also have careful regard to the Defendant's actual version insofar as the alleged coal off-take agreement is concerned and the consequences the Defendant contend for.

18. Plaintiff argues that on a proper interpretation of paragraphs 16 to 19 of the affidavit, it is evident that the off-take agreement was never concluded and is therefore legally irrelevant. Applicant argues that this is supported by the following, even on the defendant's own version:
    18.1. The letter from Mr van Rooyen from Barnard Incorporated Attorneys dated 18 March 2019[16] expressly stipulates that the coal off-take agreement has no bearing on the AOD: *"Your attention is once again draw [sic] to the fact that the AOD stands apart from the offtake agreement and that compliance and adherence to the terms of conditions of the AOD will not be subject to any other provision / agreement / undertaking / warranty."*
        (a). Moreover, when one has regard to the annexures to the opposing affidavit, in particular the alleged offtake agreement[17], it is evident that this is only a concept agreement and has never been finalised or signed by the parties.
        (b). Consequently, any allegations pertaining to this alleged

[16]. Page 73.
[17]. .

agreement are legally irrelevant and the allegations that the particulars of claim [sic] are excipiable because of the lack of reference to other agreements or the off-take agreement holds no water.

19. The second issue pertaining to the failure to set out the interest calculation would only be legally relevant if the National Credit Act, (NCA), was applicable however, the NCA is not applicable. On a proper interpretation of the agreement clause 3.1 provides that the amount of R10 million is the pre-estimated liquidated damages that the plaintiff may recover if there is a breach of the agreement. Interest is not applicable under the circumstances. The reference by the defendant to the alleged capital amount referred to in the first agreement is legally irrelevant bearing in mind that the first agreement was cancelled and revoked in terms of the memorandum of agreement.

20. The defendant alleges that because a letter of demand was sent to its attorney, instead of the *domicilium* address in terms of the agreement, the defendant is embarrassed as the particulars of claim currently stands. Plaintiff argues that such a contention equally lacks merit bearing in mind that there is no denial that the defendant actually received the demand that was sent to its duly appointed attorney. According to plaintiff, the fact of the matter is that the defendant received knowledge of the breach when the letters were sent to its duly appointed attorney of record.

THE CONVENTIONAL PENALTIES ACT.

21. In paragraph 41[18], the defendant purports to lay claim to a defence or counterclaim premised in the Conventional Penalties Act. The defendant bears a full legal onus of proving

[18]. Page 44.

that clause 3.1 is actually a 'penalty' and if so, that it is subject to the provisions of the Act and furthermore that the penalty is disproportionate relative to the prejudice suffered by the plaintiff.[19] Relevant to that point Plaintiff makes the point that in the context of Summary Judgement proceedings, regards must be had to *Van Niekerk et al*[20] where it is submitted that a defence in respect of which the onus rests upon the defendant must, in order to comply with the requirements of comprehensiveness and *bona fides*, be disclosed with greater particularity than would be acceptable in other instances. Plaintiff submits that a mere passing reference in a singular paragraph can hardly meets this requirement.

22. Plaintiff argues further that even if one is to overlook the scant referral to the provisions of the Conventional Penalties Act, it will argue that:
    22.1. An acceleration clause, as contemplated in Section 3(1) of the agreement, would not fall within the ambit of the Conventional Penalties Act[21]; and
    22.2. Section 2(1) of the Act applies only when the plaintiff claims damages falling outside the ambit of a penalty clause providing for liquidated damages[22], which is not the case here in.

23. Plaintiff argues that it was incumbent upon the defendant to comply with Rule 32(3)(b) and disclose fully the nature and grounds of the alleged defence and the material facts relied on. Consequently, plaintiff makes the point that to the extent that the Act is applicable, the defendant should have, expressly stipulated the basis on which the penalty should be

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[19]. *Steynberg v Lazard* 2006 (5) SA 42 (SCA) para [7]; *Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Local Council* 2011 (1) SA 440 GSJ 110.
[20]. Para 9.5.6.
[21]. *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1998 (3) SA 618 (D).
[22]. *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) 417B-D.

considered to be disproportionate relative to the prejudice suffered by the plaintiff. Plaintiff argues that the this defendant has failed in this respect[23].

24. Lastly, it is instructive to note that the actual amount that the defendant is indebted to the plaintiff in the normal course would be the amount of R13.5 million[24]. It is inconceivable how the defendant can allege that the penalty is disproportionate relative to the prejudice suffered when the plaintiff takes a proverbial knock of R3.5 million under the circumstances.

25. Plaintiff argues that in law, the defendant presented no recognisable defence in essence the court would not be justified in exercising its discretion in favour of the defendant by refusing summary judgment. It contends what the defendant did is to merely oppose the action in the absence of a defence with the sole intent to delay the plaintiff's claim. On that basis plaintiff moves for the granting of summary judgment as prayed for in the notice of motion.

26. The defendant argues that its annual turnover is less than R 1 Million per annum. It makes the point that the applicant's claim amounts to R9 930 000.00. It disputes the contention by the applicant that it has complied with the agreement. It also disputes that it is in breach of the agreement as a result of a failure to make timeous payment in terms of the AOD. The Respondent argues that it has a *bona fide* defence to Plaintiff's claim in that it entered into a coal-take-off agreement with a third party which agreement was negotiated by the Plaintiff. It states that the coal take-off-agreement payments made by the third party to the Plaintiff's Attorney of record can be used to

[23]. Even if the Provisions of the Conventional Penalties Act 1962: (Act No 15 of 1962), is applicable, summary judgemnt can still be granted. See: *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd And Another* 1975 (1) SA 79 (W).

[24]. Clause 2.1.1, page 60.

set off its indebtedness to the Plaintiff.[25]

27. It has to be considered that *Uniform Rule of Court 32(3)(b)* requires the defendant to satisfy the court by affidavit that they have a *bona fide* defence to the plaintiff's claim. The Court in the matter of *F1 Steel CC v Tbhokisi Lelsimibi Steel Boxes & Tanks (Pty) Ltd*[26] stated the following: *"*Satisfy' *does not mean 'prove'. What the rule requires is that the defendant set out in its affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.*[27]*"*

"While it is not incumbent upon the defendant to formulate their opposition to the summary judgment application with the precision that would be required in a plea, none the less when they advance their contentions in resistance to the plaintiff's claim they must do so with a sufficient degree of clarity to enable the court to ascertain whether they have deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. ….

"All that the court enquires, in deciding whether the defendants have set out a bona tide defence, is: (a) whether the defendants have disclosed the nature and grounds of their defence; and (b) whether on the facts so disclosed the defendants appear to have, as to either the whole or part of the claim, a defence which is bona tide and good in law. The defendant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a

[25]. Page 73 read together with page 80 and 84.
[26]. [2018] ZAGPJHC 37 (7 March 2018).
[27]. [2018] ZAGPJHC 37 (7 March 2018), [13]-[14].

preponderance of probabilities in their favour, nor does the court at this stage endeavor to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be bona tide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant."[28]

28. The plaintiff contends that considering what was held in *F1 Steel CC v Tbhokisi Lelsimibi Steel Boxes & Tanks (Pty) Ltd*[29] above, the court ought to find that it has met the standard set for determining that it has clearly demonstrated that it has a *bona fide* defense to the claim brought by the applicant.

DEFENDANTS COUNTER CLAIM: CONVENTIONAL PENALTIES ACT.

29. Section 3 of the Conventional Penalties Act[30] provides the following: *"If upon the hearing of a claim for a penalty, it appears to the Court that such penalty is out of proportion to the prejudice suffered by the Creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the Court shall take into consideration not only the creditors proprietary interest, but every other rightful interest which may be affected by act or omission in question."*

30. The Defendant makes the point that when it failed to make commence operations at La Brie Mine by 1st April 2018,

[28]. [2018] ZAGPJHC 37 (7 March 2018) [16].
[29]. Supra.
[30]. Conventional Penalties Act 15 of 1962.

(which was the terms of the First Agreement), the parties agreed that Plaintiff could invoke an oral penalty clause in which the Defendant would be charged R1 000 000.00 per month for each month over which the mine would not be in operation. It indicates that it was as a result of this stringent penalty clause that the it was not able to make payment in terms of the first agreement and that for that reason, the parties entered into the second agreement.

31. The capital amount loaned by the Plaintiff to the Defendant was only R4 742 491.35[31] Plaintiff contends that the penalty of R1 000 000.00 per month which was evoked by the Plaintiff prejudiced the new company to the extent that it spiraled into so much debt that it had to eventually enter into a coal-off-agreement, in order to pay off Plaintiff's debt .[32] It is clear from the papers that the Penalty clause came into effect on the 1st May 2018, and due to the Defendants continued breach of the first agreement the second AOD was entered into in December 2018. The Penalty claimed by the Plaintiff amounted to R7 000 000.00 which was equal to the penalty set in lieu of default spanning over 7 (seven), months)[33]. The defendant points out that the total penalty amount claimed by the Plaintiff is just less than double the capital amount due. It points out that it has been prejudiced by the penalty clause invoked by the Plaintiff and that it is for that reason that the court has to find that it has a valid *bona fide* counterclaim in terms of the Conventional Penalties Act against the Plaintiff.

BONA FIDE DEFENCE.

32. The Respondent submits that it has a *bona fide* defence to Plaintiff's claim in that it entered into a coal-take-off agreement with a third party which agreement was negotiated by the

[31]. Paginated 49.
[32]. Paginated page 84.
[33]. Paginated page 37, paragraph 8 read together with paragraph 10.

Plaintiff. According to plaintiff, the coal-take-off agreement payments made by the third party to the Plaintiff's Attorney of record can be used to set off the Defendant's indebtedness to the Plaintiff.[34] It is clear from the email sent from Applicants Attorney on the 18th March 2019[35] that all payments received in terms of the coal-take-off agreement can be utilized to deduct the payments due and owing in respect of the AOD. Defendant points out that the coal-take-off agreement was entered into on the 15th April 2019, between the Defendant and Izimbiwa Trading Limited.[36]

33. In terms of the Plascon Evans principle, the Defendant submits that it has shown a prima facie material dispute of fact and as such summary Judgment should be dismissed and the Defendant given an opportunity to argue his defence at trial. The Defendant submits that it has shown *prima facie* that it has a *bona fide* counter claim and a *bona fide* defence to the Plaintiffs claim. As such, it argues that the application for summary judgment brought by the applicant should be dismissed and that it should be granted an opportunity to defend the action.

34. Plaintiff disputes the contention by the defendant that it has demonstrated on a *prima facie* basis that it has a *bona fide* defense against plaintiffs claim. In this regard, the defendant has submitted that its annual turnover is less than R 1 million. The applicant disputes the applicability of the National Credit Act to the facts in this case, making the point that the defendant is a juristic person and that for that reason the National Credit Act should find no application the fact that in this case.

[34]. Page 73 read together with page 80 and 84.
[35]. Paginated page 73.
[36]. Paginated page 40.

35. The defendant argues that it and the applicant entered into a new agreement but, the plaintiff makes the point that the defendant has not clearly demonstrated that a new agreement was entered into or that in the event where it was entered into, the National Credit Act is applicable to it. It is clear that the points of dispute cannot be sufficiently thrashed out within the ambit of the proceedings here in.

36. The parties are also in dispute with one another concerning the question whether the letter of demand by the plaintiff was properly delivered to the defendant. The defendant argues that it was not but, the plaintiff states that the fact the defendant became aware of the letter of demand renders irrelevant the question on the correctness or otherwise of the measures taken to was delivery of the letter of demand.

37. It is the applicant's firm contention that in its endeavors to set out a prima facie defense, the defendant fell short of the required standard of proof. It is fact that for purposes of demonstrating that it has a prima facie defense the defendant ought not to prove overly the defense it claims to have at its disposal against the claimed by the plaintiff. This was clearly illustrated in the case of *F1 Steel CC v Tbhokisi Lelsimibi Steel Boxes & Tanks (Pty) Ltd*[37]*.* In this case, the word 'prove' in the sense of the duty incumbent upon the defendant to prove that it has a *bona fide* defense against the plaintiff's claim was defined and qualified.

38. In that regard, the court stated that a defendant in an application for summary judgment is not to be expected to prove on the same standard of proof required for purposes of civil cases that it has a *bona fide* defense. In that regard, among others, the court stated: *"*Satisfy' *does not mean 'prove'.* The court

[37]. Supra.

proceeded to state clearly that: "*What the rule requires is that the defendant set out in its affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim*[38]*."*

39. As already indicated, for both parties to fully substantiate the basis upon which they hold as they do on the individual aspects upon which the disputes turn, the court ought to give them the latitude to do so by granting the defendant leave to defend in which event the aspects in dispute can be fully thrashed out for the court to properly arrive at a decision.

40. In the result the application for summary judgement stands to be refused and the defendant should be granted leave to defend. Consequently, the following order is made:

ORDER.

1. The application for summary judgement is dismissed.

2. The defendant is granted leave to defend.

2. Costs shall be costs in the cause.

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T.A. Maumela.
Judge of the High Court of South Africa.

Judgment reserved: 21 August 2019

[38]. See *F1 Steel CC v Tbhokisi Lelsimibi Steel Boxes & Tanks (Pty) Ltd* above.

Judgment delivered: 07 July 2020

REFERENCES

For the Plaintiff:	Adv. M Louw
Instructed by:	Barnard Inc
For the Defendant:	Adv. C Malan
Instructed by:	Carl Van Zyl Attorneys