

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

20 October 2023

DATE

SIGNATURE

CASE NUMBER:

12250/2022

In the matter between

ABSA BANK LIMITED

Plaintiff

and

BCCN PROJECTS (PTY) LTD

First Defendant

CRUTCHFIELD, CLIFFORD ASHLEY

Second Defendant

JUDGMENT

DOSIO J:

Introduction

[1] This is an application for summary judgment against both defendants, wherein the plaintiff seeks confirmation of the cancellation of the Covid Loan Agreement ('Covid

agreement') concluded between the plaintiff and the first defendant. In addition, the plaintiff seeks an order that the defendants pay the plaintiff an amount of R1.532.628,57, with interest thereon at the rate of 7.5% linked, per annum, jointly and severally, the one paying the other to be absolved.

[2] The application is opposed and the defendants contend that the particulars of claim fail to satisfy the requirements substantiating the relief sought in that the plaintiff has failed to allege in the particulars of claim which provision of the Covid agreement was breached.

[3] The issue for determination is whether the defendants have raised a *bona fide* defence and most importantly whether the particulars of claim as pleaded, contain the necessary and relevant averments to sustain an application for summary judgment.

Background

[4] On 29 September 2020 the plaintiff, represented by a duly authorized person and the first defendant represented, by the second defendant, concluded the Covid agreement. In terms of the Covid agreement the plaintiff granted a Covid-19 emergency amortizing term loan facility to the first defendant in the amount of R1.572.148,00.

[5] The Covid agreement would be cancelled and the full balance outstanding, including accrued interest would immediately become due and payable on receipt of written demand by the plaintiff to do so.

[6] The plaintiff alleges in its particulars of claim that as at 21 February 2021, the first defendant was indebted to the plaintiff in respect of the Covid agreement in an amount of R1.532.628,57. As a result, it cancelled the Covid agreement.

[7] The plaintiff attached a certificate of balance in respect of the overdraft agreement.

[8] It is common cause that the Covid agreement was entered into between the plaintiff and first defendant for the loan amount of R1.572.148,00 of which amount was advanced to the first defendant. The fact of the second defendant signing the suretyship is also not in dispute.

The contention of the defendants

[9] The defendants contended that in the particulars of claim there is an omission, in that there is the absence of allegations which would justify the plaintiff's right to cancel the agreement.

[10] It was contended that a claim predicated on the cancellation of a contract, due to a breach thereof, necessitates that the plaintiff must allege and prove a breach of the contract and an accrued right to cancel, due to the material breach.

[11] It was argued that the particulars of claim are deficient in respect of these elements, in that the plaintiff assumes a breach without elucidating the nature of such breach. Furthermore, that the particulars of claim fail to plead the specific contractual provisions breached. It was contended that the absence of such a crucial averment renders the particulars of claim defective and incomplete.

Contentions of the plaintiff

[12] The plaintiff's counsel contended that if the defendants were of the opinion that the particulars of claim were defective in that they did not establish a cause of action, the correct procedure would have been to raise an exception. Furthermore, it was argued that the defendants have not disputed that they received the money or that it was repaid.

[13] It was argued that the cause of action is clear and that the defendants do not have a *bona fide* defence and that accordingly summary judgment should be granted.

The law

[14] Rule 32(2) of the Uniform Rules requires that when a plaintiff applies for summary judgment, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit. Rule 32(2)(b) requires that the plaintiff shall verify the cause of action and the amount, if any. A plaintiff must also identify any point of law relied upon as well as the facts upon which the plaintiff's claim is based, as well as a brief explanation why the defence pleaded does not raise any issue for trial.

[15] In terms of Rule 32(3)(b) of the Uniform Rules of Court, a defendant must satisfy the court by affidavit, or with the leave of the court by oral evidence that the defendant has a *bona*

fide defence to the action. The sub-rule also states that such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon.¹

[16] The legal principles governing summary judgment proceedings are well-established in the matter of *Maharaj v Barclays National Bank Ltd*,² where the Appellate Division, (as it then was), outlined the principles and explained what is required from a defendant in order to successfully oppose a claim for summary judgment. The Appellate Division stated that: ‘One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined 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. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be’³ [my emphasis]

[17] In the matter of *Absa Bank Ltd v Mphahlele NO and a Similar Case*⁴ (*‘Mphahlele’*) the Court held that:

‘From the foregoing, it is clear that this requirement of the sub-rule does not provide for a verification of evidence or the supplementing of a cause of action with evidence. It is confined solely to those facts which are already present and as pleaded in the plaintiff’s summons (it being trite that a plaintiff in summary judgment proceedings is prohibited from taking a further procedural step in the proceedingsby, for example, amending the particulars of claim and then seeking to claim summary judgment’.⁵ [my emphasis]

[18] From the matter of *Mphahlele*⁶ it is clear that a plaintiff may not supplement the cause of action with evidence in the affidavit supporting summary judgment but rather that the

¹ see *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA); *Nedbank Limited v Tshoga* (55936/2020) [2022] ZAGPPHC 196 (25 March 2022); *Central News Agency Ltd v Cilliers* 1971 4 SA 351 (NC); *Visser v Kotze* 2012 ZASCA 73, 25 May 2012 par 11.

² *Maharaj v Barclays National Bank Ltd* [1976] 2 All SA 121 (A).

³ *Ibid* page 127.

⁴ *Absa Bank Ltd v Mphahlele NO and a Similar Case* (unreported, GP case number 45323/2019 and 42121/2019 dated 26 March 2020).

⁵ *Ibid* para 17.

⁶ *Mphahlele* (note 4 above).

substantiation of facts must already be articulated in the particulars of claim. A defect in the particulars of claim cannot be cured in the affidavit supporting summary judgment.

[19] In the matter of *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality*⁷ the Court held that a defective summary judgment application should be refused with costs.

[20] In the matter of *Standard Bank of South Africa Ltd v Roestof*⁸ ('Roestof') it was held that a technical defect due to some obvious and manifest error which causes no prejudice to the defendants, can be overlooked (at 496E).

[21] However, in the matter of *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC*⁹ ('Shackleton') the court did not agree with the judgment in the *Roestof*¹⁰ matter. The Court in the matter of *Shackleton*¹¹ explained that it is not accurate that a defective application can be rectified simply because the defendant(s) have extensively addressed their defence to the claim. The Court held that:

'the proper starting point is the application. If it is defective then *cadit quaestio*. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons'.¹² [my emphasis]

[22] As evidenced by the cases of *Roestof*¹³ and *Shackleton*,¹⁴ there are different points of view on this issue. It appears that *Roestof's*¹⁵ position is the least followed. In the matter of *Cohen N.O v D*¹⁶ ('Cohen'), the Supreme Court of Appeal did not expressly address this Issue, however, it did note that the learned author D.E van Loggerenberg¹⁷ chose the *Shackleton*¹⁸

⁷ *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] ZAFSHC 157; [2016] 4 All SA 895 (FB).

⁸ *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W).

⁹ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP).

¹⁰ *Roestof* (note 8 above).

¹¹ *Shackleton* (note 9 above).

¹² *Ibid* para 25.

¹³ *Roestof* (note 8 above).

¹⁴ *Shackleton* (note 9 above).

¹⁵ *Roestof* (note 8 above).

¹⁶ *Cohen N.O v D* [2023] ZASCA 56.

¹⁷ D.E van Loggerenberg in *Erasmus Superior Court Practice* (Jutastat).

¹⁸ *Shackleton* (note 9 above).

decision above *Roestof's*¹⁹ decision and recommended that when addressing the revised Rule 32(2)(b), the principles in *Shackleton*²⁰ be applied.²¹

[23] In the matter of *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd*²² ('*Nissan Finance*') the Court held that :

'courts determining summary judgment applications have, both prior to the recent amendments to rule 32 and subsequent thereto, consistently endorsed the approach that an applicant in summary judgment proceedings must comply strictly with the requirements of the Rules of Court'.²³

[24] The matter of *Nissan Finance*²⁴ held further that summary judgment is a special remedy that should only be given when it is obvious that the claim is valid and the defendant has no defence. However, the application is invalid and must be rejected if the applicant's affidavit is unclear and does not specify on what grounds judgment is sought.²⁵

[25] In the matter of *Shabalala v Bixoflo t/a Blue Clover N.O.*,²⁶ the Court found that particulars of claim that are defective, on the basis of them being vague and embarrassing, cannot sustain an application for summary judgment.²⁷

Evaluation

[26] The plaintiff's counsel relies on the case of *Caxton Ltd v Barrigo*²⁸ ('*Caxton*'), where summary judgment was granted, even though textual criticism of the summons was raised by the defendant. The Court in the matter of *Caxton*²⁹ held that even though the summons was not above criticism, the summons and affidavit still conveyed beyond reasonable doubt to the defendant what the plaintiff's case was. The matter of *Caxton*³⁰ is distinguishable from the

¹⁹ *Roestof* (note 8 above).

²⁰ *Shackleton* (note 9 above).

²¹ *Cohen* (note 16 above) para 26.

²² *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* [2023] ZAGPJHC 303.

²³ *Ibid* para 25.

²⁴ *Nissan Finance* (note 22 above).

²⁵ *Ibid* para 26.

²⁶ *Shabalala v Bixoflo t/a Blue Clover N.O* [2023] ZAKZPHC 30.

²⁷ *Ibid* para 43.

²⁸ *Caxton Ltd v Barrigo* 1960 (4) SA 1 (T).

²⁹ *Ibid*.

³⁰ *Ibid*.

matter *in casu* in that in the matter of *Caxton*,³¹ the defendant did not file a plea, whereas in the matter *in casu* the defendants did file a plea.

[27] The particulars of claim at paragraph 5.1 state that:

‘the plaintiff granted a Covid-19 emergency amortizing term loan facility to the First Defendant in an amount of R1 572 148.00.’

[28] The particulars of claim at paragraph 5.2 state that:

‘the Covid agreement would be cancelled and the full balance outstanding including accrued interest would immediately become due and payable repayable on receipt of written demand by the Plaintiff to do so.’

[29] The plaintiff has jumped from paragraph 5.1 to 5.2 without alleging what the breach is and what gave rise to the plaintiff’s entitlement to cancel the Covid agreement. Such an omission goes beyond a textual criticism of the particulars of claim as it goes directly to the cause of the action.

[30] The plaintiff should have referred to section 17.1 of the Covid agreement which sets out the events of default, with specific reference to ‘non-payment’, before setting out in paragraph 13 of the particulars of claim, that the plaintiff is entitled to an accelerated payment in terms of section 17.13 of the Covid agreement.

[31] A cancellation should be based upon an event of default, which default must be pleaded by the plaintiff in order for the defendant to file a meaningful plea thereto. The first mention of a breach or default is in the affidavit in support of the summary judgment at paragraphs 10.6 and 10.7. This goes against the decision of *Mphahlele*³² which states that a plaintiff may not supplement the cause of action with evidence in the affidavit supporting summary judgment.

[32] The plaintiff has not met the necessary legal standard for granting summary judgment.

[33] The substantial defects in the particulars of claim, with reference to the failure to substantiate the purported right to cancel the agreement and an assumption of breach, without

³¹ Ibid.

³² *Mphahlele* (note 4 above).

adequately pleading same, demonstrates the incompleteness of the cause of action which is a requisite for summary judgment.

[34] As a result, this Court finds the plaintiff's particulars of claim vague, as they fail to show exactly what informs the breach which warrants the cancellation of the agreement and the acceleration of payment. For this reason, this failure renders the papers defective and as stated in the matter of *Nissan Finance*,³³ Rule 32 should be applied strictly and this Court should not depart from this position.

[35] The deficiencies in the plaintiff's particulars of claim are fatal to the plaintiff's pursuit of summary judgment and even though the defendants have filed a plea thereto, as per the doctrine propounded in *Shackleton*,³⁴ it invalidates the application.

Costs

[36] The defendant's counsel argued that due to the fact that it had alerted the plaintiff in its plea that the default had not been alleged, that as a result thereof, the plaintiff should pay the costs in the event that the application for summary judgment is dismissed. This Court disagrees.

[37] The order of costs is within the discretion of the Court. This Court finds no reason to depart from the order that costs should be in the cause.

Order

[38] The application for summary judgment is dismissed.
Costs in the cause.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 October 2023

³³ *Nissan Finance* (note 22 above).

³⁴ *Shackleton* (note 9 above).

Date Heard: 2 October 2023

Judgment handed down: 20 October 2023

Appearances:

On behalf of the Plaintiff: Adv N.S. Nxumalo

Instructed by: SMIT JONES & PRATT

On behalf of the Defendants: Adv S.J. Mushet

Instructed by: AJ VAN RENSBURG INCORPORATED