



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 18 April 2019

SIGNATURE: _____

Case No. 24719/2017

In the matter between:

FREYSINNET (PTY) LTD

APPLICANT/PLAINTIFF

And

SUPER KWIK SLABS CC

FIRST RESPONDENT/DEFENDANT

GERHARDUS WILKEN

SECOND RESPONDENT/DEFENDANT

JUDGMENT

MILLAR, A J

1. This is an application in which the applicant, the plaintiff in the main action, applied for summary judgment against the respondents, the first and second defendants.
2. The respondents were sued on an acknowledgement of debt signed by the second respondent in his capacity as a member of the first respondent on 26 August 2016. The second respondent also bound himself as surety and co-principal debtor to the applicant for the fulfilment of the first respondents acknowledged indebtedness.
3. The summons was issued on 6 April 2017 and served on 4 May 2017. Notice of intention to defend was delivered on 15 May 2017 and thereafter on 5 June 2017 an application for summary judgment delivered.
4. The application was initially enrolled for hearing on 31 July 2017 but was postponed *sine die*. In the summons and the application, the applicant initially claimed R1 554 051.40. By the time that the application was heard, the first respondent had paid all but R796 327.78. The applicant seeks judgement for this lesser amount.
5. The respondents opposed the application and to this end delivered an affidavit on 10 April 2019, 22 months after the application was first enrolled for hearing, setting out what they contended was their defence. This was based on two legs – firstly that the second respondent had signed both the acknowledgment of debt and deed of suretyship in error and that the first respondent had a counterclaim for damages against the applicant. Both were expressed in the following terms:

“7.1 On/about 26 August 2016 I signed the acknowledgement of debt that the Plaintiff/Applicant relies upon. At the time, I was however under the mistaken belief that the amounts therein contained were correct and, in addition, I was not

aware of damages suffered by the 1st Defendant caused by the Plaintiff/Applicant on construction sites where its services were utilized.”

6. Save for the bald assertion that the acknowledgment had been signed in error and that the respondents had been mistaken as to the correct amount it ought to have signed acknowledgment for, nothing further was said in this regard.
7. The counterclaim was in respect of “*damages at the Bedfordview and Clearwater construction sites*” and this was quantified in the sum of R341 488.00 – in respect of both. The respondents also procured an updated statement of account for “Clearwater” in the sum of R331 655.87 from the Applicant and attached this in substantiation of the contention that the outstanding amount due to the applicant would be wholly set off by the counterclaim.
8. It was not disputed that the respondents had in the period after the institution of action and before the hearing paid R757 723.62 of the amount claimed. It is also not disputed that there was no defence proffered for the difference between the amount for which judgment was sought and the amount of the counterclaim – that is R454 839,78.
9. In regard to the counterclaim, the respondents, relying on *Weinkove v Botha*¹ argued that the counterclaim, even if unliquidated, could constitute a *bona fide* defence for purposes of summary judgment.
10. Whether or not the counterclaim does indeed constitute a *bona fide*² defence to the applicant’s claim is to be ascertained from all the facts put forward in support of it. Regard must be had to the nature and grounds³ as well as the magnitude⁴ of the counterclaim.

¹ 1952 (3) SA 178 (C) at 184

² *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227G-228B

³ *Crede v Standard Bank of South Africa Ltd* 1988 (4) SA 786 (C) at 789B-D

⁴ *NBS Boland Bank Ltd v One Berg River Drive CC and Others* 1999 (4) SA 928 (SCA) at 938G

11. In the present matter, the counterclaim was based on damages suffered by the first respondent as a result of “*poor workmanship and/or penalties directly attributable to the Plaintiff.*” Nothing further was stated in this regard. Save for the statement that damages had been suffered and the quantum, nothing further, either by way of allegation or documentary evidence corroborating that such damages had in fact been suffered, were placed before the court .
12. The 22-month period between the first enrollment of this application, the continued payment towards the amount of the acknowledgment and the date of hearing is significant in that had the respondents a *bona fide* counterclaim, it was not in consequence of their having insufficient time to properly consider and formulate such counterclaim, that they were unable to do so.
13. The affidavit opposing summary judgment was bereft of any particulars from which it could be said that there was indeed any mistake as to the amount in respect of which the acknowledgement had been signed⁵ or indeed whether there was a counterclaim, or that it was bona fide. Simply put, the affidavit does not comply with the provisions of Rule 32(3)(b) of the Uniform Rules of Court⁶.
14. In the circumstances I make the following order:
 - 14.1 The First and Second Respondents are ordered, jointly and severally, the one paying the other to be absolved to:
 - 14.1.1 Pay to the Applicant the sum of R796 327,78;
 - 14.1.2 Pay interest on the sum of R796 327,78 at the rate of 10,5% per annum from 4 May 2017 to date of payment;
 - 14.1.3 Pay the Applicant's cost of suit.

⁵ Border Concrete Engineering Co (Pty) Ltd v Knickelbein 1982 (2) SA 648 (E) at 651

⁶ The rule reads in part that the affidavit must be by a “*person who can swear positively 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.*”

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 16 APRIL 2019

JUDGMENT DELIVERED ON: 18 APRIL 2019

COUNSEL FOR THE APPLICANT: ADV. JH LERM

INSTRUCTED BY: BARNARDS INC ATTORNEYS

REFERENCE: MR W DE WET

COUNSEL FOR THE FIRST RESPONDENT: ADV.

INSTRUCTED BY: JOHAN NYSSCHENS ATTORNEYS

REFERENCE: MR J NYSSCHENS