IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 037834/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***NO***

Date: ***25 March 2024*** Signature: _____

In the matter between:

KING PRICE INSURANCE COMPANY LIMITED Applicant

(Registration Number: 2009/012496/06)

and

INTEGRITAS RISK SOLUTIONS (PTY) LTD Respondent

(Registration Number: 2016/194427/07)

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The plaintiff seeks summary judgment in the amount of R 6 489 711-05. The plaintiff's claim is premised on an acceleration clause contained in a repayment agreement.

[2] To sustain its claim for acceleration, the plaintiff relies on two alleged breaches of the repayment agreement: first, that the defendant failed to provide it with specific documentation in breach of clause 3.2 and second, that the defendant has moved its insurance book in breach of clause Vll thereof.

B. BACKGROUND

[3] During their business dealings which are unknown to this court, the plaintiff overpaid an amount to the defendant, which the defendant has undertaken to repay. The defendant breached the agreement to make repayment and due to an acceleration clause now owes the plaintiff R6,489,711.05.

[4] Not much is in dispute between the parties as it is common cause between them that they entered a repayment undertaking and an acknowledgement agreement (hereafter "repayment agreement") which is annexed to the particulars of claim.

[5] The plaintiff claims that the defendant breached the repayment agreement in two different ways and argues that any one of these breaches entitles the plaintiff to the relief sought in the particulars of claim and need not be proven cumulatively.

[6] Upon the occurrence of a breach, an acceleration clause was triggered, resulting in the balance of the outstanding amounts owed to the plaintiff becoming due and payable immediately.

[7] As a defence to the plaintiff's claim, the defendant alleges that it did not breach the repayment agreement and in addition, instituted a counterclaim in the amount of R1,448,885.57.

[8] The plaintiff hereafter argues that there is no *bona fide* defence to the claim and in fact, it is clear from a perusal of the plea that the defendant breached the agreement.

[9] The plaintiff argues that the defendant's counterclaim does not constitute a *bona fide* defence, is underpinned by a different agreement and for an amount lesser than the plaintiff’s claim. Even if the court were to find that the counterclaim constitutes a *bona fide* defence, the plaintiff would still be entitled to judgment in terms of rule 32(6) of the uniform rules of court to an amount of R5,040,825.48.

C. THE TERMS OF THE AGREEMENT BROADLY:

[10] The current claim is against the defendant for the unpaid balance of the overpayment, which the defendant has agreed to the following repayment terms:

10.1 The defendant acknowledged its indebtedness to the plaintiff for a total amount of R7,495,563.00.

10.2 The amount would be repaid in monthly instalments of R25,000.00 per month, first instalment to be made before the last day of June 2021.

10.3 The debt would, however, be fully repaid no later than 1 July 2028.

[11] To ensure the repayment of the debt, the defendant ceded its entitlement to its net profits to the plaintiff until such time as the debt had been settled in full.

[12] In addition, the defendant would remit 100% of its net profits to the plaintiff on a monthly basis.

[13] To ensure all monthly net profits were paid to the plaintiff, the defendant was obliged to make available to the plaintiff such management accounts, records or documentation reasonably required by the plaintiff to verify the defendant's calculation of its net profits ceded to the plaintiff and in respect of which it incurred the monthly obligation to pay.

[14] The agreement contained an acceleration clause in terms of which the monthly repayments of R25,000.00 per month as detailed above, would fall away and the total outstanding debt would become immediately due and payable should the defendant breach the agreement in any manner.[1]

[15] The plaintiff, reliant upon a certificate of indebtedness,[2] claims the outstanding amount of R6 489 711.05.

D. POINT *IN LIMINE*

[16] As a point *in limine*, the defendant takes issue with the plaintiff having filed a replication and plea to the counterclaim after having launched the current application for summary judgment. The defendant alleges that the plaintiff has *"waived"* its right to apply for summary judgment.[3]

[17] The plaintiff submits that it never waived the right to apply for summary judgment by filing a replication and plea to the counterclaim. It launched the application for summary judgment before the replication and plea.

[18] This is thus the first question to be answered in this application.

The defendant's defence:

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1 Clause VII of the agreement.

2 Which was agreed between the parties to be prima facie proof of the content thereof at clause Vill of the agreement.

3 Affidavit resisting summary judgment para 15.

[19] Secondly, the defendant denies the first breach of the repayment agreement. It alleges that clause 3.2, properly construed, does not require the defendant to provide specific documents but instead requires the defendant to make available such management accounts, records and/or documentation reasonably required by the plaintiff to verify the defendant's calculation of its net profit. The defendant insists that it complied with the clause by providing quarterly management accounts, income statements and balance sheets for the entire period in question. There was accordingly no breach of clause 3.2.

[20] Thirdly, as to the second alleged breach, the defendant confirms that it did move its insurance book but did so out of necessity. The need to move the book arose because of the plaintiff's *mala fide* cancellation of the binder agreement which made the defendant's performance under the repayment agreement impossible without moving its book. The defendant accordingly did not move its book "by its own doing" and in breach of clause VII.

[21] Fourthly, the defendant has a claim for set-off, which claim is uncontested in the plaintiff's affidavit in support of summary judgment and reduces the plaintiff's claim to the lesser amount of R5 040 825.49.

[22] Finally, the defendant has a counterclaim in the further amount of R1 053 505.30. This claim arises out of the plaintiff's unlawful and intentional use of the defendant's confidential information and consequent unlawful competition.

E. THE LEGAL PROVISIONS

[23] Summary judgment is a procedure used to obtain the swift enforcement of a claim against a defendant who has no real defence to the claim.[4]

[24] Rule 32 provides for a summary judgment procedure which is designed to enable a plaintiff whose claim falls within certain defined categories to obtain judgment without the necessity of going to trial, in spite of the fact that an intention to raise a defence has been intimated by the delivery of a notice of intention to defend. By means of this procedure a defence lacking in substance can be disposed of without the otherwise inevitable delay in obtaining judgment and without putting the plaintiff to the expense of a trial.[5]

[25] Rule 32 was amended with effect from 1 July 2019.[6] Before then the delivery of a notice of intention to defend was a prerequisite to an application for summary judgment under rule 32(1) as it was. It has been held that once a notice of intention to defend had been delivered and the plaintiff took a further procedural step like filing a declaration, he thereby waived his right to apply for summary judgment. The delivery of a plea is now a prerequisite to an application for summary judgment under rule 32(1) in its current amended form.[7]

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4 Civil Procedure – A Practical Guide 2nd Ed – Pete, Hulme et al, p589 Glossary.

5 Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Ed, 2009 ch17 – p516

6 By GN R842 in GG 42497 of 31 May 2019.

7 Erasmus – Superior Court Practice Volume 2 RS 22, 2023, D1 Rule 32-12.

[26] In *Mncube v Wesbank a Division of FirstRand Bank Limited* [8] the defendant gave notice of intention to amend his plea within the time period allowed for the bringing of an application for summary judgment. The amendments to the plea were effected after that period expired. The plaintiff delivered its application for summary judgment within 15 days after the amendments to the plea were effected. In a subsequent opposed application brought by the defendant to set aside the summary judgment application as an irregular step in terms of rule 30 because it allegedly was delivered out of time, the court held that the plaintiff had 15 days from the date on which the amendments to the plea were effected to deliver its application for summary judgment. Consequently, the application was not an irregular step.[9]

[27] In *Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops*[10] the question arose whether a plaintiff who takes a further procedural step after the defendant has delivered a plea, i.e. a replication or exception, thereby waives his right to apply for summary judgment or is precluded from exercising that right under rule 32 in its amended form. In *Quattro* the plaintiff delivered a replication simultaneously with its application for summary judgment. The court held that by delivering its replication, the plaintiff did not waive its right to apply for summary judgment. (emphasis added). Summary judgment was accordingly granted.

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8 Mncube v Wesbank a Division of FirstRand Bank Limited, Unreported Case No. (2022/9750) [2023] ZAGPJHC 895 (10 August 2023).

9 *Ibid* paras 33 – 34.

10 [2021] JOL 49833.

[28] In the recent case of *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd*,[11] as in *Quattro*, the plaintiff also delivered its replication and application simultaneously. The defendant subsequently applied for an order that the summary judgment application be set aside as an irregular step in terms of rule 30. The court followed *Quattro* and dismissed the application.

[29] In *Maharaj v Barclays National Bank Ltd*[12] Corbett JA (as he then was) held that:

"Accordingly, 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

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11 [2023] 3 All SA 458 (WCC)

12 Maharaj v Barclays National Bank Ltd 1976 (I) SA 418 (A

(c) which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment…"

[30] In *Cohen N.O. and Others v Deans*[13] the Supreme Court of Appeal held that:

"The only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd (Tumileng).*[14] As observed by Binns-Ward J in *Tumileng,* most of the old authorities still apply in determining whether a defendant has disclosed a *bona fide* defence. All the defendant is required to do is disclose a genuine defence, as opposed to 'a sham' defence. Prospects of success are irrelevant and as long as the defence is legally cognisable in the sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail."[15]

[31] Whether under the old rule 32 or the amended rule 32, what has not changed is that a defendant, to successfully oppose a summary judgment application, must disclose a *bona fide* defence.[16]

[32] Mr. Loots SC submitted on behalf of the defendant that clause 3.2 of the repayment undertaking does not require the defendant to provide specific

13 Cohen N.O. and Others [2023] ZASCA 56

14 Tumileng Trading [2020] ZAWHC 52.

15 Cohen N.O. and Others v Deans *supra* at para [29].

16 *Ibid* para [28].

documents MONTHLY but instead requires the defendant to make available such management accounts, records and/or documentation reasonably required by the plaintiff to verify the defendant's calculation of its net profit. In other words, the agreement allows the plaintiff to request documentation reasonably required to verify the debtor's net profit.[17] (emphasis added).

[33] Clause 3.2 reads as follows:

"The Debtor cedes its entitlement to its net profits. (Generated from any business conducted by it) to the Creditor until such time as the Debt has been settled in full. The Debtor shall remit 100% of its net profits to the Creditor on a monthly basis and (at the request of the Creditor) make available to the Creditor such management accounts, records and/or documentation reasonably required by the Creditor to verify the Debtor's calculation of its net profits in question, the first payment of which shall be made on or before the last day of the month following the month in which this Acknowledgment is signed by the last signing party and each subsequent payment to be made on or before the last day of each succeeding month until such date on which 50% of the Debt is paid (each payment being based on the preceding month's net profits)."

[34] From the above-quoted clause 3.2 the management accounts in question are to be requested by the Creditor. There is no explicit suggestion that they are due every month.

[17] See also defendant's affidavit resisting summary judgment at paras 44 to 46.

[35] The defendant further alleged that even in the event where the acceleration clause were to be breached, the agreement provides that the plaintiff would still be required to provide the defendant with an opportunity to remedy its breach before the acceleration clause would kick in.

[36] Having regard to the foregoing analysis, it is my view that the plaintiff did not waive its right to apply for summary judgment by having filed a replication and plea to the counterclaim after launching the current application for summary judgment.

[37] On a consideration of the merits of the application for summary judgment itself, the defendant's affidavit resisting the application falls squarely within the findings in *Maharaj v Barclays National Bank Ltd,*[18] in that it sets out a *bona fide* defence to the application for summary judgment.

[38] The next issue up for consideration, is the defendant's counterclaim. In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*[19] it was held that even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action. The court emphasised that the doors of the court would not be finally closed to the defendant. I thus do not opt to deal here with the defendant's counterclaim in a piecemeal fashion.

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18 *Supra* ft 12.

19 2004 (6) SA 29 (SCA) at 35C – D.

[39] In conclusion, the defendant has disclosed a *bona fide* defence. Accordingly, the defendant should be allowed to defend the action.

[40] There is no reason why the costs in this matter cannot follow the cause.

[41] The following order is made:

The application for summary judgment is dismissed with costs on an attorney and client scale including costs of two counsel so employed.

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J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 04 October 2023

Date of Judgment: 25 March 2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 25 March 2024.