IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

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SIGNATURE **DATE**

Appeal Case Number: A166/2023

In the matter between:

TC BUILDING PROJECTS (PTY) LTD **FIRST APPELLANT**

THOMAS C HANEKOM **SECOND APPELLANT**

and

HILL, GRAHAM LEONARD **FIRST**

RESPONDENT

HILL, PATRICIA MYRL **SECOND RESPONDENT**

JUDGEMENT

COETZEE AJ (Motha, J concurring)

INTRODUCTION:

[1] This is an appeal against the whole of the judgment of Regional Magistrate A.E. Smit, granted in the Regional Court of North West, held at Brits, on the 28th of February 2023, in terms whereof summary judgment was granted in the following terms:

[1.1] Payment of R320 487.70 by the First and Second Appellants.

[1.2] Interest on the above amount *a tempore morae*; and

[1.3] Cost of suit on the Attorney and own client scale.

BACKGROUND:

[2] During April 2018, Graham Leonard Hill and his wife, Patricia Myrl Hill (referred to as the 'Respondents'), entered into a verbal agreement with TC Building Projects (Pty) Ltd and Thomas Hanekom (the 'First and Second Appellant') for the construction of a residential property at Estate D'Afrique in Hartbeespoort, North West. It was agreed that the construction would be in accordance with a schedule of finishes and provisional cost items.

[3] During the construction process, the First and Second Appellants faced financial challenges, leading them to sign an Acknowledgment of Debt on the 7th of November 2019 in favor of the Respondents. The Acknowledgment of Debt provided, *inter alia*, as follows:

[3.1] That the First Appellant owed an amount of R340 487.70 to the Respondents.

[3.2] That the First Appellant were obligated to pay R10,000.00 in monthly installments for a period of 34 months.

[3.3] If the First Appellant fail to comply with the terms of the agreement, the whole of the indebtedness shall immediately become due and payable.

[3.4] The Second Appellant bound himself as surety and co-principal debtor.

[4] On the 3rd of August 2022 the Respondents issued summons on the basis that the Appellants defaulted on their payment obligations in terms of the agreement by only paying two installments of R10 000.00 each.

[5] The Appellants filed a plea dated the 28th of September 2022, in which they raised the following defenses:

[5.1] While the Second Appellant conceded to signing the Acknowledgment of Debt Agreement, on behalf of the First Appellant and himself, he alleges that he was

unaware that he was signing the Acknowledgment of Debt as surety as well. He contends that he did not read the provisions of the agreement and only became aware of this aspect after being served the summons.

[5.2] The Second Appellant refuted any breach by the First Appellant of the terms of the Acknowledgment of Debt, or any other agreement entered between the parties.

[6] The First Defendant filed two counterclaims.

[6.1] In the first counterclaim it is alleged that the Respondents owed the First Appellant an amount of R121 694.00 for extra work and materials used during the construction. This amount included R18 198.00 for the installation of gas, R53 255.00 for additional material on a roof, and R50 250.00 to build a boundary wall. These items were allegedly over and above the provisional cost items verbally agreed upon and the provisional cost items.

[6.2] In the second counterclaim the First Appellant states that it rendered services and incurred costs in respect of the construction in the amount of R2 277 760.99. It alleges that the Respondents paid an amount of R2 005 661.33 but failed to pay the outstanding amount of R272 099.66, being the difference between the amount as per the schedule of finishes and provisional cost items, and the amount already paid by the Respondents.

[7] After the application was heard, the magistrate concluded that the Appellants had no *bona fide* defence to the Respondent's claim and granted summary judgment. An appeal to this court was then subsequently launched.

GROUNDS OF APPEAL:

[8] The Appellants' Notice of Appeal raises numerous criticisms regarding the reasoning of the presiding officer, some of which may not necessarily constitute grounds for appeal. When properly considered the grounds of appeal appear to be the following:

[8.1] Whether the Appellants have set out sufficient facts to establish a defence on the claim in the summons i.e. the Acknowledgment of Debt and a defence based on the two counterclaims.

[8.2] Whether the defences, as contained in the counterclaim, are good in law.

LEGAL FRAMEWORK:

[9] The legal principles governing summary judgment proceedings are well-established. In *Maharaj v Barclays National Bank Ltd*[1], Corbett JA outlined the principles of what is required from a defendant to successfully oppose a claim for summary judgment as follows:

[1] 1976 (1) SA 418 (A) at 426 A-D.

'…[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 had "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. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence."

[10] Regarding the remedy provided by summary judgment proceedings, Navsa JA said in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[2]:

'[31]…The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at

[2] 2009 (5) SA 1 (SCA).

the same time causing great loss to plaintiffs who were endeavoring to enforce their rights. [32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'

[11] In Tumileng Trading CC v National Security and Fire (Pty) Ltd[3] ('Tumileng') the court held as follows:

"[13] Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant.

[15]... Under the new rule, a plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the pleaded defence is not bona fide; in other words, by showing that the plea is a sham plea." (footnotes omitted) (emphasis added)

[3] 2020 960 SA 624 (WCC)

[12] When considering that the delivery of a plea as the catalyst for a summary judgment application, it is paramount to evaluate whether a defence raised therein is a triable issue, when it is read together with the affidavit resisting summary judgment. The plea (or counterclaim, when the defence raises therefrom) must therefore be in harmony with the affidavit resisting summary judgment. This assessment should not only be based on the test in rule 14(3)(b), which necessitates a full disclosure of the nature and grounds of the counterclaim, along with the underlying material facts that must be genuine and legally sound, but also against the requirements of Rule 17(4) pertaining to the plea and counterclaim.

FIRST DEFENCE – SECOND APPELLANT UNAWARE THAT HE WAS SIGNING THE ACKNOWLEDGMENT OF DEBT AS SURETY

[13] In the court *a quo* the Second Appellant contended that he is not bound by the suretyship clause contained in the Acknowledgment of Debt due to the Respondents' failure to bring it to his attention, and because he did not read the document. Despite this, he acknowledged that he did indeed sign this document which contained the suretyship clause.

[14] In *George v Fairmead*[4] the Appellate Division held that when a man is asked to put his signature to a document, he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.

[4] 1958 (2) SA 465 (A) at 472A.

[15] Likewise, the Supreme Court of Appeal in *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers*[5] confirmed that where a party signing a contract, even in a representative capacity, is unaware of the terms of the contract by virtue of not reading the contract, such party does not escape liability because a unilateral mistake is not excusable and is insufficient to amount to *iustus error.*

[16] The Second Appellant will therefore not be able to rely on the lack of true consensus, as the mistake was due to his own fault. In the matter of *Patel v Le Clus (Pty) Ltd*[6], the error of one of the contracting parties, who carelessly misread one of the terms of the contract, was for that reason not regarded as iustus. He was bound because he was at fault.

[17] The Second Appellant is bound as surety and cannot withdraw from that obligation. This is, therefore, not a triable issue.

SECOND DEFENCE – DENIAL THAT THE FIRST APPELLANT IS IN BREACH OF THE ACKNOWDEDGEMENT OF DEBT

[17] The Appellants did not make mention or reference any correspondence in the plea or affidavit resisting summary judgment that the outstanding payment debt in terms of the Acknowledgment of Debt has been paid. The Appellants seem to rely only on the counterclaims.

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[5] 2007 (2) SA 599 (SCA)
[6] 1946 TPD 30.

[18] Although the court has a discretion to refuse summary judgment, the SCA in *Soil Fumigation Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*[7] held that a court should be less inclined to exercise its discretion in favour of a defendant where the answer to the plaintiff's claim is raised in the form of a counterclaim as opposed to a defence to the plaintiff's claim in the form of a plea. Moreover, a Court can exercise its discretion in the defendant's favour (and refuse summary judgment) only based on the material placed before it, and not based on mere conjecture or speculation.

[19] This defence lacks factual support to establish whether it is a *bona fide* defence. This bald statement alone is not adequate to prevent summary judgment. The court is called upon to consider this defence in conjunction with the content of the counterclaims.

THIRD DEFENCE – COUNTERCLAIMS FOR EXTRA WORK UNDERTAKEN

[20] Where a counterclaim is put up as a defence, a full disclosure of the nature and the grounds of the counterclaim as well as the material facts upon which a defendant relies must be made for it to be successful in a defence[8] . This means that it must be as comprehensive as when advancing only a defence. The court must be placed in a position to be able to consider not only the nature and grounds of the counterclaim, but also the magnitude thereof and whether it is advanced *bona fide.*[9] The necessary

[7] 2004 (6) SA 29 (SCA) at par. 10 and 25.
[8] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products* 2004 (6) SA 29 (SCA) at par. 10.
[9] *Slabbert & Slabbert v Watermeyer & Co* 1957 1 PH A 46; *Traut v Du Toit* 1966 (1) SA 69 (O) 71 E – G; *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd 1983 (2) SA 95 (C)*

elements of a completed cause of action must be included.[10] The counterclaim must, moreover, be based on facts and not on mere conjecture or speculation or on the deponent's belief.[11]

[21] The First Appellant filed its counterclaims on the 28th of September 2022. The First Appellant pleaded that extra work was done and material used during the construction process. It also stated that an amount was outstanding in terms of the schedule of finishes and provisional costs items. It failed to give sufficient particularity regarding the details of the claim. The court is left to speculate as to precisely when the additional work was undertaken and when the debt became due.

[22] On the 31st of January 2023 the Respondents filed a special plea of prescription, on the basis that the First Appellant did not issue the respective counterclaims within a period of 3 years from the date upon which the prescription commenced to run, being the end of June 2019. In the affidavit resisting summary judgment, which was filed on the 1st of February 2023, the First Appellant alleges that the construction was finalised in or about June 2019. According to the First Appellant it is during this time that the Respondents became liable to the First Defendant for the outstanding amounts. It appears that the First Appellant attempted to address the issue of prescription in the affidavit resisting summary judgment by stating that the debt on the project only became due after all additional items, requests, snag list, repairs, variations, and negotiations were finalized in May 2020. The affidavit resisting summary judgement contains two

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[10] *Credé v Standard Bank of SA Ltd 1988 (4) SA 786 (E); Muller and Others v Botswane Development Corporation Ltd (supra) 656.*
[11] *Mercury Investments (Pvt) Ltd v Marks* 1961 1 PH F 45.

versions from the First Appellant on when the alleged debt became due to him, whilst his original plea and counterclaim did not provide any such date. It appears that the First Appellant may have omitted the mentioned dated in an effort to avoid the issue of prescription.

[23] In the matter of *A J Shepherd (edms) Bpk v Santam Versekeringsmaatskappy Bpk*[12] it was held that a party on appeal may not present argument which conflicts with the facts that are common cause on the papers and in the court *a quo*.

[24] Although the court at summary judgment is not required to consider where the probabilities lay, it was held in *One Nought Three Craighall Park (Pty) Ltd v Jayber*[13] that such court is in just as good a position as the trial court to consider a matter of law. This court cannot make a definite finding on the prescription of the counterclaim, because of the lack of material facts in the plea that can only be described as blurred and vague. The varying accounts given by the First Appellant in the affidavit resisting summary judgment, on the due date of the alleged debt, indicated its lack of *bona fides*. The defences were not fully set out as required by Rule 14(3)b).

[25] In the absence of any misdirection by the court *a quo*, such judgment must stand.

As a result, the following order is made:

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[12] 1985 (1) SA 399 (A).
[13] 1994 (4) SA 320 (W) at 323 A-B.

ORDER:

1. The appeal is dismissed with costs.

2. The First and Second Appellants are ordered to pay the costs of the appeal on an attorney and client scale.

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COETZEE, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the 5th day of February 2024.