REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 613/09

In the matter between**:**

CECILIA DU COUDRAY APPELLANT

and

MANDY WATKINS RESPONDENT

APPEAL JUDGMENT Delivered on 26 March 2010

SWAIN J

[1] This appeal lies against an order of the *Court a quo*, granting summary judgment against the appellant (defendant in the *Court a quo*) in favour of the respondent (plaintiff in the *Court a quo*) for payment of the sum of R37,199.86, interest thereon at the legal rate of 15.5% and costs.

[2] In the appellant's heads of argument and before us in argument, M/s Nel submitted that the appeal should succeed on the basis that:

[2.1] The respondent's claim was based on a contract of sale of the appellant's business to the respondent for a purchase price of R740,000.00

[2.2] Clause 26 (ii) of the agreement provides as follows:

"That the purchaser or his nominee carry out a due diligence to satisfy themselves, amongst other things, as to the profitability of 'the business' and confirm their approval in writing to the seller within ten days of acceptance of this offer".

[2.3] Clause 26 (iii) of the agreement provides as follows:

"That the purchaser is approved in writing by the Franchisor prior to the effective date".

[2.4] Clause 1 (c) of the agreement defined the effective date as 01 October 2008.

[3] M/s Nel submitted that Clause 26 (ii) and 26 (iii) were suspensive conditions on the basis that the introductory paragraph to Clause 26 provides as follows:

"Notwithstanding anything herein contained this offer is subject to the following".

[4] The words "subject to" are the normal way of indicating a suspensive condition in a contract

Badenhorst vs van Rensburg 1986 (3) SA 769 (A) at 777 I - J

[5] Consequently, the operation of the obligations flowing from the contract is suspended pending the occurrence of the events specified in Clauses 26 (ii) and 26 (iii), namely:

[5.1] That the respondent carry out a due diligence to satisfy the respondent as to the profitability of the business, and confirm the respondent's approval in writing to the appellant, within ten days of acceptance of the offer.

[5.2] That the respondent is approved in writing by the Franchisor prior to the effective date, being 01 October 2008.

[6] No allegation was made by the respondent in the respondent's particulars of claim, that these conditions had been satisfied within the specified time periods.

[7] It is trite law that the fulfilment of a condition must be alleged and proved by the party relying on the contract

Resisto Dairy v Auto Protection Insurance Company

1963 (1) SA 632 (A) at 644 G - H

[8] Rule 14 (2) (a) of the Magistrates' Court Rules provides that the plaintiff must file an affidavit "verifying the cause of action and the amount claimed". The respondent formally complied with this requirement by filing an affidavit in which the following appears:

"That the defendant is indebted to me in the amount as claimed and on the grounds stated in the summons".

[9] In the case of

Caltex Oil SA Limited v Crescent Express (Pty) Ltd. & Others 1967 (1) SA 466 (DCLD) at 469 C – D

Milne J P, dealing with the provisions of Rule 32 (2) of the High Court Rules, which in similar vein provide that an affidavit shall be delivered swearing "positively to the facts verifying the cause of action" stated the following:

"For there to be a verification of a cause of action within the meaning of Rule 32 (2) it seems to me that there must be made to appear a complete cause of action. Unless a complete cause of action is made to appear it does not seem to me that it can be said to be verified".

[10] It is therefore quite clear that a complete cause of action was not pleaded by the respondent in the particulars of claim, and that

consequently there could be no verification of the cause of action, as required by the relevant Rule.

[11] As stated by Tebbutt J in

Globe Engineering v Ornelas Fishing Company

1983 (2) 95 (c) at 97 F

"It has been repeatedly held that the remedy of summary judgment is an extraordinary and stringent one closing, as it does, the doors of the Court to the defendant. There must, therefore, apart from any other considerations, be a compliance with the requirements of Rule 32. Rule 32 (2) provides for the filling of an affidavit by a person who can swear positively to the facts 'verifying the cause of action'. The 'cause of action' must therefore appear *ex facie* the summons……."

[12] It is trite that a "cause of action" consists of those facts which must be proven before the plaintiff is entitled to judgment

McKenzie v Farmers Co-operative Meat Industries

1922 AD 16

[13] Even if the respondent were to prove all of the facts alleged by the respondent in the particulars of claim, the respondent would still not succeed for the simple reason that no evidence could be led

to prove the fulfilment of the suspensive conditions, and that a binding agreement of sale eventuated.

[14] The argument advanced by Mr. Haasbroek, who appeared for the respondent, in answer to this submission, was twofold.

[15] The first leg of the argument was that the Magistrates' Court Rules differed from the High Court Rules by the inclusion of Rule 14 (6), which contained the following provision:

"Subject to the provisions of rule 17 (7), the court may, if the defendant does not so pay into court or find security or satisfy the court, give summary judgment for the plaintiff".

Rule 17 (7) provides as follows:

"An exception or application to strike out shall, if particulars thereof have been delivered before the hearing of an application by the plaintiff for summary judgment, be heard and determined at the hearing of such application. If no such application be made, either party may on 10 days' notice set down such exception or application for hearing before the trial".

[16] Relying upon the decisions in

Car Bargains v Nhlanhla

1971 (1) SA 214 (T)

and

Golding v Abrahams

1977 (1) SA 350 (C)

Mr. Haasbroek submitted that in the absence of the filing of an exception, by the appellant, the appellant was precluded from raising as a defence to the application for summary judgment, that the respondent's particulars of claim failed to disclose a cause of action.

[17] The relevant dicta by the learned Judges in these cases, do not however support the argument advanced by Mr. Haasbroek.

[18] In the Car Bargains' case Colman J, in whose Judgment Hill J concurred, had the following to say at page 217 H – 218 A:

"The reference in sub-rule (6) to Rule 17 (7) is significant. It indicates clearly the course to be followed by a defendant who seeks to stave off summary judgment on the ground that the summons is defective. It is true that in terms of sub-rule (6) of Rule 14 the magistrate *may* (not *must*) grant summary judgment when the defendant has neither complied with sub-rule (3) nor excepted in terms of Rule 17.

The magistrate, therefore, had a discretion to refuse summary judgment, and he would no doubt have done so if, on what was before him, he had been of the opinion that the plaintiff had no case or had not made out a case".

[19] In Golding's case Watermeyer J, in whose Judgment Theron J concurred, had the following to say at 353 F – H

"In other words, it seems to me that in the magistrate's court the effect of Rules 14 (3) (c), 14 (6) and 14 (7), read together with Rule 17 (7), is that the mere allegation by the defendant that he has an exception to the summons does not constitute a *bona fide* defence to the claim in terms of Rule 14 (3) (c), and the magistrate would then have a discretion in terms of Rule 14 (6) whether or not to grant summary judgment. Of course, if it should appear to the magistrate that the plaintiff's cause of action is a bad cause of action, he would exercise his discretion in favour of the defendant (cf. *Transvaal Spice Works and Butchery Requisites (Pty.) Ltd. v. Conpen Holdings (Pty.) Ltd.*, 1959 (2) S.A. 198 (W)), but the mere allegation of an imperfectly pleaded cause of action would not in my opinion preclude him from exercising his discretion in favour of the plaintiff".

[20] Consequently, these cases are no authority for the proposition that in the absence of an exception, challenging an incomplete cause of action, upon which an application for summary judgment is based, the defendant is precluded from raising this issue, to defeat the grant of summary judgment, in terms of the Magistrates' Court Rules.

[21] What is clear from both of these decisions, is that the Magistrate in such a situation, has a discretion whether to grant summary judgment or not. However, if he is of the "opinion that the plaintiff had no case, or had not made out a case" (Car Bargains' case *supra*), or "that the plaintiff's cause of action is a bad cause of action"

(Golding's case *supra)* he should exercise his discretion in favour of the defendant and refuse summary judgment.

[22] The exercise of a discretion whether to grant summary judgment or not, should also involve a consideration of the necessity for the plaintiff to verify the cause of action, whether in terms of Rule 32 (2) of the High Court Rules, or Rule 14 (2) (a) of the Magistrates' Court Rules. This aspect is a vital and necessary component of the plaintiff's right to obtain summary judgment. It is clear that the cause of action to be verified must be complete. I comprehend that the need for the plaintiff to file such an affidavit verifying the cause of action, is to ensure that the Court is presented with a *bona fide* claim, which is neither frivolous, nor vexatious. An allegation in such an affidavit that the defendant has no *bona fide* defence to the action, cannot validly be made where the cause of action is not complete. The obligation on the plaintiff to verify a complete cause of action on which summary judgment is sought, arises independently of the obligation imposed upon a defendant to set out a *bona fide* defence to the action. Consequently, if *ex facie* the summons, particulars of claim or declaration, a complete cause of action is not made out, which does not give rise to a presently exigible claim as verified by affidavit, the Court in the exercise of its discretion should refuse summary judgment. This is so, even if the defendant in the Magistrate's Court has not filed an exception, or application to strike out, in terms of Rule 17 (7), or such a defence has not been raised by the defendant in the affidavit opposing summary judgment, in terms of

Rule 14 (3) (c) in the Magistrates' Court, or Rule 32 (3) (b) in the High Court.

[23] Consequently, the fact that the appellant did not raise the issue of the incomplete nature of the respondent's cause of action, by way of an exception in terms of Rule 17 (7), nor in the affidavit opposing summary judgment, matters not.

[24] Whether the respondent failed to comply with the provisions of Rule 14 (3) (c) and verify a complete cause of action, requires consideration of the second argument raised by Mr. Haasbroek. This was that the claim advanced by the respondent was in respect of an overpayment made to the appellant, as payment of the purchase price, in respect of the sale of the business by the appellant to the respondent. This claim was founded either on the *condictio indebiti,* or the *condictio sine causa*. In either event, so the argument went, the contract of sale formed no part of the respondent's cause of action to recover the overpayment. In other words, it was not necessary for the respondent to allege fulfilment of the suspensive conditions, referred to above, in the respondent's particulars of claim, as part of the respondent's cause of action.

[25] Mr. Haasbroek strenuously argued that the allegations in the particulars of claim, concerning the agreement of sale were not facts which the respondent had to prove in order to disclose a cause

of action (*facta probanda*), but were merely facts which proved them (*facta probantia)*. I disagree. Whether couched in the form of the *condictio indebiti,* or the *condictio sine causa*, an essential element of either cause of action, is that the payment was without a valid *causa.* In order to establish this element, the respondent would have to prove what the respondent was obliged to pay the appellant in terms of the contract, in order to prove that what was paid was in excess of the obligation, imposed in terms of the contract. These are facts which have to be proved to disclose a cause of action, and not merely facts which prove the cause of action. A necessary component of the respondent's cause of action consequently is an allegation that the suspensive conditions were fulfilled. As a result, the respondent did not set out a complete cause of action in the respondent's particulars of claim, and the respondent failed to verify a complete cause of action in terms of Rule 14 (3) (c).

[26] Mr. Haasbroek made no issue of the fact that the appellant raised this aspect for the first time on appeal, but in any event, the appellant was entitled to do so, as the issue is one of law, the consideration of which does not in my view, involve any unfairness to the respondent

Shraga v Chalk

1994 (3) SA 145 (N) at 150 F – 151 A

[27] The conclusion I have reached renders it strictly unnecessary to consider whether the Magistrate erred in concluding that the appellant had failed to set out *a bona fide* defence, but I will do so for the sake of completeness.

[28] As pointed out above, the respondent's claim is based on an overpayment, which is alleged to arise out of a valuation placed upon the stock of the business sold.

[29] The respondent, in the particulars of claim, alleged the following:

"The parties performed the stock-taking and the value of the stock was agreed upon at R25,566.14"

It was common cause that this amount was a typographical error and the amount should have read R255,600.14.

[30] The appellant, in the affidavit opposing summary judgment, said the following:

"The plaintiff's averment that the stock valuation is R255,600.14 is incorrect, as it was not the intention of the parties to value the stock at cost price, notwithstanding the agreement stating same, however at retail price. The retail value of such stock is R530,000.00 hence the reference to such amount".

[31] The Magistrate, after referring to the non-variation clause in the contract, held that the cost value of the stock was determined at R255,600.14, as it was agreed by the parties that the value of the stock would be determined by the cost value.

[32] M/s Nel submitted however, that the appellant had set out in sufficient detail a claim for rectification of the agreement in the affidavit, which Mr. Haasbroek hotly disputed. It is trite that what is required of the defendant, is that the nature and grounds of the defence are disclosed with sufficient particularity, to conclude that the defendant has a *bona fide* defence. The Court considers whether the facts alleged by the defendant constitute a good defence in law, and whether that defence appears to be *bona fide*

Maharaj v Barclays National Bank
1976 (1) SA 418 (A) at 426

[33] The allegation of the appellant in the opposing affidavit is that the intention of the parties was not to value the stock at cost price, but at the retail price, notwithstanding what the agreement states. In my view, this sufficiently sets out the nature and grounds for a claim to rectification of the agreement. It is clear that it is alleged that the agreement does not correctly record the parties common intention, in the respects specified. Although not expressly alleged, it is a reasonable inference that this is so because of a common

mistake of the parties. The precise way in which the agreement is to be rectified is clear, namely the stock has to be valued at its retail price and not its cost price.

[34] It seems the Magistrate incorrectly decided that the parties were bound to the terms of the agreement, because of the non-variation clause, without appreciating that what was being advanced, albeit not in the clearest fashion, was a claim to rectification of the agreement. In this the Magistrate erred. In my view the defendant set out a *bona fide* defence to the claim with sufficient particularity, such that the claim for summary judgment should have been refused.

In the result the order I make is the following:

a) The appeal succeeds, and the Judgment of the *Court a quo* granting summary judgment in favour of the respondent against the appellant is set aside.

b) The application for summary judgment is refused and the appellant is granted leave to defend the action.

c) The respondent is ordered to pay the appellant's costs, such costs to include the costs of the opposed application for

summary judgment in the *Court a quo*, as well as the costs of the appeal.

_____

SWAIN J

I agree

_____

MURUGASEN J

Appearances: /

Appearances:

For the Appellant	:	M/s A. Nel
Instructed by	:	Bothas Incorporated C/o Botha & Olivier Pietermaritzburg
For the Respondents	:	Mr. P. Haasbroek
Instructed by	:	Schreiber Smith Attorneys Empangeni
Date of Hearing	:	19 March 2010
Date of Filing of Judgment	:	26 March 2010