

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

REPORTABLE

Case No: 3657/07

In the matter between:

EDWARD STREET PROPERTY INVESTMENTS CC

Plaintiff

and

JEAN LAMBRECHTS

First Defendant

Wit I FM JOHANNES LAMBRECHTS

Second

Defendant

MARIUS ARTHUR EDWARD CONRADIE

Third Defendant

Coram

: R.C.A. Henney, AJ

Judgment by

: R.C.A. Henney, AJ

For the Applicant

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Instructed by

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Date(s) of Hearing

28 OCTOBER 2010

Judgment delivered on

01 DECEMBER 2010

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MARIUS ARTHUR EDWARD CONRADIE

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JUDGMENT DELIVERED ON 1 DECEMBER 2010

HENNEY, AJ:

BACKGROUND

[1] The Plaintiff issued Summons in 2005 against the three defendants and Lalaco Beleggings ("CC"), a duly registered close corporation, in the Paarl Magistrate's Court in respect of arrear rental.

The action was withdrawn against the three Defendants who at that stage were also members of the "CC". The "CC" did not oppose the action. Judgment was granted in

default against it for payment in the amount of R411 802.72 plus interest at 15,5% p.a. a *tempore morae*. This judgment debt was never paid by the "CC.

[2] On 22 December 2006, the "CC was deregistered in terms of Sections 26(1) and 26(2) of the Close Corporations Act. 69 of 1984.

In March 2007 the Plaintiff issued summons against the three defendants for payment of the said amount plus interest out of this court. The plaintiff avers that the three defendants are liable in terms of Section 26(5) which provides:

"If a corporation is deregistered while having outstanding liabilities, the persons who are members at the time of deregistration shall be jointly and severally liable for such liabilities'.

[3] The defendants entered an appearance to defend the action, whereupon the plaintiff launched an application for summary judgment. This application was opposed by the defendants. They claimed they had a *bona fide* defence to the action. In essence their defence was that they were not responsible for the liabilities of the Close Corporation in terms of Section 26(5) of the Act. as the Close Corporation was improperly deregistered.

[4] In May 2007 the matter was postponed by agreement between the parties in order for the defendants to launch an application in the North Gauteng High Court to have the deregistration by the Registrar of Close Corporations declared null and void.

On 27 July 2008 the North Gauteng High Court dismissed the defendants' application. The plaintiff thereafter re-enrolled the application for summary judgment.

[5] **The Application**

As a result of the issues raised by the parties in the Summary Judgment application before me, it would be appropriate to re-visit the relevant portions of the Uniform Rules governing summary judgments. Rule 32 states the following:

"Summary Judgment:

(1) *Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-*

a) *on a liquid document; for a liquidated amount in money;*

(c) *.....*

(d) *-.....*

together with any claim for interest and costs.

(2) *.....*

(3) *Upon the hearing of an application for summary judgment the defendant may-*

(a) *.....*

(b) *satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other 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".

[6] During argument counsel for the defendants submitted that the claim was not founded on a liquid document. This issue was never raised by the defendants in their papers filed of record. In any event, the defence raised by the defendants is that they are not liable for payment of the amount claimed. The amount claimed was therefore never in dispute. The contention that the amount claimed was not founded on a liquid document is without substance as the Plaintiff's claim is based on a liquidated amount sounding in money (See **Neves Builders & Decorators v De La Cour 1985 (1) SA 540 CPD at 544 F - H**, and **Tredoux v Kellerman 2010 (1) SA (C)160 at 166G**).

[7] The defendants, after the enrolment of the matter, also filed a "Supplementary Affidavit" in amplification of their defence. Miss Van Huyssteen, counsel for defendants, argued that in a summary judgment application the court is entitled to adopt a lenient approach, and that the court has a discretion to allow the defendant to file a supplementary affidavit.

Miss Van Huyssteen submitted further that in exercising its discretion to allow a litigant to present his case fully, there should be no prohibition against a defendant supplementing his defence in rectifying a defective opposing affidavit. As authority for this proposition, Miss Van Huyssteen referred to the matter of **Juntgen t/a Paul Juntgen Real Estate v Nottbusch 1989 (4) SA 490 (W) at 493 C-D** where it was held that:

' It follows that because of the scrutiny of the bona fides of the defendant in respect of the defence to which he lays claim, a defendant may find that his affidavit is inadequate. He may have forgotten to tell his attorney of an important

fact or may have missed the significance thereof. Attorneys, like other humans, make errors which are called omissions. The attorney's view on what is adequate may differ from what counsel or the Court thinks. A defence may develop subsequent to the signing of the affidavit. It has all the potential to cause injustice if the Court's discretion to allow improvement of defective attempts is to be hampered by an application of the dictum in the Joubert case in any literal meaning thereof.'

[8] The further reasons advanced by Miss Van Huyssteen for filing the supplementary affidavit, were that the defendants truly believed in their prospects of succeeding in their application for the deregistration to be set aside and consequently failed to deal with the defences the "CC" may have had against the claim.

[9] ISSUES FOR DETERMINATION

The following issues must therefore be determined;

- a) whether condonation should be granted for the filing of the Supplementary Affidavit

and;

- b) whether the Supplementary Affidavit serves to rectify, amend or supplement the Opposing Affidavit and;

c) if so whether it discloses a *bona fide* defence.

In answering the first two questions, it is clear that the court has a wide discretion, especially in the case of Summary Judgment, to permit the filing of further affidavits, provided that good cause is shown for further affidavits to be permitted. The onus in my view rests on the party who seeks to have such affidavits permitted. Erasmus, "**Superior Court Practice**" Volume 1 at **B1-47**. states the following:

*'There should in each case be a proper and satisfactory explanation which negatives mala fides or culpable remissness as to the cause of the facts or information not having been put before the Court at an earlier stage, and the Court must be satisfied that no prejudice is caused by the filing of additional affidavits which cannot be remedied by an appropriate order of costs.'*¹

Erasmus, "**Superior Court Practice**" says further at **B1-228 - B1-228A**:

'In Superior Court Practice a Defendant has been allowed to supplement his or her affidavit by a further affidavit where, for instance, the first affidavit was defective, even though the supplementary affidavit was out of time. It is submitted there must be some basis for granting leave to file a supplementary affidavit for example, an adequate explanation by the defendant for the deficiencies, in his or her opposing affidavit, and at least some indication that the prepared supplementary affidavit is likely to clear the difficulties.'

[10] In this matter it seems that the defendants do not seek to cure or clear any deficiency

in their original affidavit. They neither seek to supplement nor say anything in addition to what they had already stated earlier. The purpose of filing the Supplementary Affidavit is clearly aimed to substitute their initial defence, due to the fact that they could not succeed in having the decision of the Registrar of Close Corporations to deregister the Close Corporation nullified.

[11] In the matter of **Joubert, Owens, Van Niekerk Ing v Breytenbach 1986 (2) 357 TPD at 361**. the court after referring to the matter of **Empire Fresh Meat Supply (Pty) Ltd v Ilic 1980 (4) SA 23(W)** held:

Soos wat in die gemelde passasie genoem is, blyk dit baie duidelik dat die toestemming wat verleen word ondersekere omstandighede vir die liassehng van n aanvullende verklaring hoofsaaklik daarop gemik is om 'n verweerder te help waar daarbloot formele gebreke of dergelike defekte in die beantwoordende verklanning mag wees. Dit kan nie. soos dit vir my lyk. gebruik word om 'n verweerder se onvolledige verweeraan te vul en om op die manier vir horn 'n geleentheid gee om 'n tweede kans te kry om n summiere vonnis aansoek afte weernie.'

[12] In this present matter there is no question of an incomplete ("onvolledige") defence. It is an attempt to substitute the initial defence with a completely new defence. The reference Miss Van Huyssteen made to the **Juntgen** decision as referred to in para 7 would in my view find application in a deserving and *bona fide* case. It may also find application in a matter where the defendant is taken by surprise, or would not have had information at their

disposal when his or her affidavit was initially deposed to. Whether it is permissible to file a supplementary affidavit for the purpose of substituting a defence would depend on the circumstances of each particular case.

It is clear that none of the circumstances as mentioned in the **Juntgen case** are present in this case. The defendants do not aver that there were some errors in, or certain important facts missing from, or that facts that were not in the initial opposing affidavit, which therefore required to be rectified or supplemented. It was also not averred that a defence which the defendants were not aware of subsequently developed.

In this case, if one has to have regard to the supplementary affidavit, the defendants at all relevant times were aware of all the facts and did not fully disclose the nature and grounds of their defence. They consciously chose not to fully disclose all the facts at their disposal which in fact is a requirement in terms of Rule 32.

[13] It is also clear in my view, as stated by **Erasmus, "Superior Court Practice"** at B1 - 47. that the supplementary affidavit *'had been shaped to relieve the pinch of the shoe.'*

The defendants therefore in my view did not make out a case to justify the filing of the supplementary affidavit because, it does not seek to rectify, amend or supplement their initial defence as set out in the initial opposing affidavit. It seems rather to substitute a defence in circumstances where the defendants would not be permitted to do so.

It follows therefore, that the application for the filing of a supplementary affidavit by the defendants cannot succeed.

[14] Even if it would have been permissible to condone the filing of the supplementary

affidavit, I am not persuaded that the defendants have a *bona fide* defence in any event.

In para 5 of the Supplementary Affidavit the first defendant on behalf of the others and himself, states:

'I am advised by my legal representative that the Defendants can avail themselves of any and all defences which the Close Corporation could have relied on, and that the liability of the defendants does not extend any further than the extent of the Close Corporation's actual liability to the Plaintiff, if any.'

[15] If it is assumed that the defendants' supplementary affidavit should be admitted, the following defence was raised:

- 1) That during September 2000, the close corporation (Lalaco Beleggings) entered into a lease agreement with the plaintiff for the purposes of conducting a restaurant business.
- 2) During May 2001, the close corporation sold the restaurant and sublet the leased premises to one Penders. The plaintiff was aware of this and insisted that the rentals payable be paid directly to the plaintiff. Penders, the sub-lessee, breached the rental agreement and during 2003 a summons was issued by the plaintiff against the close corporation for outstanding rental in respect of the period 1 March 2003 - April 2005.
- 3) The plaintiff did not advise the close corporation that Penders failed to fulfil his obligation.
- 4) The plaintiff instituted an action against the close corporation (as principal debtor) and the three defendants (as sureties) for the amount.

5) In the Paarl Magistrate's Court during or about 2006, default judgment was taken against the close corporation.

6) It is not disputed that the three defendants were aware of the proceedings in the Magistrate's Court. Miss Van Huyssteen argued that the three defendants took a conscious decision not to defend this action in the Magistrate's Court, because they foresaw that the close corporation would be liquidated. According to the defendants neither the close corporation nor its members were aware of the breach of the rental agreement by the sub-lessee. The plaintiff was aware of the breach by the lessee and should have informed the close corporation.

[16] The argument by counsel for the defendants is without merit for the following reasons: Firstly, it is a completely different defence than that averred in their initial opposing affidavit. This itself is enough reason to hold that it lacks *bona fides*; Secondly, if they had this *bona fide* defence, they should have stated it in the initial opposing affidavit, which they purposely omitted to do; and finally, during the proceedings in the Paarl Magistrate's Court, before judgment was given, no such defence was raised. In fact, it was submitted in argument by defendants' counsel that a conscious decision was made by the three defendants, as members of the "CC", that judgment by default be granted against the 'CC.

[17] On a conspectus of the evidence, it is clear that the defendants deliberately failed to fully disclose the nature and grounds of their defence. In the light of this failure, and given the nature of the defence itself. I am of the view that the defendants lack *bona fides*.

Conclusion

[18] It has been established that the defendants were members of the "CC" at the time of its deregistration. I am satisfied that the plaintiff is entitled to hold the defendants jointly

and severally liable in terms of Section 26(5) of the Close Corporations Act for the amount due to the plaintiff in terms of the judgment given in the Magistrate's Court Paarl under Case No 2833/2005 for the amount of R411 802,72 plus interest at 15,5% a *tempore morae*.

The Order

[19] In the result, I make the following order:

Summary Judgment in favour of the plaintiff in the sum of R411 802.72. with interest at 15,5% a *tempore morae*, is granted against the first, second and third defendants jointly and severally, the one paying the other(s) to be absolved with costs.

R.C.A. Henney, AJ