IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 3476/2014

In the matter between:-

PINNACLE MICRO (PTY) LTD Plaintiff/Applicant

[Registration Number: 1993/000917/07]

And

PREMI-COM COMMUNICATIONS CC 1st Defendant/ Respondent

[Registration Number: 2004/038415/23]

DONOVAN ALLAN McDONALD 2nd Defendant /Respondent

[Identity Number: 6.…….]

CORAM: VAN ZYL, J

DELIVERED ON: 16 APRIL 2015

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[1] A summons was issued in terms of which the plaintiff instituted two claims against the defendants, jointly and severally, payment by the one the other to be absolved, for payment of the amounts of R369 624-25 and R407 929-37

respectively, together with ancillary relief, which includes costs on a scale as between attorney and own client.

[2] I will refer to the parties as cited in the main action.

[3] The plaintiff is no longer seeking summary judgment against the second defendant. Mr Reinders, on behalf of the plaintiff, indicated in his heads of argument already that after the filing of the answering affidavit, the plaintiff granted the second defendant leave to defend the action. However, reference will still be made in the judgment to the second defendant in so far as he acted on behalf of the first defendant and/or in instances where the defence of the first defendant is the same to or intertwined with that of the second defendant.

CLAIM 1:

[4] In claim 1 the plaintiff avers that the plaintiff and the first (and second) defendants concluded an oral agreement in terms of which the first (and second) defendants acknowledged their indebtedness to the plaintiff, jointly and severally, the one to pay the other to be absolved, in the amount of R411 624-25, together with interest and costs on a scale as between attorney and own client. The plaintiff further avers that in terms of the said agreement, the defendants had to pay the said amount by way of monthly instalments in the amount of R7 000-00 per month, the first payment to be made on or before 7 September 2013 and thereafter on or before the 7th day of every succeeding month until the full amount has been paid. Pursuant to the acknowledgement of debt

agreement, the first and second defendants made six monthly payments of R7 000-00. Since February 2015, the defendants have however neglected to pay the aforesaid instalments, whereupon, in terms of the acknowledgement of debt, the full outstanding balance together with costs and interest became immediately due and payable. The current outstanding balance amounts to R369 624-25.

[5] Although the defendants admit the conclusion of an acknowledgment of debt agreement, it is averred that it is only the first defendant who entered into the said agreement and that it was therefore only the first defendant who was responsible for the payment of the monthly instalments of R7 000-00 per month.

[6] The opposition by the first defendant to claim 1 is based upon an averment that although the initial claim amount was R411 624-25, the plaintiff, and specifically Rainier Esterhuizen and Tim on behalf of the Plaintiff, informed the second defendant, on behalf of the first defendant, that the plaintiff's insurance had paid out an amount of R354 000-00 for the plaintiff's loss and that they would therefore settle the matter on the basis that the first defendant was to pay only the difference between the said amounts to the plaintiff. Only then was it agreed that the first defendant will pay the aforementioned difference in instalments of R7 000-00 per month. The first defendant therefore denies that the acknowledged of debt agreement was concluded for the full amount of R411 624-25.

[7] In addition to the aforesaid the defendants base their opposition of claim 1 on a counterclaim for damages against the Plaintiff. It is averred on behalf of the first defendant that Mrs Sonia Kruger, a representative of the plaintiff, provided the first defendant's statement with the plaintiff, which statement reflected the first defendant's key client list, to one of the first defendant's other distributors, IRT Distributions. Due to this, IRT Distributions closed the first defendant's account with them and then the plaintiff also closed the first defendant's account with itself. As confirmation of these averments, the defendants attached a copy of the e-mail wherein the information was sent to Mr van der Merwe of IRT Distributions by Mrs Sonia Kruger of the plaintiff as Annexure "A", as well as a confirmatory affidavit by Mr van der Merwe as Annexure "B".

[8] As a result the first defendant did not receive any income, neither did the second defendant, because the first defendant is the second defendant's only source of income. This caused the first defendant's inability to continue with the monthly payments of R7 000-00 as agreed upon between the first defendant and the plaintiff.

[9] Regarding the alleged damages the defendants suffered and their intended institution of a counterclaim, the following averments appear in the answering affidavit:

> "*3.13 As will be explained herein below, the actions of the plaintiff caused the first defendant and me damages and the damages have a direct nexus with any amount*

the applicant claims or might be entitled to. The first defendant and I intend instituting a counterclaim in the main action for our damages and the Honourable Court will be asked to stay the determination of the plaintiff's claims until after our damages are proven.

…

4.9 The damages that I refer to in the paragraphs herein above was caused by the plaintiff because of the standstill the first defendant's business experienced due to the fact that the plaintiff closed the first defendant's account with them and caused the first defendant's account to be closed with IRT Distributions. The first defendant's account with the plaintiff has been closed since that incident but IRT Distributions re-opened the account with them after a week. However, in that week certain of the first defendant's clients had to approach other service providers as the first defendant could not provide them with its usual services at that stage. The first defendant has now lost those clients to other service providers and therefore not only suffered damages in the period that the business was brought to a standstill but is continuously suffering damages due to the loss of those clients. By implication I am also suffering damages as explained herein above.

4.10 Although the damages cannot be precisely quantified at this stage, I feel confident that it will amount to more than the amount that the plaintiff claims in claim 2 and the balance of the difference between the amount in claim 1 and the amount paid by the insurance. As mentioned herein above the first defendant and I intend to lodge a counterclaim in the main action in order to

claim the damages that we have suffered. The amount of damages will be calculated and quantified by an expert should we be granted leave to defend the action.

4.11 As explained herein above, the reason why the first defendant could not pay the amount indebted to the plaintiff, is because the plaintiff has, in breach of its agreements with the first defendant, stopped all business with the first defendant and I am of the opinion that any damages that we have suffered because of the actions should either be subtracted from the amount claimed by the plaintiff or the plaintiff's proved claim amount subtracted from my damages, depending on which amount is higher.

4.12 Because of the fact that this is a summary judgment application and because the extent of such damages can only be determined by thorough investigation, it has not yet been possible in the available time to calculate and liquidate the damages and to tender the difference, if there is any, to the plaintiff.

4.13 ….. I have been advised and accept that the damages must be determined through thorough investigation and proved in an action procedure wherein oral evidence can be led and all the income statements can be provided to the Court. Furthermore, oral evidence by an expert witness such as an accountant will probably be necessary."

CLAIM 2:

[10] Insofar as claim 2 is concerned, the plaintiff avers that the

first defendant applied in writing to the plaintiff to be a registered dealership and, acting in terms of the dealership agreement, the plaintiff sold and delivered to the first defendant certain equipment at the special instance and request of the first defendant. The goods so sold and delivered amounted to R407 929-39, which amount is due and payable.

[11] Although the defendants aver that the application for dealership document which the plaintiff annexed to its particulars of claim was not filled out when it was signed, it is admitted by the second defendant on behalf of the first defendant that the first defendant is indebted to the plaintiff in the claimed amount of R407 929-39. The first defendant however avers that it was unable to pay the said amount to the plaintiff, because the plaintiff has in breach of its agreement with the first defendant, stopped all business with the first defendant. The same defence regarding the alleged damages suffered by the defendants and the intended counterclaim as raised in opposition of claim 1, is also raised as a defence to claim 2.

CONSIDERATION OF THE MERITS:

[12] At the onset of his oral argument Mr Reinders indicated that he cannot convincingly submit that summary judgment should be granted against the first defendant on claim 1. In this regard he conceded that the defence raised on behalf of the first defendant pertaining to the alleged payment of insurance money and the alleged agreement concluded as

a result of that payment, should be considered to constitute a *bona fide* defence to the greater part of the amount claimed. Should the averments on behalf of the first defendant be accepted in this regard for purposes of summary judgment, it would leave a balance of approximately R9 000-00 on claim 1, with regards to which amount summary judgment ought not to be granted in the circumstances.

[13] In my view Mr Reinders' concession was correctly and responsibly made. The first defendant should be granted leave to defend claim 1.

[14] Regarding the plaintiff's second claim against the first defendant, Mr Reinders submitted that summary judgment should be granted. He emphasised the fact that the first defendant admits that he is indebted to the plaintiff for the amount claimed and that the first defendant's only defence is an alleged counterclaim, but which counterclaim is unquantified. Mr Reinders submitted that in order for a defendant to succeed with a counterclaim as a defence to a claim in summary judgment proceedings, a defendant is compelled to comply with the provisions of Rule 32(3)(b), requiring full disclosure of the nature and grounds of the counterclaim as well as the material facts upon which it relies. He submitted that the first defendant does not disclose a *bona fide* defence, as the first defendant should at least have given an indication of the amount of damages and the calculation thereof. Mr Reinders pointed out that the first defendant did not even give an estimation of the

alleged damages and the grounds for such calculation. Mr Reinders furthermore pointed the following aspects out in this regard:

14.1 Although it is the first defendant's case that the plaintiff closed the first defendant's account, the first defendant did not aver that he was unable to still do business with the plaintiff on a cash basis, which would have restricted or even negated the first defendant's alleged damages.

14.2 For the first defendant`s counterclaim, it intends to rely on the very same written agreement, the existence and validity of which the first defendant is currently denying.

14.3 According to the first respondent itself, its account with IRT Distributions was re-opened after a week. Despite the lapse of time since then, the first defendant did not even attempt to make any calculation of his damages.

[15] In the well-known judgment of **Maharaj v Barclays National Bank Limited** 1976 (1) SA 418 (A) at 426 the following is stated with regards to the requirement of a *bona fide* defence:

> "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 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. …
>
> It must be conceded at once that the defendant's affidavit, insofar as it purports to set forth a defence on the merits (as outlined above), is not a wholly satisfactory document. …The affidavit does, nevertheless, appear to disclose a defence which seems, on the face of it, to be *bona fide*."

[16] Mr Reinders is correct in pointing out that no allegation was made on behalf of the first defendant that after the closing of its account with the plaintiff, it was not allowed to buy goods on a cash basis from the plaintiff. However, from paragraph 3.2 of the answering affidavit it is evident that the business transactions between the plaintiff and the first defendant were done on a consignment basis. The following averments were made:

> "The business entails that the first defendant sell the plaintiff's products, to wit computers and computer related products, to clients that I recruit on behalf of the first defendant. After selling the products and receiving payment from the clients, the first defendant <u>then pays</u> the plaintiff the amount for the products that the first defendant sold on their behalf on consignment basis." (Own emphasis)

Without the necessity to speculate, the aforesaid arrangement is in my view clearly indicative of the first defendant's financial inability to pay the plaintiff for any

specific product before having received payment for the said product from the relevant client. It therefore appears that the first defendant would not have been financially able to do business with the plaintiff on a cash basis.

[17] Regarding the agreement which the first defendant seemingly intends to rely on for purposes of its counterclaim, it is in my view evident from the answering affidavit that the first defendant is in fact not relying upon the written agreement alleged by the plaintiff, but on an oral agreement. In this regard it is averred on behalf of the first defendant that it has been doing business with the plaintiff for approximately 11 years. Considering that the alleged written agreement is only dated August 2011, it appears that the parties have indeed been doing business for many years prior to the alleged conclusion of the written agreement. In addition thereto, in paragraph 3.8 of the answering affidavit the first defendant is specifically relying on an oral agreement which existed between the plaintiff and the first defendant. I cannot agree with Mr Reinders' contention that the oral agreement referred to in paragraph 3.8 should be understood as being a reference to the settlement agreement between the parties. When read in context, it is in my view a clear reference to the alleged oral agreement in terms of which the parties have been doing business with one another.

[18] It is indeed so that although a defendant in summary judgment proceedings may rely on an intended counterclaim for an unliquidated amount, the extent of such

counterclaim should be stated. See **Jacobsen van den Berg SA (Pty) Ltd v Triton Yachting Supplies** 1974 (2) SA 584 (O) at 588. However, in that very same judgment it is stated at 588G:

> "If a defendant is not able to give any further information, he as buyer or one of the parties to the account should say so and give reasons why he cannot do so."

[19] In **Nedperm Bank Ltd v Verbri Projects CC** 1993 (3) SA 214 (WLD) at 224 E the following was stated:

> "I have looked at all the cases. They indeed support the proposition of a discretion, but a discretion exercised in appropriate cases where there is some factual basis, or belief, set out in the affidavit resisting summary judgment which would enable a Court to say that something may emerge at a trial, and there was a reasonable probability of it so emerging, that the defendant would indeed be able to establish the defence which it puts up in its affidavit and which at the particular time it might have difficulty in precisely formulating or in precisely quantifying because of lack of detailed information."

[20] That the closing down of the first defendant's account by the plaintiff and IRT Distributions apparently did have a negative financial impact on the first defendant's business, seems to be corroborated by the fact that the first defendant's failure to pay the agreed instalments of R7 000-00 per month occurred during March 2014 for the first time, which corresponds with the time at which the plaintiff's accounts were closed, considering that the relevant e-mail which led to the closing of the accounts was sent on 3

March 2014. I am therefore satisfied that except for the amount of the intended counterclaim, the first defendant made a full disclosure of the nature and the grounds of its intended counterclaim, and the material facts upon which it relies.

[21] Considering the averments made in paragraphs 4.10 to 4.13 of the answering affidavit, already alluded to in paragraph 9 above, I have to agree with Mr Olivier's contention that the first defendant has tendered a reasonable explanation as to why it is unable to quantify its counterclaim at this stage.

[22] I consequently do not know whether the intended counterclaim, if successful, would extinguish the second claim of the plaintiff, or not. However, in the exercising of my discretion, I am of the view that against the background of the totality of the circumstances of this matter, summary judgment should be refused. See **Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd** 2004 (6) SA 219 (SCA) at paragraph 10:

> "In order to be successful in a defence, the defendant must, of course, comply with the provisions of Rule 32(3)(b), which requires a full disclosure of the nature and the grounds of the counterclaim as well as the material facts upon which it relies. Failure to comply with these provisions will not necessarily mean, however, that summary judgment will follow. In accordance with the provisions of Rule 32(5), the Court retains an overriding discretion to refuse summary judgment. This overriding discretion pertains not only to that part of the

> claim which would be extinguished by the counterclaim, but also to the balance of the claim. In short, the Court retains a discretion to refuse the application for summary judgment in its entirety, even where a defence to only a part of the claim has been raised."

[23] The only question which remains is whether, considering that the first defendant admits its indebtedness to the plaintiff in the amount claimed in the second claim of the plaintiff, judgment on the second claim should be postponed pending the adjudication of the counterclaim or whether the first defendant should be granted leave to defend the second claim. In this regard Mr Reinders contended that the appropriate order will be to postpone judgment on the second claim pending the adjudication on the counterclaim, so as to enable the plaintiff to apply for earlier adjudication of the claim should it eventually appear that the first defendant is unnecessarily dragging out the process. He relied on the **Soil Fumigation Services v Chemfit Technical Products**-judgment, *supra*, paragraph 11, for this contention.

[24] In the circumstances of this matter, where the first defendant, although it admits its indebtedness to the plaintiff in the amount claimed in the second claim, avers that such indebtedness originated from a different agreement than the written agreement which the plaintiff relies on, it would, in my view, be in the interest of justice that the second claim and the intended counterclaim be adjudicated upon *pari passu*. Moreover so where the plaintiff has already granted leave to the second defendant, in its capacity as alleged

surety, to defend the second claim. In **Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another** 1984 (2) SA 693 (CPD) at 701 A – C it was held that:

> "To the extent that the surety and co-debtor has in his own right all the defences *in rem* of the principal debtor, a counterclaim giving rise to set-off upon judgment being granted is as much a defence 'of the defendant' whether defendant refer to is the principal debtor or the surety and co-debtor sued in the same action. In my opinion , therefore, a surety and co-debtor may avail himself of the same defence of set-off as a principal debtor according to the practice described in Rule of Court 22(4).
>
> …
>
> It should as a general rule not be granted against the surety in an action which a principal debtor has also been sued for the same debt and it has been shown in the application for summary judgment that the principal debtor has a *bona fide* defence which, if it should succeed in the action, will simultaneously result in the discharge of the surety from his accessory liability for the debt claimed in the action. In the present case considerations of convenience and justice as between the parties concerned satisfy me that the claim against first defendant and second defendant and the counterclaim should be adjudicated upon *pari passu* and not piece-meal, particularly since the ultimate liability of second defendant depends upon the outcome of the claim and counterclaim as between plaintiff and first defendant."

Also see **Cape Town Transitional Metropolitan Substructive v Ilco Homes Ltd** 1996 (3) SA 492 (CPD) at 501 D – E:

> "For purposes of the alternative claim the plaintiff has, however, conceded that the defendant has a *bona fide* defence, on the basis of the counterclaim. That being so, I should not interfere at this stage with the normal development of the case through the pleadings by granting summary judgment, particularly where the plaintiff will have a further remedy under Rule 22(4) if it concludes, in due course, that it has adequate grounds for seeking acceleration of the adjudication of the claim in convention.
>
> I would accordingly dismiss the application for summary judgment and grant leave to defend on the basis of the defendant's alleged counterclaim."

[25] I accordingly conclude that leave should be granted to the first defendant to defend the plaintiff's second claim against it.

COSTS:

[26] In my view there is no reason, nor was any reason advanced by any of the counsel, why the usual order in summary judgment proceedings where leave is granted to the defendant(s) to defend the matter, should not be granted in this instance.

[27] The following order is therefore made:

1. The application for summary judgment is refused.

2. Leave is granted to the defendants to defend the action.

3. The costs of the application for summary judgment are costs in the cause.

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C. VAN ZYL, J

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