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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 4080/2016

In the application between:

QUALITA SEEDS (PTY)LTD Plaintiff

and

FS PEANUTS BK First Defendant
THOMAS FREDERIK DREYER Second Defendant

JUDGMENT BY: C REINDERS, J

HEARD ON: 2 JANUARY 2017

DELIVERED ON: 9 FEBRUARY 2017

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[1] On 26 October 2015 the Plaintiff (Qualita Seeds) issued summons against the First Defendant, FS Peanuts BK (FS Peanuts), and the Second Defendant, Thomas Frederik Dreyer (Mr Dreyer), for payment in the amount of R 1 146 887,50 together with interest and costs. After a notice of intention to defend was filed on 16 November 2016 by both Defendants, Qualita Seeds now moves for summary judgment against the Defendants, jointly and severally, the one paying the other to be absolved for payment of the above mentioned.

[2] The claim of Qualita Seeds against the Defendants is based on a written agreement titled “ERKENNING VAN SKULD EN OOREENKOMS OM SKULD TE BETAAL” (“acknowledgement of debt”), annexed as Annexure “Q1” to the particulars of claim. In this acknowledgement of debt Mr Dreyer represented FS Peanuts and acknowledged in clause 1 thereof that FS Peanuts is indebted to Qualita Seeds in the amount of R 1 146 887,51 which amount is due and payable in respect of goods sold and delivered by Qualita Seeds to FS Peanuts at the latter’s special instance and request. Qualita Seeds’ cause of action is set out fully in Annexures “A1” and “A2” (Tax Invoices dated 23/11/2015 and 19/10/2015 respectively) attached to the acknowledgement of debt. In clause 11 of the agreement Mr Dreyer bound himself as surety and co-principal debtor towards Qualita Seeds for the due compliance of FS Peanuts’ obligations in terms of the agreement with Qualita Seeds. Furthermore, in clause 2 of the agreement FS Peanuts undertook to pay the debt together with interest in amounts and on dates as set out, and in clause 3 it was agreed that in the event that FS Peanuts fails to make payment on the due dates, the full outstanding debt and costs will immediately be due and payable. In terms of clause 10 FS Peanuts consents to judgment being granted in terms of the acknowledgement of debt.

[3] In his affidavit in opposition to the application for summary judgment, Mr Dreyer premised the Defendants’’ defence on the following grounds:

3.1 The deponent to the affidavit in support of the application for summary judgment, Johannes Carl Snyman (Mr Snyman), failed to attach a resolution to the affidavit in terms whereof he is authorised to act on behalf of Qualita Seeds nor does he the declare why the averments falls within his personal knowledge

or make any averments in regards to the background of the matter.

3.2 The acknowledgement of debt is a credit agreement and consequently the National Credit Act 34 of 2005 (the "Credit Act") and the provisions for enforcement thereof is applicable to the agreement.

3.3 Although Mr Dreyer admits that he signed the acknowledgment of debt, he was misled in the signature thereof; it came to his attention that delivery of the goods to FS Peanuts was not effected; there is no proof attached to the summons re delivery of the goods and the acknowledgement of debt does not make mention for which the debt is due.

[4] The first defence *in limine* dealt with Mr Snyman's authority to depose of the affidavit and his personal knowledge of the facts of this matter. I find no merit in this defence. In terms of Rule 32(2) a plaintiff is required to file an affidavit with the application for summary judgment, either by himself or any other person that can swear positively to the facts, verifying the cause of action and the amount claimed and stating that in his opinion there is no bona fide defence to the action and that the notice of intention to defend has been delivered solely for the purpose of delay. It is trite that any person who can swear positively to the facts may depose to the affidavit

See: **Rees and Another v Investec Bank Ltd** 2014 (4) SA 220 (SCA) paras [11]-[12]

Mnr Lubbe on behalf of Defendants argued that the affidavit makes no mention of the exact particulars of his knowledge .I do not agree with him. In his affidavit Mr Snyman stated "Ek was ten alle tye self ten nouste betrokke by die besigheidstransaksies wat tussen die eiser en die eerste verweerder plaasgevind het. Ek dra dus persoonlik kenis van die feite en omstandighede in hierdie

aangeleentheid." As is evident from Annexure "Q1" Mr Snyman is a director of Qualita Seeds and in this capacity represented the Plaintiff in concluding the agreement. There can be no doubt that Mr Snyman bears knowledge of the facts and circumstances of the matter. Moreover it has been held that the deponent to the verifying affidavit need not be authorised by the plaintiff to depose to the affidavit.

See: **Collett v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA).

[5] Mr Dreyer attempted to put up a defence that the Credit Act is applicable to the acknowledgement of debt and that there was no compliance with the Credit Act. In terms of sec 4 of the Credit Act a large agreement (described in sec 9(4) as an agreement concluded in respect whereof the principal debt is at or above the threshold amount, currently determined at R 250 000.00) in terms of which the consumer is a juristic person whose asset value or annual turnover is below the threshold value in terms of sec 7(1) currently being R 1 million, is exempted from the provisions of the act. It is common cause that Qualita Seeds is a company and FS Peanuts is a close corporation and that the acknowledgement of debt was signed in respect of a debt amounting to R 1 146 887.51. Annexures "A1" and "A2" to the acknowledgement of debt were for goods sold and delivered in the amounts of R 476 200 and R576 600,00 respectively. The agreement was also exempted from the provisions of Sec 4(2)(c) in respect of Mr Dreyer as surety to FS Peanuts.

See: **Standard Bank v Hunkydory Investments194 (Pty) Ltd** 2010 (1) SA 627 (C) at par 13-27.

I am satisfied therefore that the acknowledgement of debt is not subject to the provisions of the Credit Act and this defence is without merit.

[6] A plethora of purported defences on the merits were advanced by Mr Dreyer. From these I have to determine whether Mr Steyn on the merits has set out facts which, if proved at the trial, would constitute a defence well in law. Mr Dreyer avers that he was defrauded into signing the acknowledgement of debt, stating “Ek bevestig egter dat die skulderkenning onder valse voorwendsels aan my voorgehou en neergele is vir ondertekening”. No further particulars of the averred misrepresentation or fraud is disclosed, for instance by whom the representation was made or what the fraud or misrepresentation entailed. It is trite that a party wishing to rely on fraud or a material misrepresentation must make essential allegations, one of which is that Mr Dreyer should have he relied, to his detriment, on such misrepresentation into entering into the acknowledgement of debt.

See: (**Seven Eleven Corp of SA (Pty) Ltd v Cancun Trading NO** 150 CC 2005 (5) SA 186 (SCA) at para [38].

The scant averment by Mr Dreyer does not even come close to meeting the essential averments to constitute fraud or misrepresentation, and am not satisfied that Mr Dreyer has set out the grounds on which he rely sufficiently full to persuade met that what he has alleged, if proved at the trial, will constitute a defence to the plaintiff’s claim.

See: **Breytenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) at 228 D.

[7] It is averred by Mr Dreyer that after signing the acknowledgement of debt it came to his knowledge that the goods referred to in the acknowledgement, were not delivered to FS Peanuts. No detail is given on when exactly it came to his knowledge or by whom this information was conveyed. The averment is bald and sketchy. He furthermore avers that that the acknowledgement did not state in respect whereof the debt became due. According to the first page of Annexure Q1 Mr Dreyer is

the sole member of FS Peanuts. Not only did the acknowledgement of debt which Mr Dreyer signed specifically state that the claimed amount is due in respect of goods **sold and delivered** as per the annexed tax invoices, the latter formed part of the acknowledgement of debt that Mr Dreyer signed and initialled with Mr Swanepoel on 7 September 2016. It is clear that Mr Dreyer demonstrates a lack of bona fides in this regard.

[8] In the Defendant's heads of argument prepared by Adv Harms, two new defences, not contained in Mr Dreyer's opposing affidavit, were raised. The first being that the deponent to the affidavit in supporting the summary judgment does not verify the cause of action and that there are in fact two causes of action. Mr Snyman declared under oath in par 2 the following:

> "**Ek bevestig dat**: (my emphasis)
>
> 2.1 Die verweerders die bedrag soos in die dagvaarding in saak no.: 5119/2016 gevorder, aan die eiser verskuldig is, tesame met die rente daarin vermeld; en
>
> 2.2 Die bedrag vermeld in die dagvaarding reg bereken is, asook dat die bedrag aan die eiser verskuldig is weens die omstandighede en **uit hoofde van die skuldoorsaak soos in die dagvaarding uiteengesit** (my emphasis), die inhoud waarvan aan my bekend is."

In my view it is abundantly clear from the summons that the cause of action whereupon the plaintiff relies in the particulars of claim is the acknowledgement of debt. There are indeed not two causes of action but only one, which was verified by Mr Snyman.

[9] The second ground advanced in the heads is that the is vague and embarrassing in that the claimed amount includes interest and does not constitute only goods sold and delivered "when it is clear that the

acknowledgement of debt does not contain an agreement for interest prior to 1 September 2016." In terms of clause 2 of the acknowledgement of debt FS Peanuts undertook the following: "…om die voormelde skuldbedrag tesame met verdere rente, bereken teen 10,50% **vanaf 1 September 2016** (my emphasis) tot en met datum van betaling…te betaal:" Mr Pienaar on behalf of the plaintiff submitted that this issue was never raised Mr Dreyer in opposing the application. He argued that viewed in to talitto the particulars of claim is not vague and embarrassing as there could not be any doubt by the Defendants as they knew exactly what the case against them was. I was referred to **Standard Bank Ltd v Roestof** 2004 (2) SA 492 (W) in which Blieden J articulated at 498 C:

> "The papers as a whole must be looked at in order for a court to come to a conclusion as whether leave should be granted to a defendant or not. The function of a court should not be to protect dishonest defendants because a plaintiff's pleadings are less than perfect. Each case must be judged on its own facts."

[10] It is trite that the Defendants are required to satisfy me that they have a bona fide defence which is good in law and that they should do so with a sufficient degree of clarity for me to ascertain whether they have deposed to defences which, if proved at the trial, would constitute a good defence to the action.

See: **Maharaj v Barclays National Bank Limited** 1976 (1) SA 418 (A) at 423 A-H.

This must be done by disclosing sufficiently the grounds of its defence and the material facts relied upon therefore.

See: **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) at paras [30] – [34].

[11] As alluded to in the paragraphs above, the Defendants failed to meet these requirements. The Defendants were unable to swear to a defence, valid in law, which is not inherently or seriously unconvincing.

See **Mahraj** *supra* at 954 E-F.

I am of the view that Defendants are advancing defences simply to delay the obtaining of a judgment to which they well know Qualita Seeds is entitled.

See: **Skead v Swanepoel** 1949 (4) SA 763 (T) at 766-7.

[12] I am also satisfied that the Plaintiff has availed itself of its duty to clearly make out a case for summary judgment and is entitled to summary judgment in the amounts as claimed.

[13] Accordingly the following order will issue:

1. Summary judgment is granted against the Defendants, jointly and severally, the one paying the other to be absolved, for:
   1.1 Payment in the amount of R 1 146 887.51.
   1.2 Payment of interest on the amount of R 1 146 887.51 calculated at 10,5% per annum from 1 September 2016 to date of payment.
   1.3 Cost of suit on the scale as between attorney and client.

C. REINDERS, J

On behalf of the Plaintiff: Adv. C.D. Pienaar
Instructed by:

	Jac N Coetzer Inc c/o Phatshoane Henney Attorneys BLOEMFONTEIN
On behalf of the First Defendant:	Adv. E. Lubbe Instructed by: Theron Jordaan & Smith c/o Symington & De Kok BLOEMFONTEIN