



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 341/2017

In the matter between:

CARGILL RSA (PTY) LTD

Applicant

and

LOUWRENS BIBBEY N.O.

1st Respondent

(in his capacity as trustee of the SUSARA
MAGDALENA WILHELMINA ODENDAL
TESTAMENTERE TRUST, MT2576/00)

JOHN FRANK BIBBEY N.O.

2nd Respondent

(in his capacity as trustee of the SUSARA
MAGDALENA WILHELMINA ODENDAAL
TESTAMENTERE TRUST, MT2575/00)

**ADRIAAN GERHARDUS ODENDAAL
BIBBEY N.O.**

3rd Respondent

(in his capacity as trustee of the SUSARA
MAGDALENA WILHELMINA ODENDAAL
TESTAMENTERE TRUST, MT2575/00)

BERNARDUS JOHANNES DAVEL N.O.

4th Respondent

(in his capacity as trustee of the SUSARA
MAGDALENA WILHELMINA ODENDAAL
TESTAMENTERE TRUST, MT2575/00)

And in the application of:

CASE NUMBER: 340/2017

CARGILL RSA (PTY) LTD

Applicant

and

THUNDERFLEX 52 (PTY) LTD

Respondent

HEARD ON: 10 AUGUST 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 24 AUGUST 2017

I. INTRODUCTION

[1] Two applications have been allocated to me for adjudication. The applicant in both applications seeks payment in the amount of just over R60 million together with interest and costs in the one application from four trustees of a trust that conducts a farming business (“the principal debtor”) and in the second application from the surety. Both the principal debtor as well as the surety executed notarial bonds in favour of applicant as their creditor and consequently, applicant furthermore seeks orders in terms whereof the notarial bonds be perfected together with the customary ancillary relief.

II. THE PARTIES

- [2] Cargill RSA (Pty) Ltd is the applicant in both applications, it being a private company that advances money to farmers and/or third parties for the credit of farmers, and/or supplies fertiliser and other agricultural products to farmers. Adv J J Pretorius argued the matters before me on behalf of applicant.
- [3] The four trustees of the Susara Magdalena Wilhelmina Odendaal testamentary trust MT2575/2000 (“the trust”), to wit Messrs Louwrens Bibbey, John Frank Bibbey, Andriaan Gerhardus Odendaal Bibbey and Bernardus Johannes Davel are cited as the four respondents in application 341/2017, *i.e.* the application against the trust as principal debtor.
- [4] Thunderflex 52 (Pty) Ltd (“Thunderflex”), a surety and co-principal debtor with the trust, is the respondent in application 340/2017. Adv PR Cronje represented the respondents in both applications.
- [5] The parties agreed that one set of heads of arguments in respect of both applications would be prepared and that the court be requested to adjudicate both applications *pari passu* in order to write one judgment.

III. THE RELIEF CLAIMED

- [6] The following relief is claimed in application 341/2017, this not being a *verbatim* quotation:

1. That first, second, third and fourth respondents in their representative capacity (herein after “the Trust”) must pay the amount of R60 810 009.53 (Sixty million eight hundred and ten thousand and nine rand and fifty cents) to applicant;
2. That the Trust must pay agreed arrear interest on the above amount calculated at the prime lending rate from time to time per *annum* from 1 November 2016 until date of payment;
3. That Notarial Bond, Annexure “C86” to the Founding Affidavit, be called up;
4. That the sheriff of the Court is authorised to attach the movable assets listed in paragraph 2 of and Annexure “A” to annexure “C86” to the Founding Affidavit as well as all the Trust’s other moveable assets that they may own, wherever situated, to remove the same and to hand the same to applicant;
5. That applicant may sell such assets, or any part thereof, in the manner, at the price and against such terms and conditions that applicant may deem meet;
6. That applicant may transfer ownership in and to the assets sold to the purchaser or purchasers thereof;
7. That applicant may receive the proceeds of such sale and set the same off against the said amount due by the Trust to applicant, interest thereon and legal costs;
8. That applicant must pay the balance of such proceeds, if any, to the Trust;
9. That should such proceeds be less than the balance due by the Trust to applicant, the outstanding balance remains a due and payable debt by the Trust to applicant;
10. The trust shall pay the costs of this application on the scale as between attorney and own client.

The same relief is claimed against Thunderflex in application 340/2017, save insofar as the reference to the notarial bond in

paragraph 3 of the notice of motion is to annexure “C87” of the particular founding affidavit and the word “Trust” was substituted with “respondent.”

IV. THE DISPUTE BETWEEN THE PARTIES

- [7] The respondents raised in essence two defences: firstly, a denial of liability in that incorrect invoices were issued to the trust and secondly, privilege insofar as any offers made on behalf of the trust in settlement of its alleged indebtedness are privileged, these having been made during *bona fide* settlement negotiations.
- [8] Mr Pretorius on behalf applicant anticipated that he might not be able to persuade the court to grant judgment in the full amount of R60 810 009.53 plus interest and as a result submitted in his written heads of argument that judgment should be granted in the amount of R44 909 828.20 – an amount allegedly accepted by the trust to be correct after having done a reconciliation - and that the dispute in respect of the balance of the claim be referred for oral evidence, alternatively trial.
- [9] During oral argument Mr Pretorius made further concessions and submitted that at best for respondents the amount due might be reduced to R24 328 580.99 calculated as follows:

	Original Invoice	Reduced Invoice	Reduced Amount
1.	Annexure “C4” p105	Annexure “C4” p105	R4,922,862.00
2.	Annexure “C5” p106	Annexure “C96” p367	R5,900,849.14
3.	Annexure “C6” p107	Annexure “C98” p369	R5,865,392.25

4.	Annexure "C7" p108	Annexure "C101" p372	R2,399,997.60
5.	Annexure "C9" p110	Annexure "C104" p375	R2,712,018.00
6.	Annexure "C12" p113	Annexures "C107.1 – 107.4" PP378 – 381	4 x R168,028.00 = R672,112.00
7.	Annexure "C14" p117	Annexure "C109" p383	R1,855,350.00
			R24,328,580.99

V. MATERIAL COMMON CAUSE FACTS

- [10] Respondents successfully showed that *bona fide* disputes exist pertaining to several of applicant's invoices and I shall again refer to these aspects *infra*. However, several facts are common cause and/or cannot be disregarded. When objectively considered, these appear to be correct and no defence was raised in this regard. I shall deal with these *infra*.
- [11] The validity and enforceability of the two notarial deeds is not in dispute. Thunderflex shall stand or fall by the defences raised by the trust as the principal debtor.
- [12] The parties, *i.e.* applicant and the trustees on behalf of the trust entered into a Master Input Advance Agreement ("the agreement". In terms hereof applicant agreed to advance an agreed portion of the purchase prices of the products needed by the trust to plant, either by way of cash payment made to the trust and/or to third parties to the credit of the trust, or to supply fertilizer and/or other agricultural input products directly to the trust. The trust agreed to cultivate certain grain products (sunflower and white and yellow

maize) on farm land of which it was the owner or lessee and agreed to sell the crops so cultivated to applicant.

- [13] Applicant made advance payments to the trust and/or to third parties on behalf of the trust and agricultural products such as *inter alia* seed, fertilizer, diesel and chemicals were delivered to the trust. This allowed the trust to cultivate the crops agreed upon.
- [14] The trust sold and delivered crops (sunflower and white and yellow maize) to applicant as it was obliged to do in accordance with the parties' agreement. It needs to be mentioned at this stage that it is alleged by applicant that the trust failed to deliver in full as a result of which it suffered damages, being the increase purchase price of substituting products. I wish to emphasise that the issue of damages is certainly contentious and as will be indicated *infra*, I am not prepared to adjudicate the dispute in respect of the alleged breach of contract and/or damages. Consequently I am not prepared to grant judgment for damages at this stage of the proceedings.
- [15] Respondents have shown that several invoices, making up applicant's claim, are disputed on *bona fide* grounds and I am not prepared to find that applicant is entitled to rely on clause 29 of the agreement which stipulates that in the event of a failure to dispute any entry on a statement in writing within sixty days, "such entry shall be regarded as correct and will be conclusive proof of the correctness of such entry." For the same reason the customary certificate of balance annexed to the papers, signed by the secretary and a director of applicant, pertaining to the alleged outstanding amount is

unacceptable at this stage of the proceedings. As indicated, Mr Pretorius made several concessions in this regard and it is unnecessary to consider the effect of clause 29 or the certificate any further.

VI. EVALUATION OF THE EVIDENCE

[16] I have evaluated the evidence in light of the submissions of counsel and the authorities referred to *infra*.

[17] I need to point out that the trust felt aggrieved by allegations in the replying affidavit which were regarded as requiring a response. Consequently it sought leave to file a rejoinder in answer to applicant's replying affidavit, costs of that application to be costs in the main application. Applicant did not oppose the application and I consequently granted the relief. In the rejoinder the trust again attempted to show that the invoices relied upon by applicant were incorrect and/or inaccurate and/or that items were claimed such as *inter alia* administration costs to which the applicant was not entitled. Again, in this affidavit the trust makes a huge issue of the fact that the registration numbers of the trucks that delivered products to it were not inserted on the invoices provided to it.

[18] In evaluating the facts presented by the parties I shall bear in mind the Plascon Evans rule. I accept that a final order can only be granted if the facts averred in the applicant's affidavits which have been admitted by the trust together with the facts alleged by the trust justify such an order, obviously also bearing in mind that the

trust's version may be rejected on the papers, should it be found to be far-fetched, untenable or false.

- [19] I am also mindful of the *dictum* of Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26] where he said the following:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.”

- [20] If one considers the thousands of tonnes of grain sold and delivered by the trust to applicant, which is not in dispute, there can be no doubt that the trust farms on a very large scale and managed to cultivate thousands of hectares of crops with fertiliser, seed, chemicals, diesel and other agricultural inputs financed by applicant. The trust failed to dispute relevant facts, such as the deliveries of all these agricultural inputs, but clutched at straws by nit-picking several invoices, analysing each invoice and questioning minor discrepancies. As will become clear, I accepted all queries to be correct for purposes of arriving at my conclusion.

- [21] Several offers were made by Mr Louwrens Bibbey on behalf of the trust pertaining to payment of the applicant's claim. It is in dispute whether these offers were made during privileged and *bona fide* settlement negotiations and/or whether conditional offers were made which were not accepted subject to the conditions attached to the offers. It might be an interesting debate whether or not the

offers should be accepted as admissible evidence, but bearing in mind the conclusions to which I have arrived, it is unnecessary to consider the arguments in this regard. The topic may again become relevant when the matter goes on trial.

[22] I do not intend to find that the trust should be held liable for payment of the amount of R45 million, but it is not insignificant that Mr Louwrens Bibbey made an offer my way of an sms dated 23 December 2016 to applicant's attorney, that the amount of R45 million would be paid in instalments of R5 million on 1 July 2017 and R20 million each on 1 September 2018 and 1 September 2019 respectively, and that the balance of the account would be paid on 1 September 2020, but only after an audit of the account. I have noted that the offer was made "without prejudice". However, it is apparent from this sms that at least an amount of R45 million was conceded to be payable by the trust to applicant.

[23] The importance of the offer communicated by way of sms on 23 December 2016 becomes apparent when the e-mail dated 15 September 2016 of Ms Elbie Louwrens on behalf of the trust to applicant's Ms Yvette Nel - annexure "C94" on page 365 of the papers - is considered with annexure "C95" on page 366 of the papers, together with the allegations contained in the replying affidavit. On annexure "C95" – a statement of applicant – Ms Louwrens on behalf of the trust clearly indicated in her handwriting which invoices were disputed and eventually wrote the following at the bottom of the invoice – *"Fakture (in English; invoices) R44 909 828.20"*. No doubt, this resulted in Mr Louwrens Bibbey

accepting the reconciliation and thereupon making the offer to applicant's attorney.

[24] I painstakingly perused the trust's answering affidavit as well the rejoinder filed in response to the replying affidavit of the applicant, but could not find any allegation that any delivery mentioned in any of the invoices was placed in dispute. In fact, there can be no doubt that, once Ms Louwrens did her reconciliation as mentioned *supra*, she effectively conceded that the trust was liable for payment of the amount of R44 909 828.20. She deposed to a confirmatory affidavit to the rejoinder filed on behalf of the trust and I quote the following:

"3. I never admitted that any statement, invoice or delivery note is correct.

...

4. I in fact never received any delivery notes as everything went to the Applicant.

5. I informed Ms Nel that I am not able to reconcile the documentation provided to me with what appears on the statement. This much is clear from the email I sent to her. Where I did not include other queries, it was mainly due to the fact that I did not have proof of delivery or assurance that it is due."

I find these allegations highly improbable in the light of her e-mail of 15 September 2016, annexure "C94" on page 365. Clearly, she was in possession of the invoices of the suppliers mentioned in the e-mail which allowed her to query the differences between the invoices of the suppliers and the amounts debited on the statements of applicant. Not a single delivery in respect of any of the invoices

was queried at that stage or at any other stage prior to the adjudication of this application.

- [25] In motion proceedings the affidavits not only serve as the pleadings, but must also contain the essential evidence which will ordinarily be led at the trial. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28]. The following dictum in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Others* 2008 (3) SA 371 (SCA) at para [13] is also apposite:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If

that does not happen it should come as no surprise that the court takes a robust view of the matter.” (emphasis added)

- [26] The disputed issues, such as applicant’s entitlement to claim administration costs and/or fees and/or interest on disputed amounts and/or damages because of the trust’s alleged breach of contract cannot and shall not be adjudicated by me in favour of applicant on the papers. However, the application should not be dismissed only because a *bona fide* dispute exists pertaining to these aspects. In order to adjudicate these disputes, the matter shall be referred to trial.
- [27] I have carefully listened to the arguments of counsel and I have also perused the invoices, annexures “C4,” “C5” read with “C96”, “C6” read with “C98”, “C7” read with “C101”, “C9” read with “C104”, “C12” read with “C107. – 107.4” and “C14” read with “C109” carefully. If the amounts contained in these invoices are reduced to the actual capital and also bearing in mind the comments by Ms Louwrens referred to *supra*, I am satisfied that applicant has proven that the amount of R24 328 580.99 is not in dispute. The trust has not complied with the warnings sounded in *Wightman supra*. It failed to comprehensively set out its defence in respect of these invoices, save for the minor discrepancies shown, and failed to present the evidence needed to persuade me that a real and *bona fide* dispute exists. Consequently, applicant is entitled to judgment for payment of this amount.

VII. CONCLUSION

- [28] Applicant is substantially successful in respect of its monetary claim against both the trust as well as the surety. Although the amount to be awarded at this stage of the proceedings is less than 50% of the amount claimed, applicant's substantial success entitles it to its costs as well. The parties agreed in the agreement that in the event of action to be instituted by applicant, it would be entitled to attorney and own client costs and there is no reason by such an order shall not be made.
- [29] Furthermore applicant is also entitled to orders in terms whereof the two notarial bonds are perfected and therefore the orders in paragraphs 3 to 9 of both notices of motion shall granted.
- [30] Mr Cronje argued strenuously that the applications should be dismissed with costs because of the manner in which applicant approached the applications and the fact that I should find that respondents have a *bona fide* defence, bearing in mind the principles set out in Plascon Evans. He argued that if I do not find in respondents' favour, applicants should be penalised by not allowing them all their costs. Mr Pretorius submitted that the remainder of the disputes be referred to oral evidence, alternatively trial. I am satisfied that the matter should be referred to trial and an appropriate order will be made to deal with all pre-trial procedures to be undertaken to ensure the matter is indeed ripe for hearing.

- [31] After oral argument I requested counsel to obtain trial dates that suit the parties in the event of an order being made for the matter to be referred to trial. The agreed trial dates allocated to the parties are 17, 18 and 20 October 2017. The time available to comply with all pre-trial procedures is restricted and my orders shall provide for deadlines in order to prevent surprise to any of the parties.

VIII. ORDERS

- [32] Therefore the following orders are issued.

In respect of application 341/2017.

1. First, second, third and fourth respondents in their representative capacities as trustees of the Susara Magdalena Wilhelmina Odendaal testamentary trust MT2575/1999 ("the Trust") shall pay to applicant the amount of R24 328 580.99, jointly and severally with the respondent in application 340/2017, the one to pay, the other to be absolved;
2. The Notarial Bond, Annexure "C86" to the Founding Affidavit, is hereby perfected;
3. The sheriff of the Court is authorised to attach the movable assets listed in paragraph 2 of and Annexure "A" to annexure "C86" to the Founding Affidavit as well as all the Trust's other moveable assets that they may own, wherever situated, to remove the same and to hand the same to applicant;
4. Applicant may sell such assets, or any part thereof, in the manner, at the price and against such terms and conditions that applicant may deem meet;

5. Applicant may transfer ownership in and to the assets sold to the purchaser or purchasers thereof;
6. Applicant may receive the proceeds of such sale and set the same off against the said amount due by the Trust to applicant and its legal costs;
7. Applicant shall pay the balance of such proceeds, if any, to the Trust;
8. Should such proceeds be less than the balance due by the Trust to applicant, the outstanding balance remains a due and payable debt by the Trust to applicant;
9. The Trust shall pay the costs of this application on the scale as between attorney and own client;
10. All disputes between the parties pertaining to the remainder of applicant's claim, including whether or not there was an admission of liability and offer to pay are referred for trial, such hearing to take place on 17, 18 and 20 October 2017, and there shall be compliance with the following:
 1. The founding, answering and replying affidavits and the rejoinder shall be regarded as the combined summons, plea, replication and rejoinder respectively;
 2. Both parties shall file their discovery affidavits not later than 31 August 2017;
 3. In the event of any party being of the view that full discovery has not been made, notice in terms of rule 35 (3) shall be served and filed not later than 6 September 2017 and in the event that an application in terms of rule 35 is required, such application shall be set down for hearing not later than 28 September 2017;

4. Any request for further particulars shall be filed by not later than 31 August 2017 to which the other party shall respond by not later than 14 September 2017;
5. Any party intending to make use of expert evidence shall give notice in terms of rule 36(9)(a) on or before 7 September 2017 and the required opinions and summaries of such experts shall be filed by not later than 14 September 2017;
6. Any party intending to make use of plans, photographs or the like, shall give the required notice in terms of the provisions of rule 36 (10) by not later than 14 September 2017;
7. The parties shall arrange a rule 37 conference to be held on or before 29 September 2017 and the minutes thereof shall be filed with the registrar of the court on or before 5 October 2017.

In respect of application 340/2017.

1. Respondent shall pay to applicant the amount of R24 328 580.99, jointly and severally with the trustees of the trust in application 341/2017, the one to pay, the other to be absolved;
2. The Notarial Bond, Annexure “C87” to the Founding Affidavit, is hereby perfected;
3. The sheriff of the Court is authorised to attach the movable assets listed in paragraph 2 of and Annexure “A” to annexure “C87” to the Founding Affidavit as well as all the respondent’s

other moveable assets that it may own, wherever situated, to remove the same and to hand the same to applicant;

4. Applicant may sell such assets, or any part thereof, in the manner, at the price and against such terms and conditions that applicant may deem meet;
5. Applicant may transfer ownership in and to the assets sold to the purchaser or purchasers thereof;
6. Applicant may receive the proceeds of such sale and set the same off against the said amount due by the respondent to applicant and its legal costs;
7. Applicant shall pay the balance of such proceeds, if any, to the respondent;
8. Should such proceeds be less than the balance due by the respondent to applicant, the outstanding balance remains a due and payable debt by the respondent to applicant;
9. The respondent shall pay the costs of this application on the scale as between attorney and own client;
10. All disputes between the parties pertaining to the remainder of applicant's claim, including whether or not there was an admission of liability and offer to pay, are referred for trial, such hearing to take place on 17, 18 and 20 October 2017, and there shall be compliance with the following:
 1. The founding, answering and replying affidavits and the rejoinder shall be regarded as the combined summons, plea, replication and rejoinder respectively;
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7. The parties shall arrange a rule 37 conference to be held on or before 29 September 2017 and the minutes thereof shall be filed with the registrar of the court on or before 5 October 2017.

JP DAFFUE, J

On behalf of applicant:
Instructed by:

Adv JJ Pretorius
Christo Dippenaar Attorneys
Bloemfontein

On behalf of respondents: Adv PR Cronje
Instructed by: Phatshoane Henney Attorneys
Bloemfontein