



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: 4685/2020

In the matter between:

BIDFOOD (PTY) Ltd

Applicant

and

**BASFOUR 3218 CC t/a
BLACK MOUNTAIN HOTEL**

Respondent

CORAM: PAGE AJ

HEARD ON: 14 October 2021

DELIVERED ON: 8 November 2021

- [1] This is an application for summary judgment. I will refer to the applicant as the plaintiff and to the respondent as the defendant.
- [2] The plaintiff instituted action proceedings against the defendant based on a partly oral and partly written agreement concluded during September 2020 in terms of which the Plaintiff would supply the Defendant with goods following the receipt of verbal, alternatively electronic orders made by the Defendant.
- [3] Briefly, the terms of the agreement include that the Plaintiff would invoice the Defendant following the delivery of the goods. Monthly statements would be furnished to the Defendant indicating its indebtedness to the Plaintiff.

- [4] The Defendant would be liable for payment within thirty days of the delivery of the goods.
- [5] It is averred that the Defendant failed to make full payment in respect of the goods ordered.
- [6] A statement reflecting all invoices is attached to the particulars of claim reflecting the amount of the claim, namely R 450 736.53.
- [7] The Defendant, in its plea denies that it is indebted to the Plaintiff in the aforesaid amount. The Defendant further admits a failure to pay and avers that it is warranted in withholding payment to the Plaintiff.
- [8] The plaintiff's claim is based on a liquidated amount allowing it to launch the application for summary judgment.
- [9] The defendant submits that summary judgment is incapable of being granted solely on the premiss that the plaintiff fails to comply with the provisions of Uniform Rule 32 because the plaintiff fails to verify its cause of action set out in its papers.
- [10] The reason for this according to the defendant, is that the plaintiff pleads in its particulars of claim that the parties entered into a partly oral partly written agreement, alternatively oral supply agreement concluded during or about 20 September 2020.
- [11] The defendant declares in its opposing affidavit further that Annexure "D", which is a letter of demand, appended to the particulars of claim refers to a credit agreement concluded on 19 May 2009. A representative of the defendant is named in Annexure "D" whereas, in the particulars of claim such representative is not named.
- [12] It is further declared that the application mentioned in annexure "D" refers to an agreement which was dated more than ten years preceding the agreement pleaded by the Plaintiff. The same amount claimed in the particulars of claim is claimed in annexure "D"
- [13] The plaintiff, in its affidavit in support of summary judgment refers to a partly oral partly written agreement dated July 2007 concluded in Taba Nchu or in the alternative in Bloemfontein. The agreement is described herein as a supply agreement.

- [14] The defendant declares in its opposing affidavit that the plaintiff's claim is premised on a contract which proffers three different versions and as such the plaintiff has not verified its cause of action.
- [15] The plaintiff, in its heads of argument deals elaborately with the bare denial of the plaintiff's claim as contained in its plea.
- [16] The plaintiff's only submission related to the opposing argument of the defendant as mentioned hereabove is that the court should take cognisance of the fact that the defendant has failed to raise an exception against the particulars of claim.
- [17] Uniform Rule 32 requires a plaintiff to inter alia verify its cause of action in the affidavit in support of summary judgment.
- [18] It is noteworthy that the defendant's arguments raised are not to be simply taken lightly. The issues raised by the defendant in their affidavit opposing summary judgment is not dealt with during the arguments submitted by the plaintiff either.
- [19] The plaintiff's cause of action as set out in the particulars does not pose any uncertainties as it stands. However, the letter of demand attached thereto refers to different contract. The affidavit in support of the summary judgment refers to another contract. These conflicting averments on the plaintiff's papers need to be considered in determining whether the plaintiff has in fact verified its cause of action.
- [20] At the outset it is important to bear in mind the objective of Rule 32. The rule was specifically designed to prevent a plaintiff's claim, based on certain causes of action, from being delayed but rather to dispose thereof without conducting a costly trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue. Summary judgment procedure should be resorted to only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. On the one hand the procedure assists a plaintiff who has a verified claim from being frustrated by a defendant who does not have a bona fide defence and is merely defending the claim to cause delay and on the other hand the procedure guards against depriving a defendant of his right to defend the matter.

- [21] In the first instance, It is accepted that a plaintiff is required to set out a cause of action in its summons clearly for the summons to be valid. Without a cause of action, the summons will be defective.
- [22] The plaintiff is further required to verify all the facts supporting its cause of action in the affidavit in support of the application for summary judgment.
- [23] In the case at hand, the deponent in the affidavit in support of the application for summary judgment does not verify all the facts supporting the plaintiff's cause of action. It in fact contradicts the cause of action set out in the plaintiff's particulars of claim. The different agreements are not pleaded in the particulars of claim either.
- [24] In *ABSA Bank Ltd v Coventry* 1998 (4) SA 351 (N) at 353 D-E it was held that that if ex facie the affidavit the requisite verification has not occurred, the court would have no jurisdiction to grant summary judgment.
- [25] In *Shackleton Credit Management (PTY) Ltd v Microzone Trading 88* [2011] 1 All SA 427 SA 112 (KZP) at 122 F-I, a different approach was adopted to the finding in *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 496 F-H, in which it was held that if the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify the approach that refuses the application, especially in a case where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him. In *Shackleton Credit Management (PTY) Ltd v Microzone Trading 88* the court held the opposite view, namely, that the "proper starting point is the application. If it is defective, then cadit quaestio. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons." The decision in *Shackleton Credit Management (PTY) Ltd v Microzone Trading 88* is the preferred approach.
- [26] In the case at hand, it can be accepted that the plea does not deal specifically with the averments in the particulars of claim, and it does not tender any positive submission or explanation to support its denial. In this respect it may be different from the plea tendered in the case of *Standard Bank of South Africa Ltd v Roestof*. What is of importance from the decision in *Shackleton Credit Management (PTY) Ltd v Microzone Trading 88*, is that the proper starting point is the application. If the application is defective even if the defendant as in the case at hand tenders a bare denial the point of departure is whether the application for summary judgment complies with the requirements set out in Rule 32. This is so, in my opinion, because the procedure protects both the

plaintiff and the defendant. The Plaintiff cannot rely on the procedure if it does not comply with the requirements laid down in Rule 32(2) (b).¹

- [27] In the matter before me, the deponent to the plaintiff's affidavit in support of summary judgment refers to the plaintiff's cause of action which is based on goods sold and delivered during the period September 2019 to March 2020. In the next paragraph the deponent refers to the agreement dated July 2007 concluded at Thaba Nchu, alternatively Bloemfontein. The cause of action pleaded in the particulars of claim refers to a partly oral partly written agreement dated during September 2020. This is confusing and contradictory.
- [28] The particulars of claim and annexure "D" thereto is scrutinized together and here another contradiction appears related to the agreement in question. None of these issues are satisfactorily dealt with in the plaintiff's papers. Not in the particulars of claim nor in the verifying affidavit. One should not have to try and read into the papers to find the cause of action. It should have been clearly pleaded and verified. For the plaintiff to require the defendant to except to the particulars of claim is a poor argument. The plaintiff has a responsibility to comply with the requirements set out in Rule 32 as much as the defendant does.
- [29] In the premisses, I find that the application for summary judgment is defective due to non-compliance with rule 32(2)(b) in that the affidavit does not verify the plaintiff's cause of action and as a result the application for summary judgment should fail.
- [30] I make the following order:
1. The application is dismissed.
 2. Costs are ordered to be costs in the cause.



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¹ "The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise an issue for trial."