REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 002313/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

21.07.2025
DATE

MAHOSI J

In the matter between:

BROUGHTON CLINTON AMISS *N.O.* First Plaintiff

JULIEANN AMISS *N.O.* Second Plaintiff

and

F E INDUSTRIAL SUPPLIES CC Defendant

JUDGMENT

Mahosi, J

[1] This is an application for summary judgment. The issue is whether the defendant's plea contains sufficient facts to substantiate a *bona fide* defence.

[2] The first and second plaintiffs are trustees of the Amiss Family Trust registered in accordance with the Trust Property Control Act[1] and trading as BAC Logistics. The defendant is a Close Corporation registered and incorporated in terms of the Companies Act[2] of the Republic of South Africa.

[3] Central to this matter is a written credit agreement ("the Agreement") dated 26 May 2023 in terms of which BAC Logistics agreed to render logistics services to the defendant at its special instance and request. Following its conclusion, on 06 October 2023 to 06 November 2023, BAC Logistics provided the defendant with logistics services to the total value of R 749,135.00 (Seven Hundred Forty-Nine Thousand One Hundred Thirty-Five Rands) and $ 3,000.00 (Three Thousand United States Dollars). Based on the defendant's failure to pay for the services, the plaintiffs issued a summons against the defendant on 15 January 2024.

[4] The matter was defended, and in its plea, the defendant denied being indebted to the plaintiffs for the amount claimed in the particulars of claim, on the basis that the latter were in breach of the written Subcontractor's Agreement concluded between the parties on 22 May 2023. In particular, it alleged that the plaintiffs breached clause 21 ("Restraint of Trade clause") by unlawfully approaching and contracting to do work directly with its customers in 2023 and clause 36.1 by failing and refusing to engage with it, within fourteen days, and to negotiate in good faith to resolve the matter. The defendant claimed to have incurred damages and has instituted a counterclaim against the plaintiffs for damages amounting to R1,267,500.00 and R5,290.00 in respect of an outstanding invoice for escorting and tracking services.

[5] Vexed by the defendant's defences, the plaintiffs filed this application, asserting that their claim was based on a contract and referring to the defendant's denial as "bald and unsubstantiated". They further averred that the defendant's counterclaim was contractually excluded by clause 27.1 of the Agreement, which read:

> "Unless otherwise specifically agreed in writing by the Creditor, the Debtor shall pay all amounts due, without deduction or set off, to the Creditor immediately upon presentation of the invoice. It is agreed that the payment shall not be

[1] Act 57 of 1988, as amended.
[2] Act 71 of 2008.

withheld or deterred on account of any Claims or Counterclaims which the Debtor may allege."

[6] The defendant filed an affidavit resisting the summary judgment on the basis that it was ill-founded because the plaintiffs failed to specifically deny the breach of the subcontractor's Agreement, which entitled it to a counter-relief that could only be determined at trial. It averred that the plaintiffs' affidavit fell short of the requirements of Rule 32(2)(b) as it fails to explain why the defence it pleaded does not raise a triable issue.

[7] Rule 32 of the Uniform Rules of Court regulates the summary judgments and it reads:

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

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.

(2)

(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) 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 any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may—

(a) give security to the plaintiff to the satisfaction of the Court for any judgment including costs which may be given; or

(b) satisfy the Court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the Court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant 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."

[8] The summary judgment procedure is designed to enable plaintiffs with clear cases to obtain prompt enforcement of their claims against defendants who lack valid defences. This remedy is considered extraordinary and drastic, as it effectively denies the defendant the opportunity to contest the claim. Courts emphasise that it is granted based on the supposition that the plaintiff's case is unimpeachable and the defendant's defence appears to be flawed and without merit.[3]

[9] In the case of *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another*,[4] the Court emphasised that summary judgment applications aim to quickly dismiss cases that lack a genuine triable issue, thereby saving judicial resources and enhancing access to justice. When such an application is made, the applicant has the right to a prompt hearing of the application, which is protected under Section 34 of the Constitution.

[10] The Supreme Court of Appeal, in *Cohen NO and Others v Deans*,[5] clarified that the prospects of success for a defence do not matter. If the defence is legally valid and can be proven during a trial, a summary judgment application will be unsuccessful.[6] The key question is whether the defendant present facts that raise a triable issue and a viable legal defence, thereby requiring them to disclose the nature and grounds of their defence fully. Thus, the defendant need only provide facts that could support a good defence if proven at trial.[7]

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[3] See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).
[4] 2020 (1) SA 623 (GJ), at [16].
[5] [2023] ZASCA 56.
[6] *Id* at [29].
[7] *Id* at [31].

[11] The plaintiffs submitted that the defendant's counterclaim was not a *bona fide* defence, as it was excipiable and contractually excluded by clause 27.1 of the Agreement. It referred this Court to the judgment in the case of *Tesven CC and Another v South African Bank of Athens*.[8] In that case, the Supreme Court of Appeal (SCA) clarified that, under Rule 32(3)(b), the Court has the discretion to refuse summary judgment, even if the defendant's opposing affidavit lacks exhaustive material facts necessary for evaluating their bona fides. The SCA referred to a judgment in *Maharaj v Barclays National Bank Ltd*,[9] in which Corbett JA referred to the 'extraordinary and drastic nature' of the remedy of summary judgment and said the following:

> "(O)ne of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. 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. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See, generally, *Herb D Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N), *Arend and Another v Astra Furnishers (Pty) Ltd* [1974 (1) SA 298 (C)] at 303 4; *Shepstone v Shepstone* 1974 (2) SA 462 (N).) At the same time the defendant is not expected to formulate his

[8] [1999] ZASCA 75; 2000 (1) SA 268 (SCA).
[9] 1976 (1) SA 418 (A) at 426A - G.

> opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliot* 1948 (1) SA 1084 (C) at 1087; *Herb Dyers* case supra at 32.)"[10]

[12] In the current matter, the plaintiffs submitted that the defendant's plea contains no pleaded facts to substantiate a *bona fide* defence when considered in light of the admitted Agreement and its specific terms. What is apparent is that the defendant denied liability to the plaintiffs' claim and instituted a counterclaim for damages resulting from a breach of a restraint of trade clause as contained in the subcontractor's Agreement.

[13] In its plea and counterclaim, the defendant claims that the plaintiffs breached clause 21 of the subcontractor's Agreement by directly engaging with its customers during 2023, resulting in damages of R1,267,500.00 and an unpaid invoice for services totalling R5,290.00. The plaintiffs allegedly failed to meet with the defendants within a specified timeframe to negotiate a resolution, further complicating the issue. The defendants sent a demand letter to the plaintiffs, requesting that they rectify the breach, which the plaintiffs failed to address. In the affidavit resisting summary judgment, the defendant submitted the date on which the breach occurred, the customer with whom the plaintiffs allegedly did business, and how it quantified its claimed amount.

[14] Although the defendant's plea does not exhaustively address the facts and evidence relied upon to substantiate them, its affidavit, when considered in relation to the plaintiffs' claim, appears to present a legitimate defence. It has sufficiently outlined the defence and the key facts supporting it, meeting the requirements of Rule 32(3)(b). The subcontractor's Agreement relied upon by the defendant is allegedly the main contract governing the parties' business relationship. The plaintiffs signed it on 19 May 2023, and the defendant signed it on 22 May 2023, which was before the conclusion of the Agreement relied upon by the plaintiffs.

[15] To the extent that the plaintiffs do not deny the breach of the restraint of trade clause and that it resulted in the defendant incurring financial loss, it follows that the latter fully disclosed the nature and grounds of its defence, which is both bona fide and good in law. Overall, both parties accuse each other of breaching contractual

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[10] See also *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227G 228F.

obligations, leading to financial claims. The two agreements relied upon by both parties require the Court's interpretation to determine whether the parties are liable for damages against each other.

[16] On the facts disclosed, the defendant's defence that, it has a counterclaim resulting from the subcontractor's Agreement, which it concluded with the plaintiffs, cannot be considered a sham defence or mala fides. It is a reasonable defence and valid in law. Therefore, the summary judgment should be refused.

[17] The general rule is that the costs should follow the result, being the successful litigant. There is no reason to deviate from this general rule in the circumstances of this matter.

Order

[18] Accordingly, the following order is made:

1. Summary judgment is refused.

2. The defendant is granted leave to defend the main action.

3. The plaintiffs are to pay the defendant's costs of suit.

D. Mahosi J

Acting Judge of the High Court

Heard: 15 April 2025

Delivered: This judgment was prepared and authorised by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives through email and by uploading it to the electronic file of this matter on Caseline. The hand-down date is deemed to be 21 July 2025.

APPEARANCES:

For plaintiffs:	Advocate B.D. Stevens
Instructed by:	Jurgens Bekker Attorneys
For defendants:	Advocate S.S. Cohen
Instructed by:	Larry Marks Attorneys