

SOUTH AFRICA / JUDGMENT

Barloworld Equipment (Pty) Ltd v Zed Quarrying (Pty) Ltd and Another (6656/08) [2008] ZAKZHC 82 (28 October 2008)

[2008] ZAKZHC 82

COURT

High Courts - Kwazulu Natal

BEFORE

Ntshangase

CASE / FILE NUMBER

6656/08

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IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

6656/08

BARLOWORLD EQUIPMENT (PTY) LTD Plaintiff

versus

ZED QUARRYING (PTY) LTD First Defendant

ALEXANDER DAVIDSON Second Defendant

RESERVED JUDGMENT

Delivered on: 28 October 2008

NTSHANGASE, J

- [1] This is an application for summary judgment pursuant to a summons in which ‘claim A’ is for payment of R336 237.15 for repair services rendered and parts associated with the first defendant’s construction plant, sold and delivered to the first defendant and, ‘claim B’ the sum of R8363.73 in respect of hire services of construction equipment to the first defendant “(d)uring or about April 2006 until January 2008”, at first defendant’s special instance and request. The liability of the second defendant arises from his alleged suretyship for the debts of the first defendant to a limit of R200000.00.
- [2] The defendants deny liability and resist the granting of summary judgment on the grounds that –

R45000 as part of the plaintiff's 'claim A' is at variance with the agreed cost of repairs and is claimed when the plaintiff had failed to comply with its contractual obligations. The plaintiff's claim is for defective workmanship.

R234000 of the plaintiff's 'claim A' is for repairs, by the plaintiff, of a defect that was caused by the plaintiff's

employees' poor workmanship in repairing a leak in the transmission of a 30 ton caterpillar articulated dumb truck [“the

truck”], commissioned by the second defendant.

The background according to the defence

[3] According to the opposing affidavit deposed to by the second defendant the truck developed a leak in its transmission. It was decided to repair the leak. The plaintiff, duly represented by its service manager Paddy Bagnal quoted an amount of R 30000.00 to repair the leak. The second defendant agreed on the first defendant's behalf that the plaintiff proceed to effect the necessary repairs at an agreed cost of R30000.00. It was agreed that such repairs would take no longer than one week. It in fact took five weeks to repair the leak. An amount of R45000.00 was charged instead of the agreed R30000.00. When the truck was returned it operated for less than one day whereafter its entire transmission which had been in perfect working order but for the leak failed

completely to function; an event ascribed to the plaintiff's technicians' gross negligence. It constituted a breach of their obligations to correctly effect the necessary repairs. Thereafter it took the plaintiff four months to repair the truck's

transmission, despite the plaintiff's knowledge of the first defendant's contractual commitment to “Lafarge” to undertake certain quarrying work “and further that any downtime would be critical to the first defendant's ability to fulfil its obligations to “Lafarge.” In order to mitigate its damages the first defendant hired a comparable unit at a cost of R80000 per month.

The nature and grounds of defence and the material facts

[4] I have indicated the basis of resistance to make payment of R45000 which, added to R234000 comprise R279000 of the plaintiff's 'claim A'. Contrary to the plaintiff's averments in paragraph 7 of the particulars of claim, the plaintiff, according to the defendants has failed to meet its obligations and is accordingly not entitled to the payment claimed. In regard to R234000 of 'claim A' the defendants state that –

“the plaintiff is attempting to claim for the cost of repairing a transmission which it damaged on the first instance through ineptitude on the part of its technicians to the extent that the transmission failed completely.”

The defendants are, in my view, entitled to be heard in the trial Court on their version that to the extent of R279000 the plaintiff's 'claim A' is accordingly without basis.

[5] The balance of the plaintiff's 'claim A' is to be met by an intended counterclaim which, as the defendants contend, "exceeds the value of the plaintiff's claim," and would, in terms of rule 22(4) of the Rules, extinguish such claim. It is in respect of a claim for damages allegedly incurred by the first defendant in hiring ? a substitute vehicle at R80000 per month for four months to perform the tasks when the truck was, in that period, out of commission by reason of gross

negligence in workmanship attributed to the plaintiff.

[6] Mr Harrison who appeared for the plaintiff, in turn advanced an argument which relies on certain clauses of the "General Conditions of contract for work to be carried out" ["Annexure B"], "Terms and Conditions of rental"

["Annexure C"] and "Conditions of sale ["Annexure D"] which, it is common cause, bind the defendants, and contended with reference thereto that the plaintiff contracted out of liability with the defendants for the losses they allegedly suffered, and that the defendants contractually excluded their right to claim damages. Such conditions are an integral part of an "Application for 30 day credit facilities" ["Annexure A"] by the second defendant to the plaintiff on behalf of the first defendant. Annexure "A" ["Annexure A"] with its conditions is referred to under paragraph 6 of the particulars of claim and is relied upon to demonstrate the unsustainability of the counterclaim as a defence against the plaintiff's claim.

[7] Clause 7(a)(i) and (ii) of Annexure "B" to the extent of its relevance reads:

"(a) The company shall be exempt from and shall not be liable under any circumstances for –

any indirect or consequential damages of any nature

or any loss or profit [sic]1 or other special damages of any profit or other special damages of any nature which the customer may suffer as a result of any breach by the company of its obligations under the contract;

(ii) any loss or damage to any property of the customer

delivered to the company for the purposes of the contract, even if the loss or damage arises out of negligence on the part of the company, its servants, agents or sub-contractors."

[8] In limine the defendants point to the fact that while the plaintiff did put up the annexures containing such terms in the particulars of claim, it did not plead that such terms pertained to either 'claim A' or 'claim B' which constitute the basis of its claim to be enforced in these summary judgment proceedings and that there was in consequence thereof, a failure to show a nexus between such terms and their exclusionary and exemption provisions with either 'claim A' or 'claim B' and that there is no allegation that the transactions that form the basis of 'claim A' and 'claim B' were concluded

pursuant to Annexure "B". The annexures are referred to under paragraph 6 of the particulars of claim as follows:

“6. The material terms of the credit application [Annexure A] are, inter alia, the following:

6.1 ...

6.2 The first defendant agreed to be bound by the plaintiff’s usual terms and conditions associated with hire, sale and the work carried out and parts supplied with that work. A copy of such terms and conditions is annexed hereto marked ‘B’, ‘C’ and ‘D.’”

I am of the view that on the technical issue of the plaintiff’s failure to plead the nexus between the exclusionary and exemption clauses and ‘claim A’ and ‘claim B’, the defendants do have an arguable case.

[9] Other than such technical attack, the defendants allege a breach by the plaintiff, of its obligations in that the plaintiff’s employees’ gross negligence put the truck out of commission, resulting in being incurred, damages which flow naturally and directly from a breach of contract or as may reasonably be supposed to have been in the contemplation of the parties as a probable consequence of the breach. Mr Crampton argued for a distinction to be drawn between such damages as were incurred by the defendants as a result of the alleged breach and the indirect, consequential and special damages as contemplated in Clause 7(a)(i).

In *Shatz Investments (Pty) Ltd v Kalovyrynas*² such a distinction was drawn by analogy to a lessor’s breach of lease and there Trollip JA stated that the loss characterised as “damages that flow naturally and generally from the kind of breach of contract . . . which the law presumes that the parties contemplated would result from such a breach” is determinable in various ways and that –

“(o)ne well known example is ascertaining the cost of hiring other comparable premises.”

He distinguished special damages:

“Where the premises are expressly let for profit – making business, ... loss of profits for the unexpired term of the lease may be recoverable in appropriate circumstances. Such damages are ordinarily regarded, however as not general damages but as special damages.”

Mr Crampton submitted accordingly that clause 7(a)(i) does not affect a claim for ordinary contractual damages that are directly caused by the breach.

[10] Clause 7(ii) is an exemption provision which pertains to “any loss or damage to the property of the customer,” and on that basis it is argued that the provision does not affect the defendants’ intended counterclaim which in fact does not lie in loss or damage to property. The argument proceeded to point to the fact that even if the plaintiff’s claim to exemption were based on negligence, it must fail on the basis of gross negligence for which the counterclaim is to be brought. Mr Crampton argued for recognition of the distinction and on the authority of *Afrox Healthcare Bpk v Strydom*³ submitted that negligence in Clause 7(ii) cannot be assigned an extended meaning as also connoting gross negligence, upon which the claim of the defendants is founded, and, in that regard referred to the following dictum

in the case of Afrox Healthcare, supra:

“Wat uitsluitings – of vrywaringsklousules soos 2.2 betref is die algemene benadering in ons reg dat sodanige klousules, ofskoon geldig en afdwingbaar, hulle beperkend uitgelê moet word.”

On this premise it is argued that the defendants’ charge against the plaintiff’s employees’ gross negligence is, with reference to the intended counterclaim, not affected by the exemption provisions in Clause 7(ii)(b) and (c) which bear on negligence.

[11] The sustainability of the counterclaim is also assailed with reference to clause 7(ii)(d) which reads:

“The company shall not be liable to the customer for any claim of any nature whatever made by the customer unless the claim is made in writing within 90 (ninety) days after delivery or a written tender of delivery of the work to the customer.”

The defendants’ response hereto includes the following:

“When the unit was returned to first defendant after plaintiff had purported to effect the leak [sic]⁴ in the transmission, the vehicle operated for less than one day, whereafter the entire transmission failed.”

What the defendants did upon failure of the transmission appears from the following:

“Following upon the failure of the transmission I advised plaintiff’s representatives both orally and by way of electronic mail that the unit’s transmission had failed and that the unit was inoperative.”

[12] Although upon discovery of the transmission’s failure it is averred by the defendants that an electronic communication was sent to the plaintiff, no such communication has been exhibited; it as a point raised by Mr Harrison. It may however here be stated that affidavits in summary judgment proceedings are customarily treated with a measure of indulgence and, as was the case

in Koornklip Beleggings (Edms) Bpk. v Allied Minerals Ltd⁵,

“... the opposing affidavits, even read without reference to the attached letter, (provided) sufficient details to support defendant’s defence.”

In the present matter I find, without reference to any letter, that there is, in the averments of the defendants sufficient details to support the defendants’ defence. Whether or not the probabilities are that such communication as is alleged by the defendants as having been made was in fact made within the ninety day period if not immediately upon discovery of the transmission’s failure, would be best left to the trial court to determine.

[13] It was also argued by Mr Harrison with reference to clause 3(a)(iii) of Annexure “B” that there cannot be a deduction or set-off. The essence of Mr Harrison’s argument with reference to clause 3(a)(iii) is that the purport of the counterclaim as a set-off against the plaintiff’s claim, is, in terms of clause 3(a)(iii), incompetent.

The relevant part of clause 3(a)(iii) reads:

“3 PAYMENTS

(a) The contract price shall be paid by the customer –

...

(ii) ...

(iii) without any deduction or set-off on the 30th of the month following that in which the work is completed”

With regard to clause 3(a)(iii) Mr Crampton argued that in the absence of reciprocally and mutually owing debts, no deduction or set-off arises and, as I understand the argument, the counterclaim does not purport to be a deduction or a set-off, and that the defence, based as it is on defective workmanship, renders the plaintiff’s claim not to become due for a set-off to occur against it. It is an arguable issue.

[14] The question which also arises is whether or not the defendants used the repaired truck. Paragraph 28 of the opposing affidavit reads:

“It took plaintiff four

(4) months to repair the unit’s transmission.”

This seems to suggest that the leak was repaired.

What the defendants elsewhere state is that contrary to the plaintiff’s averments, the plaintiff failed to fulfil its obligations for which a claim for R45000 is made. In respect of the plaintiff’s claim for R234000, the defendants’ defence is that the amount represents the cost of repairing the damage caused to the transmission by the plaintiff for which the defendants cannot be held liable.

[15] In regard to the plaintiff’s ‘claim B’ for R8363.00 for the supply of hire services of construction equipment

the particulars of claim read:

“During or about April 2006 until January 2008, the plaintiff supplied hire services of construction equipment to the first defendant at the first defendant’s special instance and request.”

The plaintiff also avers that the amount remains outstanding on the hire account. The defendants deny liability by reason of an alleged uncertainty of the calculation of the amount and by reason of the vague formulation of the claim. It is, also denied that the hire of equipment was at first defendant’s special instance and request and that there was agreement that the plaintiff

would charge in accordance with its usual tariff. However in what appears to relate to the period in which the truck was out of commission the defendants aver, in a further response to the plaintiff's claim that the plaintiff failed to provide a loan unit to the first defendant which is a norm in the industry and accordingly deny that any charges are due to the plaintiff. Now this, as a defence may be found to lack clarity. But as has often been stated, what a defendant is reasonably expected to set out in the opposing affidavit depends to some extent upon the manner in which the plaintiff's claim has been formulated. Under 'claim B' I find the formulation of the defendants' affidavit in opposition to be no less efficient than the manner of formulation of the plaintiff's own claim.

[16] Now, against Mr Harrison's contentions advanced to demonstrate the unsustainability of the intended counterclaim as a defence to the plaintiff's claim, to which I now revert, I am of the view that the defendants have put forward a triable and arguable issue in a defence which can possibly succeed. It is of course beyond this court's function to decide the

issues

raised in respect of the intended counterclaim or to determine whether or not there is a balance of probabilities in favour of one

party or the other.

[17] What rule 32(3)(b) requires is that the defendant set out in the opposing affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. I am of the view that this is not a proper case for the doors of the court to be closed to the defendants. I am satisfied that the defendants have disclosed fully the nature and grounds of a bona fide defence to the action. Accordingly the application for summary judgment must fail.

[18] Mr Crampton had urged that in the event of the defendants' success in these proceedings the plaintiff be ordered to pay the costs as, in terms of letters exchanged between the parties the plaintiff had become aware of the defendants' defence. Such letters were not exhibited. In my view this is a proper case for the usual order to be made.

The order

[19] I accordingly make the following order:

The application for summary judgment is refused.

The defendants are granted leave to defend.

The costs of the application will be costs in the cause.

Date of Hearing: 28 July 2008

Date of Judgment: 28 October 2008

Counsel for the applicant: Adv GM Harrison

Instructed by: Chamberlains Attorneys

c/o Dev Maharaj & Associates

Counsel for the defendants': Adv D Crampton

Instructed by: Stowell & Company

1 From a reading of clause 8(c)(i) of Annexure "D" the italicised part of this provision appears to be intended to read: "loss of profit."

2 1976(2) SA545 (A) at 550C-G

3 2002(6) SA 21[SCA] at [9]

4 What appears to have been intended is: "effect repairs to the leak"

4 What appears to have been intended is:

"effect repairs to the leak"

5 1970(1) SA 674 (C) at 678E

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