

SOUTH AFRICA / JUDGMENT

CSS RSA International (Pty) Ltd v Busicor 201 CC (4119/2023) [2024] ZAMPMHC 67 (9 December 2024) [2024] ZAMPMHC 67

COURT

Middelburg High Court, Mpumalanga

BEFORE

Malangeni

CASE / FILE NUMBER

4119/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
MPUMALANGA DIVISION,
MIDDELBURG

CASE NO: 4119/2023

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE 9/12/2024

SIGNATURE

In the matter between:

CSS
RSA INTERNATIONAL (PTY) LTD
APPLICANT
and
BUSICOR
201 CC
RESPONDENT

This judgment was
handed down electronically by circulation to the parties and/or
parties' representatives by email. The date
and time for
hand-down is deemed to be 9December 2024 at 12:00.

JUDGMENT

Malangeni AJ

Introduction

[1] This is an opposed application for summary judgment in terms of rule 32 of the Uniform Rules of Court. The relief sought by the applicant is:

1.1 Payment of the amount of R750 000.00.

1.2 Interest in the amount of R750 000.00 at a rate of 11.25% per annum, a tempore mora from due date of each invoice, alternatively date of demand to date of payment in full.

1.3 Payment of the amount of R288 362.50.

1.4 Interest on the amount of R288 362.50 at a rate of 11,25% per annum, a tempore mora from due date of each invoice, alternatively date of demand to date of payment in full.

1.5 Costs of suit.

1.6 Further and/or alternatively relief.

[2] This application was supposed to be heard on 16 August 2024 but the answering affidavit was filed on 8 August

2024. There was dispute as to when exactly the said affidavit was supposed to be filed before the date of hearing. The applicant argued that it was supposed to be submitted on 7 August 2024 whereas the respondent submitted that such should have been done on the close of business on 8 August 2024.

[3] As a result of this dispute, the matter was postponed to 11 October 2024 for hearing, and costs were reserved. I do not intend to deal with the aspect of reserved costs at this stage but to get to it at a later stage.

Background

[4] During April 2023, both parties duly represented entered into an oral agreement for services to be rendered and goods and machinery to be supplied by the applicant to the respondent.

[5] The material terms of the agreement were that:

5.1 The applicant would, from time to time and at the respondent's special instance and request, supply the respondent with–

5.1.1 certain machinery, materials, related services and labour;

5.1.2 at such sites designated by the respondent;

5.1.3 for purposes of enabling or facilitating the processing of certain tonnages of mining rock, as supplied to the applicant by the respondent;

5.1.4 for work done, the applicant would issue tax invoices in respect of the machinery, materials, related services and labour so requested by the respondent, which tax invoices would be payable by the respondent upon presentation, alternatively within a reasonable time from date of presentation thereof.

[6] The applicant performed its duties, issued invoices as the respondent failed to discharge its duties (paying). Therefore, the respondent remains indebted to the applicant in the sum of R1 038 362.50.

[7] The respondent filed its plea and stated as follows:

On paragraph 3 in response to paragraph 2 of particulars of claim appearing on page 204 of the indexed bundle as follows–

7.1 The oral agreement referred to in paragraph 2.1 of the particulars of claim did not come into existence exclusively in April 2023. The plaintiff and defendant have been working together on various sites since 2014.

7.2 The defendant specifically pleads that it was contacted by Isithunzi Beneficiation and Isabis Mining Projects to perform work at the Bothashoek and Kwagga sites. The defendant's representatives requested the plaintiff's representative whether or not the plaintiff would be willing to provide machinery and render services on the express condition that the plaintiff would take the risk that it would only receive payment on the respective invoices when the defendant is paid by Isithunzi Beneficiation and Isabis Mining Projects (as has been the agreement on previous sites since 2014).

7.3 The defendant specifically pleads that it was a material express term of the oral agreement that the defendant would not be liable to make payment to the plaintiff if it did not receive payment from Isithunzi Beneficiation and Isabis Mining Projects.

7.4 The defendant pleads that it was a further express term of the oral agreement that for each invoice rendered by the plaintiff (and subsequently paid by the defendant if it were paid by Isithunzi Beneficiation and Isabis Mining Projects) the defendant would render a separate invoice for 5% commission which would be paid back to the defendant. This agreement was reached on the basis that the plaintiff would not have received the work if it were not for the defendant's relationship with Isithunzi Beneficiation and Isabis Mining Projects.

7.5 POC 4 and POC 5.1 to 5.82 (a total of 97 prolix and unnecessary pages annexed to the particulars of claim) do not evidence the alleged terms of the oral agreement as pleaded by the plaintiff. What they do evidence is the fact that the plaintiff has received a total of R16 161 969.11 (sixteen million, one hundred and sixty-one thousand, nine hundred and sixty-nine rand and eleven cents) and the only invoice that remains outstanding for the Kwagga site is invoice 000304 (Annexure POC 5.83) to the value of R288 362.50.

7.6 It is pleaded that as per the agreement, each cent of the R16 161 969.11 paid to the plaintiff by the defendant was paid immediately after defendant received payment from Isithunzi Beneficiation and Isabis Mining Projects, respectively. Currently, Isithunzi Beneficiation and Isabis Mining Projects cumulatively owe the defendant R1 819 907.56. The two statements reflecting the amounts due and owing to the defendants are attached hereto and marked as annexure “P11”.

7.7 As per the express agreement, the defendant is not liable to make payment to the plaintiff until such time it received payment from Isithunzi Beneficiation and Isabis Mining Projects. The plaintiff’s representative Mr. Zdenke (Stan) Fisher, specifically contracted on these terms as he had done since 2014.

[8] The defendant has filed a counterclaim against the plaintiff’s claim, contents of which are the following:

8.1 Of the R16 161 969.11 (sixteen million, one hundred and sixty-one thousand, nine hundred and sixty-nine hundred rand and eleven cents) already paid by the plaintiff to the defendant, the defendant has failed to honour its undertaking to pay the 5% commission on some of the invoices.

8.2 The total amount of R184 574.00 represents the amount due and owing to the defendant by the plaintiff. A commission calculated clearly evidencing the plaintiff’s indebtedness to the defendant is attached hereto as annexure “CL1”. The respective invoices referenced in “CL1” which were delivered to the plaintiff are attached hereto cumulatively as annexure “CL2”.

8.3 In terms of this counterclaim, the defendant prays for judgment against the plaintiff for:

8.3.1 Payment in the amount of R184 574.00;

8.3.2 Interest on the aforesaid amount of R184 574.00 at a rate of 5% a tempore mora;

8.3.3 Costs of suite on attorney and own client scale, which costs to include the costs of counsel, and

8.3.4 Further and or alternative relief as the honourable court may deem fit under the prevailing circumstances.

[9] I went through the respondent’s answering affidavit and realized that it reiterates the plea.

The Applicable Law

[10] An application for summary judgment is governed by rule 32 of the Uniform Rules of Court. This rule provides that:

“(1) The plaintiff may, after the defendant has delivered a plea, apply to 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 into 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."

- [11] The court in deciding whether to grant or refuse summary judgment is guided by the following principles. First, the summary judgment is not meant to bar the respondent from defending the case. The meaning of this phrase was explained in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*,^[1] where the court held that:

"So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

- [12] Second, the respondent must disclose fully the nature and grounds of his defence. It is trite that the answering affidavit must disclose fully the nature and ground of the defence and the facts upon which it is founded. In *Maharaj v Barclays National Bank Ltd*,^[2] it was stated that:

"[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 bona fide and good in law. If satisfied on these matters the Court must refuse summary judgement, either wholly or in part, as the case may be."

- [13] Third, the respondent's defence must be bona fide. The meaning of a bona fide defence was clearly explained in *Nedbank v Maredi and Another*,^[3] in the following: "a bona fide defence, which means a defence set up bona fide or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim". For a comprehensive contract, parties to

it must have a common mind. In the absence of this crucial factor, there would be no valid contract. In *Jones and Another v Vorster and Steyn Incorporated and Others*,^[4] it was held that “a contract only comes into being when there is consensus between the contracting parties as regards the subject matter, the terms and conditions thereof”.

Analysis

- [14] From these proceedings, it is clear that there is a serious dispute of facts that are incapable of being resolved on the papers. The applicant relies on an oral agreement entered into between the parties. It is the terms of this contract that are disputed by the respondent. In doing so, the latter introduces or establishes or comes up with its own terms not covered by the former. These disputes of facts as they stand do not favour any of the parties. I mean to say that they are so interwoven to such an extent that no side can claim benefit from them.
- [15] At this stage, even this Court cannot be in a position to say that the respondent entered an appearance to defend and filed a plea with the intention to delay the applicant's action. In circumstances of this nature, where oral agreement is in issue, the only route the case should take is to go for oral evidence. The only way of going for oral evidence is to have the matter heard on a trial day so that the parties can ventilate their issues for court consideration and a decision. The parties are raising clashing or differing terms of the oral agreement.
- [16] When the terms of an oral agreement are disputed, that cannot be taken lightly or ordinarily as that becomes a serious contention. Once this starts happening, it then suggests that the parties were not sharing a common mind from the date of inception of the contract. Prima facie, what was being raised by the respondent against the applicant's claim is a bona fide defence that is good in terms of the law. To put it differently, from the respondent's answering affidavit, it is clear that the applicant's claim is disputed on bona fide and reasonable grounds. I am of the view that it is not delaying the finalisation of the applicant's case. The respondent has raised a triable issue and has satisfied all the requirements for resisting summary

judgement.

- [17] If I grant this summary judgment, the respondent would not receive its day in court. This would be in contrary with section 34 of the Constitution. This section gives everyone affected negatively by law access to court. This section provides that everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, where appropriate another independent and impartial tribunal. In *Chief Lesapo v North West Agricultural Bank And Another*,^[5] the Constitutional Court stated: “[a]n important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law”.

Reserved Costs for 16/08/2024

[18] Rule 32(3)(b) provides that the defendant may–

(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.

[19] The application was scheduled to be heard on the 16 of August 2024. According to Erasmus Superior Court Practice, when it comes to the definition of “court day”, the definition makes it clear that only court days are to be included in the computation of any time expressed in days prescribed by the rules or fixed by any order of court. Non-court days, in terms of the definition are Saturdays, Sundays and public holidays. The definition does not apply to provisions contained in statutory provisions, including the Superior Courts Act 10 of 2013.[6] Rule 1 is otherwise subject to the provisions of the Interpretation Act 33 of 1957, and in computing a period of time in terms of the definition, the first date is to be excluded and the last included.[7]

[20] When it comes to the filing of the answering affidavit, it was properly filed as the filing happened within 5 (five) days before the date of the hearing. In so disputing this filing, the applicant’s legal representative made a mistake. I take that as an honest mistake as I do not think it was made with any malice. It is human to err. I cannot find any reasons to burden the applicant with costs of this issue although the issue of this affidavit not being filed timeously inconvenienced the respondent as the matter could not proceed on the scheduled date.

[21] I am mindful of the general rule regarding costs that they follow the successful party. Further that they are discretionary.

[22] I therefore issue the following order:

1. The application for summary judgment is dismissed.
2. The applicant is ordered to pay costs on an attorney and client scale.
3. No order as to costs in terms of reserved costs dated 16/8/2024.

M MALANGENI

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: Advocate Ferrar Instructed by: Fyfer Incorporated. For Respondent: Advocate Jooste Instructed by: Van Heerden & Krugel Attorneys DATE OF HEARING: 11 OCTOBER 2024
DATE OF JUDGEMENT: 9 December 2024

[1] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture

[2009] ZASCA 23; 2009 (5) SA 1 (SCA); [2009] 3 All SA 407 (SCA) para 31.

[2] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426.

[3] Nedbank Limited v Maredi and Another

[2014] ZAGPPHC 58 para 3.

[4] Jones and Another v Vorster and Steyn Incorporated and Others

[2010] ZAWCHC 5 para 24.

[5] Chief Lesapo v North West Agricultural Bank and Another

[1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 para 13.

[6] Van Loggerenberg Erasmus Superior Court Practice RS 22, 2023, D1 Rule 1-4.

[7] Van Loggerenberg Erasmus Superior Court Practice RS 23, 2024, D1 Rule 1-5.

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Prepared on 10 October 2026 · Esheria