

SOUTH AFRICA / JUDGMENT

Environmental Resources Ltd v FINN and Another (3408/00) [2000] ZAGPHC 8 (11 April 2000)

[2000] ZAGPHC 8

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

3408/00

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO:3408/00

DATE:11 APRIL 2000

In the matter between:

ENVIRONMENTAL RESOURCES LIMITED..... Applicant

and

FINN, LAWRENCE WILLIAM.....First Respondent

FINN, PESIREE.....Second Respondent

ORDER

WILLIS, J: In this case an order is made in terms of prayers 1, 2, 3 4 and 5 of the notice of application for summary judgment dated 25 February

2000. The claim is baaed on a written agreement which, it is common cause, was concluded on 6 May 1993. The parties to this agreement were the plaintiff, Melanie Ann Fisher (who is now deceased), the first defendant, the second defendant and a close corporation Monmouth Foods CC.

The agreement appears as annexure B to the particulars of claim. It is common cause that the parties signed an addendum to this agreement on 15 October 1994 but it seems clear that this addendum is not relevant to these proceedings.

The claim in the agreement is defined as meaning the claim which Peggy (i.e. the plaintiff) had against the Hurvitz Group in respect of monies lent and advanced by her to the Hurvitz Group. Clause 5 of the agreement reads as follows:

"5.1 It is recorded that as at 31st December 1991 the amount of the claim was Botswana Pula 598 940.

5.2 The claim shall be repayable by the Kurvitz Group to Peggy on three months notice in writing given to the Hurvitz Group requiring payment.

5.3 Melanie and Phillip {the deceased and the second defendant) bind themselves jointly and severally as sureties and co-principal debtors with the Hurvitz Group for the due repayment of the claim.

5.4 In the event of notice being given by Peggy during her lifetime in terms of 5.2, Melanie shall be liable for the payment of simple interest on the claim at the prime overdraft rate charged by First National Bank Ltd, Carlton Centre branch from time to time reckoned from 1st January 1993 to date of payment, which interest shall be payable by Melanie on the same day upon which the claim becomes repayable. 5.5 Phillip binds himself as surety and co-principal debtor with Melanie for the payment of the interest referred to in 5.4." It is immediately apparent upon perusing the agreement that it was an agreement that was entered into after some consideration. In other words, ex facie the documents it appears to have been one that was seriously and deliberately entered into.

After the conclusion of the agreement, and on 15 March 1995, Melanie died and the second defendant was appointed as the executor of her estate. The plaintiff alleges that due notice has been given in terms of the provisions of the agreement calling upon the first defendant to repay the indebtedness within three months and that the notice period has elapsed. It is common cause that no amount has been paid to the plaintiff in response to the demand. The second and third defendants are sued as sureties and co-principal debtors.

The affidavit resisting summary judgment is signed by the second defendant representing all three defendants. It seems clear from this affidavit that the defence essentially is a defence against the claim against the first defendant and accordingly if this defence is not established, the liability of the second and third defendants as sureties must follow.

In terms of the main defence the second defendant seeks to contend that the plaintiff did not lend and advance any monies to the first defendant despite the express terms to the contrary appearing in that agreement. It is also alleged that in terms of the agreement the "claim" constituted security to the plaintiff for payment of expenses to her. It is curious that this defence is articulated as follows in paragraph 6 of "he affidavit resisting summary

judgment:

"I have been intimately involved in the business of the Hurvitz Group of Companies, including first defendant, since 1990 and am familiar therewith. It was and remains my understanding, and I state that it was a term of the agreement, that the said claim constituted security to plaintiff for payment of the expenses and that the plaintiff would not demand payment of the same and would not be entitled to payment thereof as long as the expenses would be paid."

I would wish to point out it immediately becomes apparent that the second defendant is no babe in the woods. He is an experienced and able businessman dealing with a company having many millions of turnover and assets. It is extraordinary that he should claim that the express terms of an agreement did not reflect his intention.

Furthermore, it is common cause that he had addressed a letter on 3 November 1995 to a Mr Oshy Tuchentaft in respect of the plaintiff's claim in which he records as follows:

"I acknowledge that the agreement correctly records the agreement between the parties and that the claim, if not repaid to Peggy during her lifetime, will become payable to her estate on her death if she has not forgiven the claim in her will."

Mr Meyer, who appears for the plaintiff, contended that the express terms of the written agreement belie the second defendant's

contention. He submitted that the second defendant seeks to advance a version which could directly contradict the express provisions of the written agreement. I am in respectful agreement with him. His allegations as to his understanding is irrelevant and inadmissible

and it cannot be used to redefine the terms of this agreement (see *Johnston v Leal* 1960 (3) SA 927 (A) at 943B).

The unsubstantiated statements that the plaintiff did not lend and advance money to the first defendant are, in my view, insufficient to defeat a claim for summary judgment.

The first defendant states in paragraph 12 that he has at all times contended that the portion of the agreement dealing with the claim is incorrect, it does not reflect the intention of the parties and that the agreement falls to be rectified. Rectification, in my experience, has become something of a vogue concept. The second defendant does not, however, set out the facts which it is necessary to allege and prove in order to succeed in obtaining rectification of a contract. It is not, in my view, sufficient for a person seeking rectification simply to rely on bald, vague and unsubstantiated conclusions as has been set out in this particular affidavit (see *Meyer v*

Merchants Trust Ltd 1942 AD 244; Von Zieqler v Superior Furniture Manufacturers (Pty) Ltd 1962 (3) SA 3 99 (T); Heuhoff v York Timbers Ltd 1981 (4) SA 666 (T) at 674; Levin v Zoutendiik 1979 (3) SA 1145 (W); Gralio (Pty) Ltd v D E Claasen (Pty) Ltd 1980 (1) SA 816 (A) at 824).

The affidavit resisting summary judgment contains the following curious allegation.

"I respectfully point out that one of the expenses listed in Schedule A to the agreement was a premium for R365,00 per month payable to Beland Medical Aid Society. This premium increased over the years to R1 106,00 per month. The said premiums were paid by first defendant direct to the Beland Medical Aid from May 1993 to September 1999. The total amount so paid amounted R54 638,00. However, the amount of expenses that was paid to the plaintiff was not reduced by the amount of the said premiums and the said premiums were included in the monthly amount paid to plaintiff. Plaintiff was not obliged to pay these premiums and did not do so. Accordingly plaintiff has received R54 638,00 in excess of the amount to which she was entitled in terms of the agreement and has further enjoyed the benefit of the interest on the said sum." It is significant to note that in paragraph 7.2 of the agreement the following clearly appears:

"Melanie is aware that the amounts listed in schedule A represents the amounts currently payable in respect of the expenses and that they may increase from time to time. Melanie accordingly undertakes responsibility in terms of 7.1 for payment of the amounts listed in Annexure A and any increases thereto from time to time". (My emphasis).

I agree with the submission of Mr Meyer that the second defendant's contentions in defence of the claim are confused and unsubstantiated.

No particulars are given of the amounts allegedly paid and there is no evidence that payment was made save for the second defendant's

vague statement in respect of the payments to the Medical Aid Society.

In paragraph 8 and 9 of the affidavit resisting summary judgment, the second defendant seeks to contend that the plaintiff has repudiated

the agreement. This is a curious assertion in the light of the background of events and in the light of a letter which Oshy Tuchentaft addressed to the second defendant concerning the estate of the late Cyril Hurvitz in which the following appears:

"With reference to paragraph 3 of your letter of 9th March my suggestion was that Peggy would forgive the THG debt in her will, not before. She must retain the claim, including interest, which will be capitalised as an additional measure of security as I mentioned in my letter of 8th March." This letter was dated 22 March 1993.

No basis is set out for the contention that the contents of the letter, Annexure E, to his affidavit constituted a repudiation of the agreement. Indeed, Annexure B of the agreement indicates nothing of the sort. The receipt of overpayment allegedly can hardly constitute a repudiation of the agreement.

The second defendant also seeks to deny that due notice was given in terms of clause 5.2 of the first defendant and on this basis seeks to contend that the amount claimed is not due and payable. It is clear, if one has regard to paragraph 5.2 of the agreement, that the notice does not affect the validity of the claim, nor does it in any way impact upon the amount that is due. It simply governs the question of when such an amount is payable. In other words, it is a time clause and not a proper condition precedent. In any event, it is specifically alleged that the notice, Annexure E, was delivered to the first defendant on 27 October 1999. That letter was addressed to Lobatsi Estates, Lobatsi District, Botswana which is stated in the letter to be the principal place of business of the first defendant. It is not disputed that this address is the principal place of business of the first defendant. It is not disputed that the second defendant represents the first defendant as a director in these proceedings. Indeed, the second defendant states that he has been intimately involved in the business of the first defendant since 1990 and is familiar with such business. He seeks to confess and avoid the question of whether or not there had been the notice given in terms of 5.2. He sets out no factual basis for the denial which, in the circumstances, one would expect him to be able to do.

The entire defence, as set out in the affidavit, is done in a vague and sketchy manner. If one has regard to the second defendant's professed knowledge of the affairs of the first defendant, the defence is set out in a manner which is far too bald (see *Breitenbach v Fiat SA* (Edms) Bpk 1976 (2) SA 226 (T) at 22B; *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 678 and *Joubert, Owens Van Niekerk Inc v Breytenbach* 1986 (2) SA 357 (T) at (361-2)). I would also wish to refer to the case of *Standard Bank of SA Ltd v El-Naddaf and Another* 1999 (4) SA 779 (W) in which Marais J, dealing with an application for rescission of a default judgment said at 784G:

"It seems to me that the situation is analogous to that under Rule 32(3)(b) of the Uniform Rules of Court which require that the Court must be satisfied that the defendant has a bona fide defence. This subrule was considered in *Breytenbach v Fiat (SA)* (F.dms) Bpk 1976

- (2) SA 226 (T). The relevant portion of the subrule requires the defendant to satisfy the Court by affidavit . . . that he has a bona fide defence to the action; such affidavit ... shall disclose fully the nature and ground of the defence and the material facts relied upon therefor. It will immediately be seen that the second portion of the sentence contains requirements different to those specifically required in applications for rescission. However, Caiman J deals with the requirement that the defendant must satisfy that his defence is bona fide as
- (a) separate from the requirement that he must satisfy the Court that he has a defence; and
 - (b) separate from the requirement that he shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

I am not satisfied, indeed I am far from satisfied, that the defendants have a bona fide defence. I am certainly far from satisfied that the defendants have disclosed fully the nature and grounds of the defence and the material facts relied upon therefor.

I deal finally with the points raised in paragraph 4 of the affidavit resisting summary judgment. The following allegation appears:

"I am advised and respectfully submit that plaintiff's affidavit does not comply with the requirements of Rule 32 of the Rules of this Honourable Court and that on that ground alone this application falls to be dismissed with costs. Legal argument in this regard will be addressed to this Honourable Court at the hearing thereof". Needless to say, one was left in the dark until one had the benefit of hearing Mr Nowitz, who appears for the defendants, interesting argument on this point. Mr Nowitz submitted that that the allegation appearing in paragraph 3 of the affidavit in support of the application for summary judgment which reads as follows:

"I hereby verify that the first, second and third defendants are indebted to the plaintiff in the amounts and on the grounds stated in the summons" falls short of the requirements of Rule 32. It is significant that that allegation is preceded by the following allegation:

111 can and do swear positively to the facts herein contained which are within my own personal knowledge and belief and are true and correct."

I have cast my eyes anxiously across Rule 32 and cannot see any flaw in the allegations appearing in the affidavit. Indeed, the case of *Flaminoo Knitting- Mills (Pty) Ltd v Clemans* 1972 (3) SA 692 (D) in which case judgment was given by Milne J, as he then was, it is emphasised at 694 by reference to various other authorities that (a) the affidavit should be made by the plaintiff himself or any other person who can swear positively to the facts (this is precisely what occurred, here) , (b) that it must be an affidavit verifying the cause of action and the amount, if any, claimed and (c) it must contain a statement by the deponent that in his opinion there is no bona fide defence to the action and that notice of intention to defend had been delivered solely for the purpose of delay.

It is true that the ipsissima verba used were not that the cause of action was verified but it is abundantly clear that the cause of action is confirmed by reason of the allegation which appears in paragraph 3, viz. on the grounds stated in the summons. Indeed, there seems to be no doubt whatsoever that the cause of action arises from the written agreement that was annexed to the summons. The defence is not that this agreement was never entered into but that it should either be rectified or that the true agreement was something else.

I have already dealt with these issues but there can be no doubt that the defendant know precisely the basis upon which the plaintiff seeks summary judgment.

Accordingly in my view summary judgment should be granted as claimed. The question of the value date, in my view, needs to be settled. The parties agreed that the value date should be the date of the

judgment.

On the question of costs, I am satisfied that the plaintiff was not unduly cautious in briefing two counsel, the matter is sufficiently

complex and the amount of money is sufficiently large to merit the services of two counsel.

Accordingly the following order is made: Summary judgment is given against first, second and third defendants jointly and severally for:

1. Payment of the equivalent in South African Rands in the amount of 598 940 Botswana Pula.
2. Interest on the aforesaid sum at the prime overdraft rate charged by First National Bank Ltd, Carlton Centre branch from time to time, calculated from 1 January 1993 to date of payment.
3. The date for value is the date of this judgment.
4. The plaintiff is awarded the costs of the application which costs are to include the costs of two counsel.

ON BEHALF OF PLAINTIFF : ADV R MEYER SC

ADV COHEN

Instructed by :Monte Hacker

ON BEHALF OF DEFENDANTS : ADV M NOWITZ

Instructed by :R Druker

DATE OF JUDGMENT : 23 MAY 2000

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