

SOUTH AFRICA / JUDGMENT

FVN Projects CC and Another v A G Formwork and Scaffolding (Pty) Ltd (A469/2015) [2017] ZAGPPHC 278 (2 June 2017)

[2017] ZAGPPHC 278

COURT

North Gauteng High Court, Pretoria

BEFORE

Prinsloo, Molopa-Sethosa, Teffo

CASE / FILE NUMBER

A469/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

/ES

(GAUTENG

DIVISION. PRETORIA)

CASE

NO: A469/2015

DATE:

02/06/17

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

IN

THE MATTER BETWEEN

FVN

PROJECTS CC

1st

APPELLANT

REG

NO: 1987/011478/23 (1st
Defendant a quo)
FRANS
PETRUS VAN NIEKERK
2ND
APPELLANT
(2nd Defendant
a quo)
AND
AG
FORMWORK & SCAFFOLDING (PTY)
LTD RESPONDENT
(Plaintiff a quo)

JUDGMENT

PRINSLOO, J

- [1] The respondent, which specialises in the leasing of building equipment, including scaffolding, to customers, on 10 October 2012, entered into a written agreement with the first appellant, represented by the second appellant, in terms of which such equipment would be leased to the first appellant.
- [2] The written agreement entered into between the parties consisted of an Application to Open an Account (annexure "A" to the particulars of claim) and the "Plaintiff's Standard Conditions of Hire" (annexure "B" to the particulars of claim).
- [3] It is common cause that scaffolding was leased by the respondent to the first appellant during the period June 2013 up to and including October 2013 to be used by the first appellant at a site situated in Lanseria.
- [4] In terms of the agreement, payment for hiring the equipment had to be made within thirty days after the date of the invoice.
- [5] Invoices were rendered, but, according to the particulars of claim, an amount of R432 868,26 remained due and payable.
- [6] The respondent sued the second appellant as a second defendant on the basis of a deed of suretyship which the second appellant allegedly signed when representing the first appellant as the sole member of the first appellant close corporation, when entering into the agreement.
- [7] When the appellants entered an appearance to defend the action, the respondent, as plaintiff, applied for summary judgment. The affidavit supporting the summary judgment application is dated 9 December 2014.

- [8] The appellants, in opposing the summary judgment application, filed an answering affidavit dated 13 January 2015, and later, by agreement between the parties, filed a supplementary opposing affidavit dated 11 February 2015.
- [9] The learned Judge a quo granted summary judgment for the aforesaid amount of R432 868,26 plus interest on 19 February 2015 without giving reasons for his judgment. When reasons were applied for, these were supplied by the learned Judge in a judgment dated 17 April 2015.
- [10] On 10 June 2015, the learned Judge granted leave to appeal to the Full Court of this Division.
- [11] When the appeal came before us on 15 March 2017, Mr Du Toit appeared for the appellants but there was no appearance for the respondent.

When we questioned counsel about the absence of the respondent's representative, he pointed out that the notice of set down was served on 1 March 2017. The appellants' heads of argument, recording the date of the hearing, was served on the respondent's attorneys on 22 February 2017 and the notice about the date of the hearing was sent to both parties by the Registrar on 19 January 2016. Against this background, we ordered the matter to proceed in the absence of the respondent.

Defences raised in the opposing, and supplementary opposing, affidavits

- [12] It was contended on behalf of the appellants that the respondent had failed to comply with the requirements of Rule 18(6) by not supplying a legible copy of the agreement. In the opposing affidavit the appellants contend, having submitted that this was an Incidental Credit Agreement, that the respondent failed to allege compliance with the provisions of the NCA or to allege that the Incidental Credit Agreement does not

constitute a credit agreement governed by the NCA. In particular, it was alleged that the respondent had failed to comply with the requirements of section 129 and 130 of the NCA by giving the prescribed notices before instituting action. It was also contended that the respondent had failed to allege that it is a registered credit provider as intended by the provisions of the NCA, and, in the result, it was argued in the opposing affidavit that the summons was issued prematurely before compliance with the provisions aforesaid, with particular reference to sections 129 and 130.

- [14] As to the suretyship, on which the respondent based its claim against the second appellant, it is contended in the opposing affidavit that the respondent's representatives, at the conclusion of the alleged agreement, did not specifically point out to the second appellant that he was also signing as a surety. Clause 11 of the agreement annexure "A" to the particulars of claim contains, in fine print, reference to a "suretyship" to the effect that the signatory of the agreement (the second appellant) "agrees that by this signature hereto, he/she not only binds the customer for whom he purports to act, but in addition thereto binds himself/herself personally as surety and co-principal debtor in solidum with such customer for the due and proper discharge of all such customers' obligations". It is alleged in the

opposing affidavit that clause 11 was not brought to the attention of the second appellant when he signed the agreement and the second appellant relies on advice he had received to the effect that "in the absence of a particular show and pointing out of such suretyship, that I am not bound by the terms and conditions of such suretyship". The second appellant contends that he always acted on behalf of the disclosed principal (the first appellant) and that he was unaware that the respondent's representatives had negligently failed to disclose to him that annexure "A" to the particulars of claim contained a clause purporting to bind him as a surety. He alleges that he never intended to bind himself as a surety or to

create any form of personal liability.

[15] In the supplementary opposing affidavit it is contended that the parties entered into an agreement which would either absolve the first appellant from paying the outstanding balance for hiring the equipment (the amount sued for) or reduce the amount to a nominal figure.

I briefly summarise the allegations in this regard as they are contained in the supplementary opposing affidavit: the respondent,

represented by Mr Gerrie de Beer, and the first appellant, represented by the second appellant, agreed that certain equipment would be rented for a specific project, taking into consideration that the first appellant had budgeted certain rental costs in the renting of the equipment.

It was agreed between the parties that should delaying factors occur, a fixed amount in respect of the rental would be payable by the first appellant.

The first appellant experienced certain difficulties beyond its control during the rental period which included a general strike, a strike on the particular premises where the first appellant rendered the services to its client and that certain contractors caused delays on the site, which caused the first appellant not to be in a position to return the equipment to the respondent within the agreed time period for the rental.

Upon the occurrence of these events, the second appellant approached Mr De Beer at his office in Midrand, during which meeting Mr De Beer conceded that the first appellant would not be liable to make payment for rental costs, over and above those initially agreed to. It was furthermore agreed that the equipment should be returned as soon as possible whereafter the longer period could be discussed, so as to agree to an ex gratia amount which may be payable and/or may not be payable in respect of the longer usage of the equipment. Mr De Beer did not invite the appellants to discuss any amount which may be agreed upon for the equipment being returned later than the date initially anticipated. Subsequently, the respondent "unilaterally" caused an invoice to be issued and thereafter a summons. In these circumstances, the appellants deny being indebted in the amount claimed or any other amount as the initial agreed amount in respect of rental for equipment in respect of the project was indeed paid by the first appellant to the respondent.

Brief remarks about how the defences raised in the opposing affidavits were dealt with by the learned Judge a quo

[16] I deal with these defences in the same order that they were raised in the opposing affidavits.

- As to the "defence" raised in respect of the requirements of Rule 18(6), and the alleged non-compliance therewith, nothing was said in the judgment, presumably because the issue was not argued. Nothing further turns on this "defence".
- As to the defence based on the applicability of the NCA, the learned Judge, in paragraph [8] of the judgment, summarised the defence as it was raised in the opposing affidavit by referring to the alleged applicability of an incidental credit agreement and the argument that sections 129 and 130 were not complied with.

In paragraph [11] the learned Judge pointed out that counsel for the respondent submitted that the NCA does not apply because the first appellant is a juristic person, alternatively, the credit agreement the parties concluded was in respect of a principal debt in excess of R300 000,00 and the NCA is, therefore, not applicable "and that the first respondent is a 'small' entity with an asset value or annual turn-over of less than R1 million in respect of the small or intermediate credit agreement". Further alternatively, it was found that in view of the fact that the principal debt is an amount of some R432 000,00 "the NCA finds no application, and correspondingly sections 129 and 130 were unnecessary as between the parties dealing at arm's length".

I assume that the learned Judge had the provisions of section 4 of the NCA in mind which stipulate:

"Application of the Act -(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except -

- (a) a credit agreement in terms of which the consumer is-
 - (i) a juristic person whose asset value or annual turn-over together with the combined asset value or annual turn-over of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);
 - (ii) the state; or
 - (iii) an organ of state;
- (b) a large agreement, as described in section 9(4) in terms of which the consumer is a juristic person whose asset value or annual turn-over is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);
- (c) ...; or
- (d) "

Judging by the wording of section 4(1), as quoted, the credit agreement foreshadowed in section 4(1)(a) and the "large agreement"

foreshadowed in section 4(1)(b) are provided for in the alternative so that the NCA applies to every credit agreement except one or the other of those two types of agreement or, for that matter those mentioned in section 4(1)(c) or section 4(1)(d) which clearly do not apply.

Section 4(2)(a) stipulates that the asset value or the annual tum-over (a clear reference to the type of

agreement foreshadowed in both the agreements referred to in section 4(1)(a)(i) and 4(1)(b)

respectively) of a juristic person at the time a credit agreement is made, is the value stated as such by that juristic person at the time it applies for or enters into that agreement.

Given the drastic nature of the summary judgment proceedings, and the limitation placed on a plaintiff seeking summary judgment as to what may be contained in the supporting affidavit to the summary judgment application, there was no evidence before the learned Judge about what either the asset value or annual tum-over of the first appellant was when the agreement was entered into.

I see no reference to either the first appellant's "asset value" or "annual tum-over" in either annexure "A" or annexure "B" to the particulars of claim, constituting the agreement between the parties.

I add, for the sake of detail, that section 5 of the NCA deals with the "limited application of the Act to incidental credit

agreements". It stipulates that one of the provisions in the NCA which applies with respect to an incidental credit agreement is Parts A and C of Chapter 6. Part C includes sections 129 to 133 so that, to this extent at least, the argument offered by the appellants falls inside the ambit of the provisions of the Act.

Section 7 of the Act deals with the threshold determination and industry tiers foreshadowed, for example, by the provisions of section 4(1) which would be a reference to "the threshold value determined by the Minister in terms of section 7(1)", as it appears in the wording of section 4(1)(a)(i) which I quoted. The threshold presently applicable is one of "not more than R1 million for purposes of section 4(1)".

Again, there was no evidence before the learned Judge, from the particulars of claim, the agreements entered into, the supporting affidavit to the summary judgment application or the opposing affidavits as to either the annual tum-over of the first appellant or the asset value. In these circumstances, it is difficult to understand the finding of the learned Judge that the tum-over of the first appellant is less than R1 million. There was no finding about the asset value of the first appellant.

Against this background, it is perhaps understandable that the appellants plead in their notice of appeal that the learned Judge erred in finding that the exclusions contained in the provisions of section 4(1)(a)(i) and 4(1)(b) read with 7(1) were applicable in the absence of the respondent having pleaded as much or even referred thereto in the particulars of claim.

In heads of argument, counsel for the appellants referred to the judgment in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* (National Credit Regulator as amicus curiae) 2016 6 SA 102 (SCA), where it was held, at 108E-109C, (I only quote a few extracts)

"A failure to allege and prove compliance with section 129(1) (even after section 130 procedures) would render a summons excipiable and the matter would end without judgment in favour of the claimant being granted."

Counsel argued that, on the same basis, it is also necessary to plead, if that is the case of the plaintiff, that an Act which may be relevant to the transaction is not applicable. In this regard we were referred to *Credit Corporation of SA Ltd v Swart* 1959 1 SA 555 (O) dealing with the Hire Purchase Act and where it was held that "where the return of an article is claimed which does not fall under the provisions of the said Act, it is therefore essential to set out sufficient facts in the summons that the Act is

not applicable". A similar finding was made in *Botha v Potch Motors (Edms) Bpk* 1963 1 SA 279 (T) where it was held that there was no averment in the summons that the vehicle (the Hire Purchase Act may have been applicable) belonged to a class or group of movables which the Minister had by notice exempted from the provisions of the Act.

In all these circumstances, it seems to me that the issue raised by the appellants in their opposing affidavit and their reliance on the provisions of the NCA is a triable one which, with respect, the learned Judge ought to have allowed them to present to a trial Court by giving leave to defend.

- As to the defence based on the deed of suretyship, the learned Judge dismissed it, finding that the provisions of clause 11 of annexure "A" are unambiguous and that the second appellant was simply "clutching at a straw". Again, I am of the view that this is a triable issue given the strict nature of summary judgment proceedings.
- As to the defence raised in the supplementary opposing affidavit about the agreement entered into between the second appellant and Mr De Beer, the learned Judge held that this was no more than an afterthought holding "if indeed a meeting ever took place between Messrs De Beer and Van Niekerk in Midrand purporting to vary the terms and conditions of the rental of scaffolding, it remains obscure as to why an addendum or variation agreement signed by the parties has not been attached to the supplementary opposing affidavit referred to". With respect, this finding, in my view, appears to raise the bar too high for a defendant opposing a summary judgment application and, it seems to me, that the alleged agreement was pleaded with sufficient detail in the supplementary opposing affidavit to justify a referral of the matter to the trial Court for evidence to be led.

[17] In all the circumstances, I am of the view that a proper case was made out by the appellants for the appeal to be upheld.

The order

[18] I make the following order:

1. The appeal is upheld with costs.
2. The order of the learned Judge a quo is set aside and replaced with the following:

"2.1 The application for summary judgment is dismissed.

2.2 The respondents are granted leave to defend the action.

2.3 Costs of the summary judgment application will be costs in the cause."

W R C PRINSLOO

JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

A469/2015

L M MOLOPA-SETHOSA

JUDGE OF THE GAUTENG DIVISION. PRETORIA

M J TEFFO

JUDGE OF THE GAUTENG DIVISION. PRETORIA

HEARD ON: 15 MARCH 2017

FOR THE APPELLANTS: DR DU TOIT

INSTRUCTED BY: WW B BOTHA ATTORNEYS

NO APPEARANCE FOR THE RESPONDENT

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Prepared on 12 October 2026 · Esheria