

SOUTH AFRICA / JUDGMENT

Sasfin Bank Limited v Van Blerk NO and Others (1795/2020) [2020] ZAFSHC 174 (23 October 2020) [2020] ZAFSHC 174

COURT

Free State High Court, Bloemfontein

BEFORE

C Nekosie

CASE / FILE NUMBER

1795/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 1795/2020

In

the matter between:

SASFIN
BANK LIMITED
Applicant
(REGISTRATION
NUMBER 1951/002280/06
and
PIETER
ENSLIN VAN BLERK N.O
1ST
Respondent
ELIZABETH
VAN BLERK N.O
2ND Respondent
JACOB
COENRAAD DE CLERK N.O
3RD Respondent
PIETER
ENSLIN VAN BLERK
4th
Respondent

ELIZABETH
VAN BLERK
5th
Respondent
JACOB
COENRAAD DE CLERK
6th Respondent

CORAM: C NEKOSIE AJ

JUDGMENT

BY: C NEKOSIE AJ

HEARD ON: 22 October 2020

DELIVERED ON: 23 October 2020

- [1] This is an opposed application for summary judgement. It concerns the applicant's attempts, as cessionary, to claim from the respondents the arrear and future rentals in respect of the rental agreement for monitoring equipment. The second to sixth respondents allegedly bound themselves as guarantors to the applicant.
- [2] On 26 June 2017 Technofin (Pty) Ltd (Technofin) and the Enslin Van Blerk Family Trust (the Trust), represented by the first, second and third respondents, entered into an agreement whereby the Trust rented monitoring equipment for amongst others, the movement of its fleet vehicles, from Technofin for a contract period of 60 months.
- [3] The goods were supplied and installed in the Trust's vehicles and it functioned until May 2018 when it stopped working. Until the equipment stopped the respondent paid the rental in terms of the agreement. On enquiry it was explained that the sim-cards have lapsed, and no cellular data was supplied by Technofin. The Trust considered this conduct as a repudiation of the agreement and through its attorneys on 18 July 2018 addressed a letter to Technofin and requested it to rectify the breach. Technofin failed to do so and the Trust accepted the repudiation and cancelled the agreement.
- [4] Technofin ceded the rental agreement to Absa Technology Finance Solutions (Pty) Ltd who in turn sold it Sunlyn (Pty) Ltd. Alternately

the rental agreement was ceded to the Applicant.

- [5] In terms of rule 32(3)(b) of the Uniform Rules, the defendant resisting summary judgment application must set out in his affidavit

facts which if proved at trial, shall fully disclose the nature and grounds of defence and material facts relied upon.

- [6] In *Maharaj v Barclays National Bank Ltd*[1] Corbett JA stated:

“All that a 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.”

- [7] The principles laid down in Maharaj supra has remained unchanged despite the amendment to the rule requiring that the application for summary judgment may only be brought after the plea has been filed. This was affirmed in Tumileng Trading CC v National Security and Fire (Pty) Ltd[2] with the following statement:

“However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly 'no'! The reason for the negative answer is that the enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, it is whether the ostensible defence that has been pleaded is bona fide or not. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule 32(2)(b) (viz. showing that 'the defence as pleaded does not raise any issue for trial') with what is demanded of a defendant in terms of subrule 32(3)(b) (viz. showing that its defence to the action is bona fide; i.e. that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of 'issue for trial' in subrule 32(2)(b) as denoting something different from a 'bona fide defence' within the meaning of subrule 32(3)(b).”

- [8] The Applicant derives its locus standi from the cessions and sale of the rental agreement. Essentially the applicant avers that there was no obligation to provide sim-cards and data as it did not form part of the main rental agreement. The applicant relies on the Main Rental Agreement and its annexures, in particular annexure D1, where it is stated that rental agreements does not include maintenance and service.
- [9] It was submitted that the alleged representation in respect of the continued functioning of the equipment by Morne Wentzel, purportedly having acted on behalf of the initial contracting party, Technofin, is irrelevant. In support of that contention I was referred to Karabus Motors (1959) Ltd v Van Elk[3] wherein it was stated:

“It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties (see Wessels Law of Contract, para. 1122)”

Clearly, ex facie the papers Mostert was, at the very least, an agent of Technofin. Surely the cessionary to the agreement must inherit the obligations of the initial contracting party if undertakings were made to facilitate the conclusion of the agreement.

- [10] In resisting the application the respondents aver that the rental agreement was signed with the understanding and representation that the sim-cards and data was included in the agreement. It avers thus that there was a reciprocal duty on Technofin to perform by providing the data and sim-cards.
- [11] The parties agree that the principle as was found Botha and Another v Rich N.O and others[4] that the party from whom performance is claimed may raise a failure of counter-performance as a defence. If the sim-cards and data formed part of the goods supplied in terms of the rental agreement, the respondents will have raised a bona fide defence.
- [12] I relied on what is contained in the particulars of claim to be the terms of the rental agreement because the attached agreement is illegible. The rental agreement does not make any mention of the supply of data and sim-cards. Annexure D1 only states that the agreement does not include maintenance or service. It is unclear what this maintenance and service would entail. On behalf of the applicant it is submitted that it should be interpreted as to mean that the provision of sim-cards and data is excluded.
- [13] The respondent contends that the documents were, apart from the printed words, blank when they signed, and they were made to believe that the sim-cards and data were included.
- [14] It is common cause that the equipment was installed with sim-cards and data provided by Technofin. The respondents rely on what was conveyed by the representative to them for their assertion that the sim-cards and data was included. I must accept there was a presentation or quotation of what the rental agreement entails and that it was signed on that basis. This acceptance is because Annexure D1 paragraph (k) reads as follows:
- “This below equipment is installed as per the quotes given and accepted”*
- [15] The quotes are absent from the pleadings and they would form an integral part of the events that lead to the signing of the agreement because it is in the events preceding signing of the rental agreement where the respondent’s defence lies.
- [16] The locus standi of the applicant is disputed by the respondent and the alleged cessions are yet to be proven.
- [17] I therefore conclude that the applicant has not presented the respondent with the proverbial unanswerable case. The respondent has, in my view, presented a bona fide defence, particularly because the sim-cards and data were provided at the commencement of the agreement despite there being no mention of same in the main rental agreement.
- [18] In consequence the application cannot succeed.

IT IS ORDERED THAT:

1. The application for summary judgment is refused.
2. Leave is granted to the respondent to defend the action.

3. Costs shall be costs in the cause.

CNEKOSIE, AJ

For the applicant: Adv PC PLOOS VAN AMSTEL

Instructed by KWA ATTORNEYS

Applicant`s Attorney

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Johannesburg

Correspondent:

HILL McHARDY & HERBST INC

BLOEMFONTEIN

For the Respondent: Adv S REINDERS

Instructed by:

ROSSOUWS ATTORNEYS

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[1] 1976 (1) SA 418 (A) at 426A-C

[2] 2020 JDR 0747 (WCC) at para 40

[3] 1962(1) SA 451 at 453D

[4] 2014(4) SA 124 (CC) at p143 para43

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Prepared on 13 October 2026 · Esheria