

SOUTH AFRICA / JUDGMENT

South African Securitisation Programme (RF) Ltd and Others v Adam Masebe Secondary School and Another (2022-025736) [2024] ZAGPPHC 1256 (27 November 2024)

[2024] ZAGPPHC 1256

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

2022-025736

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 2022- 025736

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 27 November 2024

(5)

Signature

In

the matter between:

SOUTH
AFRICAN SECURITISATION PROGRAMME (RF) LTD
First Plaintiff
SASFIN
BANK
LIMITED
Second Plaintiff
SUNLYN
(PTY)
LTD
Third
Plaintiff
TECHNOLOGIES
ACCEPTANCES RECEIVABLES (PTY) LTD
Fourth
Plaintiff
FINTECH
UNDERWRITING (PTY) LTD
Fifth
Plaintiff
And
ADAM
MASEBE SECONDARY SCHOOL
First
Defendant
THE
MEMBER OF THE EXECUTIVE COUNCIL FOR
Second Defendant
EDUCATION
FOR GAUTENG PROVINCE

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of court against the first and second defendants, jointly and severally, the one paying the other to be absolved. It is opposed by the defendants.

B.

BACKGROUND

[2] On 1 July 2015 and 31 July 2020 respectively, the first defendant, Adam Masebe Secondary School ("the school") concluded two rental agreements with Technologies Acceptances Receivables (Pty) Ltd ("TAR") and Sunlyn (Pty) Ltd ("Sunlyn") respectively in relation to the rental of certain office equipment.

[3] TAR concluded the first rental agreement with the school as an agent for and on behalf of the undisclosed principal, Fintech Underwriting (Pty) Ltd ("Fintech"), pursuant to and in terms of a written agency agreement concluded between them previously, in 2004.

[4] Both rental agreements were for a period of 60 months and the respective agreed upon monthly rentals were:

4.1 first rental agreement: R8,600.00 plus VAT; and

4.2 second rental agreement: R2,000.00 plus VAT.

[5] The first defendant acknowledged in writing that the equipment underlying each of the rental agreements was duly delivered and installed to the satisfaction of the first defendant.

[6] Both rental agreements provided for TAR and Sunlyn and/or all their cessionaries would be entitled to prove, on a prima facie basis, the school's indebtedness.

[7] The second defendant, the Member of the Executive Council for Education for Gauteng Province ("the MEC") is liable for the debts of the school as contemplated in section 60(1),

(2) and (3) of the South African Schools Act 84 of 1996 and the State Liability Act 20 of 1957.

[8] Pursuant to and in terms of:

8.1 the first main cession agreement concluded between Fintech and the third plaintiff, Technologies Acceptances Receivables (Pty) Ltd ("TAR"),

all rights, title and interest in and to the first rental agreement were ceded, transferred and made over from Fintech to TAR on 25 June 2015;

8.2 a second main cession agreement concluded between Sunlyn and the second plaintiff, Sasfin Bank Ltd ("Sasfin") all rights, title and interest in and to the second rental agreement were ceded, transferred and made over from Sunlyn to Sasfin on 31 July 2021; and

8.3 a Sale Agreement concluded between Sasfin and the first plaintiff, the South African Securitisation Programme (RF) Ltd ("SASP") all rights, title and interest in and to the second rental agreement were duly sold from Sasfin to SASP on 17 February 2021.

[9] Consequently, as at date hereof, all rights, title and interest in and to:

9.1 the first rental agreement vests in TAR; and

9.2 the second rental agreement vests in SASP.

- [10] The school, in breach of each of the rental agreements, failed to maintain the monthly agreed upon rental instalments. Notwithstanding demand, the school failed to remedy same.
- [11] Each of the rental agreements provided that in the event of the school failing to make any payment pursuant to and in terms of the rental agreements on the due date thereof, it would be deemed that the school breached the respective rental agreements, whereupon TAR and SASP would be entitled to inter alia forthwith claim immediate payment of all amounts which would have been payable in terms of the rental agreements until expiry of the rental period stated in the schedules to each rental agreement, whether such payments were then due for payment or not.
- [12] TAR and SASP elected to invoke the acceleration clauses as a direct result of the school's breaches as aforesaid. Consequently, the school is indebted to TAR and SASP respectively in the following terms:

TAR

12.1 Claim A: R85 326.27 together with interest thereon at the rate of 12.50% (prime plus 5%) per annum from 25 November 2021 to date of final payment.

SASP

12.2 Claim B: R172 548.39 together with interest thereon at the rate of 13.00% (prime plus 6%) per annum from 25 November 2021 to date of final payment.

- [13] As a direct result of the first defendant's breach of the rental agreements, the plaintiffs, in the alternative to each other, instituted the present proceedings.

C. ISSUES FOR DETERMINATION

The defendants' contentions:

- [14] The plea

14.1 In their plea to the plaintiffs' particulars of claim, the defendants by way of special plea, allege that the action was instituted prematurely in view of the plaintiffs' purported failure to have complied with the provisions of section 2(2)(a) of the State Liability Act[1] i.e the failure to have served the summons on the MEC.

14.2 Defendants deny that the MEC, in terms of section 60 of the School's Act[2] is liable on account of the fact that the second defendants have no knowledge thereof;

14.3 Deny a cession of rights in and to the respective rental agreements, had taken place on account of the fact that they have no knowledge thereof;

14.4 Deny that the defendants breached any or both of the rental agreements; more specifically, it is alleged that:

- 14.4.1 the first rental agreement had lapsed through effluxion of time in May 2020, alternatively;
- 14.4.2 the defendants cancelled the first rental agreement during or about 7 September 2021;
- 14.4.3 the equipment rented in terms of the second rental agreement was defective; and
- 14.4.4 the plaintiffs collected the equipment during or about 31 August 2021; the said collection constituted a repudiation of the second rental agreement.

The defendants' affidavit resisting the application for summary

judgment

- [15] In addition to the defences raised in the plea, the defendants in the answering affidavit allege that the conclusion of the two rental agreements were in violation of section 217 of the Constitution of the Republic of South Africa ("the Constitution") read with section 38 of the Public Finance Act, Act 1 of 1999 ("the PFMA").

The plaintiffs' main submissions

- [16] The defendants are not entitled to raise a ground in the affidavit resisting the application for summary judgment, not raised in their plea. See: *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd* 2020 JDR 1742 (GP)
- [17] Notwithstanding, the purported non-compliance does not amount to a defence in law. See: - *Technofin Leasing and Finance (Pty) Ltd v Framesby High School* 2005 (6) SA 87
- [18] The purported non-compliance with section 2(2)(a) of the State Liability Act 20 of 1957 does not render the action premature. See: - *Minister of Police and Others v Samuel Molokwane* (730/2021)
- [2022] ZASCA 111 (15 July 2022).
- [19] The defendants, as non-parties to any of the instruments of cession, are not entitled, procedurally or otherwise, to raise any issues in respect of the process of cession and/or call upon the plaintiffs to prove the cessions. See:
- *Hillock and Another v Hillsage Investments (Pty) Ltd* 1975 (1) SA 508 (A).
- [20] In relation to the first rental agreement the defendants allege that payment of the monthly agreed upon rental instalments had been made up and until the expiry of the said agreement through effluxion of time. With the plaintiffs relying on a certificate of balance, an allegation that payment was made, is insufficient to disturb the evidentiary burden placed on the defendants by the certificate of balance. See: *Breitenbach v Fiat (Edms) Bpk* 1976 (2) SA 226 (T).
- [21] The purported failure of the equipment does not amount to a defence as against the plaintiffs. See: *South African Securitisation Programme (RF) Ltd v Fullimput 11 (Pty) Ltd t/a Barons Place and Another* 2021 JDR 1671 (WCC).

[22] On behalf of the plaintiffs, Mr Aucamp dealt with the point taken concerning the non-compliance with section 2 of the State Liability Act 20 of 1957 by not serving the summons on the MEC or Head of a State Department. He referred to the matter of Minister of Police and Others v Samuel Molokwane[3] where the Supreme Court of Appeal emphasised that the purpose of the section was to ensure the Head of Department is legally represented.

In this case, the Head of Department was represented by counsel. In the fullness of the hearing Ms Kwanaite abandoned the special plea. There is consequently no need to belabour the point.

[23] Ms Kwanaite commenced her address resisting the application for summary judgment by submitting that the defendants have a bona fide defence as contemplated in Tumileng Trading CC v. National Security and Fire (Pty) Ltd[4]. In Tumileng,[5] the court held that:

“...A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant’s prospects of success are irrelevant”.

[24] Ms. Kwanaite submitted further authority in this regard, and proffered a defence based on section 217 of the constitution, which states that when an organ of state procures goods and services, it should do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. In this matter, the first rental agreement and the second rental agreement was not done in accordance with section 217 of the constitution because, there was not even a tender process that was conducted. There was only an agreement between the applicant and the first defendant, which on its own is not a valid agreement.

[25] Ms Kwanaite galvanised her submissions by stating that the contracting scheme by the school was not compliant with the National Treasury Note of 2007/8 or the rules for deviating from calling for competitive bids.

[26] Since this was not pleaded in the plea, it was submitted that the defendants still have an opportunity to amend their plea in terms of Rule 28(10) even though no notice or application to amend has been made so far.

[27] The above defences cannot prevail in light of the decision in Greater Tzaneen Municipality v Bravospan 252 CC[6] referred to on behalf of the plaintiffs. The Constitutional Court held that:[7]

“Unfortunately, the circumstances of this case are not unique. As Navsa ADP stated in Govan Mbeki:

“This case is part of an ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder.”

D.

CONCLUSION

[28] In light of the above scathing observations by the apex court, it is clear that no bona fide defence was advanced and that the plaintiffs are entitled to summary

judgment.

[29] In the result, the following order must follow:

[30] Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

IN FAVOUR OF THE SECOND PLAINTIFF:

- [1] Payment of the amount of R85 326.27.
- [2] Payment of interest on the amount of R85 326.27 at the rate of 12.50% per annum from 25 November 2021 to date of final payment.
- [3] Costs of suit, such costs to be taxed on the attorney and client scale.

IN FAVOUR OF THE FIRST PLAINTIFF:

- [1] Payment of the amount of R172 548.39.
- [2] Payment of interest on the amount of R172 548.39 at the rate of 13% per annum from 25 November 2021 to date of final payment.
- [3] Costs of suit, such costs to be taxed on the attorney and client scale.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 15/10/2024

Date of Judgment: 27 November 2024

On behalf of the Plaintiffs: Mr S. Aucamp

Instructed by:

On behalf of the Defendants: Ms R Kwanaite

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 27 November 2024.

[1] Act 20 of 1957.

[2] Act 84 of 1996.

- [3] Minister of Police v Molokwane [2022] ZASCA 111.
- [4] 2020 (6) SA 624 (WCC).
- [5] Supra at para 13.
- [6] [2024] ZACC 20.
- [7] At para 49.
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