

SOUTH AFRICA / JUDGMENT

South African Securitisation Programme (RF) LTD and Others v Cellsecure Monitoring and Response (PTY) Ltd and Others (21647/2021) [2022] ZAGPPHC 925 (25 November 2022)

[2022] ZAGPPHC 925

COURT

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

21647/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

No: 21647/2021

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED:

NO
25
November 2022
In the matter between:-
SOUTH
AFRICAN SECURITISATION
PROGRAMME
(RF)
LTD
First Plaintiff
FINTECH
UNDERWRITING (PTY) LTD
Second Plaintiff
SUNLYN
(PTY)
LTD

Third Plaintiff
V
CELLSECURE
MONITORING AND
RESPONSE
(PTY) LTD
First Defendant
CELLSURE
INTERACTIVE MANAGEMENT
SOLUTIONS
(PTY) LTD
Second Defendant
CELLSURE
HOLDINGS (PTY) LTD
Third Defendant

Coram: Kooverjie J
Heard on: 25
October 2022

Delivered: 25 November 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 25 November 2022.

SUMMARY: Rectification permissible in summary judgment proceedings – the defences raised are not bona fide as they are not in accordance with the plea - the contents of the plea are material when determining bona fide defences.

ORDER

It is ordered:-

1.
Rectification of the rental schedule to the rental agreement by the substitution on the description of the user recorded as Cellsecure Holdings (Pty) Ltd – 2001 (007287/07 with Cellsecure Monitoring and Response (Pty) Ltd – 1999/020357/07.
2.
Payment of the sum of R4,327,956.81.
3.
Interest on the aforesaid sum at the rate of 13% (prime plus 6%) per annum from 22 January 2021 to date of payment.
4.
Costs of suit.

JUDGMENT

KOOVERJIE J

SUMMARY JUDGMENT

- [1] The plaintiffs instituted action against the first defendant on the basis of an alleged breach of a written rental agreement. The plaintiffs now seek summary judgment against the defendants for payment of the outstanding rental amounts.

CONDONATION

- [2] The defendants requested condonation for the non-timeous filing of their opposing affidavit. The defendants were required to file their affidavit five days before the hearing of the application. However, the affidavit was only filed a day before the set down date. This caused the matter to be removed with the defendants tendering the wasted costs occasioned by the postponement. The core explanation was that the defendants' instructing attorney developed severe COVID symptoms at the time and was unable to timeously attend to the matter and consult with the defendants.
- [3] It was argued that there was no prejudice to the plaintiff.
- [4] I am amenable to grant condonation for the late filing of the opposing affidavit as I find the explanation to be reasonable and furthermore the plaintiffs have not contested the defendants' explanation for the delay.

BACKGROUND

- [5] In July 2018 the first defendant and Alternative Rental Solutions (Pty) Ltd ("ARS"), previously TBI Asset Rentals (Pty) Ltd ("TBI"), the cedent, concluded a rental agreement with the defendants. Such agreement together with the rental schedule was annexed as Annexure 'A1' to the particulars of claim. The rental agreement commenced on 1 August 2018 and the duration was for a period of 60 months. The monthly rental instalments were calculated to R107,825.62.
- [6] It was alleged that if the rental agreement had run its full period the total amount would have been R6,468,937.20. The first defendant only paid R2,140,980.39 which was for a period of 18 months. It was alleged that an amount of R4,327,956.81 remains due and payable. The second and third defendants bound themselves as guarantors and co-principal debtors with the first defendant.
- [7] There were also various cessions. The rights, title and interest in the rental agreement were ceded from ARS to Sunlyn (Pty) Ltd (the third plaintiff). The second cession was with Fintech Underwriting (Pty) Ltd (the second plaintiff) and the third cession with the first plaintiff, the South African Securitisation Programme (RF) (Pty) Ltd ("SASP").

- [8] The first defendant, Cellsecure Monitoring and Response (Pty) Ltd signed a written certificate of acceptance accepting delivery of the equipment.
- [9] In these proceedings the plaintiffs' main contention was that the new defences raised in the affidavit have no merit and same should have been raised in the plea. The new defences raised by the defendants were the following:
- (i) the rental agreement does not record the true nature of the agreement between the parties;
 - (ii) the certificate of acceptance was signed in error;
 - (iii) the certificate of balance does not constitute prima facie proof of the first defendant's indebtedness. Moreso it was defective as it should have been signed by "ARS" and not "SASFIN";
 - (iv) no certificate of balance was furnished in respect of the second and third defendants' indebtedness;
 - (v) the deponent lacked personal knowledge;
 - (vi) a dispute was raised regarding the rectification the plaintiff proposed.

THE PLEADINGS

- [10] It cannot be disputed that the plea constituted bare denials. It is established law that a plea constitutes a bare denial when the defendant does not clearly and concisely state the material facts upon which he relies for his defence, alternatively does not state his defence with sufficient particularity to enable the plaintiff to reply thereto.
- [11] The plaintiffs, in their supporting affidavit to the summary judgment application, alleged in paragraph 9:
- "9. I have read and considered the summons and particulars of claim in this action. I have read and considered the respondents' plea. The respondents' plea raises no triable issues whatsoever. The respondents have failed to make a single positive allegation which would constitute a defence to SASP.s claim. The respondents have simply sought to boldly deny every allegation made on behalf of SASP."*
- [12] Upon receipt of the plea, the plaintiffs claimed that their case remained undisputed, more particularly that:
- (i) the monthly rental was due and payable;
 - (ii) the equipment was delivered;
 - (iii) the second and third defendants signed as guarantors and co-principal debtors to the agreement;
 - (iv) there was a cession of rights; and
 - (v) the rental agreement was breached.

[13] In paragraphs 7 to 10 of the particulars of claim, the plaintiffs sought rectification in that the name of the “user” should have been the first defendant and not the third defendant. The plaintiff submitted that due to a common error, the name of the third defendant, Cellsecure Holdings (Pty) Ltd was recorded.

[14] The following was pleaded:

“7. On or about 18 July 2018 and at Midrand, Alternative Rental Solutions (Pty) Ltd (previously known as TBI Asset Rentals (Pty) Ltd and before that as 1973 ARS (Pty) Ltd with registration number 2017/481700/07 (hereinafter referred to as “the hirer”) and the first defendant, both parties represented by duly authorised persons, entered into a written rental agreement (“the rental agreement”), a copy whereof is annexed as Annexure ‘A1’, the terms thereof to be incorporated herein by reference.

8. The rental schedule to the rental agreement does not record the correct agreement between the parties, in that the first defendant is incorrectly recorded.
9. The rental schedule recorded Cellsecure Holdings (Pty) Ltd – 2001/007287/07 as a user where it should have recorded Cellsecure Monitoring and Response (Pty) Ltd – 1999/020357/07 as the user.
10. The failure to correctly record the first defendant on the rental schedule to the rental agreement was occasioned by a common error between the parties and the parties concluded the rental agreement in a bona fide but mistaken belief that it recorded the correct agreement between the parties.”

[15] The defendants’ response to the said paragraphs was:

“Save to admit that the first defendant attended to the signing of the document purporting to be a rental agreement, the balance of this paragraph is denied and the defendants put the plaintiffs to the proof thereof.” (Paragraph 4 of the plea).

[16] Further at paragraphs 12 and 13, the plaintiff pleaded that the rental equipment was delivered and the rental amounts were due and payable:

“12. The first defendant would pay rentals to the hirer of R107,815.62 plus VAT per month, commencing on the date as defined in the rental agreement and thereafter on the same day of each succeeding month. The first defendant acknowledged that the equipment had been delivered and installed in accordance with the terms and conditions of the rental agreement.

13. The hirer accordingly complied with all its obligations in terms of the rental agreement. The certificate of acceptance signed by the first defendant is annexed hereto and marked Annexure ‘A2’ thereto.”

[17] The defendant’s response thereto constitutes a bare denial. At paragraph 5 it was pleaded:

“5. The allegations are denied.”

[18] At paragraphs 15 to 17, the plaintiffs pleaded that the second and third defendants bound themselves as guarantors. The defendants' response thereto was again a bare denial. The same response was furnished regarding the cessions which the plaintiff pleaded in paragraphs 18 to 25 in its particulars of claim.

[19] On the issue of the amount due and payable the plaintiffs pleaded at paragraphs 30 to 34:

"THE AMOUNTS DUE BY THE DEFENDANT

30. The first defendant breached the terms of the rental agreement in that it failed to maintain regular monthly payments.
31. The failure to continue to maintain the monthly agreed upon instalments constituted a breach of the rental agreement which breach entitle SASP to claim immediate payment of all the amounts which have been payable in terms of the rental agreement until the expiry of the rental period, whether such amounts are then due for payment or not.
32. As at 21 January 2021 the outstanding balance in respect of the rental agreement calculated to an amount of R4,327,956.81 and in confirmation of such amount, a certificate of balance is issued by SASP and annexed hereto as 'E'.
33. The prime rate as defined in the rental agreement as of date of due payment being 21 January 2021, was 7.00% per annum.
34. In the premises, the first, second and third defendants, jointly and severally, the one paying, the other to be absolved, are indebted to SASP in the amount of R4,327,956.81 together with interest thereon at a rate of 13.00% (prime plus 6%) per annum from 22 January 2021 to date of final payment."

[20] The defendants' response once more constituted a bare denial. The response in the plea at paragraph 11 was:

"11. The allegations are denied."

[21] Ordinarily such bare denials would entitle a plaintiff to relief sought in its claim. In Bragan[1] at paragraph 16 the court remarked:

"An applicant for summary judgment is therefore entitled to rely on a plea in considering whether or not to launch an application for summary judgment. Where a defendant has failed to disclose a defence in its plea, a plaintiff (in most instances) be entitled to the relief sought in its claim."

The court further went on to say:

"I accept that there may be circumstances in which a defendant in summary judgment may well be able to raise a defence in an affidavit

resisting summary judgment but which was not raised in its plea. However, this is not the case in the present matter. In the present

circumstances the defences raised in the affidavit resisting summary judgment clearly were an afterthought for the reasons I have already alluded to. This is precisely what the drafters of the new rule have tried to avoid.”

[22] Cognisance is taken of the fact that with the amendments to Rule 32, a plaintiff is only able to apply for summary judgment after the delivery of the plea. Previously, summary judgment proceedings could be instituted upon the notice of intention to defend being filed. The rationale behind the amendments was so that summary judgment proceedings could be adjudicated on the basis of the defendant’s pleaded defence. This was particularly to avoid a situation where the defendant’s version in its opposing summary judgment application diverges materially from the subsequently delivered plea.

[23] In Bragan reference was made to the Firstrand Bank Ltd v Shabangu and Others[2] matter where the rationale of the amended Rule 32 process was explained:

“It sets out the intention of the legislature to address the shortcomings of the position under the old rule bearing in mind that the plaintiff is required to bring a summary judgment application at the time when a possible defence to the claim has not yet been disclosed in the plea. The amended rule now requires an affidavit in support of summary judgment to be filed only once the defendant’s defence to the action is apparent, by virtue of having been set out in a plea.”

BONA FIDE DEFENCE

[24] In order to successfully resist the summary judgment application, the defendants must satisfy the court that they have a bona fide defence by disclosing fully the nature and the material facts upon which the defence is premised. Whilst it is not required of the defendants to exhaustively deal with the facts and the evidence relied upon, they must at least disclose the defences and the material facts with sufficient particularity and completeness so as to enable the court to decide whether the aforesaid discloses a bona fide defence.[3]

[25] Rule 32(3) requires an opposing affidavit to fully disclose the nature and grounds of the defence and the material facts relied upon. A defendant cannot merely make bald denials.[4]

[26] At paragraph 15 in Bragan the court reiterated the purpose of pleadings. It stated:

“The role of pleadings in litigation is well-known and need not be restated in detail. The object of the pleadings is to define the

issues upon which a court will be called upon to adjudicate and to enable the parties to prepare for trial on the issues as defined.

Pleas are answers by the defendant to the claims made against it by the plaintiff and in which its defence is set out. Rule 22(2)

stipulates:

A defendant shall in its plea either admit or deny or confess and avoid all material facts alleged in the combined summons or declaration or state which of the stated facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which it relies.”

[27] I am of the view that in determining whether a defence is bona fide and whether there are triable issues, the contents of the plea are material.

[28] It is for this reason that the defendants are required to fully set out the nature and the grounds of its defence as well as the material facts relied upon in its affidavit, with reference to the plea.[5] The defences therefore raised in the affidavit supporting summary judgment should be in harmony with the plea.[6] The plea should further comply with the provision of Rule 18(4) and 22(2) in that it should clearly and concisely set out all the

material facts relied upon for the defence in order for the plaintiff in the context of summary judgment proceedings, to consider whether or not the defence as pleaded raises any issue for trial.

[29] Pleadings define the ambit of the dispute. They indicate what the nature of the dispute is and what facts must be proven by the plaintiff to sustain the claim.

[30] The golden rule of a pleading is that the opposite party must be fairly apprised of the case which is to be raised against him, and denials must accordingly be pleaded with such certainty that he may be able to know what the issues in dispute are.[7]

[31] Notably the defences set out in the opposing affidavit that concern the merits, namely the rental amount due and payable; delivery of the equipment; and that the rental agreement does not record the true nature of the agreement, are not in harmony with the plea.[8]

[32] For the defendants to be successful, it was vital to have set out the material facts upon which the defences were premised. Instead the responses constitute bare denials.

[33] I am mindful that a bona fide defence is assessed upon a consideration of the extent to which the nature and grounds of the defence and the material facts relied upon have been canvassed. Bona fides does not mean that the defendant has to satisfy the court that his version is believed to be true. All the defendant is required to do is to swear to a defence valid in law, in a manner which is not seriously unconvincing. Put differently, he should show that there is a reasonable possibility that the defence he advances may succeed on trial.[9]

[34] I am further mindful that at this stage of the proceedings, the court is not required to decide the disputed issues or determine whether or not there is a balance of probabilities in favour of another. The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide.

THE DEFENCES

Rental Agreement

- [35] As alluded to above, the defendants placed the issue of rectification into dispute. The plaintiffs pleaded that due to a common error between the parties, the rental schedule incorrectly reflected the name of the third defendant instead of the first defendant.
- [36] A claim for rectification of a contract may be granted in summary judgment proceedings provided that the plaintiffs are able to demonstrate that the parties were ad idem as to the respects in which their written contract does not concisely reflect their agreement.[10]
- [37] In the opposing affidavit, the defendants raise issue with the fact that the rental schedule incorrectly recorded the agreement between the parties. In particular, they disputed that:
- (i) the amount stipulated in the rental schedule;
 - (ii) Part B to the schedule is non-existent;
 - (iii) no rental quotation was agreed upon by the parties;
 - (iv) the wording in the rental schedule is vague.

However, they do so without placing the material facts they rely upon, hence setting out their version.

- [38] A sufficient and full disclosure of the material facts is necessary to persuade the court that what the defendants alleged, if it is proved at the trial, would constitute a defence to the plaintiff's claim. The onus is always on the party claiming rectification to show, on a balance of probabilities, that it should be granted.
- [39] Rectification of a written agreement is a remedy available in instances where the agreement, through a common mistake, does not reflect the true intention of the contracting parties or where it erroneously does not record the agreement between the parties.[11]
- [40] The principle requirement for rectification is that the common continuing intention of the parties is not reflected in the agreement. Therefore the parties cannot cause the incorrect words in their agreement to be the true intention. This is contrary to the basis of our contractual law.[12]
- [41] In *Brits v Van Heerden*[13]the court stated that rectification may be granted where the written memorial of an agreement does not reflect the true consensus of the parties.
- [42] On the facts I have noted that both the Master Level Agreement and the Addendum thereto recorded the first defendant as the "user".
- [14] The rental schedule, however, reflected the third defendant's name as the "user". This was clearly an error. Therefore it cannot be gainsaid that the parties' continued common intention, at all relevant times, was that the "user" was the first defendant, Cellsecure Monitoring and Response (Pty) Ltd.

[43] The further defences that pertain to the wording in the rental schedule, namely the use of the word “services” and further that Annexure ‘B’ was not attached to the schedule are, in my view, not bona fide. The defendants should have at least raised such defences in their plea and illustrated the basis of their defences. Instead, their response constituted a bare denial. The only inescapable conclusion that one can draw is that the said defences were contrived. In the premises, the plaintiffs’ relief for rectification is granted.

DELIVERY OF THE EQUIPMENT

[44] On this aspect the defendants raise the defence of justus error. Mr van der Merwe, who deposed to the affidavit on behalf of the defendants, argued that the certificate of acceptance was signed

without him reading through the contents thereof. Again this does not constitute a bona fide defence.

[45] In my view, the defendants can surely not escape their obligations by relying on Mr van der Merwe’s omission to read the certificate confirming the delivery of the rental equipment. A mistaken party is not able to escape from a contract if his conduct of not reading the certificate was due to his own action. There are no allegations that the plaintiffs misled him or that misrepresentations were made.[15]

[46] In fact, the wording in the certificate expressly and clearly set out:

“... Kindly sign at the foot of the copy hereof, thereby confirming that the goods have been delivered and installed to your satisfaction, on receipt of which we shall pay the supplier.

Once signed ... which will constitute your confirmation of the commencement of your liability to us in terms of the agreement.”

[47] The question that begs an answer is: why was such version not pleaded in the plea? To the contrary, as indicated above, the defendants’ response in the plea constituted a bare denial. This defence, in my view, is also not bona fide.

AMOUNTS OWING

[48] It is not in dispute that the defendants complied with their payment obligations for at least 18 months in respect of the said agreement. Despite a bare denial in the plea, they now, in their opposing affidavit, raise the issue of SASFIN’s authority.

[49] The defendants do not dispute that the certificate of balance constitutes prima facie proof of the amount owing. The contentions raised are that: the certificate was not agreed to between the parties; secondly, the certificate does not set out the basis of the calculation in arriving at the amount of indebtedness; thirdly, the certificate had to be certified by TBI and not SASFIN; and lastly, the parties agreed to a certificate issued by the hirer, TBI, and not a cessionary of TBI.

[50] I have noted that the master rental agreement recorded that the amount of indebtedness would be that which is set out in the certificate of balance. Clause 2.10.3 of the Master Lease Agreement states:

“A certificate signed by any of our managers or authorized person(s) certifying the amount due by the user or any other matter relating

thereto, will on the face of it, be the amount of the user’s indebtedness. It shall not be necessary to prove the appointment of the person signing such certificate.”[16]

[51] The certificate of balance further sets out the following that: the person certifying the balance is a senior litigation manager of SASFIN Bank; SASFIN administrates and manages the rental agreements on behalf of the first plaintiff; and the facts are within his personal knowledge and he is duly authorized to certify the indebtedness of the user on behalf of the SASP.[17]

[52] It should be emphasized that the said defences are once again raised without the defendants setting out a version of what the amount should be as well as the fact that there was an agreement that the certificate would be issued by TBI.

[53] I may mention that our rules of court allow parties to amend their pleadings. In this instance, the defendants could have amended their plea so as to align the defences raised in the affidavit. Instead the plea remains one of bare denial and does not raise any triable issues. I reiterate, the defendants could not rely on defences which are unrelated to their version on the plea. On this basis the rest of the defences are not bona fide.

[54] A defendant who intends to disclose a bona fide defence in its affidavit which is not raised in its plea should first deliver its notice of intention to amend the plea in terms of Rule 28(1)(ii). The court may, in terms of Rule 28(10), at any stage before judgment grant leave to a party to amend any pleading or document.[18]

[55] The Supreme Court of Appeal in NPGS Protection and Security Services CC v Firststrand Bank Ltd[19] warned litigants that:

“The ever increasing perception that bold averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by the court. See for example the well-known

judgment

of this court in Maharaj v Barclays Bank Ltd 1976 (1) SA 418 A where the proper approach to applications for summary judgment is stated.”

PERSONAL KNOWLEDGE

- [56] It is acknowledged that this defence could not have been raised in the plea. However, a determination must be made as to whether the defence has merit. The defendants raised the point that the deponent to the supporting affidavit lacked personal knowledge. It was further argued that the mere fact that the deponent was authorized to act on behalf of the plaintiffs does not imply that he has personal knowledge.
- [57] In my view, there is no merit to this defence. The deponent states in his affidavit the following that: the defendants' files are in his possession and control; he has familiarized himself with the documents and he was duly authorized to represent the first plaintiff.[20] Under the said circumstances, the deponent acquired knowledge of the matter.
- [58] Our courts have been seized with this legal point time and again. It has exhaustively been found that where an applicant was an entity, the deponent to the affidavit need not have first had knowledge of the facts. The deponent could rely on the documents in its possession and upon perusal thereof confirm his/her personal knowledge of the matter.[21]

CONCLUSION

- [59] In conclusion, I find that the defendants' defences are unsustainable. In my view, they are not bona fide, nor are they good in law. In the premises, I find that the plaintiffs are entitled to the relief sought.

H KOOVERJIE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:

Adv S Aucamp

Instructed by:

Smit, Jones & Pratt

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Counsel for the respondent:

Adv LVR van Tonder

Instructed by:

Smit Sewgoolam Inc

Date heard:

25 October 2022

Date of Judgment:

25 November 2022

- [1] Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and Another (11096/20) [2020] ZAGPP 387, 5 August 2020
- [2] 2020
- (1) SA 155 (GJ), see paragraphs 14 and 15 of Bragan
- [3] Maharaj v Barclays National Bank Ltd 1976 (1) SA 419 at 426
- [4] NPGS matter at par 11
- [5] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 524 (WCC) at paragraphs 22, 24, 26 – 27.
- [6] Erasmus Superior Court Practice van Loggerenberg, Second Edition, P D1-416
- [7] Modipane v MM Dada Bk h/a Dada Motors Lichtenburg (1559/2010) [2011] ZANWHC 43 (30 June 2011)
- [8] Belrex 95 CC v Barday 2021 (3) SA 178 WCC at par 35
- [9] Erasmus Superior Court Practice, Van Loggerenberg, P D1-411
- [10] PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68
- [11] PV v EV (843/2018) ZASCA 76 (30 May 2019 at par 13
- [12] PV v EV, par 13
- [13] 2001
- (3) SA 257C at 283B
- [14] 001-19 and 001-31
- [15] Slip Knot Investments 777 v Du Toit 2011 (4) SA 72 and Constantia Insurance Co Ltd v Composure 2003 (4) SA 345 (SCA) at par 19
- [16] P 001-22
- [17] P 001-80
- [18] Belrex 95 CC v Barday 2021 (3) SA 178 (WCC)
- [19] 2020
- (1) SA 494 (SCA) at 509 F-G
- [20] P 006-5

[21] Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA)

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