

SOUTH AFRICA / JUDGMENT

South African Securitisation Programme RF Ltd v Initiative for Specialized Resources Management (Pty) Ltd and Others (2023/045850) [2024] ZAGPJHC 545 (6 June 2024) [2024] ZAGPJHC 545

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.S. Kruger

CASE / FILE NUMBER

2023/045850

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2023 – 045850

1. REPORTABLE: YES / NO

2. OF INTEREST TO OTHER

JUDGES: YES/NO

3. REVISED: YES/NO

In

the matter between:

SOUTH
AFRICAN SECURITISATION PROGRAMME
RF
LTD
Applicant/Plaintiff
and
INITIATIVE
FOR SPECIALIZED RESOURCES
MANAGEMENT
(PTY) LTD
First
Defendant
DANIEL
FRANCOIS DU TOIT
Second
Defendant
RUDOLF
JOHANNES VAN WYK RAUTENBACH
Respondent/Third
Defendant

JUDGMENT

KRUGER, AJ

Summary

Application for summary judgment against the third defendant as guarantor and co-principal debtor. Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973

- (3) SA 49 revisited- for a Court to exercise its discretion to give leave to defend, facts of exceptional nature must be placed before Court to establish reasonable grounds to believe a claim is not correct. Barely legible annexures are unhelpful and frowned upon- costs.

Order

[1] In this matter, for the reasons set out below, I make the following order:

Summary judgment is granted against the third respondent subject to any judgment granted against the first and/or second defendant for:

- (1) Payment to the plaintiff in the sum of R 578 090.66;
- (2) Payment of interest on the aforesaid amount at the prime interest rate plus 6% per annum from 12 April 2023 to date of payment;
- (3) Costs of suit to be taxed on the scale as between attorney and client.

Introduction

- [2] The applicant shall be referred to as the plaintiff and the respondent as the third defendant.
- [3] The plaintiff instituted action for specific performance against the defendants jointly and severally, payment by one to absolve the others, for the temporary return of certain specified equipment (“the equipment”) hired to the first defendant by Sunlyn (Pty) Ltd (“Sunlyn”) in terms of a Master Rental Agreement (“the contract”) as well as payment in the sum of R 578 090.66 together with interest calculated at prime plus 6% per annum from 12 April 2023 to date of payment and costs of suit on the scale as between attorney and client. The contract was concluded on 28 April
2020. As at 11 April 2023 the first defendant is alleged to have been in arrears with payment of rental in the sum of R 213 293.27.
- [4] The contract is made up of several parts one of which is styled “Terms of Business”. Copies of the various parts constituting the contract are annexed to the particulars of claim. The Terms of Business is alleged to stipulate, amongst others, that in the event of the first defendant failing to make payments, Sunlyn has the right to claim immediate payment of all amounts which would have been payable in terms of the contract until the expiry of the rental period, whether such amounts were then due for payment or not (“future rentals”). Sunlyn is then to take possession of the equipment and to return same to the first defendant on payment of all amounts owing to it without deduction of any amount owing as a result of the loss of possession of the goods by the first defendant. These terms are set out in clause 11 of the Terms of Business as pleaded in paragraph 5.11 of the particulars of claim. Clause 13 stipulates that a certificate signed by any manager of Sunlyn or any other authorised person certifying the amount due by the first defendant will, on the face of it, be proof of the amount of the first defendant’s indebtedness.
- [5] The claim for payment in the amount of R 578 090.66 includes future rentals.
- [6] It is alleged the second and third defendants concluded a written guarantee in terms of which they bound themselves as co-principal debtors and/or guarantors with the first defendant jointly and severally in favour of Sunlyn or its cessionary should any cession arise, for the due and proper fulfilment of the first defendant’s obligations in terms of the contract.
- [7] On 29 March 2009, Sunlyn and Sasfin Bank Limited (“Sasfin”) had concluded a cession of the contract in terms of which Sunlyn, amongst others, ceded existing and future contracts to Sasfin. A copy of this cession agreement is annexed to the particulars of claim.
- [8] On 17 June 2020, Sasfin and the plaintiff concluded a Sale and Transfer Agreement in terms of which, amongst others, the contract was sold by Sasfin to the plaintiff whereby the latter obtained all of Sasfin’s rights, title and interest in and to the equipment leases. Sasfin would deliver all documents relating to, and all agreements recording the equipment leases to the plaintiff or its nominees. Sasfin would be deemed to have delivered the equipment to the

plaintiff by way of attornment at the premises at which such equipment is situated on the basis that the lessee would after the effective date of the Sale and Transfer Agreement hold such equipment on behalf of the plaintiff. In the result, the contract was sold by Sasfin to the plaintiff. Copies of the Sale and Transfer Agreement are annexed to the particulars of claim.

- [9] In summary, the third defendant in his plea admits that the initial rental period of the contract after its completion would run indefinitely until either party on 30 days' written notice terminates the contract. He also admits that the first defendant agreed to pay all rentals which would escalate at the rate of 15% per annum in advance every month. It is further admitted that the third defendant concluded the written deed of guarantee with Sunlyn. The cession between Sunlyn and Sasfin is not denied but 'noted' and the terms admitted in accordance with the copy annexed to the particulars of claim. The sale of the contract by Sasfin to the plaintiff is admitted together with the copy annexed to the particulars of claim.
- [10] In so far as the third defendant denies any of the terms of the contract's Terms of Business as alleged in the particulars of claim, it is on the grounds that the ".....attachments referred to by the plaintiff are illegible" and that "...the terms and conditions relied upon by the plaintiff is [sic] illegible and any reference to any addition agreement as pleaded can therefore not be admitted or denied." and so forth. As regards the first defendant's breach of the contract by non-payment, the third defendant alleges that he terminated all dealings with the first defendant during 2022 and has no knowledge thereof. He admits that the cedent complied with its obligations, but denies that all equipment was delivered.
- [11] Application for summary judgment was made on or about 2 August 2023 against all the defendants "...jointly and severally payment by the one the other to be absolved..." for the return of the specified goods and for payment in the sum of R 578 090.68 together with interest calculated thereon at the prime rate plus 6% per annum from 12 April 2023 to date of payment. The application against the first and second defendant was wrong in that they did not defend the action. The application for summary judgment proceeded against the third defendant only.
- [12] Judgment by default was granted against the first and second defendants on 28 February 2024 jointly and severally, payment by the one to absolve the other for the same relief as prayed for in the summary judgment application.
- [13] In the affidavit opposing summary judgment the third defendant denies the application for summary judgment was deposed to by a person as required in Rule 32(2)(b) of the Uniform Rules of Court. Also, the accuracy of the certificate of balance is contested mostly on the basis that its author is not in the employ of the plaintiff, but a senior litigation manager with Sasfin. The third defendant continues his complaint that the Terms of Business portion of the contract annexed to the particulars of claim is illegible and offends against the provisions of Uniform Rule of Court 18(6) which results in him being unable to comment on it. As to the allegation that the first defendant breached the contract by failing to pay rental

to the extent that, as at 11 April 2023 the arrears were R 213 293.27, the third defendant reiterates that his involvement with the first defendant came to an end in February 2022 with the result that he has no knowledge thereof.

- [14] In the third defendant's heads of argument, the defence raised pertaining to the illegibility of the Terms and Conditions is pursued, as is the question of compliance with Uniform Rule of Court 32(2) regarding the deponent to the affidavit in support of the application for summary judgment. The third defendant's severance of his ties with the first defendant and his consequent lack of knowledge are brought to bear in arguing that in the circumstances it cannot be said that he does not have a defence to the application.
- [15] At the hearing of the summary judgment application, the plaintiff revised the relief claimed and accordingly handed up a draft order . It no longer seeks the return of the equipment from the third defendant, only payment as claimed.
- [16] The various defences raised at the hearing are dealt with hereunder.

Alleged non-compliance with Rule 32(2) pertaining to the deponent of the affidavit in support of the application for summary judgment as well as the question relating to the authorship of the certificate of balance

- [17] Counsel for the third respondent did not seriously pursue these defences during the hearing, instead simply relying on what he had stated in his heads of argument. Counsel for the applicant pointed out that these defences were ill conceived with reference to the affidavit filed in support of the summary judgment application in which the deponent, Mr Govender, declares that he is employed by Sasfin as its litigation manager. He continues that Sasfin is in possession, administers and manages rental agreements which had been ceded, sold and transferred to the plaintiff, which is an associated company of Sasfin. The latter performs all administrative and litigious functions in relation to the enforcement of such ceded and transferred rental agreements. Mr Govender expressly confirms he is authorised to depose to the affidavit on behalf of the plaintiff. It is further recorded in paragraphs 3 and 4:

"3. In the ordinary course of performing my function as Litigation Manager in Sasfin's administration and enforcement of rental agreements so ceded and transferred to Sasfin and the Plaintiff, I have read the records, documents and accounts pertaining to the current action, as well as the Plaintiff's particulars of claim and the annexures thereto."

4. In the premises the facts set out herein are within my personal knowledge and are to the best of my knowledge both true and correct."

- [18] The Supreme Court of Appeal in *Rees and Another v Investec Bank Ltd*[1], following upon *Barclays National Bank Ltd v Love*[2] and *Maharaj v Barclays National Bank Ltd*[3] held that where the plaintiff in a summary judgment application was a corporation, the deponent to the verifying affidavit need not have first-hand knowledge of every fact comprising its cause of action. The deponent could rely for its knowledge on documents in the corporation's possession.
- [19] Having regard to the above and the contents of the verifying affidavit regarding the deponent's position of employment and function as well having read the records, accounts and the like of Sasfin, it is clear the deponent is a person who can swear positively to the facts, has authority to do so and otherwise is in compliance with the requirements of Uniform Rule of Court 32(2). The deponent confirms the sum of R 578 090.66 as being the sum of arrears and future rentals. The certificate of balance wherein it is certified that the first defendant is indebted to the plaintiff in the sum of R 579 090.66 was done by a senior litigation manager of Sasfin. It follows that for much the same reasons the attack on the deponent of the verifying affidavit fails, the dispute regarding the certificate of balance also fails.

Illegibility of the Terms of Business annexure

- [20] The third defendant contends that the crux of the relief claimed by the plaintiff is based on a part of the contract named "Terms of Business", the copy of which annexed to the plaintiff's particulars of claim is illegible. In the result the applicant had failed to comply with Rule 18(6) of the Uniform Rules of Court. It was argued that an applicant for summary judgment, in accordance the judgment in *Gulf Steel (Pty) Ltd v Rack-Hire Bop (Pty) Ltd*[4] is required to satisfy the court that the claim has been clearly established and that the pleadings are technically in order and until such time as these requirements are met, summary judgment stands to be refused.
- [21] As was the case in the unreported judgment of Mr Justice Manoim in *DSV South Africa t/a DSV Air and Sea v Phoenix Neomed (Pty) Ltd*[5] the third defendant omitted to have availed himself of provisions in the Uniform Rules of Court such as Rule 30 read with Rule 18(12), Rule 35(12) and Rule 35(14). Nor did it request a better copy of the part of the contract complained of. It was held that in such circumstances, the illegibility of the copy relied upon by the plaintiff does not raise a triable issue and does not justify the granting of leave to defend. I find myself in agreement with that judgment in the context of the prevailing circumstances in this matter.
- [22] Counsel for the third defendant sought to distinguish DSV on the basis the third defendant had stated in its plea that the Terms of Business was illegible. Despite this, the plaintiff has not provided a legible copy.

- [23] The full copy of the contract runs to some 10 pages. Of those, the Terms of Business consists of two pages. No doubt it is very difficult to read. At first blush it seems wholly illegible, but on closer inspection it is legible, though it requires patience and perseverance. Also, the papers of the matter are uploaded to Case Lines which provides for a document to be viewed and zoomed in. In doing so, the copy of the Terms of Business is legible albeit with difficulty.
- [24] The third defendant elected not to plead, at least in the alternative and on the assumption that the terms of the Terms of Business corresponds with the extensive pleading of its terms in the particulars of claim, any defence valid in law. Had there been any facts which may have substantiated any such defence, such as perhaps absence of consensus, misrepresentation, error and the like, one would have expected it to have been pleaded by the third defendant. Instead, he elected to pin his defence in this respect on his alleged inability to read the Terms of Business. In the result no defence valid in law has been raised in this respect. The terms of the contract as pleaded in the particulars of claim corresponds with the contract annexed to the particulars of claim. In particular the terms pleaded in paragraph 5.11 of the particulars of claim corresponds with Clause 11 of the Terms of Business as annexed to the particulars of claim. It provides for the following:

“5.11 If the 1st Defendant breaches any of the conditions or terms of the Master Rental Agreement, or fail to pay any amounts due to Sunlyn...then the 1st Defendant agreed that Sunlyn has the right without notice to the 1st Defendant and without affecting any of Sunlyn's other rights to:

5.11.1 claim immediate payment of all amounts which would have been payable in terms of the Master Rental Agreement until expiry of the rental period...whether such amounts are then due for payment or not. Sunlyn is to take possession of the goods and only return them to the 1st Defendant on the receipt of all payment of all amounts owing to it. The 1st Defendant would not be entitled to withhold payment or make any deductions from any amount owing as a result of its loss of possession of the goods; or...”

- [25] As a consequence, the third defendant has failed to put up a bona fide defence as intended in *Breytenbach v Fiat SA (Edms) Bpk*[6] in this respect. The purported illegibility is not a triable issue in and of itself which warrants the granting of leave to defend.

The defence that the third defendant had no knowledge of the dealings of the first defendant after February 2022

- [26] For the third defendant it is contended that since he terminated his involvement with the first defendant prior to the latter falling in arrears with the rentals, he is unaware whether or not there was compliance with the contract by Sasfin. He cannot admit that the first defendant is in breach of the business terms, nor that it is indebted to the plaintiff either as alleged or at all. In the result, the third defendant requires the Court to exercise its discretion to grant leave to defend even though no bona fide defence valid in law has been disclosed.

[27] Counsel for the third defendant relied upon the judgment in *Gruhn v M Pupkewitz & Sons (Pty) Ltd*[7] it was found that where a the surety alleges that he has reason to believe the amount claimed does not represent the correct price of goods sold, it cannot be said that he has no defence to the application. A Court may exercise its discretion and give the surety

an opportunity of asking for further particulars[8] and of defending the action. In my view, the judgment must not be construed as an unfettered road to induce a court in such circumstances to exercise its discretion in favour of a defendant and on that basis only grant leave to defend. Facts of exceptional nature are to be placed before Court for it to exercise its discretion in favour of a defendant who offers no defence.

In *Gruhn* the defendant in the affidavit resisting summary judgment declared that he had reason to doubt the amount claimed on an acknowledgement

of debt namely R 22 871, 35 is wrong because in a summons issued against him before on another occasion on the same acknowledgment of debt, the sum was R 34 131,74. This action was withdrawn after a request for further particulars to enable him to plead. The Court found that this fact is not irrelevant as the inference may be drawn that the plaintiff may not have been able to provide the requested further particulars or were unwilling to do so. It elected to issue a new action thereby avoiding it being compelled to deliver the further particulars sought, simultaneously reducing the sum claimed to R 22 871,35. From this it may be inferred there existed a defence as to the withdrawn claim at least to the extent of the difference between the respective sums claimed. In addition, the defendant declared that the plaintiff omitted providing particulars of goods allegedly delivered despite numerous requests to do so. Also, the particulars of claim omitted setting out details of the alleged transactions upon which the claim is based.[9] Having regard to what the Court described as the exceptional nature of all the facts placed before it by the defendant, it found the Court below should have exercised its discretion in favour of the defendant.

[28] It seems to me that the third respondent has failed to make a case that he has reason to believe the plaintiff's claim is wrong in any respect, be it the amount claimed or any other part of the facts alleged in sustaining the cause of action as set out in the particulars of claim. The third defendant elected to rely almost entirely upon the alleged illegibility of the Terms of Business, rather than pleading at least some defence in the alternative, as he might have done had there in fact been any defence available. On closer analysis questions raised by the third defendant in his plea as well as the affidavit resisting summary judgment which was not pursued in either his heads of argument or in argument before court, reveals that it has no merit. The third defendant found it concerning that the amount on the first page of the accelerated claim statement annexed to the particulars of claim, namely R 578 090.66, differs from a later page thereof where it is recorded as being R 561 712.84. This is explained by the fact that the latter does not include amounts indicated on the first page namely R 16 205.32 towards late charges and R 172.50 for process fees and the like. When these amounts are taken into account, the total amount of R 578 090.66 accords with the certificate of balance annexed to the particulars of claim. Though the third defendant admits equipment

to have been delivered for which a copy of a delivery note was annexed to the particulars of claim, he baldly denies the delivery of the balance. This is unconvincing because the delivery precedes his break with the first defendant by more than a year when one would expect him to have had knowledge of the first defendant's affairs.

[29] The third defendant also relied upon the unreported judgment in *Macsteel Service Centres SA (Pty) Ltd v Profin Trading 35 CC and Others* (96119/2015) [2016] ZAGPPHC in which summary judgment was sought against a surety for payment of goods sold and delivered to the principal debtor. Leave to defend was granted. For the sake of convenience paragraph 11 of the judgment, which is relied upon by the third defendant, is quoted:

*“...he says he had left the first respondent in 2010 already. He had to investigate the circumstances relating to the debt claimed by the plaintiff, which may reveal a defence or defences to the claim. It was also submitted in argument that the plaintiff issued a simple summons and has not annexed any document substantiating the claim amount and how it is arrived at. In *Mowchenson & Mowschenson v Morcantile Acceptance Corp of SA Ltd* 1959 (DJ SA 362 (W)) the court held that if there is doubt as to the evidence tendered by the plaintiff; the doubt should be resolved in favour of the defendant.”*

[30] Contrary to *Macsteel*, the plaintiff's claim is set out comprehensively in the particulars of claim to a combined summons which sets out the cause of action in particularity. It is supported by seven annexures consisting of some 48 pages which include, amongst others, copies of the contract and schedules thereto, a delivery note, guarantees, detailed statements of arrear as well as future rentals and the relevant cession agreements. The plaintiff duly substantiated its claims and there can be little, if any doubt as to the evidence tendered as referred to in *Mowchenson*. In the result, the judgment in *Macsteel* offers no succour the third defendant in the circumstances prevailing in this case.

[31] Finally, a word concerning costs. Litigants must ensure that annexures to pleadings are not only legible, but comfortably so. Failing to do so is unhelpful and detracts from the pursuit of an efficient legal process. It may well in future attract adverse

orders

as to costs.

Conclusion

[32] The relevant defences raised by the third defendant are technical in nature. No adequate substantive defence is offered on the facts pleaded.

[33] It is incumbent upon a defendant to fully disclose the nature and grounds of its defence and the material facts it relies upon with sufficient particularity to enable a Court to establish whether a bona fide defence has been set up. This third defendant failed to do.[10]

[34] No adequate reasons have been put forward upon which the Court might have exercised its discretion to grant leave to defend.

[35] For all the reasons as set out above I make the order as set out in [1].

N.S. KRÜGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION JOHANNESBURG

Electronically submitted.

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 06 June 2024.

Appearances:

COUNSEL FOR THE APPLICANT: Adv S Aucamp INSTRUCTED BY: ODBB Attorneys- Mr A du Toit
COUNSEL FOR THE RESPONDENT: Adv P Marx INSTRUCTED BY: Gerhard Botha Attorneys
DATE OF ARGUMENT: 16 May 2024 DATE OF JUDGMENT: 06 June 2024

[1] 2014 (4) SA 220 (SCA) at [8], [12] and [14]-[16]

[2] 1975 (2) SA 514 (D)

[3] 1976 (1) SA 418 (A) at 423A – H

[4] 1998 (1) SA 679 (O) at 683H-684B

[5] (2022-011215) [2023] ZAGPJHC 1028 (13 September 2023). Application for leave to appeal was dismissed: (2022-011215) [2023] ZAGPJHC 1364 (16 November 2023)

[6] 1976 (2) SA 226 (T)

[7] 1973 (3) SA 49

[8] The reference to a request for further particulars was to Uniform Rule of Court 21 as it was at the time. It allowed for a request for such particulars after delivery of a pleading to enable it to plead thereto. Since the rule was changed in January 1988, it is no longer allowed. Further particulars now may only be sought for preparation for trial after close of pleadings.

[9] At 57H-58B. The judgment is in Afrikaans. It reads: “Dat 'n koper teenoor 'n verkoper gewoonlik weet waarom die saak gaan, moet aanvaar word, maar dit is nie noodwendig dat 'n borg, wat instaan vir die prys van goedere verkoop en gelewer aan 'n koper, weet waarom die saak gaan nie. Sy probleem kan dus, a fortiori, groter wees. In die onderhawige saak moet die bewering van die verweerder dat hy rede het om te glo dat die bedrag in die skulderkenning genoem, nl. R22 871,35, nie die regte prys van die goedere verteenwoordig nie, m.i. gelees word, nie as 'n alleenstaande bewering nie, maar in samehang met die feite

wat hy onder eed uiteensit. Hy verklaar dat voorheen 'n dagvaarding teen hom uitgereik is op dieselfde borgakte, vir 'n bedrag van R34 131,74 en dat die aksie teen hom teruggetrek is nadat hy 'n aansoek gedoen het om nadere besonderhede. Hierdie bewering kan m.i. nie as irrelevant beskou word nie want die afleiding kan gedoen word dat die eiser nie behoorlik nadere besonderhede kon of wou verskaf nie en as gevolg daarvan 'n nuwe aksie ingestel het waarin hy die skulderkenning as skuldoorsaak wou voorstoot en daardeur wou probeer verhinder dat hy gedwing kon word om nadere besonderhede te gee. Terselfdertyd is die bedrag wat geëis word verminder van R34 131,74 na R22 871,35, waarvan afgelei kan word dat 'n verweer teen die eerste eis wel kon bestaan het ten opsigte van ten minste die verskil tussen die twee bedrae. Die verweerder verklaar verder dat ondanks herhaalde versoeke die eiser nog nie in staat was om besonderhede aan hom te verskaf van die goedere wat na bewering aan die koper gelewer is nie.”

[10] Tesven CC v SA Bank of Athens [1999] 4 All SA 396 (A)

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Prepared on 11 October 2026 · Esheria