

SOUTH AFRICA / JUDGMENT

Tip Trans Cape Pty (Ptd) v Muller and Others (61182/2016) [2017] ZAGPPHC 509 (23 August 2017)

[2017] ZAGPPHC 509

COURT

North Gauteng High Court, Pretoria

BEFORE

N M Mavundla

CASE / FILE NUMBER

61182/2016

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC

OF SOUTH AFRICA]

CASE

NUMBER: 61182/ 2016

Not

reportable

Not

of interest to other judges

Revised.

23/8/2017

In

the matter between:

TIP

TRANS CAPE PTY
(LTD) PLAINTIFF

And

PIETER

CHRISTIAAN

MULLER 1st

DEFENDANT

CAPER

HERMANUS

SCHOEMAN 2nd

DEFENDANT

JOHANNES

ALDARUS VAN
TONDER 3rd
DEFENDANT

JUDGMENT

MAVUNDLA J.

[1] This is an opposed application for summary judgment against the defendants, for:

1.1 payment in the amount of R549 064. 63;

1.2 interest at the rate of 12% from 1July 2015 to date of payment.

1.3 costs on attorney and client scale;

1.4 further and or alternative relief.

[2] The defendants oppose the summary judgment on the basis, inter alia, that:

2.1 the plaintiff has failed to respond to the rule 35(12) notice in terms of which they required all documents pertaining to paragraphs 1 and 2 of the applicant's affidavit dated 7 September 2016 and all records pertaining to the appointment of Simon Pieter Visser as director of the applicant;

2.2 the defendants performed a Windeed search from the records of the Company and Intellectual Property Commission which reveals that there are two Directors of the plaintiff, namely Simon Pieter Visser and Mbuzeni Sidwell Pharela, whereas the former stated in his affidavit for summary judgment that he is a sole director of the plaintiff and duly authorised to bring the application, which averment is disputed.

2.3 The defendant further contends that Visser, has not made material averments regarding his source of his knowledge for verifying the cause of action, regard being had to the disputed issue that he is a sole member of the applicant, whereas there are two directors.

2.4 The defendants admitted that they signed as sureties, they applied for the credit facility, but contend that the second respondent did not initial the standard terms and conditions of the credit agreement.

2.5 they further contend that they were not aware when they signed the agreement that they signed as sureties, which was not disclosed to them by the plaintiff.

[3] It is trite that in order to successfully resist summary judgment the defendants must satisfy the Court that they have a bona fide defence, by placing sufficient facts which show that the applicant's case is not unassailable; vide *Marsh and Another v Standard Bank of SA Ltd.*[1] They must disclose fully the nature and grounds of the defence and the material facts relied upon; Vide *Maharaj v Barclays Bank Ltd*[2]

[4] Rule 35(12) deals with the production of documents referred to in a pleading or an affidavit. It is however "not a procedural

mechanism to delay the resolution of the merits of a disputes." vide Patch Boudienste CC v First Rand Bank Limited.[3] The sanction for failure to comply with rule 35(12) is that the relevant document cannot be used by the party failing to produce same; vide Potpale Investments v Mkhize.[4] In casu the defendants did not resort to rule 30 A to compel compliance with rule 35(12); vide Centre For Child Law v Hoerskool Foschville.[5]

[5] The General Law Amendment Act, Act 50 of 1956 provides that:

"No contract of suretyship entered into after the commencement of this Act shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety..."; vide Litecor Voltex {Natal) v Jason.[6] The defendants' contention that they did not know that they were signing as sureties is devoid of any truth and controverted by the fact that annexure "POCI" which is the application for credit, reveals that the three defendants attached their signatures to this document. Immediately above their signatures reads the following "I/We further bind ourselves, in my/ our personal capacity/ies as sureties for and co-principal debtors with the applicant on the basis as set out in the Standard Terms and conditions hereunder." It is trite that a party who attaches his signature to a document is presumed to have read it, can hardly be heard to say he does not know what he signed for. In my view the defendants are disingenuous that they did not know what they bound themselves for and I therefore conclude that they knew that they were signing as sureties. In my view the defendants do not have a bona fide defence.

[6] In my view, the fact that the second defendant did not initial the standard trading terms and conditions document, does not nullify the main agreement which they signed as sureties. Where it is clear that the defendants know what the claim of the plaintiff is all about, and it is clear that they do not have a defence, save technical defences, the Court, in the exercise of its discretion, should not permit the defendants to hide behind technicalities to escape or delay paying the plaintiffs claim, as, in casu, the defendants are trying to do, in my view; vide Standard Bank of South Africa Ltd v Roestof"[7]

[7] The deponent to the summary judgment affidavit stated, inter alia, that the records of the applicant are in his control and supervision to which he refers where necessary and swears positively and verifies the cause of action and the amount. There is no merit on the defendants' attack that the deponent to the affidavit has no personal knowledge and does not verify the cause of action.

[7] In the premises I find that the defendants do not have a bona fide defence and consequently the following order is made against all three defendants, the one paying the other to be absolved:

1. payment in the amount of R549 064. 63;
2. interest at the rate of 12% from 1July 2015 to date of payment.

3. costs on attorney and client scale;

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 21/08/2017

PLAINTIFFS ADV : ADV. C.G.V.O. SEVENSTER

INSTRUCTED BY :BM ATTORNEYS

DEFENDANTS ADV : ADV Z SCHOEMAN

INSTRUCTED BY : D PALEOGOGU ATIORNEYS

[1] 2000(4) SA 947 at 949B-950B; also Shepstone v Shepstone 1974 (2) SA 462 (N) at 467A.

[2] 1976 (1) SA 418 (A) at 426AB.

[3] (unreported, GP case no 23898/ 15 dated 25 APRIL 20.16) at para [23].

[4] 2016 (5) SA 96 KZP at 103E.

[5] 2016 (2) SA 121 AT 13I C-D, H-1.

[6] 1988 (2) SA 78 (D)at 81F.

[7] 2004 (2) SA 492 WLD at 496 G -H.

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