



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No: 1188/2021

In the matter between:

GARDEN TO FLOORS (PTY) LIMITED

Plaintiff

And

BLACKTOPS CIVILS (PTY) LIMITED

First Defendant

XHOLILE ELSON DASHEKA

Second Defendant

THAMSANQA DASHEKA

Third Defendant

JUDGMENT

BESHE J:

-

[1] Plaintiff issued provisional sentence summons against defendants calling upon them to immediately pay, jointly and severally, the one paying the others to be absolved, an amount of R890 812.10 together with interest thereon. It is alleged that the amount claimed is for the hiring of plant equipment from the plaintiff in terms of a plant hire agreement which is attached as well as invoices in compliance with *Rule 8 (3) of the Uniform Rules* of this court. It is alleged that second and third defendants bound themselves as sureties in respect of first defendant's debt to plaintiff.

[2] In response to the provisional sentence summons, second defendant who describes himself as a director of the first defendant, **Mr Xholile**

Dasheka deposed to answering affidavit in terms of *Rule 8 (5)*. The ground upon which liability is disputed is essentially that the claim is not founded on a liquid document or liquidated claim and not premised on any services delivered or on agreed amounts.

[3] In the next paragraph however, **Mr Dasheka** states that after receipt of a letter of demand, they engaged with plaintiff and pointed out that according to their calculations, the amount due was R279 623.00 on the invoices. Further that, subsequent to that, two payments were made. That as at the time of issuing of the summons the outstanding amount was R279 623.00. This was followed by yet another payment of R139 812.00, resulting in the current outstanding amount being R139 811.00.

[4] **Mr Dasheka** goes on to assert that the agreement the plaintiff is relying on is in respect of different / previous project which has since been concluded in respect of which there are no outstanding payments. He further asserts that the plaintiff is intent of importing the terms of the previous agreement to the new agreement. Furthermore, that neither the third defendant nor himself stood surety for first defendant's debt in respect of the latter agreement.

[5] In reply, plaintiff denies that equipment is hired in respect of specific projects and asserts that it is hired in respect of all projects to be carried out by the defendants. Hence the agreement relied upon makes no mention of a "Raymond Mhlaba" Project. The court's attention is drawn to *Clause 4* of the agreement relied upon. *Clause 4* provides that the hire is for a definite period but if the equipment is not returned at the expiry of that period, the hirer of the equipment will continue upon the same terms and conditions for an indefinite period. According to the plaintiff, the defendants only off hired the plant on 30 June 2021. A letter to this effect is attached. Regarding the assertion that the claim is not based on a liquid document, plaintiff draws the court's attention to paragraph 31 of the terms and conditions of hire of plaintiff's equipment which provides that a certificate issued by a director or manager of the plaintiff as to

the existence of and the hirers' indebtedness to the plaintiff shall be sufficient and satisfactory proof thereof for the purpose of *inter alia*, provisional sentence. A certificate to this effect is annexed to plaintiff's summons as well as detailed invoices. According to the plaintiff, the documents relating to notification of the payments attached by the defendants are irrelevant as they relate to a period prior the invoices on which the present claim is based.

[6] The issue to be decided is whether the plaintiff has made out a case for a provisional sentence judgment, which will be so if the defendants have no valid defence to the claim and are merely playing for time as plaintiff suggests.

[7] In the matter between ***Twee Jonge Gezellen v Land and Agriculture Development Bank***¹ it was stated that "*the purpose of provisional sentence has always been to enable a creditor who has a liquid proof of his or her claim, to obtain a speedy remedy without recourse to the expensive, time consuming and often dilatory process that accompany action proceedings following upon an illiquid summons*". It was further stated that it precludes a defendant who does not have a valid defence from "*playing for time*".

[8] On a reading of the papers filed, I am satisfied that the claim is founded on a liquid document, it is a liquid claim, based on the agreement, statement account by plaintiff's official covering the period concerned as well as the detailed invoices.

[9] In the ***Twee Jonge Gezellen***² matter the Constitutional Court developed the common law to provide for courts to have a discretion to refuse provisional only where there defendant demonstrates:

(i) *an inability to satisfy the judgment debt*. In this regard, the defendants have made it clear that the company is in all respects solvent even though paying R890 872. 10 will have a disastrous effect

¹ 2011 (3) SA 1 CC at [18].

² Supra at 24 E – G.

on their business.³ So, clearly the defendants are able to satisfy the judgment debt;

(ii) an even balance of prospects in the main case on the papers; and

(iii) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.

[10] On the facts raised on the papers, do the defendants enjoy prospects of success in the main case? It is difficult to discern the defences raised by the defendants as they are contradictory. They range from alleging that the claim is not based on a liquid document, to disputing the amount outstanding on the basis that certain payments were made. Their calculations however bring the amount close to the one claimed by the plaintiff. They also contend that the claim is in respect of a separate agreement and plaintiff seeks to import the terms of that agreement to a latter one. Yet, the agreement produced by the plaintiff as having been entered into by the parties makes no reference to a particular project. Even though the defendants have taken the liberty to annex certain documents to their answering affidavit, they do not provide a separate / subsequent agreement entered into by the parties. I am of the view that the defendants do not enjoy a prospect of success in the main case. On the contrary, the possibility of the defendants “*playing for time*” as it were, cannot be excluded. Plaintiff has drawn the court’s attention to the stance that was adopted by the defendants in response to the issuing of summons. It is common cause that the defendants issued a *Rule 30* notice. This resulted in a postponement of the matter pending the outcome of defendants’ application in terms of *Rule 30 (2)*, with the defendants directed to file the *Rule 30 (2)* application within the time frames as stipulated in the said rule. Costs were reserved. However, no such application was forthcoming. I am satisfied that the plaintiff has made out a case for the granting of a provisional sentence judgment in its favour.

³ Paragraph [11] of the answering affidavit page 40 of the indexed papers.

[11] Accordingly, provisional sentence is granted in favour of the plaintiff against the defendants jointly and severally, the one paying the others to be absolved, for:

- 1. Payment of an amount of R890 812.10.**
- 2. Interest on the said amount at the prevailing legal rate as from 1 August 2021.**
- 3. Costs of the application, which costs shall include the reserved costs of the 5 October 2021.**

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

For the Plaintiff : Adv: V S Notshe SC
Instructed by : SJ SKOSANA ATTORNEYS
261 Oxford Street
EAST LONDON
Ref: G/CL1578
Tel.: 072 928 5008

For the Defendants : Adv: L A Roux
Instructed by : PEYPER ATTORNEYS
C/o BATE CHUBB & DICKSON ATTORNEYS
Suite 3, Norvia House
34 Western Avenue
EAST LONDON
Ref: Pieter van Zyl
Tel.: 043 – 532 5761

Date Heard : 5 May 2022
Date Reserved : 5 May 2022
Date Delivered : 1 July 2022

Judgment handed down electronically by circulation to the parties' legal representatives via email and release to SAFLII.

The date and time of handing down of the judgment is deemed to be 12h00 on the 1 July 2022.