



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 621/2023

In the matter between:

FILZO ENETERPRISES (PTY) LIMITED	First Applicant / First Defendant
LEON FILLIS	Second Applicant / Second Defendant
NOSIPHO FILLIS	Third Applicant / Third Defendant

and

MEYERS HIRE (PTY) LIMITED	Respondent / Plaintiff
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JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Govindjee J

[1] The applicants (referred to for convenience as ‘the defendants’) apply for leave to appeal against a judgment of this court handed down on 12 September 2023. This follows an order in favour of the respondent (‘the plaintiff’) following an application for summary judgment, granting payment in the amount of approximately R1,5 million in respect of hire costs, and approximately R75 000 for agreed tyre

excess costs, interest and costs on an attorney and client scale. The defendants were granted leave to defend the balance of the plaintiff's claims.

[2] Condonation was granted for the late filing of the application during the hearing.

[3] The points in issue on the merits are narrow. Firstly, the defendants submit that the court erred in finding the amount of some R1,6 million in respect of hire costs to be capable of speedy and prompt ascertainment. Secondly, the court should not have given effect to the plaintiff's election to allocate payments, totalling some R100 000,00, made by the defendants to damages which had not been proved.

[4] Both these issues were debated at length during the application for summary judgment itself, and were addressed in the judgment sought to be appealed. As to the first point, it was emphasised that the defendants admitted the rates of hire, as well as the total of the invoices rendered, so that the amount claimed was capable of speedy and prompt ascertainment and was for a liquidated amount in money. There is nothing to gainsay this conclusion.

[5] The focus of the application was, as was the case during the application for summary judgment, on the second point, pertaining to the allocation of 'credits' totalling approximately R100 000,00. This point was considered and addressed as follows in the judgment:

'The difficulty with accepting this argument is that Filzo accepts the copy of the written application for credit, attached to the particulars of claim, as constituting part of the agreement. Clause 4.2 of the terms and conditions provides that '[t]he customer acknowledges that a company is entitled in its own discretion to appropriate any payment made by the customer, to any part of the account which it may elect. On a plain reading, the clause was broadly crafted to that Meyers Hire was contractually entitled to do what it did by crediting payments received to its sub-account for alleged damages in respect of certain vehicles, rather than to the outstanding amount for hire costs. That contractual entitlement is unchallenged so that this portion of the opposition is unarguable and the disclosed defence is, in this respect, not bona fide.' (footnote omitted.)

[6] It may be added that clause 3.1.9 of the general terms and conditions applicable to the agreement confirmed that the first defendant agreed to pay to the plaintiff all costs incurred in repairing any damage of any nature whatsoever to the vehicle.

[7] In essence, the only basis for challenging the summary judgment is that the plaintiff could have applied the payment received of approximately R100 000,00 to the outstanding hire costs account, amounting to R1,6 million, so that summary judgment ought to have been refused. Ultimately, what the defendants fail to accept is that the manner in which the plaintiff proceeded is a consequence of its own, admitted, agreement. Absent any challenge to the interpretation of the relevant clause, cited above, and absent any authorities suggesting the contrary, I am unable to conclude that an appeal on the basis averred would have a reasonable prospect of success.¹ There is also no other compelling reason why an appeal should be heard.

[8] Finally, it may be added that the pleaded defence was that 'the amount due on the said invoices are disputed and denied'. That plea morphed into the averment, in the opposition to the application for summary judgment, that the 'credits' had been impermissibly allocated, and that the amount for hire costs would have been reduced if the credits had been allocated to that heading. As Mr *Brown*, for the plaintiff, pointed out, the defence presented was an evolving one. Reading the plea with the defendants' opposing affidavit, the defence presented was bad in law and the court's exercise of its discretion to grant summary judgment would not readily be overturned when considering the varying basis for the defence. This is an additional basis for refusing the present application.

¹ S 17(1)(a)(i) of the Superior Courts Act, 2013 (Act 10 of 2013). See *Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA)* at 463F: there must be a sound, rational basis for concluding that an appeal would have a reasonable prospect of success.

Order

[9] The following order is issued.

1. The application for leave to appeal is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 29 November 2023

Delivered: 05 December 2023

Appearances:

For the Applicants / Defendants:

Adv Somandi
St George's Chambers, Makhanda

Instructed by:

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