

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2022-011215

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

..... **...13/09/2023...**
SIGNATURE **DATE**

In the matter between:

DSV SOUTH AFRICA (PTY) LTD
APPLICANT
t/a DSV AIR AND SEA

and

PHOENIX NEOMED (PTY) LTD

RESPONDENT

JUDGMENT

Manoim J

- [1] This is an application for summary judgment in terms of which the plaintiff seeks payment of the sum of R3 754 387-50, together with interest thereon and costs on the attorney and client scale.
- [2] The plaintiff is a logistics company. It provided the defendant, with what are referred to as clearing, forwarding and export/import services. What this meant in this case is that the plaintiff would be responsible for receiving the defendant's goods at the port of entry, offloading them, clearing them with customs, warehousing them and then delivering them to the defendant. The defendant is a company that imports specialised medical equipment for customers in the health care industry. The plaintiff rendered its services to the defendant in terms of a written agreement concluded in November 2020.
- [3] The arrangement between the parties was that the plaintiff would render services from time to time for the defendant and then invoice it. The sum outstanding represents the total amount of several invoices for services rendered between December 2021 and June 2022 which despite demand remain unpaid.
- [4] The defendant filed a plea in which it raised the following defences. The agreement was admitted but the defendant alleged it was subject to an implied or tacit term that the defendant would only have to make payment if it was paid by the Department of Health. There is also a bare denial that the services were rendered by the plaintiff for the amounts claimed in the invoices.

- [5] The defendant also complained that the copy of the contract attached to the summons was illegible and hence it was impossible to admit or deny the terms.
- [6] Nevertheless, on the basis of the rendition of some of the terms in the contract set out in the particulars of claim the defendant pleaded that one of the clauses which obliged the defendant to pay the amount invoiced notwithstanding they may be disputed and only thereafter might the right to dispute arise, was contrary to the Constitution and public policy.¹
- [7] The plaintiff then brought an application for summary judgment. Here the plaintiff acknowledged that there had been another payment of R 600 00 made by the defendant since the summons was issued. Together with a consequent customs VAT reversal of R 35 921,55, the original claim of R4 390 309,05 was thus reduced to a claim for 3,754,387.50.
- [8] In the affidavit resisting summary judgment the defendant raised a further defence that the plaintiff had caused some of the equipment intended for use in the ICU's of a hospital to become damaged whilst being warehoused and hence were no longer fit for purpose. In the affidavit the defendant puts this amount as approximately R 1,675,506.06.²
- [9] The defendant filed this answering affidavit five days late. The plaintiff required the defendant to file an application for condonation which it duly did. It explained

¹ Clause 45.3 of the contract.

² This appears to be based on the annexures attached to the affidavit. See defendant's heads of argument, footnote 17.

that shortly before the affidavit needed to be filed the directors were overseas on business and hence the delay which was not excessive. The upshot was that the defendant was five days late with filing. Whilst it did not account for the full period of delay, (the period extended over the December/ January period and the application was initially set down for the unopposed roll on 8 February) its explanation was limited to the five day period. Nevertheless, the defendant tendered costs of the wasted costs for removing the matter from the roll. The matter was removed from the roll, but the plaintiff's attorneys were still insistent in opposing condonation. I heard this application when I heard the merits and granted condonation.

[10] The short time period of delay coupled with an explanation for the delay that was not unreasonable in the circumstances justified condonation. This is the type of opposition that is unnecessary and was so trivial and a waste of valuable court time.

Defences raised by the defendant.

[11] In resisting summary judgment, the defendant must raise a bona fide defence.³ Although two are intertwined the defendant has raised several defences each of which it alleges is a self-standing basis to constitute a bona fide defence to summary judgment being granted. I deal with each separately.

a. *The illegible contract.*

³ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) 425G-426E.

- [12] The defendant complains that the copy of the contract annexed to the summons was illegible. Since it was illegible it was non-compliant with the rules and summary judgment should be refused. But for all the reliance on cases dealing with formalities required of a plaintiff in summary judgment proceedings this complaint is wrong on the facts. The contract attached to the summons is in typed form. Whilst on CaseLines it is small, and a challenging read, it is certainly not illegible.
- [13] But if this was a basis that prevented the defendant from pleading it could have raised several provisions in the Rules to deal with this. Rules 30 as an irregular proceeding read with Rule 18(12) or Rule 35(12) or 35(14). It did not. Nor it appears did it do what any other litigant might have done in similar circumstances and asked for a better copy to be furnished before it filed its plea. Moreover, this contract was likely to be in the possession of the defendant whose director had signed it. In any even a more satisfactory copy of the agreement was made available to the defendant prior to it having to file its answering affidavit in the summary judgment application. The defendant does not say in this affidavit that it was precluded from raising a defence in its plea that it would otherwise have raised had it had a more readable copy of the contract that it had now received.
- [14] But despite all the above the point is that the defendant responded to the central contractual issue in this case which is clause 45.3 the 'pay and then argue later clause' which I go on to discuss later when I deal with the legal consequences of this clause including the allegation that it is unconstitutional.

[15] In argument the defendant shifted the focus of this point not to prejudice but to case law dealing with the strict consequences of a plaintiffs' non-compliance with the rules. But this reliance was misdirected. There was no non-compliance with rules; a legible copy of the agreement was annexed to the particulars of claim when the action was instituted; and; secondly, even though its print was small, the defendant was able to plead to the relevant contractual provision, which it duly did, and hence was not prejudiced. This does not raise a triable issue.

b. Denial of performance

[16] This defence was only clearly raised in the affidavit resisting summary judgment. Here the defendant alleges that negligence by the plaintiff led to it incurring a loss of approximately R1,6 million because crucial equipment had been incorrectly stored by agents of the plaintiff.

[17] In response the plaintiff has first argued that this defence was never raised by the defendant in the plea. In *Erasmus* the authors state:

"(...) the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. In this regard the plea should comply with the provisions of rules 18(4) and 22(2).

[18] This passage was cited with approval in *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* where Machaba AJ remarked that the rationale for this:

“(…) follows practice logic that the defendant may not, in his or her affidavit resisting the plaintiff’s summary judgment application, raise defences that have not been pleaded sa[v]e for those that appear normally in this application.”⁴

[19] Although I consider this legal proposition to be correct, it is at least arguable that this defence was raised in the plea, although it requires a robust reading in to do so. Nevertheless, even if I accept that the defence was raised obliquely in the plea, it must fail for another reason.

[20] The contract makes it clear in clause 45 that if there is any dispute over whether the company (i.e., the plaintiff) has performed its obligations the customer (i.e., the defendant) must still perform its obligations in terms of the agreement (i.e., to make payment of the invoices) as if the company had performed.⁵ The contract goes on to state that the customer’s remedy in such situations is to claim for repayment in whole or in part. But the contract states that this right is only open to the customer on payment of the disputed amount. Put more simply this is a pay now sue later provision. Thus, even if I accept that the defendant may have a valid claim against the plaintiff for non-performance, it must in terms of the contract first have had to make payment of the invoice before enforcing this right. The defendant has not done so, nor has it even instituted a counter claim. There is thus no bona fide defence disclosed given the provisions of clause 45.

⁴ (2020/32427) [2021] ZAGPJHC 836 (20 December 2021) paragraph 67.

⁵ Clause 45 consists of four sub-clauses which must be read together.

c. *Additional terms*

[21] The defendant's other apparent difficulty in this case, as appears from the plea and answering affidavit, is that several of the invoices were for services delivered in relation to equipment meant for the Department of Health. The Department has apparently not yet paid the defendant. The defendant alleges that it was "*...an explicit, alternatively implied, alternatively tacit term of the agreement ...*" that the defendant's payment obligations would be subject to it being paid by the Department of Health.

[22] However no express term in the contract provides for this, and there is no evidence nor even allegation made of a variation to the contract. The contract itself is watertight on these issues. First it has the standard non-variation clause that provides that no variation will be binding on the company unless reduced to writing and signed by one of its directors. Second, in terms of clauses 3 and 35 the agreement governs all trading between the parties. Nor as the plaintiff argues is there any trading term that can be implied as a consequence of custom or trade usage. Thus, the fact that the Department may not have paid the defendant is not relevant for the purposes of the defence. In the face of the express terms of the agreement and absent of any variation that meets the requirement of clause 33 (which is not alleged) this defence too must fail,

d. *Supervening impossibility*

[23] The same issue of the non-payment by Department of Health is raised as one of *vis major* or *casus fortuitus*. As added elaboration it was suggested by the defendant that the difficulties obtained by it because of the Covid 19 epidemic meant that the government had not carried out payments in accordance with its normal obligations to service providers. That may well be a matter on which one can be sympathetic to the defendant's plight but legally it does not give rise to this defence where the test is one of objective impossibility of performance. The fact that commercially a party's customer does not pay it does render it impossible to pay its creditor in turn. As Hutchison *et al* explain in their book the *Law of Contract*:

*"It is therefore not enough if it is only impossible for the particular contracting party to perform; nor is it sufficient in our law if performance has merely become difficult or expensive."*⁶

[24] At best for the defendant in this matter the non-payment or delayed payment by the government had made its ability to pay the plaintiff difficult or expensive. But this difficulty also does not constitute a bona fide defence that raises a triable issue."

e. Constitutional argument

⁶ Hutchison *et al* " *Law of Contract in South Africa*" Oxford, Third edition, paragraph 15.4.3.1.

[25] Finally, I deal with an argument raised that the provisions of clause 45 'the pay now sue later clause' are an impermissible limitation of the right of access to court in terms of section 34 of the Constitution. That section states:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[26] Clause 45 does not operate to remove the defendant's substantive right to sue the plaintiff for non-performance. That right is retained in terms of clause 45.2. The limitation on the exercise of that right is procedural. The defendant has to pay the disputed amount first before the right becomes operative. Pay now and then you can sue later is the import of the clause. Arguably this may impose a burden on an economically vulnerable customer who may not have the resources to pay first and sue later. But equally it could be argued it protects the company from spurious claims of non-performance from its customers where it has performed, and they refuse to pay.

[27] What matter is that the parties by contract have agreed to this provision. Despite its harshness on a customer that aspect alone does not *a fortiori* give rise to a constitutional issue in terms of section 34 of the Constitution. As Cameron JA observed in *Napier v Barkhuizen*, a case dealing with the adequacy of a time bar period in an insurance policy:⁷

⁷ 2006 (9) BCLR 1011 (SCA).

“(...) the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”⁸

[28] If I were to find that this argument raised a section 34 issue, I would be doing what the court in *Napier* said must not be done – imposing my conception of fairness of the parties individual arrangements. This defence too fails to raise a triable issue.

Conclusion

[29] The defendant has raised several defences to the summary judgment application. Despite condoning a late filing of its answering affidavit, and a generous reading in of the plea to include some issues only clearly articulated in the answering affidavit, I find that none of the defences raises a triable issue. The plaintiff is entitled to summary judgment in the amount claimed in the summons but as reduced in the summary judgment application.

⁸ *Napier*, supra, paragraph 13.

[30] The plaintiff claims costs on an attorney client scale. It has been successful in obtaining summary judgment, but the issue is whether it should be entitled to this level of costs. Certainly, it would be entitled to the costs, as tendered by the defendant, for removing the costs of the unopposed application for summary judgment from the court roll. But given the plaintiff's unnecessary opposition to the application for condonation for the late filing of the answering affidavit, which occupied much time both in written and oral argument, and which proved unsuccessful, the defendant ought to be entitled to these costs. But to avoid complications in taxation instead of awarding the defendant the costs incurred in successfully defending the condonation application, I will rather instead reduce the plaintiff's entitlement to costs to party and party costs for all the litigation.

ORDER: -

[31] In the result the following order is made:

[1] Summary judgment is granted against the respondent/ defendant in favour of the applicant/ plaintiff for:

- a. Payment of the sum of R3 754 387.50;
- b. Interest on the aforesaid amount at the rate of prime plus 3% from 03 September 2022 to date of final payment;

- c. Costs of suit on a party and party scale, including the wasted costs incurred by the applicant/plaintiff in removing the summary judgment application on 8 February 2023.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 07 August 2023

Date of judgment: 13 September 2023

Appearances:

Counsel for the Applicants: E. Fasser

Instructed by: Wright, Rose-Innes Inc

Counsel for the Respondent: MA Badenhorst SC

Instructed by: Geysers Attorneys