



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

CASE NO. 21/56220

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

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DATE

COCHRANE STEEL PRODUCTS (PTY) LTD

APPLICANT/ PLAINTIFF

And

**TIP CON (PTY) LTD
DEFENDANT**

1ST RESPONDENT/ 1ST

THABELO PATRICK SIALA

2ND RESPONDENT / 2ND DEFENDANT

Judgment

31 January 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 31 January 2024.

Thupaatlase AJ

Introduction

[1] In order to avoid confusion, the parties will be referred to as cited in the main action. The plaintiff seeks an order for summary judgment against the first and second defendants, jointly and severally, the one paying the other to be absolved, for payment in the sum of R 2, 863, 432. 45 with interest at the rate of 24% per annum from 29 February 2020 to date of final payment with costs on an attorney and client scale.

Parties

[2] The plaintiff is Cochrane Steel Products (Pty) Ltd a private company duly registered and duly incorporated in terms of company laws of the Republic of South Africa. The principal place of business of the plaintiff is Kempton Park.

[3] The first defendant is Tipp Con (Pty) Ltd, a private company duly registered and duly incorporated in terms of company laws of the Republic of South Africa.

[4] The second defendant is an adult male person. He is being sued in his capacity as surety, guarantor, and co-principal debtor in solidum with the first defendant in favour of the plaintiff for the due performance of the obligations of the first defendant including payments due to the plaintiff in terms of the agreement.

Background

[5] The plaintiff issued summons against both defendants for payment of sum of money. The plaintiff claims damages as a result of an alleged breach of agreement entered into between the plaintiff and the first defendant. In response the defendants entered a notice of intention to defend and subsequently filed a plea.

[6] As a result, the plaintiff brought the summary judgment application alleging that the defendants' plea has been filed as a dilatory tactic and that the defences raised

in the plea are not bona fide. The defendants are resisting the summary judgment application.

Issues for determination

[7] There are several issues to be decided and these can be enumerated as follows:

- 7.1. Whether the defendants' point in limine that the plaintiff was required, in terms of Rule 32(2)(c) of the Uniform Rules of Court, to attach the certificate of balance (as a liquid document) to the affidavit in support of summary judgment) should succeed. According to the argument of the defendants a failure to attach a liquid document as required by the rule peremptorily destroys the plaintiff's claim.
- 7.2. Whether the defendants are entitled to rely on the *exceptio non adimpleti contractus* to withhold payment to the plaintiff.
- 7.3. Whether the first defendant's obligation to pay the plaintiff was conditional on the tacit, alternatively, implied term that Transnet SOC (the purchaser to whom the first defendant on-sold the goods) would first pay the first defendant.
- 7.4. In amplification of its defence above the defendants have argued that the products manufactured and supplied by the plaintiff were rejected by the end-user, Transnet SOC Ltd (Transnet). It is alleged by the defendants that this contravened an implied term of the agreement and consequently eviscerated any contractual obligation that the defendants may have had to make payment to the plaintiff for the products.
- 7.5. Whether the plaintiff waived payment of the outstanding invoices until payment has been received by the defendants from its client (Transnet).
- 7.6. Whether summary judgment for the full amount claimed should be granted, or, whether the first defendant's alleged counterclaim (in the limited amount of R516,000 against the plaintiff) constitutes a bona fide defence in respect of the limited amount of R516,000.

[8] The defendants contend that these defences are bona fide, good in law and subvert the answerability of the plaintiff's claim. For this reason, the application for summary judgment ought to be refused, with costs.

[9] The plaintiff contends that the defences as pleaded by the defendants do not raise any issue for trial and are not bona fide. It is further argued that the appearance

to defend and subsequent plea are solely done to delay the plaintiff to obtain the relief.

The Facts

[10] The facts of this case appear from the pleadings. It is also clear that in order to determine this application, this court is required to delineate relevant facts. The crux of the dispute between the parties is the nature of an agreement that the parties concluded. The plaintiff contends that this is a pure credit agreement where it supplied goods to the defendant and that payment was to be effected by the defendants upon receipt of the goods.

[11] On the other hand the by the defendants contend that the payment to the plaintiff was contingent upon, the end-user (Transnet) paying the first defendant for the supply and installation of the fence as per the specifications.

[12] The terms of the agreement between the parties are in dispute. The copy attached to the particulars has various alterations and it is not clear which version was eventually agreed to as a final version between the parties. The dispute pivots around the interpretation of the terms of the agreement.

Issues that are common cause

[13] It is common cause that the plaintiff and first defendant entered into a written credit agreement on 29 August 2019 and that this agreement was attached to the plaintiff's particulars of claim ("POC") as annexure B1 to B5 ("credit agreement").

[14] The credit agreement is not subject to the National Credit Act 34 of 2005.

[15] The second defendant is bound as surety and co-principal debtor for the performance by the first defendant of its obligations to the plaintiff in terms of a suretyship clause contained in the credit agreement, which the second defendant signed.

Defendants' Case

[16] The first defendant admit non-payment of the sums reflected in the invoices submitted by the plaintiff, however, but denies that such amounts are due and payable. The reason being that that the goods to which the outstanding payment pertain were rejected by the end user.

[17] According to the defendants it was an express, alternatively tacit, alternatively implied term of agreement for the supply of goods between the parties that, the goods so supplied should comply with the specifications of the client of the defendant. And because the goods were rejected by its client for non-compliance, so the defendants submitted, they were absolved from making any payment to the plaintiff.

[18] In the alternative, the defendants submitted that the plaintiff waived its entitlement to payment for the goods and services rendered as per submitted invoices until payment has been received from Transnet.

[19] The defendants also put in dispute the authenticity of the certificate of balance (COB).

Plaintiff's case

[20] The plaintiff's case is that the defendants are in breach of a credit agreement between the parties. That plaintiff sold and delivered to the first defendant at the latter special instance and request as per the said credit agreement.

[21] The terms of payment as stipulated in the agreement was that payment would be effected within 30 days of such sale and delivery. This according to the plaintiff the defendants failed to do, resulting in breach of the agreement as alleged in the particulars of claim.

[22] The plaintiff has characterised the pleaded defence as a sham and neither bona fide nor good in law.

The law

[23] Summary judgment has been described as an extraordinary and stringent remedy that should only be granted where the plaintiff can establish its claim clearly and the defendant fails to set up a bona fide defence. See ***Steeledale Reinforcing (Cape) v HO Hup Corporation SA (Pty) Ltd 2010 (2) SA 580 (ECP)***.

[24] The defendants are required to satisfy the court by way of an affidavit that they have a bona fide defence to an action. The affidavit should disclose fully the nature and grounds of the defence as well as the material facts relied upon.

[25] It has be held that '[a]ffidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated

defence may be a sufficient indication of a bona fide defence for the purpose of the rule’.

[26] In the case of ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423; Misid Investments (Pty) Ltd v Leslie*** 1950 (4) SA 473 (W) at 474 it was held that “Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based on facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part as the case may be.”

[27] ***In Breitenbach v Fiat (Edms) Bpk***1976 (2) SA 226 (T) at p 228 it was held simply that a defendant will satisfy a court of the bona fides of his defence if he swears to the defence, which is valid in law and which is sworn in a manner that is not inherently or seriously unconvincing, or, if he shows that there is a reasonable possibility that his defence may succeed at trial.

[28] The Supreme Court of Appeal in ***JoobJoob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1(SCA) at 11G–12D referred with approval to the *locus classicus* of *Maharaj v Barclays National Bank Ltd* stating: ‘The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings.

However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor. Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.'

Analysis

[29] The resolution of the matter centres around the agreement that the parties concluded on 21 October 2019. It is against that agreement that it can be determine whether the defence raised is bona fide and therefore raising any issue for trial.

[30] As already mentioned the agreement between the parties is common cause and has been admitted as the one governing the relationship between the parties. The court will continue to consider each of the defences raised:

Compliance with Rule 32(2)

[31] The defendants have raised a defence that summary judgment should fail as the plaintiff has not attached the liquid document relied upon when applying for summary judgment. The particulars of claim of the plaintiff makes it clear that cause of action is breach of agreement as result of which payments were not done. The defendants do not dispute there did not pay the invoices which were presented by the plaintiff.

[32] The Plaintiff's application for summary judgement is based on the fact that its claim is for a liquidated sum of money.

[33] I am satisfied that the production of a certificate of balance is not required and that as submitted by the plaintiff, the certificate of balance is merely an evidentiary tool to facilitate proof of the quantum of the amount claimed and serves as prima facie proof thereof. In the premises it is found that the point in limine raised should fail as Rule 32(2)(c) does not apply.

Whether the defendants are entitled to withhold payment due to non-payment by Transnet

[34] This issue became a main trust of the defendants' defence to resist the summary judgment application. The defendants spent an enormous amount of

energy to illustrate the relationships with Transnet. It is, however, clear that the contractual relationship was between the plaintiff and the first defendant. The plaintiff had no relationship with Transnet. As a matter of fact, the plaintiff was an unsuccessful bidder to the tender that was subsequently awarded to the first defendant.

[35] The defendants have submitted that they provided the specifications of Transnet to the plaintiff so that the goods to be supplied by the plaintiff was to be compliant with the said specifications. It is further submitted by the defendants that because the goods were rejected by its client (Transnet), for non-compliance, first defendant was not liable to pay the plaintiff.

[36] According to the defendants it was an express, alternatively tacit, alternatively implied term of the agreement (credit agreement) that the goods supplied by the plaintiff would be manufactured and produced in accordance with the Transnet's specifications.

[37] The defendants have admitted in their plea that the written terms of the credit agreement were accepted and that the defendants had knowledge of those terms prior to accepting the general terms and conditions.

[38] Clause 20 of the credit agreement provides that "*...The Purchaser shall not for any reason whatsoever withhold payment from the Seller in respect of such goods.*

[39] Clause 32 of the credit agreement provides that: "*this agreement together with the Seller's standard Terms and Conditions constitutes the sole record of the agreement between the parties. No party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded therein.*

[40] It is trite law that parties to a contract are bound by the terms thereof. It was held in the case of *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 26: 'A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing'.

Whether there waiver or variation occurred.

[41] The defendants pleaded that the plaintiff waived payment. This contention is based on contents of an email which was sent by the employee of the plaintiff to the defendant regarding payment. The email states '*Please formally confirm that*

Tipcon will process all outstanding payments across to Cochrane once you have been paid by Transnet?’

[42] It is worth noting the response of the defendants to the email. The defendant responded as follows as contained in paragraph 125 of the answering affidavit *‘I responded the following day and confirmed as I have done previously that, the applicant would be paid regardless of whether the fencing supplied met the fencing specifications check but only once Transnet had paid first respondent.*

[43] My view is that the above quoted statement is at odds with the version of the defendants that the terms of the contract required the supplied goods to be compliant with the requirements of Transnet.

[44] Additionally, the plaintiff argued that the plaintiff had taken long time beyond the 30-day period stipulated in the contract to institute the action was proof of the assertion the plaintiff waived payment, pending payment by Transnet. The action was instituted almost two years after the defendants had failed to pay.

[45] The plaintiff has vehemently denied such assertion and has quoted clause 30 of the credit agreement which provides that: *no relaxation or indulgence, which the Seller may grant to the Purchaser will constitute a waiver of the rights of the Seller and will not preclude the Seller from exercising any rights which may have arisen in the past or which may arise in the future.*

[46] Whether summary judgment for the full amount claimed should be granted, or, whether the first defendant’s alleged counterclaim (in the limited amount of R516,000 against the plaintiff) constitutes a bona fide defence in respect of the limited amount of R516,000. It is my view that this issue does not raise a defence to resist summary judgment. The fact that the plaintiff did not collect unused goods does not raise a defence.

Conclusion

[47] This application mainly turns on the legal question as to whether the first defendant’s obligation to pay the plaintiff was affected by Transnet rejection of the goods by the client of the first defendant.

I am satisfied that the first defendant is contractually obliged to make payment for the goods sold and delivered in terms of the credit agreement irrespective of any allegations of non-conformity.

[48] As I have stated elsewhere in this judgment, the affidavit submitted by the second defendant in resisting summary judgment where it is stated categorically that payment will be effected regardless of whether the goods supplied complied with the fencing checklist issued its client (Transnet).

Order

[49] It is hereby ordered summary judgment application is granted for: ,

1. Payment in the sum of R 2, 863, 432. 45
2. Plus, interest at the rate of 24% per annum from 29 February 2020 to date of final payment.
3. Costs on an attorney and client scale.

**THUPAATLASE AJ
HIGH COURT ACTING JUDGE
GAUTENG LOCAL DIVISION**

Date of Hearing: 26 October 2023

Judgment Delivered: 31 January 2024

For the Applicant: Adv. Jeanne Mari Butler

Instructed by: NVDB Attorneys

For the Respondent: Adv. Z Cornelissen

Instructed: Van Rensburg Mabokwe Attorneys