



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 530/07

NO PRECEDENTIAL INTEREST

In the matter between:

**BRAND HOUSE (PTY) LTD
APPELLANT**

and

**SASFIN BANK LTD
RESPONDENT**

**BRANDHOUSE BEVERAGES (PTY) LTD
APPELLANT**

and

**SASFIN BANK LTD
RESPONDENT**

Neutral citation: *Brand House v Sasfin Bank* (530/2007) [2008] ZASCA 96
(16 September 2008).

Coram: Cloete, Maya et Cachalia JJA

Heard: 8 September 2008

Delivered: 16 September 2008

Summary: Summary judgment. Appellants disclosing bona fide defence.

ORDER

On appeal from: High Court, Cape Town (Thring J sitting as court of first instance).

The following orders are made:

- (1) The appeals are allowed, with costs.
- (2) The orders of the court below are set aside and substituted, with the following orders:
 - (a) Under CPD Case No: 2241/2007 (the Brand House claim):
 - '(i) The application for summary judgment is refused.
 - (ii) Leave to defend the action is granted to the defendant.
 - (iii) The costs of the summary judgment application are reserved.'
 - (b) Under CPD Case No: 2242/2007 (Brandhouse Beverages):
 - '(i) Summary judgment is granted in the sum of R367 924.37 together with interest thereon at the rate of 15,5 per cent per annum a *tempore morae*.
 - (ii) Save as aforesaid, the application for summary judgment is refused.
 - (iii) Leave to defend the action for the balance claimed is granted to the defendant.
 - (iv) The costs of the summary judgment application are reserved.'

JUDGMENT

CACHALIA JA (CLOETE, MAYA JJA CONCURRING)

[1] This judgment deals with two appeals against decisions by Thring J given in the Cape High Court, whereby he ordered summary judgment, at the instance of Sasfin Bank Ltd, against Brand House (Pty) Ltd in the sum of R316 299.77 together with interest and costs, and against Brandhouse Beverages in the sum of R1 024 773.36 also with interest and costs. These appeals are with leave of the court below. It will be convenient to refer to the appellants, where appropriate, individually as Brand House and Brandhouse Beverages and, to the respondent, as Sasfin.

[2] The appellants, who appear to be associated companies, have separate accounts with Sasfin arising from a cession agreement between Sasfin and Clickrite Gauteng (Pty) Ltd in terms of which Sasfin took over Clickrite's claims against them. These claims relate to goods sold and delivered by Clickrite to the appellants. The main issue before us (as in the court below), concerns whether, in disputing Sasfin's quantification of the claim against each of Brand House and Brandhouse Beverages, they disclosed a bona fide defence. In both cases the summons was supported by a trade creditor's statement, which set out how the amounts, for which summary judgment was sought and granted, were calculated. In its particulars of claim Sasfin averred that these statements reflect **all** of the amounts the appellants have paid and that the balances accordingly represent the deficit, ie the amounts still owing.

[3] The affidavits opposing summary judgment in the two matters, deposed to by one Maria Christina Juul, who describes herself as the 'Client Liaison Officer' of the appellants, are identical. In both, she pertinently denies that the statements attached to the particulars of claim 'are a full record of all of the payments made'. To corroborate this allegation she attaches a reconciliation statement which, she says, 'reflects all payments made' to Sasfin. The clear implication of these statements is that payments over and above those taken into account by Sasfin were made. It is contended on behalf of the appellants that the information appearing in the reconciliation statement reveals that Sasfin owes Brand House R155 600. 92, while

Brandhouse Beverages owes Sasfin R367 923.60. So Brandhouse Beverages concedes that Sasfin is entitled to summary judgment in this amount.

[4] In the court below, the learned judge found that as the author of the reconciliation statement had not deposed to an affidavit, its contents for this reason constituted hearsay evidence and were thus inadmissible. He also found that the contents of the reconciliation statement were neither clear nor readily intelligible and that there were discrepancies between it and Ms Juul's affidavits. He noted that all that the appellants were able to aver was that their combined indebtedness did not exceed the sum of R212 322.65 and that they were unable to specify the extent of each of their indebtedness to Sasfin. (This amount was arrived at by deducting the R155 600.92 allegedly owed by Sasfin to Brand House from the R367 923.60 which Brandhouse Beverages concedes it owes to Sasfin.) And further, the judge observed that counsel, who appeared on behalf of the appellants in the court below, was not able to provide any further elucidation in argument. He thus held that these shortcomings meant that the appellants had not established that either had a bona fide defence to Sasfin's claim.

[5] For present purposes it is not necessary to deal with the contents of the reconciliation statement in any detail. I accept that the reconciliation statement is not a model of clarity. And I can readily comprehend the judge's difficulty in deciphering the appellants' quantification of the relevant amounts. However, in this court, counsel for the appellants undertook a thorough analysis of the reconciliation statement, both in their heads of argument and during oral submissions in elucidation of Ms Juul's opposing affidavit. Properly understood the reconciliation statement shows the dates on which the appellants allege that amounts of invoices Sasfin claims were outstanding, were paid. Despite this counsel for Sasfin persisted in his submission that neither Ms Juul's affidavits nor the reconciliation statement indicated clearly that the appellants had paid the full amounts owing. In my view the submission is unmeritorious. Not only have the appellants now clearly and fully explained their calculations but, by conceding that the amount of R367 923.60 is owing by Brandhouse Beverages to Sasfin, have also demonstrated their bona fides. In my view, this is sufficient to overcome the threshold for resisting summary judgment.

[6] Concerning the finding by the court below that the reconciliation statement attached to Ms Juul's affidavit constituted inadmissible hearsay

evidence and also Sasfin's submission that her designation does not suggest that she has any personal knowledge of the facts, I am constrained to disagree. She says in clear terms that she has personal knowledge of the facts and even if she was not the author of the document she was able to verify its contents. The reconciliation statement was therefore admissible. (Cf: *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424.)

[7] I turn to the question of costs. In the court below the appellants were not represented by the same counsel as in the appeal. And the court's observation that counsel was not able to explain the payments reflected in the reconciliation statement indicates that the appellants, by possibly failing to present their case properly in the court below, may have been the authors of their own misfortune. But the full facts of what occurred in the court below are not before us. It is therefore appropriate to reserve the costs in that court and counsel were agreed that such orders should be made in the event that the appeals succeeded. However, it would have been clear to Sasfin, having received the appellants' heads of argument in the appeal, that Brand House indeed raised a defence and Brandhouse Beverages a partial defence to its claims. It must therefore bear the costs of having persisted in this appeal, although the employment of two counsel was not in my view justified.

[8] The following orders are made:

- (1) The appeals are allowed, with costs.
- (2) The orders of the court below are set aside and substituted, with the following orders:
 - (a) Under CPD Case No: 2241/2007 (the Brand House claim):
 - (i) The application for summary judgment is refused.
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- '(i) Summary judgment is granted in the sum of R367 924.37 together with interest thereon at the rate of 15,5 per cent per annum a *tempore morae*.
- (ii) Save as aforesaid, the application for summary judgment is refused.
- (iii) Leave to defend the action for the balance claimed is granted to the defendant.
- (iv) The costs of the summary judgment application are reserved.'

**A CACHALIA
JUDGE OF APPEAL**

APPEARANCES:

FOR APPELLANT: J C BUTLER;
L A VAN DER WESTHUIZEN

INSTRUCTED BY: CLIFFE DEKKER INC; CAPE TOWN
CLAUDE REID INC; BLOEMFONTEIN

FOR RESPONDENT: A SUBEL SC;
JT LOUW

INSTRUCTED BY: RELIHAN, MANAMELA & MAYER; JOHANNESBURG
LOVIUS BLOCK; BLOEMFONTEIN