

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 1949/2019

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

16/8/19.....

Date

A handwritten signature in black ink, appearing to read "ML Twala", written over a dotted line.

ML TWALA

In the matter between:

**FERRERO INTHEMBA RSA PROPRIETARY
LIMITED**

APPLICANT

AND

**HLUBI NATIONAL PROPRIETARY
LIMITED**

RESPONDENT

JUDGMENT

TWALA J

- [1] In this opposed summary judgment application, the applicant seeks an order against the respondent for payment of the sum of R3 325 338.75 together with interest at the rate of 12% per annum, alternatively, a rate 2% above the prime bank lending rate as determined by the applicant's bankers, from 21st January 2019 to the date of final payment and the costs of suit including the costs of counsel.
- [2] At the commencement of the hearing, the applicant raised the issue that the respondent is not properly before Court since it failed to file an application for condonation for the late filing of its affidavit resisting summary judgment as directed by the Judge in the previous hearing. A director of the respondent appeared personally on the previous occasion and was directed by the Judge to secure the services of counsel and bring an application for condonation for the late filing of the affidavit resisting summary judgment the director intended to hand up on that day.
- [3] Counsel for the respondent contended that the respondent was not aware of the directive to file an application for condonation and therefore applied to Court to hand up and move the application for condonation. In the interest of justice, the Court allowed the condonation application.
- [4] It is common cause that on the 19th of January 2017 the parties concluded an agreement whereby the respondent became a distributor of the products of

the applicant. It is not in dispute that it was a term of the agreement that the respondent will have a credit facility with the applicant for the products which the applicant sells and delivers to the respondent. The account or credit facility shall be due and payable by the respondent within 30 days from the date of the relevant statement or invoice issued for the goods sold by the applicant to the respondent. It is further not in dispute that products were sold and delivered by the applicant to the respondent and the respondent has made payment on some of the invoices.

- [5] It is contended by counsel for the respondent that the invoices attached to the particulars of claim to the summons do not correctly reflect the agreed price of the products as agreed between the parties. The respondent has fully paid the applicant in accordance with the agreed pricing between the parties. Further, that the deponent to the affidavit supporting the summary judgment application does not have personal knowledge of the material facts of the matter as he has no knowledge of the agreed terms between the parties in relation to pricing. Since the invoices on which the claim is based are incorrect, so it is contended, the applicant's claim is therefore excipiable.
- [6] Counsel for the applicant submitted that, according the agreement between the parties there was no fixing of the price for the products. The agreement provided that a product price and pack are subject to change without notice and will be those ruling at date on which the order is received and confirmed by the respondent. Where the respondent was entitled to discount or the goods or product was damaged on delivery and returned to the applicant, a proper credit note was passed for such goods against the relevant invoice. The respondent made a payment of R840 000 after receipt of the summons which amount was credited to the account of the respondent leaving a balance in the sum R2 485 338.75.

[7] It is contended further by counsel for the applicant that Invoice 464464 dated the 27th of November 2017 list goods at a costs price of R689.59 which were discounted by 25/87% resulting in a cost price of R511.19 (excluding VAT). It is noted on the same invoice that of the 3240 boxes invoiced, 42 were return to the applicant since they were wet or damaged. On the 1st of December 2017 the applicant passed credit note number CRT 276460 (Inv: 464464) in the amount of R24 475.77.

[8] It is trite that for a defendant to successfully resist an application for summary judgment, it must satisfy the Court that it has a bona fide defence and must disclose fully the nature of the grounds of the defence and the material facts relied upon for such defence.

[9] In the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the Court stated the following:

“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 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by the 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 the 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.”

[10] I agree with counsel for the applicant that the respondent never raised an issue about pricing at any stage except in these proceeding. In the e-mail correspondence of the 8th of September 2017, the prices were confirmed by both parties as the correct price agreed upon. Again, on the 12th of June 2018 the e-mail correspondence confirms the price charged on invoices as correct. There is no merit in the argument that tax invoices do not reflect the agreed price and that the discounts that the respondent was entitled to were not factored in the invoices and the interest charged is disproportionate as it is based on incorrect figures. I am of the view that it is just a ruse and not a bona fide defence and is intended to delay the applicant from obtaining the relief it is entitled to.

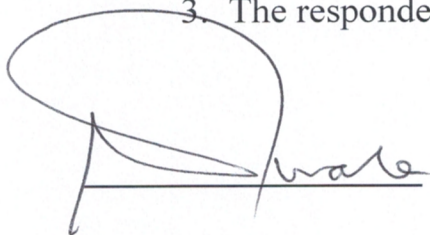
[11] I have considered the annexure A to the applicant's heads of argument although the respondent enjoyed me not to. I am in agreement that a party is not entitled to bring additional documents in summary judgment applications. However, it is not that the applicant brought a new matter in reply but was responding to the defence raised by the respondent in its reply which it could not have foreseen or anticipated. The annexure to the heads is a spread-sheet of the invoices and credit notes to show which invoices were credited and for what amount. I concluded that this was valuable information to assist the Court to come to the correct decision.

[12] In casu, I hold the view that the respondent has failed to demonstrate that it has a bona fide defence which is good in law. I am of the respectful view

therefore that summary judgment should succeed in the amount claimed in the summons less the sum of R840 000 which both parties agreed that it was paid after the summons were issued.

[13] In the circumstances, I make the following order:

1. The respondent is to pay the applicant the amount of R2 485 338.75;
2. The respondent is to pay interest to the applicant interest at the rate of 12% per annum, alternatively, a rate 2% above the prime bank lending rate as determined by the applicant's bankers, on the amount of R2 485 338.75 from 21 January 2019 to the date of final payment;
3. The respondent is to pay the costs of suit including the costs of counsel.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 6th August 2019

Date of Judgment: 16th August 2019

For the Applicant: Adv M Musandiwa

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For the Respondents: Adv. J C Bornman

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