

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: **1896/2023**

In the matter between:

**SOUTH AFRICAN SECURITISATION PROGRAMME
(RF) LIMITED**

**First Applicant/
First Plaintiff**

SASFIN BANK LIMITED

**Second Applicant/
Second Plaintiff**

SUNLYN (PTY) LTD

**Third Applicant/
Third Plaintiff**

versus

WBT AUTO WHOLESALERS

**First Respondent/
First Defendant**

LUCELLE FLEUR ANGEL

**Second Respondent/
Second Defendant**

WESLEY ERNEST ANGEL

**Third Respondent/
Third Defendant**

**Coram: Adhikari AJ
Heard: 30 January 2024
Delivered: 5 February 2024**

JUDGMENT DELIVERED ELECTRONICALLY ON 5 FEBRUARY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand-down is deemed to be on 5 February 2024.

ADHIKARI, AJ

[1] This is an opposed application for summary judgment.

[2] The plaintiffs seek summary judgment against:

[2.1] The second defendant (Ms Angel) for:¹

[2.1.1] Payment of the sum of R25 406.97;

[2.1.2] Interest on the aforesaid amount at the rate of 9% per annum from 19 August 2021 to date of payment; and

[2.1.3] Costs of suit on an attorney client scale.

[2.2] Ms Angel and the third defendant ('Mr Angel') for:²

[2.2.1] Payment of the sum of R175 169.82;

[2.2.2] Interest on the aforesaid amount at the rate of 9% per annum from 19 August 2021 to date of payment; and

[2.2.3] Costs of suit on an attorney client scale.

[3] It appears from the certificate of balance annexed to the particulars of claim that the sum claimed in respect of Claim A (that is R25 406.97) comprises of an arrear rental amount of R15 909.24 and future rental in the amount of R9 554.73. Claim A arises from a photocopier rental agreement ('the first rental agreement') concluded on or about 31 August 2017 between the third plaintiff ('Sunlyn') and the first defendant ('WBT'). WBT was provisionally wound up on 14 May 2021. A provisional liquidator

¹ For ease of reference this claim is referred to in the remainder of the judgment as 'Claim A'.

² For ease of reference this claim is referred to in the remainder of the judgment as 'Claim B'.

was appointed on 27 May 2021. WBT was finally wound up on 24 June 2021. It does not appear to be in dispute that Ms Angel's liability in respect of Claim A arises from a written guarantee in terms of which Ms Angel bound herself as guarantor and co-principal debtor for the obligations of WBT under the first rental agreement.

[4] It appears from the certificate of balance annexed to the particulars of claim that the sum claimed in respect of Claim B (that is R175 169.82) comprises of an arrear rental amount of R31 941.26 and future rental in the amount of R143 228.56. Claim B arises from a photocopier rental agreement ('the second rental agreement') concluded on or about 20 May 2019 between WBT and a close corporation known as Corprint CC. The plaintiffs contend that the liability of Ms Angel and Mr Angel (collectively referred to as '*the defendants*') in respect of Claim B arises from a written guarantee in terms of which the defendants bound themselves as guarantors and co-principal debtors for the obligations of WBT under the second rental agreement. The defendants, however, deny signing this guarantee.

[5] It appears from the pleadings that:

[5.1] Corprint's rights under the second rental agreement were ceded to Sunlyn;

[5.2] Sunlyn's rights under the first rental agreement and under the second rental agreement were ceded to the second plaintiff ('Sasfin'); and

[5.3] Sasfin's rights under the first rental agreement and under the second rental agreement were ceded to the first plaintiff ('SASP').

Applicable legal principles

[6] The purpose of the summary judgment procedure is to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.³ A defendant resisting summary judgment must satisfy the court that it has a *bona fide* defence to the plaintiff's claim, that is a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim.⁴ A defendant is required to disclose fully the nature and grounds of the defence in the opposing affidavit. In assessing whether a defendant has a *bona fide* defence to the claim, the court is called upon to enquire into (a) whether the defendant has fully disclosed the nature and grounds of the 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.⁵ If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be.⁶

[7] The effect of the amendment to Rule 32(b) is that the plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely for the purposes of delay.⁷ However, as this court noted in *Tumileng Trading*, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial because a

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para [31].

⁴ *Bentley Maudesley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C) at 874.

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C.

⁶ *Id.*

⁷ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para [22].

court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success.⁸

The defences

[8] Having regard to the allegations in the particulars of claim, read with the plea, it is apparent that the defendants admit that WTB breached the terms of the first and second rental agreements respectively by failing to make regular monthly payments in terms of those agreements and that consequently Sasfin or SASP are entitled to claim *“immediate payment of all amounts which would have been payable in terms of the rental agreements ... whether such amounts were then due for payment or not”*.

[9] It is common cause that Ms Angel signed the guarantee which underlies the plaintiffs' cause of action in respect of Claim A. The defendants, however, dispute that they signed the guarantee which underlies the plaintiffs' cause of action in respect of Claim B. No basis is set out in the plea for this denial. Further, the affidavit opposing summary judgment does not deal with this issue and in fact, the defendants accept in the affidavit opposing summary judgment that the arrear rental portions of Claim A and Claim B are not disputed. This is confirmed in the defendants' heads of argument where the submission is made that the defendants' opposition to summary judgment is limited to the plaintiffs' entitlement to the future rentals claimed.

[10] It is trite that a court should exercise its discretion against granting summary judgment where it appears that there is a reasonable possibility that an injustice may be done if summary judgment is granted. However, where the liability of the defendant

⁸ *Id.*

is undisputed, the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled.⁹

[11] Consequently, in the face of the defendants' admitted liability in respect of the arrear rental portions of Claim A and Claim B respectively, I am satisfied that the defendants have not disclosed a *bona fide* defence to those portions of the plaintiffs' claims, and that summary judgment ought to be granted in respect of the arrear rental portions of the plaintiffs' claims.

[12] Insofar as the future rental portions of Claim A and Claim B are concerned, the defendants contend that:

[12.1] Given the provisions of s 37(c) of the Insolvency Act 24 of 1936 ('the Insolvency Act') these amounts cannot be claimed in an action for specific performance because the rental agreements had been determined on 28 August 2021 by the provisional liquidator, that is prior to the action being instituted (action was instituted on 2 February 2022); and

[12.2] The amounts claimed constitute unreasonable penalties as contemplated by s 3 of the Conventional Penalties Act 15 of 1962 ('Conventional Penalties Act').

[13] In essence, the defendants contend that the plaintiffs are not entitled to claim specific performance arising from agreements that were terminated prior to action being instituted and that in any event the plaintiffs repossessed the photocopier machines when the first and second rental agreements were terminated and are thus

⁹ *Jili v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 586 (SCA) at para [13] – [14].

not entitled to the full amounts claimed in the particulars of claim. Further, the defendants contend that the plaintiffs' claims for future rentals constitute penalty stipulations as contemplated by the Conventional Penalties Act. The defendants further contend that substantially similar contractual provisions were found to constitute unreasonable penalty provisions in *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Joseph t/a Project Finance*.¹⁰ The defendants contend that they are entitled to a reduction in the conventional penalty (that is the claim for future rentals), and that the extent of the reduction will depend on when the plaintiffs repossessed the photocopier machines and what income the plaintiffs generated from the photocopier machines after they were repossessed.

[14] In the affidavit filed in support of the application for summary judgment, the plaintiffs accept that their claim is one for specific performance and legal costs. This accords with the plaintiffs' pleaded case. The plaintiffs contend that the liquidation of WTB does not have the effect of discharging the defendants from liability in terms of the guarantees and further dispute that they repossessed the photocopier machines. Mr Braun for the plaintiffs sought to persuade me that none of the defences are good in law, however, the arguments that Mr Braun relied on would require me to determine the substantive merits of the defences. That is not what this court is called upon to do in summary judgment proceedings.

[15] Having regard to the defences, I am persuaded that the defences are genuinely raised and that the defences cannot fairly be said to constitute a sham put up for purposes of obtaining delay. Further I am persuaded that the defences, if proved at the trial, would constitute defences to the plaintiffs' claims insofar as the future rental

¹⁰ *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Joseph t/a Project Finance* 2008 (3) SA 47 (C).

claims are concerned. Consequently, I am satisfied that there is a reasonable possibility that an injustice may be done if summary judgment is granted in respect of the plaintiffs' claims for future rentals.

Costs

[16] The agreements on which the plaintiffs' claims are based provide for the defendants to bear the costs of legal proceedings on a scale as between attorney and client. The defendants have set out no basis in the plea for why they should not be bound by the terms of the agreements in respect of those portions of the plaintiffs' claims in respect of which summary judgment is granted. As to the appropriate tariff to be applied, the plaintiffs' claims fall within the monetary jurisdiction of the Magistrates' Courts and consequently, I am persuaded that it would be appropriate for the plaintiffs to be limited to recovering costs on the Magistrates Court tariff.

[17] In terms of the Rule 32(9), the court in summary judgment proceedings may make such order as to costs as to it may seem just. The usual order is costs in the cause. Rule 32(9)(a) provides for a deviation from the normal order where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend. Although the plaintiffs in this matter could have anticipated that they would experience some difficulty in obtaining summary judgment, having regard to the pleaded defences, I am not persuaded that the plaintiffs knew that the defendants would be entitled to leave to defend. Consequently I am not satisfied that on the facts of this matter a deviation is justified from the usual order in respect of the portions of the plaintiff's claims for which leave to defend is granted.

In the result I make the following order:

1. Summary judgment is granted in favour of the plaintiffs against:
 - 1.1. the second defendant for:
 - 1.1.1. payment of the sum of R15 909.24;
 - 1.1.2. interest on the aforesaid amount at the rate of 9% per annum from 19 August 2021 to date of payment; and
 - 1.1.3. costs of suit on an attorney client scale, on the Magistrates Court tariff.
 - 1.2. the second and third defendants, jointly and severally the one paying the other to be absolved for:
 - 1.2.1. payment of the sum of R31 941.26;
 - 1.2.2. interest on the aforesaid amount at the rate of 9% per annum from 19 August 2021 to date of payment; and
 - 1.2.3. costs of suit on an attorney client scale, on the Magistrates Court tariff.
2. Save as provided for in paragraphs 1.1 and 1.2 above, summary judgment is refused and the second and third defendants are granted leave to defend.
3. The costs of the summary judgment application shall stand over for determination at trial.

ADHIKARI, AJ

APPEARANCES:

Applicant's Counsel:

Adv B Braun

Instructed by:

Smit Jones & Pratt Inc

Respondents' Counsel:

Adv MA McChesney

Instructed by:

Potgieter & Associates