



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1715/2022

In the matter between:

CELANUBUSI (PTY) LTD

Applicant

and

AMANZI AHLO BILE TRADING 25 (PTY) LTD t/a

TRISCH INDUSTRIES

Respondent

JUDGMENT

BEFORE: CHESIWE, J

DATE RESERVED: 15 SEPTEMBER 2022

DELIVERED ON: This judgment was handed electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 14h00 on 03 February 2023.

- [1] This is an application for summary judgment. The Plaintiff/Applicant claim against the Defendant/Respondent is for payment in the amount of R698 340, 00 (six hundred ninety-eight thousand three hundred and forty). The application is opposed by the Respondent/Defendant.

[2] The applicant seeks the following relief:

1.Payment of the sum of R698 340, 00 (Six Hundred and Ninety Eight Thousand Three Hundred and Forty Rands);

2.Interest thereon temporae moare

3.Costs of suit."

BACKGROUND

[3] Background on this matter is that during or about 01 February 2021, the Applicant duly represented by Busisiwe Ayanda Nombuso (Director of the Applicant) and Respondent duly represented by Patricia Thandeka Kojwane, entered into a partly written and partly verbal agreement (here on after referred to as "the agreement"). In the agreement, the Respondent was to hire two tipper trucks and one water tank truck from the Applicant.

[4] The material terms of the agreement were that the contract will operate on a month to month basis with either party entitled to cancel it with a month's notice. The Respondent would be liable for payment within five (5) days of receipt of the tax invoice. The Respondent would be in breach of the agreement if payment is not made and the Applicant would immediately claim possession of the assets.

[5] The Respondent breached the agreement and failed to make payment in the sum of R698 340, 00 (Six Hundred and Ninety-Eight Thousand Three Hundred and Forty Rand) within the required five (5) days.

[6] The Respondent in its plea admitted to the existence of the agreement between the parties. However, the Respondent denied that payment was due within five (5) days of receipt of the tax invoice. The Respondent pleads that the parties agreed that payment will be made every three (3) to four (4) months when the municipality acquires its equitable share. Furthermore, the Respondent pleads that the amount owed to the Applicant is R216 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand).

[7] The Applicant raised the following issue for the Court to determine, the amount owed to it and when such payment is due and payable.

- [8] The Respondent requests this Court to make a determination on whether the deponent of the affidavit in the application for summary judgment has the required personal knowledge of the matter, whether the Respondent has set out a *bona fide* defence and whether the Respondent has satisfied the Court that the matter be referred to trial.
- [9] The purpose of summary judgment is to assist a plaintiff where a defendant who cannot set up a *bona fide* defence or raise an issue to be tried, enters appearance simply to delay judgment. (**Meek v Kruger**)¹
- [10] In terms of Rule 32(2)(b), the plaintiff has to identify any point in law and facts relied upon which the claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any issue for trial. It is not enough that the defendant did not have a *bona fide* defence. On the other hand, the defendant has to disclose the defence and the material facts upon which the defence is based for the court to make a determination as to whether the defendant has a *bona fide* defence or not.
- [11] In terms of Rule 32(2)(b), the plaintiff in the founding affidavit has to verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and facts upon which the plaintiff's claim is based on and, explain briefly why the defence as pleaded does not raise any triable issues.
- [12] The Applicant in the affidavit in support of the summary judgment contends that the Respondent breached the contractual obligation by not paying the due amount of R698 340, 00 (Six Hundred and Ninety-Eight Thousand Three Hundred and Forty Rand) within five (5) days of receipt of the tax invoice. The Applicant further disputes that the Respondent only owed R214 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand) which is an incorrect calculation in terms of all the invoices that were issued to the Respondent.

¹1958 (3) SA 154 (T) at 159H-160A

- [13] The Respondent pleads and admit to the agreement, however, dispute the indebtedness including that payment was not to be made within five (5) days of receipt of the tax invoice.
- [14] The Applicant in the affidavit in support of the summary judgment, clearly set out the contractual agreement between the parties, whether this was partly written or partly oral. The Applicant explained that the parties agreed that the Applicant would charge the rate of R300, 00 (Three Hundred Rand) per hour for usage of the movable assets, further that the Respondent would be charged for the number of hours the assets were in use.
- [15] The Applicant in its heads of argument ², indicates that is evidenced the amounts owed and are reflected as follows:

"20.1 R182 160 in respect of invoice 11

20.2 R182 160 in respect of invoice 10

20.3 R182 160 in respect of invoice 8

20.4 R151 860 in respect of part of invoice 7"

The amount as reflected above amounts to R698 340, 00 (six hundred ninety-eight thousand three hundred and forty) which the Applicant avers is owed by the Respondent. The Respondent on its own version, only admit to owing an amount of R216 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand), but does not furnish evidence or plead on the outstanding balance.

- [16] The other issue as raised by the Respondent, that there was an agreement regarding the invoice being paid every three (3) to four (4) months when the municipality received its equitable share. **Annexure "A"** ³ paints a different picture. The Respondent received the invoice on 30 June 2021 and on 26 July 2021 and made payment of R223 000,00 (Two Hundred Twenty-Three Thousand). This trend of payment is further noted on invoice 6 which is for 30 July 2021 of which a payment of R130 000,00 (one hundred and thirty

² Applicant's Heads of Argument, page 72

³ Page 19 of the Plaintiff's Particulars of Claim

thousand) was made on 30 August 2021. **Annexure “A”**, the reconciliation statement shows that the Respondent made payments nearly on a monthly basis. The said arrangement of payment being made on the basis of three (3) to four (4) months can therefore not stand nor would it make business sense for a company to agree to payment over such long periods.

[17] The Respondent did not plead that the Applicant over charged it on the invoices. Instead, the Respondent simply denies the indebtedness of the amount that is due and payable.

[18] In my view, the Respondent has no *bona fide* defence and solely gave notice to defend the matter to exclusively delay it. Nor does the Respondent fully disclose the grounds and nature of its defence, except that it is only liable for the amount of R216 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand).

[19] The Court has an overriding discretion whether on the facts averred by the Applicant, it should grant summary judgment or on the basis raised by the Respondent, such discretion is unfettered. If the Court is in doubt as to whether the plaintiff's case is unanswerable at trial, such doubt should be exercised in favour of the defendant, the summary judgment should be denied. The Court can exercise the discretion and refuse judgment if the requirements for resisting summary judgment have not been met.

[20] In **Maharaj v Barclays National Bank Ltd** ⁴, Corbett JA stated as follows:

“The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and the defendant's defence is bogus or bad in law.”

[21] In **Mowschenson and Mowscheson v Mercantile Acceptance Corporation of SA Ltd** ⁵, the Court stated as follows:

⁴1976 (1) SA 418 (A)

⁵ 1959 (3) SA 362 (W) at 366

“The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and very stringent one, in that it permits a judgment to be given without trial.”

[22] The Respondent raised issue with regard to the affidavit in the application for summary judgment that the deponent had no personal knowledge of the matter. The Respondent alleged that the partly verbal and partly written agreement was entered into by Lefa Kojwane duly representing the Respondent and Mr Andile Msibi duly representing the Applicant.

[23] The Applicant denied the allegation and averred that Busisiwe Ayanda Nombuso, the deponent to affidavit in support of the summary judgment is the sole director of the Applicant and does have personal knowledge of the matter to the extent that when the agreement was entered into, the Applicant was duly represented by deponent.

[24] In **Sibani Group (PTY) Ltd v Doves Group (PTY) Ltd** ⁶, Olivier, AJ stated as follows:

“If the deponent lacks personal knowledge of the material facts, the integrity and veracity of the “evidence” placed before the court may be compromised.”

[25] Also taking cognisance that a mere assertion under oath by a deponent in an affidavit swearing positively to the facts should not be regarded as sufficient. There should be good ground in laying and relying to the Court in order for the Court to believe that the deponent fully appreciates the meaning of these words. (**Maharaj Supra**)

[26] The deponent in her amended affidavit in support of the summary judgment, stated as follows:

“2. Being sole director of the Plaintiff, I have personal knowledge of the matter, I had personally represented the Plaintiff when entering into the agreement with the Defendant, which agreement forms the subject matter of the action launched by the Plaintiff under the aforesaid case number.

⁶ (3620/2020) [2022] ZAGPJHC 770 (15 September 2022) at paragraph [16]

3. *I am also in charge of and manage the accounts department of the Plaintiff, and as a result I have in depth detailed knowledge pertaining to the Plaintiff's debtors."*

[27] Correspondence attached (**Annexure "LK7"**) to the Respondent's answering affidavit resisting summary judgment, shows communication between a certain Busisiwe Msibi and Lefa Kojwane (deponent) regarding payments that were to be made. It is further noted in **Annexure "LK6"** about an enquiring into the payment of R246 840, 00 (Two Hundred and Forty-Six Thousand Eight Hundred and Forty Rand) that was due by the Respondent to the Applicant.

[28] The Respondent in the answering affidavit states as follows:

"21.1 ...the outstanding amount as at October 2021 was R246 840. 00, appended hereto marked annexure 'LK 6'. I made further payment to the Plaintiff in the amount of R30 000. 00 leaving a balance of R216 480.00."

[29] As per **Annexure "A"** of the particulars of claim, an amount of R30 000, 00 (Thirty Thousand Rand) was received on 12 November 2021 against an outstanding balance of R546 180, 00 (Five Hundred Forty-Six Thousand One Hundred and Eighty Rand).

[30] The Respondent in the answering affidavit admits that it does not give an explanation for being liable for the alleged outstanding amount due to the Applicant, but can only state that the Applicant's calculations are incorrect.⁷

[31] The deponent to the affidavit in support of the summary judgment states under oath and indicating that she had personal knowledge. Failure of the Respondent to "*quantify with sufficient particularity, the reasons or alternatively the computation of the alleged outstanding balance of R216 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand)*"⁸ can only be concluded to mean that indeed there is bare denial on the part of the Respondent and such is *mala fide*.

⁷ Page 7 of the Defendant's Answering Affidavit at paragraph 21.2

⁸ Page 7 of the Affidavit in support of Summary Judgment paragraph 23

[32] In my view, the deponent to the affidavit in support of summary judgment swore under oath and appreciating the meaning of these words. And in the absence of quantification of the alleged outstanding balance of the R216 480, 00 (Two Hundred and Sixteen Thousand Four Hundred and Eighty Rand) it is a further view by this Court that the deponent to the affidavit to the summary judgment has personal knowledge of the matter. Although this is disputed by the deponent to the answering affidavit, **Annexures "LK 6" and "LK 7"** affirms correspondence between the two deponents albeit the disputed amount that is due and payable. The Court therefore has no reason to doubt the deponent's affidavit in support of the summary judgment and that she has personal knowledge of the matter.

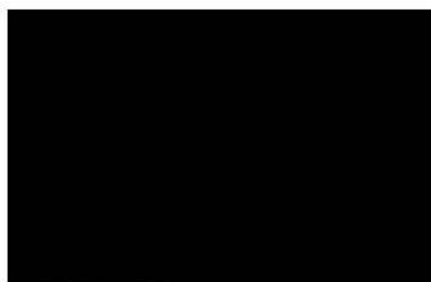
CONCLUSION

[33] Both take cognisance of the partly written partly verbal agreement and the existence thereof. Thus, the Respondent cannot at this stage when the money is due and payable raise issues that will delay payment.

[34] In my view, the Respondent has no *bona fide* defence and only entered a defence to delay the matter. I therefore see no reason why the Applicant cannot be granted the relief sought.

[35] Accordingly, the following order is made:

1. The Respondent is ordered to pay the Applicant the amount that is due and payable in the sum of R698 340, 00 (six hundred and ninety-eight thousand three hundred and forty);
2. Interest thereon payable *temporae morae*;
3. Costs of suit.



CHESIWE, J

On behalf of the Applicant: Adv. M Karolia
Instructed by: Du Toit Lampbrechts

On behalf of the Respondent: Adv. MCM Pieterse
Instructed by: Madri Du Preez Attorneys