



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

Case number: 5144/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

**CAROSPAN (PTY) LIMITED t/a NASHUA
BLOEMFONTEIN**

Applicant / Plaintiff

And

JAGER (PTY) LIMITED

1st Respondent/ Defendant

IVAAN DE JAGER

2nd Respondent/ Defendant

HEARD ON:

09 FEBRUARY 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 05 June 2023 at 11H30.

[1] These opposed proceedings involve an application for summary judgment as well as an application to strike out of the affidavit resisting summary judgment

(opposing affidavit) some allegations on the basis that they are among other things vexatious, malicious and irrelevant.

[2] The summary judgment application arises from the action instituted by the applicant as plaintiff against the respondents as defendants for payment of arrear rentals in the amount of R149 588.44, damages flowing from the early termination of a rental agreement in the amount of R3 884 843.75 together with interest and costs. The applicant also seeks the return of the rented goods.

[3] The relief sought is predicated on a breach of a Master Rental Agreement (the rental agreement) concluded by the parties on 28 November 2019¹ in terms of which the first respondent represented by the second respondent hired and received solar systems (the goods) from the applicant at a monthly rental of R155 393.75. The rental agreement was to endure for a period of sixty (60) months with effect 1 December 2019 and the second respondent stood surety for the first respondent's debt.²

[4] With regard to the striking out application, the applicant is aggrieved by the allegations averred by the respondents in paragraphs 6.7 and 6.7.1 of the opposing affidavit. The applicant contends that the allegations are irrelevant, scandalous and vexatious.

[5] I deem it apposite to first deal with the striking out application.

The striking out application

[6] In the opposing affidavit, the fact that the second respondent signed the rental agreement and the deed of suretyship is not disputed. It is also undisputed that the first respondent is indebted to the applicant in the amount claimed.

¹ The copy of the agreement is annexed to the particulars of claim as Annexure "A".

² The copy of the deed of suretyship is annexed to the particulars of claim as Annexure "E".

[7] The summary judgment is opposed on the grounds that the rental agreement is actually a simulated agreement in that, the parties concluded a verbal loan agreement pursuant to negotiations between the second respondent and the applicant duly represented by Mr Mario Engelbrecht. In terms of the said agreement, the loaned the first respondent an amount of R5 750 000.00 repayable within the period of sixty (60) months by way of instalments of R155 393.75 per month. The oral agreement was later reduced into writing, the second respondent was told that ‘they will simply twist the truth if necessary’ and when the agreement was later presented to the second respondent he signed it under the mistaken belief that it was a loan agreement. He thought the word “*rental*” translates to the Afrikaans word “*lening*” and this is because his English is not great, his home language is Afrikaans. (Paragraphs 6.1 to 6.4 of the opposing affidavit).

[8] The impugned allegations relate to threats allegedly made to the second respondent by the applicant’s attorneys and their collusion with the applicant in the dissimulation of the loan agreement as a rental agreement. They read thus:

“6.7. Once the First Defendant defaulted with payments, I was summoned to attend a meeting at the offices of Peyper Attorneys where the deponent, Mario, Sonel Pienaar (Attorney of Record) and Hannes Peyper were present, at which meeting I was threatened with being locked up for inter alia fraud if arrear payments were not made.

6.7.1. All of the aforementioned people knew exactly what the true agreement constituted as and will be called upon to testify at trial to the true nature of the agreement between the parties and to explain the collusion with the Plaintiff to mala fide conclude credit agreements cloaked as rental agreements to inter alia circumvent statutory framework.”

[9] It is the applicant’s case that these allegations are unmoored from any of the issues arising from the pleadings. They are also contradictory to the respondent’s asserted background facts namely that, the parties concluded an oral agreement

which was later reduced into a written rental agreement which was signed by the second respondent on the mistaken belief that it was a loan agreement.

[10] The applicant does not deny that subsequent to the first respondent's default on the instalments a meeting was convened between the applicant's attorneys and the second respondent. The applicant states that the meeting was solely for settlement negotiations, no threats were made against the second respondent. These allegations are therefore vexatious, defamatory and malicious, they must be struck out from the opposing affidavit.

[11] On the other side, the respondents insist that the impugned allegations are not scandalous and the applicant has failed to show that it will be prejudiced if the allegations are allowed to stand. The respondents contend that the allegations are relevant to these proceedings and the court should not disregard the respondents' version that the applicant provided a loan to the respondents and then disguised it as a rental agreement.

[12] I do not agree with the respondents' contentions for the reason that, the serious allegations of dishonesty and unethical conduct levelled against the applicant including its attorneys in the respondents' opposing affidavit are not relevant to the issue of the respondents' liability. They are simply spurious as they do not even tally with the averments upon which the respondents' defence is based, see paras 6.1 to 6.4 thereof.

[13] I have thus come to a conclusion that if the allegations are allowed to stand the applicant will be associated with dishonest, fraudulent and unethical business practices without any factual basis. Accordingly, the application ought to succeed with costs. I am however not persuaded that respondents' conduct is so reprehensible to warrant a punitive cost order.

The summary judgment application

[14] The plea and the opposing affidavit raise points *in limine*. It is the respondents' submission that the first respondent is under business rescue and in

terms of section 133 of the Companies Act³ (the Act) no legal proceedings can be instituted against a company under business rescue. The applicant has also failed to join Mr Marius Van Straaten (Van Straaten) as co-defendant/respondent and this is despite the fact that Van Straaten represented the first respondent during the conclusion of the agreement and he also signed the deed of suretyship as co-surety.

[15] The applicant disagrees and contend that the general moratorium placed on legal proceedings by section 133 of the Act does not apply in the circumstances where legal proceedings against a company are premised on a claim which involves the delivery of specified movable property pursuant to the cancellation of a rental agreement. Section 133 also does not offer refuge to the second respondent as it is a defence which accrues to a company in business rescue. Regarding the complainant against non-joinder, it is the applicant's case that Van Straaten did not sign the deed of suretyship therefore it was not necessary for the applicant to join him in the action and in these proceedings.

[16] Section 133 of the Act provides:

“General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable...;

³ Act No, 71 of 2008.

[17] On the facts germane to this matter, it is indisputable that having regard to the terms of the rental agreement,⁴ the applicant would be entitled to the return of the goods upon breach of the rental agreement therefore, it cannot be said that the first respondent's possession of the goods is lawful as provided for in section 133 (1) and section 133 does not prohibit legal proceedings pertaining to the recovery of property which does not belong to a company under business rescue. See in this regard *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd*⁵ at paras 30 to 34 where it is stated that:

“the cancellation of an instalment sale agreement by a creditor rendered unlawful the continued possession by a company in business rescue of the goods that formed the subject matter of that agreement. This Court held that although the moratorium in s 133(1) of the Act grants the company breathing space, the legislature did not intend to interfere with contractual rights and obligations of parties to an agreement.”

[18] It is also explained that the defence as incorporated in section 133 is only available to a company under business rescue.⁶

[19] As regards the issue of non-joinder, Uniform Rule 10 (3) stipulates that several defendants may be sued in one action either jointly or in the alternative jointly and severally, when the triable issue that arise in an action stands to be determined on substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action. In *Judicial Service Commission and Another v Cape Bar Council and Another*⁷ the provisions of rule 10(3) were expounded on as follows:

“It has now become settled law that the joinder of a party is only required as a matter of necessity as opposed to a matter of convenience- if that party has a

⁴ Clause 2,9 and 9.2 of the rental agreement.

⁵ (91/2020) [2021] ZASCA 43 (13 April 2021).

⁶ *Timasani*, para 28.

⁷ **2013 (1) SA 170** (SCA) at para 12.

direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned....”

[20] The examination of the rental agreement and the deed of suretyship reveals that the respondents’ contention that Van Straaten represented the first respondent during the conclusion of the rental agreement and also signed the deed of suretyship as surety is false. It is the name, surname and signature of the second respondent that appears on the rental agreement as the representative of the first respondent. While it is indeed so that Van Straaten’s name and surname also appears on the deed of suretyship, he did not sign it as a co-surety therefore it cannot be said that he has a direct and substantial interest in these proceedings. They involve the enforcement of agreements he is not party to as he did not sign them. His joinder would thus be incompetent.

[21] Based on these reasons above, the respondents’ points in *limine* ought to fail and they are accordingly dismissed.

[22] With regard to the merits of the application. It is trite that a summary judgment procedure is intended to ensure that a defendant with a triable issue or a sustainable defence has its day in court and that recalcitrant debtors pay what is due to their creditors.⁸

[23] It is indisputable that the second respondent representing the first respondent signed the rental agreement including the suretyship agreement. In the plea and the opposing affidavit liability is disputed on a cocktail of defences varying from the invalidity and the unenforceability of the agreements on the grounds the second respondent was not aware that he was signing a rental agreement to the assertion that the rental agreement is a simulated agreement. The respondents also complain that they are unable to plead to the applicant’s claim due to the illegibility of the copies of the agreement annexed on the particulars of claim (the rental agreement and the

⁸ *Maharaj v Barclays National Bank Ltd* **1976 (1) SA 418** (A) at 425G-426E; *Joob Joob Investments v Stocks Mavundla Zek Joint Venture* **[2009] All SA 407** (SCA).

suretyship agreement) as well as the applicant's failure to attach the certificates of balance (Annexures "C" and "D") referred to in the particulars of claim.

[24] Having appended his signature on the rental agreement the second respondent is taken to be bound by what appears above his signature whether or not he had understood what the agreement entailed or what he thought it involved before signing it and would thus be liable to perform the terms of that agreement. In *South African Railways & Harbours v National Bank of South Africa Ltd*⁹ it was pointed out that:

"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."

[25] The fact that the second respondent confirmed receipt of the rented goods and also provided the required insurance also puts paid to the respondents' contention that there was no rental agreement concluded including the denial of delivery of the goods. Annexures "FA3" and "FA4" of the applicant's founding affidavit are copies of the "CONFIRMATION OF RECEIPT OF GOODS BY THE USER" and "CONFIRMATION OF COVER FOR COMPLETE SOLAR SYSTEM" signed by the second respondent in that regard.

[26] The respondents' complaints that they have been rendered unable to plead to the applicant's claim because the attached copies of the agreements are illegible and that the applicant failed to attach the copies of the certificates of balance on the particulars of claim are in my view, without merit and disingenuous. For the reason that, having regard to what is deliberated in the plea the respondents have been able

⁹ **1924 AD 704** at pages 715-6.

to respond to the applicant's claim and also set out their defences on the merits. That aside, all the annexures complained about were attached on the applicant's founding affidavit as provided for in Uniform Rule 32 (2)(c).

[27] On the available facts, the applicant's claim against the respondents has been clearly established. I am not persuaded that the respondents' defence as pleaded and also set out in the opposing affidavit discloses a bona fide defence that is good in law to result in a triable issue.

[28] In the circumstances, following order is granted:

1. The allegations contained in paragraphs 6.7 and 6.7.1 of the respondents' opposing affidavit are struck out as irrelevant, scandalous and vexatious.
2. The respondents shall pay the costs jointly and severally one paying the other to be absolved.
3. Judgment is granted against the respondents jointly and severally for:
 - 3.1. Payment of R149 588.44 together with interest at the prevailing rate per annum plus 6% calculated from 01 October 2022 to date of final payment.
 - 3.2. Payment of R3 884 843.75 together with interest at the prevailing rate per annum plus 6% calculated from the date of service of summons to the date of final payment.
 - 3.3. Return of the goods as contained in the schedule of the rental agreement; and
 - 3.4. Cost of suit on an attorney and client scale.

N.S. DANISO, J

APPEARANCES:

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