



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 621/2023

In the matter between:

MEYERS HIRE (PTY) LIMITED t/a MEYERS HIRE

Applicant

and

FILZO ENTERPRISES (PTY) LIMITED

First Respondent

LEON FILLIS

Second Respondent

NOSIPHO FILLIS

Third Respondent

JUDGMENT

Govindjee J

[1] The plaintiff ('Meyers Hire') and the first defendant ('Filzo') entered into various agreements for the lease of trucks on credit. The trucks were duly delivered and invoices sent between 31 December 2020 and 4 February 2023. Filzo opposes

an application for summary judgment in respect of hire costs, tyre excess costs, damages to vehicles and wasted legal costs, together with related relief.

Outstanding hire costs

[2] Meyers Hire was contractually entitled to appropriate payments made by Filzo to any part of the account, at its own discretion. It alleges that Filzo has failed to pay a sum of almost R1,6 million in respect of invoices rendered between April 2022 and February 2023, and attached a schedule of invoices in support. Filzo disputes the amount claimed on these invoices, but not an agreement that interest would be payable in respect of all late payments (at the maximum rate prescribed by the National Credit Act) and that Meyers Hire would be entitled to collection costs and costs on an attorney and client scale.

[3] The opposing affidavit states the following:

'I have admitted that I am indebted to the plaintiff but I deny that I am indebted to the plaintiff for the amount claimed. It is common cause between the plaintiff and the defendants that the trucks were returned to the plaintiff around December 2022. The plaintiff has then rendered an invoice for January and February 2023 which are months the trucks were not in my possession but the possession of the plaintiff ... The plaintiff has incorrectly included the following amounts [for January 2023] ... It is further clear from annexure POC 11.1 that the first defendant was in credit in respect of the following vehicles ... in the total amount of R99 695,42. The plaintiff has impermissibly allocated those credit amounts to the damages which have not been proven yet instead of allocating them to the outstanding hire costs ...'

[4] It must be accepted that the claim under this heading is based on an agreement for hire costs. Filzo admits the rates of hire, the details of the leases, the vehicles delivered, updated quotations and the like, as well as the total of the invoices rendered. The amount is capable of speedy and prompt ascertainment and is for a liquidated amount in money.¹ Filzo's defence is in reality is a part-defence based on credits totalling approximately R100 000,00, together with an argument

¹ See *Leymac Distributors Ltd v Hoosen and Another* 1974 (4) SA 524 (D).

that applying these credits to the outstanding hire cost amount would impact on interest and VAT calculations.

[5] The difficulty with accepting this argument is that Filzo accepts the copy of the written application for credit, attached to the particulars of claim, as constituting part of the agreement. Clause 4.2 of the terms and conditions provides that '[t]he customer acknowledges that a company is entitled in its own discretion to appropriate any payment made by the customer, to any part of the account which it may elect.' On a plain reading, the clause was broadly crafted so that Meyers Hire was contractually entitled to do what it did by crediting payments received to its sub-account for alleged damages in respect of certain vehicles, rather than to the outstanding amount for hire costs.² That contractual entitlement is unchallenged so that this portion of the opposition is unarguable and the disclosed defence is, in this respect, not bona fide.

[6] There is, however, doubt whether Meyers Hire was entitled to invoice Filzo as it did in January 2023, so that leave to defend must be given in respect of an amount totalling some R20 000,00 under this heading. Uniform Rule 32(6)(b)(ii) provides that judgment may be entered against the defendants in respect of the balance, amounting to R1 574 261,43.³

[7] It is trite that summary judgment is a drastic remedy based on the supposition that a plaintiff's claim is unimpeachable, and the defendants' defence is bad in law. The court has an overriding, unfettered discretion whether, on the facts averred by the plaintiff, it should grant summary judgment or, on the basis of the defence raised, it should refuse it, even if the requirements for resisting summary judgment have not

² Clause 3.1.9 of the general terms and conditions applicable to the agreement confirms that Filzo agreed to pay to Meyers Hire all costs incurred in repairing any damage of any nature whatsoever to the vehicle. Whether the plaintiff is entitled to summary judgment for amounts allegedly due as damages is a separate issue, considered below.

³ *JNOG Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O). It is undisputed that the second defendant bound himself as surety for the due performance by the first defendant of all its obligations to the plaintiff arising from the terms of the agreement. The second and third defendants are married in community of property. It is alleged that the second defendant executed the Deed of Suretyship in the ordinary course of his trade and business and that no written consent of the third defendant was accordingly required by virtue of the provisions of s 15(6) of the Matrimonial Property Act, 1984. There is no basis for the defendants' denial in this respect and the point was not argued, so that the third defendant is bound accordingly.

been met. In my view the plaintiff's case under this heading is unanswerable, so that summary judgment is appropriate.

Damages to vehicles

[8] Meyer's Hire also claims summary judgment for damages to vehicles, both whilst in Filzo's possession and for damages on returned vehicles, totalling almost R1 million. The issue is whether this is a liquidated amount.

[9] In *Leymac Distributors Ltd v Hoosen and Another*,⁴ the plaintiff had sold a bus to the first defendant under a hire-purchase agreement which provided, inter alia, that should the purchaser fail to pay any instalment, the seller would be entitled to terminate the agreement, re-take possession of the bus and have it valued. When the seller exercised these rights, and claimed the difference between the unpaid balance and the independent valuation of the bus, this claim was held to be for a 'liquidated amount in money'. An amount claimed for expenses incurred in having the bus towed to recover possession thereof was, however, held to be 'manifestly not a claim for "a liquidated amount in money"'. This was on the basis that the claim was for damages representing expenditure allegedly incurred by the plaintiff in having the bus towed. The amount of these damages would not be liquidated until the court had assessed the quantum thereof, by the exercise of its own judgment as to whether the alleged expenditure was reasonable and necessarily incurred as a result of a breach of contract. That being the case, the court concluded that the question whether the claim was capable of 'speedy and easy proof' was irrelevant.⁵

[10] I accept *Mr Somandi's* submission, and the authorities upon which he relies, that it would be inappropriate to grant summary judgment for the claim for damages allegedly caused to the vehicles. Leave to defend is granted in respect of these parts of the overall claim.

Claim for tyres

⁴ *Leymac Distributors* above n 1 at 527F-G.

⁵ *Ibid* at 528E-H.

[11] The agreement made provision for Meyer's Hire to include sets of tyres as part and parcel of the various lease agreements. Although the original amount claimed for the costs of tyres over and above the agreed quantity was disputed, Meyer's Hire pleaded that, following negotiation, an agreement had been reached so that an amount of R74 536,81 remained overdue.

[12] In response, while denying liability 'for any amount in respect of damages of the trucks / vehicles', Filzo admits the core averment, confirming that 'it was a compromised amount agreed upon'. The amount having been agreed, the claim is liquidated and, absent a bona fide defence having been disclosed fully on the papers, Meyer's Hire is entitled to summary judgment for that amount.⁶ There is no justifiable reason to decide differently.

Wasted costs for registration of mortgage bond

[13] *Mr Brown* fairly conceded that there appeared to be no basis for summary judgment in respect of this claim, given the manner in which the claim has been pleaded and the seemingly incongruous references to the various defendants. Leave to defend is granted in this respect.

Interest and attorney and client costs

[14] The Uniform Rules afford the court a wide discretion to make such order as to costs as to it may seem just. The plaintiff has enjoyed substantial success and is entitled to the costs of the application. The plaintiff's contractual entitlement to claim interest on the outstanding sums at the maximum possible interest rate in terms of applicable legislation, as well as costs of suit on an attorney and client scale, is not disputed, and follows.

Order

⁶ See SF van Niekerk *et al Summary Judgments – A Practical Guide* (1998) (LexisNexis) 3-7, citing *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy (Bpk)* (2) 1978 (1) SA 164 (W) at 168G and following.

[15] The following order is issued:

1. Summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally the one paying the others to be absolved, for:
 - 1.1 payment in the amount of R1 574 261,43, in respect of hire costs; and
 - 1.2 payment in the sum of R74 536,81, for agreed tyre excess costs.
 - 1.3 interest on these amounts, at the maximum permissible interest rate in terms of the National Credit Act, 2005 (Act 34 of 2005), calculated a *tempore morae* to date of payment.
 - 1.4 Costs of suit on a scale as between attorney and client, together with interest thereon calculated at the legal rate from a date fourteen days after taxation to date of payment.
2. The defendants are granted leave to defend the balance of the plaintiff's claims.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 05 September 2023

Delivered: 12 September 2023

Appearances:

For the Applicant:

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Chambers, Makhanda

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For the Respondents:

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