

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2022-011215

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
.....	...16/11/2023...
SIGNATURE	DATE

In the matter between:

DSV SOUTH AFRICA (PTY) LTD
t/a DSV AIR AND SEA

Plaintiff/Applicant

and

PHOENIX NEOMED (PTY) LTD

Defendant/Respondent

JUDGMENT – LEAVE TO APPEAL

Manoim J

- [1] This is an application for leave to appeal brought by the defendant against a judgment I granted on 13 September 2023. In that case I granted summary judgment against the defendant. The plaintiff's case was based on the enforcement of contract between the parties whose terms are not in dispute. The defendant raised several grounds for why summary judgment should not be granted but I found that none raised a triable issue.
- [2] In the present application for leave three grounds for appeal were advanced and I consider them *seriatim*.
- [3] The first I will term the illegibility issue. The defendant's case here is that the contract on which the claim is based, whilst being annexed to the particulars of claim, was illegible and hence the papers were not compliant with the Rules of Court at the time the application for summary judgment was made. Much was made of judgments in which courts have differed as to what the consequences for a summary judgment application are where there was a technical error made by the plaintiff, but the defendants have dealt with the issues in their defence. In one matter, *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W), Blieden J took the view that if there was no prejudice to the defendant then summary judgment could still be granted.
- [4] However, Wallis J took a contrary view in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) where he stated:

*"Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence"*¹

¹ At paragraph 25.

- [5] Mr. Badenhorst for the defendant urged me to follow the approach of Wallis J rather than that of Blieden J in *Roestof* and hence grant leave to appeal. However, I do not need to make this choice because the defendant's case in this matter does not even get there on the facts for a number of reasons.
- [6] First, and perhaps most important the claim was not defective. The contract attached to the particulars of claim might be a challenging read, but it is certainly not illegible. Granted the version of the contract the defendant put up annexed to the answering affidavit is illegible, but that cannot be said of what appears annexed to the particulars of claim where the type face although faint is nevertheless capable of being read. Moreover, the contract was put up on Case Lines which very helpfully has under the "View" tab, a Zoom toggle that enables the reader to magnify a document to make it easier to read. Second, even if the defendant felt it was not equal to the challenge of reading the document as it was attached to the particulars of claim, it could have relied on the procedures set out in Rule 18(12) read with rule 30 on the basis the plaintiff had not complied with rule 18(6). The defendant did not do so. Third, the plaintiff had at the time of summary judgment application been furnished another version of the contract in the record where the type on the contract was more distinct. Finally, the facts in *Shackleton* and *Roestof* are entirely distinguishable from the present matter. Here the issue concerns whether the attached contract was sufficiently legible in the eyes of the reader, in the other cases it was whether an inconsistent reference to the defendants in plural and singular created sufficient confusion.
- [7] I do not consider this point need bother a court on appeal.
- [8] The second point was that the defendant had raised as a defence and hence a triable issue that the plaintiff had been grossly negligent in performing its duties as the defendants export agent and hence the defendant had suffered damages. That may well be a triable issue in the ordinary course. But the plaintiff sued on a contract which contains several provision which require the defendant to pay now and fight later. In other words, contractually this defence is retained but it is delayed

until the defendant has first paid. This emerges from three clauses in the contract whose import is this reading. I quote one of them clause 27 which states:

“Unless otherwise specifically agreed by the company in writing the customer shall pay to the company in cash immediately upon presentation of account all sums due to the company without deduction or set-off and payments shall not be withheld or deferred on account of any claim or counterclaim which the customer may allege.”

- [9] This principle is then amplified and added to by clauses 40 and 45 which I need not burden this decision by quoting. Thus, this defence is not a triable defence in terms of the contract.
- [10] The third defence as I understood to be modified in oral argument related to *vis maior*. Succinctly put the defendant alleges that during the Covid pandemic it had procured equipment from overseas, inter alia ventilators on behalf of its client the Department of Health. Despite procuring these goods and having them delivered to the plaintiff's warehouse, the Department had not paid it and hence it could not pay the plaintiff. But even if one accepts that the pandemic caused difficulties for the defendant's clients payment performance i.e., caused delays from what ordinarily could have been anticipated this does not amount to meet the threshold for *vis maior* as held in the case law. It may have been difficult to perform not impossible to perform. As Christie explains, the impossibility must relate to contractual obligations.² The contractual obligation on the defendant was to make payment. This may have been difficult from a cash flow point of view, but it certainly was not impossible. As Mr Fasser who appeared for the plaintiff argued this was not a case where the regulations associated with the pandemic precluded a party from performing its obligation – at most it made it more burdensome commercially.

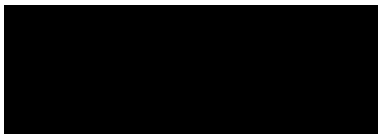
² Christie's *Law of Contract in South Africa* 7th Edition, page 549

[11] Thus, in conclusion I do not consider that any of the grounds meet the threshold for leave to appeal as now laid down in terms of section 17(1)(a) of the Superior Courts Act. The application is dismissed, and the defendant is to pay the costs of the application to the plaintiff.³

ORDER: -

[12] In the result the following order is made:

1. The application is dismissed;
2. The defendant (“the applicant in the leave to appeal”) is to pay the plaintiff’s (“respondent in the leave to appeal”) costs of the application.

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N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 15 November 2023

Date of judgment: 16 November 2023

Appearances:

Counsel for the Applicants: E. Fassler

³ See for instance *MEC for Health , Eastern Cape v Mkhitha* 2016 ZASCA 176

Instructed by. Wright, Rose-Innes Inc

Counsel for the Respondent: MA Badenhorst SC

Instructed by: Geyser Attorneys