

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

Case number: 4213/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CAROSPAN (LTD) t/a NASHUA BLOEMFONTEIN Applicant / Plaintiff

[Registration Number: 2012/001649/07]

And

MANYONI & GIJA INVESTMENT CC

1st Respondent/ Defendant

[Registration Number: 2009/207718/23]

SIBONGISENI SANELE NYAMBI

2nd Respondent/ Defendant

[Identity number: 880916 5415 080]

HEARD ON: 17 MARCH 2022

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 11h00 on 24 June 2022.

[1] In this opposed summary judgment application, the applicant claims from the respondents arrear rentals for 12 motor vehicle Dash Cams, CCTV and printing equipment (“the goods”) in the amount of R472 846.30, damages flowing early termination of the rental agreements (“agreements”) in the amount of R981 430.78 and the return of the goods.

[2] The application arises from an action instituted by the applicant against the respondents based on a breach of the agreements concluded between the applicant and the respondents on 27 May 2019 and 01 October 2019 respectively.¹ In terms of the said agreements, the first respondent hired CCTV and printing equipment from the plaintiff for a period of 60 months at a monthly rental of R14 950.00 and 12 Dash Cams for a period of 36 months at a monthly rental of R14 375.00. The first respondent fell into arrears with the instalments and by July 2021, the total amount due was R472 846.30 thus entitling the plaintiff to cancel the agreements, claim payment for the outstanding rental payments, damages resulting from the early termination of the agreements and related relief. The second respondent bound himself as surety for the first respondent’s debt.

[3] For the sake of convenience the parties are referred as cited in the main action.

[4] The application is premised on the grounds that the affidavit resisting summary judgment (“the opposing affidavit”) does not raise a triable issue in that the defendants’ bare denial regarding the non-applicability the National Credit Act² (“the NCA”) and the delivery of goods does is not bona fide. As alleged by the plaintiff in the particulars of claim, the NCA does not apply to these agreements as the goods remain vested on the plaintiff as the “Rentor”³ and the delivery and receipt of the goods was confirmed by the second defendant who signed the confirmation of receipts, Annexures “POC3” and “POC4” of the particulars of claim.

¹ Annexures “POC1” and “POC2” of the particulars of claim.

² Act 34 of 2005.

³ See clause 2 of the rental agreements

[5] Having regard to the defendants' plea and the opposing affidavit the rental agreements and their essential terms are not in dispute. The unpaid rental is also uncontroverted.

[6] Pursuant to the amendment of rule 32, a defendant's plea is taken into consideration together with the opposing affidavit in the determination of whether the facts pleaded in the plea and averred in the opposing affidavit fully disclose the nature and the grounds of a defendants' defence which is both bona fide and good in law.

[7] In the plea, except to merely deny the plaintiff's allegations that the agreements are not governed by the NCA the defendants do not substantiate their defence with facts upon which they rely by pleading the reasons for the denial. See rule 22(2). That being said, the agreements germane to this matter do not fall within the definition of credit agreements as contemplated in either section 8 (4) (e) or (f) of the NCA because, they do not provide for deferred payments for the goods but for rental payments for a fixed period of time upon which the goods must be returned to the "Rentor."⁴

[8] As regards the defendants' opposing affidavit, it falls short of the requirements contemplated in rule 32 (3) (b) of the Uniform Rules. The defendants deny that they are obligated to pay the rentals due to the fact that not all the hired goods were delivered by the plaintiff. Similarly, the defendants do not disclose which or how many of the 14 goods alleged to have been delivered by the plaintiff were not delivered.

[9] As much as the defendants are not expected to deal exhaustively with the facts and the evidence they rely upon to substantiate their defence, they must at least disclose the grounds for their defence and the material facts upon which their defence is based with sufficient particularity and completeness to enable the court to decide whether a bona fide defence which raises a triable issue has been disclosed.⁵

⁴ Absa Technology v Michael's Bid a House [2013] ZASCA 10 paras 13 to 17.

⁵ Maharaj v Barclays National Bank 1976 (1) SA 418 (A) at 426A to E; Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228-229.

The absence of sufficient particularity in the defence averred herein casts doubt on the defendants' bona fides.

[10] Nevertheless, there is no merit to the defendants' defence, the second defendant has confirmed delivery of all the goods and that they were installed accordingly as provided for in the agreements by signing the "ACCEPTANCE CERTIFICATE" embodied in the written agreements and the "CONFIRMATION OF RECEIPT OF THE GOODS," Annexures "POC3" and "POC4" of the particulars of claim. The veracity of the second defendant's signature is not disputed.

[11] The defendants seem to be of the view that in addition to presenting the signed certificates signifying delivery of the goods the plaintiff must also prove by way of oral evidence that delivery was in fact effected.

[12] I disagree. clause 5 of the agreements clearly stipulates that:

"signature by User of the acceptance certificate shall be an acknowledgement that the User has fully inspected and approved the Goods and that same are in every way satisfactory to User and that the Goods were delivered to User."

[13] Having admitted the veracity of the second defendant's signature, it is for the defendants to explain the circumstances under which the certificates acknowledging proper delivery were signed. It is important to note that the agreements commenced with effect 1 June 2019 and 1 October 2019 respectively. On the available facts, the defendants duly paid the monthly rentals until about a year after the agreements were concluded without raising the issue of non-delivery of the goods which in my view, lends credence to the plaintiff's case that the goods were delivered as per the agreements.

[14] In an attempt to rectify the shortcomings in the opposing affidavit, the defendants sought to amplify their defence in the heads of argument by essentially disputing the plaintiff's ownership of the goods, the plaintiff's capacity to institute the claims against the defendants, the liquidity of the claims and by also invoking the provisions of the Conventional Penalties Act 15 of 1962.

[15] Heads of argument are purely submissions made in favour or against the relief sought they do not constitute evidence. I agree with the submissions proffered by counsel for the plaintiff that a defence to resist summary judgment must be raised in the opposing affidavit. It is highly irregular to raise it in the heads of argument.

[16] Having regard to the facts of this matter, I'm satisfied that the plaintiff's claims against the defendants have been clearly established. I'm not persuaded that the defendants' 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.

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

Order

1. Judgment is granted against the first and the second defendants, jointly and severally, one paying the other to be absolved for;

1.1. Payment of the sum of R472 846.30;

1.2. Interest on the said amount, at the legal rate of interest, a tempore morae from the date of demand till the date of final payment;

1.3. Payment of the sum of R981 430.78;

1.4. Interest on the said amount, at the legal rate of interest, a tempore morae from the date of demand till the date of final payment;

1.5. Return of the goods as contained in the schedules of the rental agreements; and

1.6. Cost of suit on an attorney and client scale.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the applicant:

Adv. A. Sander

Instructed by:

Peyper Attorneys

BLOEMFONTEIN

Counsel on behalf of the respondents:

Adv. K. Naidoo

Instructed by:

Blair Attorneys

BLOEMFONTEIN