IN THE HIGH COURT OF SOTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 32385/16

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO

26/4/17

26/4/2017

In the matter between:

ARB ELECTRICAL WHOLESALERS (PTY) LTD	APPLICANT/PLAINTIFF
and	
K & L BUILDERS CC	1ST RESPONDENT/DEFENDANT
GARETH EDWARD BENSON	2ND RESPONDENT/DEFENDANT
BANAGANI KLEINBOOI MAHLANGO	3RD RESPONDENT/ DEFENDANT

REASONS FOR JUDGMENT

TLHAPI J

[1] On 18 July 2016 in an application for summary judgement against the respondents the following order was granted:

"1. Application for summary judgment against the 2nd and 3rd respondents is dismissed.

2. 2nd and 3rd respondents are granted leave to defend the action in as far as it relates to the Surety Agreement between the 2nd and 3rd respondents and a company by the name of Industrial Suppliers and the cession of the agreement to the Applicant;

3. Costs in the cause;

4. Summary judgment is granted against the first respondent and it is ordered it make:

 4.1 Payment in the sum of R1 717 456.42;

 4.2 Interest on R1 717 456.42 at the rate of 10.25 calculated from 29 April 2016;

 4.3 Costs of suit between attorney and client to the taxed

The application was opposed and the reasons relate to the first respondent.

[2] The applicant entered into a 'sale of business agreement' with Industrial Cable Suppliers Proprietary Limited, whereby all rights, title and interest in the credit facilities agreements entered into by the latter company were transferred to applicant effective 1 March 2014. The business was sold as a going concern. The written agreement relied upon was annexed to the particulars of claim wherein the relevant terms are stated as follows:

8.

"(a) ICS would extend credit facilities to the first defendant who purchase electrical goods from the plaintiff;

(b) The first defendant would pay the ICS's usual, alternatively a reasonable, price for the goods within 30 (thirty) after the date of the plaintiff's monthly statement reflecting the purchase price unless otherwise agreed in writing (clause 5.1 of annexure 'A');

(c) In the event of the first defendant failing to make payment of any amount on due date, then the full amount then owing by it (whether then due or not) would immediately become due and payable (clause 5.5. of annexure 'A1')

(d) The first defendant would make all payment to ICS in South Africa in South African currency and free of deduction or set-off (clause 5.4 of annexure 'A1')

(e) In the event of the purchase price of any goods not being paid on due date, the first defendant would be obliged to pay interest thereon at the maximum permissible rate of interest prescribed in terms of the National Credit Act, as amended from time to time, such interest to be reckoned daily and added to the arrear amount at the end of the month, from due date to the date full and final payment (clause 5.3 of annexure 'A1');

(f) A certificate signed by a director of the ICS....reflecting the amount owing by the first defendant to ICS and the fact that such amount is due, owing and payable would be prima facie proof of the facts stated for the purpose of action (whether by way of provisional sentence or otherwise) proof of debt on insolvency or liquidation, or for any purpose where the amount of such claim is required to be established (clause 5.6 annexure 'A1');

(g) In the event of ICS instructing attorneys to recover moneys from the first defendant, it would be liable for any costs incurred by the plaintiff on the scale as between attorneys and client, including collection commission (clause 17

of annexure 'A1');

13.

13.1 During the period June 2015 to August 2015, the first defendant purchased goods from the plaintiff to the value of R1 717 456.42 and the plaintiff accordingly sold, delivered and rendered invoices and statements reflecting such purchase for goods;

13.2 A schedule reflecting the invoice numbers and the agreed prices in respect of the goods acquired is annexed hereto as annexure "C";

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The first defendant failed to pay the amount claimed on the June 2015 statement, within thirty (30) days and was accordingly liable to pay R1 717 456.42 on the account, which became due and payable on or before 31 July 2015 and is liable for interest on the full outstanding sum of R1 717 456.42 at the rate of 2% per month (being the maximum rate of interest allowed under the National Credit Act from 1 August 2015 to date of final payment."

[3] Mr A M A Feinberg who deposed to the opposing affidavit denied that the first respondent was indebted to the applicant and he raised two points *in limine:*

(a) That the claim is based on a liquid document which the applicant failed to attach to the particulars of claim or to the affidavit in support of the application for summary judgment. What was annexed was a 'debtor's age analysis' and the applicant failed to annex any 'quotes, purchase orders, statements, invoices or at least a delivery note evidencing how the amount allegedly in arrears was calculated' (my underlining)

(b) That the National Credit Act applied to the agreement; that sections 129(1) and 130 of the National Credit Act (34) of 2005 was not complied with;

[4] In defence Mr Feinburg, averred that he was the general manager focusing on the financial management of several companies including the first respondent, which carried on business at 7 Rautenbach Streets and at Valley Centre, Jan Smuts Avenue Craighall Park. The companies were named as: Imail Corp 155 CC; T&W Electrical Contractors Pty Ltd; Harp Act Pty Ltd; Abundant Way Trading Pty Ltd; High Expression Building and Construction Pty Ltd; Marvigrath CC; Accounting and Business Consultants Pty Ltd. He averred that the companies are interlinked; they offer different services and engage with the same company such as the applicant. The companies derive their work from tenders which entail large projects and transactions which require strict compliance with time frames.

[5] According to Mr Feinberg he was the one who 'negotiates all agreements pertaining to these companies, approves quotes, purchases orders and all other documents of whatever nature that concern the companies financially and ensures that payment is made'. It was possible, he said, that the invoices pertaining to this matter had crossed his desk or that he had misfiled, or misplaced the said invoices and that it was difficult to identify any of the transactions from the debtors age analysis and no other information had been attached to assist him identifying the transactions attached to the Particulars of Claim.

Points *In Limine*

[6] It was submitted for the applicant that the age analysis was not a liquid document, but a liquidated demand. A liquidated amount is 'either one agreed upon or which is capable of speedy and prompt ascertainment, where ascertainment is a mere matter of calculation' *Tredoux v Kellerman* 2010(1) SA (CPD). On examination of the age analysis it is my view that each entry represents a liquidated amount. The details present reflect that it relates to goods sold and delivered to the first respondent as alleged in the particulars of claim, that is K & L Builders CC. It gives the date of issue of the invoice and gives the purchase order number emanating from the first respondent. There are therefore two source documents from which the amount owing could be gleaned, the date of the invoice, the invoice number and the purchase order. It is therefore incorrect to state that no invoice or purchase order details were available and from which the first respondent could ascertain what the claim was about. Furthermore, the applicant did not mention any of the very many companies mentioned by Mr Feinberg, the document in particular identifies the first respondent as the debtor and not any of the companies occupying the premises from which the first respondent conducts business.

[7] In the particulars of claim at paragraph 20 mention is made that the applicant complied with sections 129 of the National Credit Act and that the first respondent had not engaged a debt counsellor. It is also alleged that the National Credit Act did not apply to the credit agreement by virtue of sections 4(1)(a)(i) alternatively sections 4(1)(b) read with section 9(4). In the application for credit facilities the annual turnover of the first respondent is stated as R24 000 000. Mr Feinberg as being the person having negotiated the agreement should be aware of such financial status of the first respondent and of the fact that the National Credit Act was not applicable to

the agreement. Although in my view not being relevant, as at pages 33 and 36 of the papers is proof that section 129 was complied with.

Bona Fide Defence

[8] It is trite that the summary judgment procedure is not meant to deprive a defendant who has a case to defend from defending such an action and, where such defence exists on good grounds leave should be granted to defend. However where it is clear that no such defence exists, the plaintiff's rights to obtain payment should not be defeated by the filing of an appearance to defend whose main purpose to is to delay the action.

[9] The principles required by a defendant in order to succeed in its opposition to an application for summary judgement were clearly set out in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 A-D. What is required is that the opposing affidavit disclose a bona fide defence to the claim which entails such facts as disputing what is contained in the particulars of claim or even disputing what the plaintiff seeks to rely on in the source documents. It is not for the court hearing the application for summary judgment to determine the issues in favour of any one of the parties. It is sufficient if the court is satisfied that from the defences disclosed or advanced that there was a 'reasonable possibility that a defendant may succeed on trial.' In *Maharaj supra* the following was stated:

"The word 'fully' .... connotes in my view that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose a defence and the material upon which it is based with sufficiently particularity and completeness to enable the Court to decide whether the

affidavit discloses a bona fide defence

The respondent is expected to fully disclose "the nature and grounds of his defence and the material facts upon which it is founded and whether on the facts so disclosed the defendant appears to have a defence which is bona fide and good in law".

[10] The first respondent's defence is contained in paragraphs 18 to 22 of Mr Feinberg opposing affidavit. As general manager of all the different entities conducting business from 7 Rautenbach Street Brits, he negotiated the terms of the agreement. He approved the purchase orders, he ensured and approved payment. It is unlikely given his responsibilities that he would misfile or misplace invoices placed before him for payment in respect of a particular entity or that he would be unable or uncertain to effect payment of the invoices whose purchase orders he specifically approved. Misfiling or misplacing is not the type of defence as contemplated in Maharaj *supra.* I have already stated that the age analysis document contains sufficient particulars to assist him to identify the claims and from which the amounts could be easily calculated and the said document annexed to the application gives or states the amount which is owing. I reiterate, the first respondent is identified as the debtor, so are the purchase orders numbers and invoice dates. The applicant was therefore in my view entitled to summary judgment in as far as the first respondent was concerned because Mr Feinberg's explanation in my view did not disclose a *bona fide* defence which was 'good in law' entitling him to leave to defend the action.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

DATE HEARD	**:**	**18 JULY 2016**
DATE DELIVERED	**:**	~~**18 JULY 2016**~~ 26/4/2017
ATTORNEYS FOR THE DEFENDANTS	**:**	**PENNY GRIFFITHS ATT.**
ATTORNEYS FOR THE PLAINTIFF	**:**	**LOMAS-WALKER ATT.**
COUNSEL FOR THE PLAINTIFF	**:**	**ADV. F R VAN DEN HEEVER**
COUNSEL FOR THE DEFENDANT	**:**	