

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 6642/2015

NOT REPORTABLE

13/4/2015

In the matter between:

LAYHER (PTY) LTD

Plaintiff

and

SIYAKHONA SCAFFOLDING (PTY) LTD
(Registration no: 2004/025972/07)

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application for summary judgment. The plaintiff claims from the defendant, an amount of R837 842.99 plus interest, and costs. The plaintiff claims that it entered into a lease agreement with the defendant on 23 April 2013, in terms of which the plaintiff let to the defendant certain goods, more fully set out in annexure 'LAY 2' to the particulars of claim.

[2] It is common cause that the plaintiff delivered the goods to the defendant. The plaintiff alleges that after the rental period had reached its conclusion, the defendant failed to return all of the goods delivered to it, and/or alternatively returned goods which were damaged beyond economical repair at the conclusion of the rental agreement.

The plaintiff claims the value of the non-returned and/or alternatively damaged goods. This value, the plaintiff alleges, is based on its standard sale price for such goods prevailing at the time, namely July 2014.

[3] In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence. This means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88).

[4] In its affidavit opposing summary judgment, the defendant raises several points. Two preliminary points are taken. First, that this court lacks jurisdiction as the agreement, properly construed, was concluded in Mossel Bay. Second, that the plaintiff's claim is for an unliquidated amount, which removes the plaintiff's claim from the purview of summary judgment proceedings.

[5] Substantively, the defendant denies that it failed to return the goods. To buttress its denial, the defendant has attached a delivery note signed off on 28 January 2014. On that delivery note, it is stated that the goods were delivered to, and accepted on behalf of, the plaintiff on 5 March 2014. The defendant explains the length of time between the date of dispatch and the alleged date of delivery as follows. The goods were initially delivered to the plaintiff on 28 January 2014. The plaintiff refused to accept the goods as they were dirty. The defendant took the goods to some other premises for cleaning. The defendant further alleges that a Mr George Benes of the plaintiff inspected the goods at such premises. Thereafter, so the defendant states, the goods were eventually delivered to the plaintiff's premises on 5 March 2014. There is a signature of acceptance, purportedly on behalf of the plaintiff.

[6] Counsel for the plaintiff submitted that the delivery note was fabricated, and pointed out that there was a discrepancy between the delivery note and a dispatch note. That discrepancy, so argued counsel, relates to the registration numbers of the truck that supposedly loaded and delivered the goods. In the delivery note, FFR 339

GP is stated as 'vehicle particulars', whereas in the dispatch note the 'vehicle number' of the loading truck is FXX 086/165 MP.

[7] The jurisprudential framework within which an application for summary judgment should be considered, which is trite and established. The defendant must satisfy the court that he has a *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof. In *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk*¹ it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade it that he has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is *bona fide* and good in law. See *Maharaj v Barclays National Bank*.²

[8] The remedy of summary judgment is an extraordinary and drastic one, which has the hallmark of a final judgment in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. In *Dowson and Dobson Industrial Ltd v Van der Werf*³ it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain*⁴, and *Standard Krediet Korporasie v Botes*⁵. Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude*⁶.

¹ 1978 (1) SA 164 (W) at 171

² 1976 (1) 418 (A) at 426

³ 1981 (4) SA 417 (C) AT 419

⁴ 1984 (4) SA 544 (C) AT 550

⁵ 1986 (4) SA 946 (SWA)

⁶ 2009 (4) SA 669 (E) at 672C-676D

[9] In the present matter, the defendant has not contended itself with mere bald denials, as is normally the case in these matters. It says that the goods were returned, and attaches documents to that effect, which *prima facie* considered, support that contention. The alleged discrepancies pointed out by the plaintiff's counsel cannot be determined at this stage of summary judgment, but at the trial. If one has a look at the numbers referred to by counsel as the different registration numbers of the delivery truck, there are possible various explanations. It must be borne in mind that indeed two different trucks could have loaded the goods on the two different dates – 28 January and 5 March 2014. These issues can only be clarified and ventilated at the trial. I do not have to be satisfied at this stage of the veracity of the defendant's allegations. All I have to be satisfied of, is whether the defendant has disclosed a defence, good at law, which, if proven at the trial, would constitute a complete defence to the plaintiff's claim.

[10] Considering the conspectus of all the relevant factors – the facts and the proper approach to applications for summary judgments, I am satisfied that the defendant has disclosed a *bona fide* defence to the plaintiff's claim. There is nothing inherently implausible about the defendant's version. As stated earlier, if established at the trial, it will be a complete answer to the plaintiff's claim. The defendant is therefore entitled to be granted leave to defend. Given the view I take of the matter, it is not necessary for me to consider the preliminary points raised by the defendant.

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

1. The defendant is granted leave to defend.
2. Costs are in the main action.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 7 APRIL 2015

JUDGMENT DELIVERED : 13 APRIL 2015

FOR THE PLAINTIFF : ADV. J.C. VAN EEDEN

INSTRUCTED BY : D. PALEOLOGU ATTORNEYS, PRETORIA

FOR THE DEFENDANT : ADV. R. RAUBENHEIMER

INSTRUCTED BY : HAYCOCK ATTORNEYS , JOHANNESBURG