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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/04/2015 ....
DATE SIGNATURE

CASE NO: 72107/2014

17/4/2015

In the matter between:

A.G Formwork & Scaffolding(Pty) Ltd **Plaintiff/Applicant**

and

FVN Projects CC **First Respondent/Defendant**

Frans Petrus Van Niekerk **Second Respondent/Defendant**

JUDGMENT

CORAM: PHATUDI AJ:

[1] INTRODUCTION:

1.1 This is an opposed application for Summary Judgment against the First and Second Defendants sued, jointly and severally, for payment of the amount of R432 868.26 being for rental of the scaffolding up to the period including April 2014, together with 15.5% interest per annum *a temporae morae*, and costs of suit.

1.2 On 19th February 2015, I made an Order granting Summary Judgment in favour of the Plaintiff against the Defendants jointly and severally, the one paying the other to be absolved, as prayed for in the Notice of Application.

1.3 The Defendants have since delivered a notice on 04th March 2015, seeking written reasons for the Order I made on 19th February 2015.

1.4 What follows are the reasons and a summary of the factual backround that gave rise to the Order made.

[2]. The Plaintiff("the applicant") issued a Combined Summons in this Court on 24th October 2014 against the Defendants("the respondents") seeking payment of the amount of R432 868.26, being for rental of the scaffolding up to and including April 2014, together with interest thereof at 15.5% per annum a *temporae morae* from the date of summons, until date of final payment and costs of[1] suit.
A notice of intention to defend the action was delivered on the plaintiff's attorneys on 25th November 2014. The Plaintiff subsequently brought a notice of application for Summary Judgment on 04th December 2014 which was served on the defendant's attorneys on 12th December 2014[2]. The defendant delivered an opposing affidavit resisting the relevant application on 14th January 2015. The application was set down for hearing on 17th February 2015.

[3] The application for Summary Judgment was predicated on the provisions of Rule 32(1) of the Uniform Rules of Court("the Rules") which provides that:

Rule 32(1):
"Where the defendant has delivered a notice of intention to defend, the Plaintiff may apply to Court for Summary Judgment on each of such claims in the Summons as is only –

[1] Pp 3-14, Particulars of Claim, read with Annexures A-F, Bundle.
[2] Pp 55-56, Index to Bundle

(a)-----------------------------

(b) for a liquidated amount in money

(c)--------------------------------

(d)--------------------------------

In the present instance, the Plaintiff's cause of action arose during the period June 2013 up to and including October 2013. The particulars of claim, paragraph 8 in particular recites:-
"During the period of June 2013 up to and including October 2013 the Plaintiff provided to the First Defendant, at the First Defendant's request, with scaffolding to be utilized by the First Defendant at a site situated in Lanseria-------- The scaffolding was provided to the Defendant by the Plaintiff subject to the terms and conditions agreed to between the parties. Copies of the respective delivery notes issued to the First Defendant by the Plaintiff are attached hereto as Annexure "C"".

[4] It was further alleged in Paragraph 8 thereof that the First and Second Defendants had in its/his possession and under its/his control scaffolding of the plaintiff consisting of the items and quantities as listed in Annexure "D" attached[3] thereto. The contents of Annexure D were to be read as if specifically pleaded.
The items in Annexure D were in defendants' possession as from June 2013 to 31st October 2013, when the scaffolding was returned to the Plaintiff.
Furthermore, the monthly rental due to the plaintiff by the First Defendant for the scaffolding in terms of the said agreement, amounted to R432 868.26 per month for which certain invoices were issued(Annexure "E") for payment.

[5]. It was also alleged that as at 11th April 2014, the First Defendant was indebted to the plaintiff in the amount of R432 868.26, which amount become owing, due and payable to the plaintiff as per Annexure "F" attached to the particulars of claim[4]. The amount owed was reduced by part payment already made by the Defendant/s prior to the issuing of Summons.

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[3] P40, paginated Bundle
[4] Annexure F, P55, Paginated Bundle

[6]. In terms of Paragraph 9.5 of the particulars of claim the liability of the Second Defendant was that of a "surety for and co-principal debtor *in solidum"* with First Defendant[5]. Paragraph 11 of Annexure "A" at p18 specifically incorporated a Suretyship Clause which invariably bound the Second Defendant personally as "surety for and co-principal debtor" for the due and proper discharge of all such customer's obligations to the company, *in casu*, the First Defendant. This suretyship was signed by the Second Defendant on 10th October 2012.
The terms and conditions of hire were set out in Annexure "B"[6], attached to the Summons.

[7] Adv. Van der Merwe, Counsel for the applicant, submitted that the crux of the parties' relationship arose from the written contract being for goods and services provided to the First Defendant. The goods referred to were scaffolding provided by the plaintiff to First Defendant, for which Second Defendant assumed liability as a Surety and co-principal debtor.

He submitted that the First Defendant defaulted in its obligations towards the Plaintiff in that it failed to pay an amount of R432 868.26 to the Plaintiff for the use of scaffolding for the period June 2013 to October 2013, after certain invoices were issued for payment on due dates.

[8] In resisting the application, Counsel for the respondent Adv. Jacobs, raised a point *in limine*, contending that the applicant has failed to comply with the provisions of Section 129 and 130 of the National Credit Act("the NCA")[7]. He contended further that in terms of the NCA the type of agreement the parties concluded fell within the ambit of the definition of the so-called "incidental agreements" which according to him, are regulated by Section 5(1) of the NCA and matters incidental thereto.
In addition, Counsel contended that Section 129-133 of the NCA forms part of Chapter 6 of the said Act, and therefore the required notices as envisaged in Sections 129 and 130 of the NCA, were not dispatched prior to the issuing of the Summons thereby rendering the Summons premature. I propose to return to this submission in the course of this Judgment.

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[5] Annexure A, P15 paginated Bundle
[6] P20, paginated Bundle
[7] Act 34 of 2005

[9] It was contended further on behalf of the respondent that as the claim against the Second Respondent's liability was that of a Surety and co-principal debtor, he was not aware that Clause 11 of Annexure "A", being "an application for account facilities and deed of suretyship" signed on 10 October 2012, in fact bound him as surety and, therefore, became personally liable as such *singuli in solidum* with the First Respondent. In binding himself as surety, he also agreed to renounce the benefits of exclusion and division with the free meaning and effect whereof he declared to be perfectly acquainted. He in fact relied on *iustus error* as a defence.

[10] I find no substance in this contention. The plain language used in Clause 11 of Annexure "A", is not only unambiguous, but lacks complex legal parlance, to say the least. Accordingly, to contend that the Second Respondent was not aware that he was acting as Surety for and co-principal debtor with First Respondent, is tantamount to clatching at a straw. Assuming for a moment that the Second Respondent was actuated by reasonable error(*iustus error*) for having acted to his detriment, as to why from June 2013 to October 2013, as the applicant continued to provide to First Defendant the goods delivered, did Second Defendant not seek to resile from the contract, is another question.

[11] In reply, Mr Van der Merwe for the applicants submitted *inter alia* that:

10.1 the NCA does not apply to the nature and type of the credit agreement the parties have entered into. In this instance, the First Respondent is a Close Corporation and, therefore, a juristic person, alternatively,

10.2 The credit agreement the parties concluded, of which the First Respondent is a juristic person, was in respect of a principal debt in excess of R300 000.00 and the NCA is, therefore, not applicable to the debt under the credit agreement, and that the First Respondent is a "small" entity with an asset value or annual turnover of less than R1 million in respect of the small or intermediate credit agreement.

10.3 Further alternatively, in view of the fact that the principal debt in dispute and as claimed in the summons is an amount of R432 868.26, the NCA finds no application, and correspondingly Sections 129 and 130 of the NCA were unnecessary as between the parties dealing at arms' length.

[12] **LEGAL FRAMEWORK APPLICABLE FOR PURPOSES OF SUMMARY JUDGMENT IN NCA MATTERS:**

11.1 A party who seeks to resist an application for Summary Judgment is required to deliver an opposing affidavit disclosing fully the nature and grounds of the defence("bona fide defence") and the material facts on which it is based[8].

Put differently, the defendant must depose to facts that, if accepted as the truth or proved at the trial, with admissible evidence, would constitute a defence to the plaintiff's claim[9]. Such an affidavit need not be laconic nor ambiguous or fail to canvass matters critical to the defence raised.

11.2 As already indicated, the defendants placed considerable reliance on non-compliance by the plaintiff with sections 129 and 130 of the NCA. In view of the provisions of the NCA limiting the liability in certain specified instances, in particular, Sections 4(1)(a)(i), Section 4(1)(b), Section 6 and Section 7(1) of the NCA, I am inclined to subscribe to the submissions advanced on behalf of the applicant that as the relevant provisions referred to are not applicable to the First defendant/respondent, Sections 129 and 130 of the said Act were considered unnecessary before summons could be issued. The Second Defendant, needless to say, entered the picture merely on account of his status as surety for an co-principal debtor jointly and severally with the First Defendant.

11.3 There is a growing tendency since the gradual introduction in our law of the provisions of the NCA, where in many cases the defendants have opposed summary judgment applications not by raising a *bona fide* defence to the allegations of indebtedness in respect of the claim, raising for instance, technical defences ranging from non-compliance with the NCA provisions to alleged "over-indebtedness" seeking debt counsellor intervention. In my view, such technical defences in the absence of a *bona fide* defence to the action raised, should not eclipse the purpose of Summary Judgment applications.

11.4 The courts of the land have reiterated over and over again that the purpose of summary judgment is to assist a plaintiff where the defendant who cannot formulate a *bona fide* defence or raise a triable issue,

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[8] Rule 32(3)(b), Uniform Rules of Court, see also, Maharaj v Barclays National Bank Ltd 1976(1) SA 418(A) at 423, and Central News Agency Ltd v Cilliers 1971(4) SA 351(NC)

[9] Standard Bank of SA Ltd v Friedman 1999(2)SA 456(c) at 462 G.

enters appearance to defend solely for the purpose of delay.

Vide: Meek v Kruger 1958(3)SA 154(T) at 159H-160A

11.5 Turning to the facts of this matter no where in its opposing affidavit did the Respondents establish a *bona fide* defence to the claim. Instead, in its Supplementary Opposing Affidavit dated 11th February 2015 as deposed to the Second Respondent on behalf of the First Respondent, the defendants dismally failed to advance a defence, and worse still, the defendants *ex post facto*, better described as an afterthought in paragraphs 4(4.1-4.5) again failed to raise a genuine defence while in the same vein, do not dispute the existence of the rental agreement. If indeed a meeting ever took place between Messrs De Beer and Van Niekerk in Midrand purporting to vary the terms and conditions of the rental of scaffolding, it remains obscure as to why an Addendum or variation agreement signed by the parties has not been attached to the Supplementary Opposing Affidavit referred to.

11.6 In the facts analogous to the present matter, the Court in an unreported Judgment per Monama J[10], dealt briefly with the application or otherwise of Section 129 Notice vis-à-vis a juristic person and stated: [Para: 12+13]

PARA 12:

"

> It is common cause that the first defendant is a juristic person and that the plaintiff did not comply with the procedure of Section 129 of the National Credit Act 34 of 2005, as amended. It is also common cause that the main agreement is between the plaintiff and the first defendant, and that the transaction between the parties is a credit transaction. The second and third defendants are co-principal debtors in terms of their suretyship agreements.
>
> The National Credit Act applies to every credit agreement except agreements specified in Section 4 thereof"

PARA 13:

"

> The Plaintiff contends that the said provisions do not apply and the notice in terms of Section 129

[10] First Rand Bank Ltd t/a Wesbank v Ego Specialised Services cc & Others [Case NO. 47925/2011] SGC delivered on 03.04.2012(marked "Reportable")

of Act 34 of 2005("NCA") was unnecessary. The second and third respondents are mere "guarantors". Therefore, the second and third defendants cannot rely on the said provisions. They are not the "customers" within the meaning of the Act. The Act does not apply to the sureties. Accordingly, this argument is devoid of any merit and must be rejected".

11.7 I find myself wholly in agreement with the dictum stated by the learned Judge in the foregoing passage, and the reasoning thereof cannot be faulted either.

11.8 Following the statement of the law as pronounced, and applying the facts which as I have remarked are analogous to the facts in the present instance, I do not hesitate to arrive at the conclusion that, the Order granting summary judgment handed down on 19th February 2015, is hereby confirmed.

M.G PHATUDI
ACTING JUDGE, GAUTENG
DIVISION, PRETORIA

APPEARANCES:

1. Counsel for the Plaintiff: Adv. L.K vd Merwe

   Instructed by: Kemp De Beer & Goosen Attorneys, 690 Ella Street, Pretoria

2. Counsel for Defendants: Adv. M.Jacobs

   Instructed by: WWB Botha Attorneys, 446 Cameron Street, Pretoria

3. Date heard: 19 February 2015

   Date of Judgment: 17 April 2015