

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

Case No.: 1294/2014

In the matter between:

AG FORMWORK AND SCAFFOLDING

Plaintiff/Applicant

and

AFRIWORLD 144 CC

First Defendant / Respondent

MILLET COX

Second Defendant / Respondent

HEARD ON:

31 JULY 2014

JUDGMENT BY:

E.K. TSATSI, AJ

DELIVERED ON:

11 SEPTEMBER 2014

INTRODUCTION

[1] This is an opposed summary judgment against the defendants for:

- (a) the immediate return of the scaffolding of the plaintiff;
- (b) payment of the amount of R270 245.91 for rental of the scaffolding up to including February 2014 or until the date of the return of the scaffolding to the plaintiff

- (c) interest on the amount of R270 245.91 at 15,5% per annum until date of final payment;
- (d) interest on the amount of rent that will become due to the plaintiff and which may accrue from February 2014 to date of return of the scaffolding to the plaintiff at 15,5% per annum *a tempore morae* to date of final payment thereof.
- (e) costs of this action; and
- (f) further and/or alternative relief.

FACTS

[2] The plaintiff's claim arises from a contract entered into between the applicant and the first defendant on or around 18 March 2013 in terms of which the applicant leased a scaffolding to the first defendant. The second defendant signed as surety for and on behalf of the first defendant. The relief sought against the second defendant is based on the surety agreement entered into between the parties on 22 February 2013. A copy of the plaintiff's standard condition of hire was attached to the summons as annexure "B".

[3] In the particulars of claim, the plaintiff alleged, *inter alia*, that:

"9.3 The monthly rental due to the plaintiff by the first Defendant for the scaffolding of the Plaintiff in the possession of the First Defendant in terms of the agreement reached between the parties, amounts to R25 407.05 alternatively R24 587.47 per month depending on the number of days in each applicable

month. The First Defendant was provided with invoices on a monthly basis. The last invoice provided to the First Defendant for the month of February 2014 is attached hereto as Annexure “F”.

9.4 As at 28 February 2014 the First Defendant was indebted to the Plaintiff in the amount of R270 245.91, which amount is due and payable but which amount the First Defendant is refusing and/or neglecting to pay.....”

[4] As at 28 February 2014 the first defendant was indebted to the plaintiff in the amount of R270 245.91 (two hundred seventy thousand – two hundred forty five and ninety one cents), the invoice of which was attached to the summons as annexure “G”.

[5] The defendants in opposing the summary judgment denied that they are indebted to the plaintiff in the amount claimed. They alleged that the first defendant is indebted to the applicant in a “maximum amount of R119 442.77”, which amount was tendered by the first defendant.

ISSUES

[6] The main issue in this application is whether or not the defendants have disclosed fully the nature and grounds of their defence and whether or not such is a *bona fide* defence.

SUBMISSIONS

- [7] Counsel for the plaintiff submitted that prayers 1, 3 and 5 be postponed *sine die*. Further submission was that the applicant did not know that the scaffolding was stolen at the time when the particulars of claim was drafted. Counsel for the applicant argued that the reason why the monthly rental was not fixed was because the number of days differed every month. He submitted that the court should grant summary judgment in terms of prayers 2, 4 and 6.

7.1 According to counsel for the plaintiff the defendants failed to pay any money to the applicant as agreed. Clause 8 of annexure “B” attached to the court papers provides that:

“In the event of the equipment being lost or damaged or should Hirer fail to return the equipment to AG on termination of this contract of hire for whatever reason the Hirer shall pay to AG, AG’s then current full catalogue price for such lost or damaged equipment as liquidated damages, as well as all other loss or damages sustained of whatever nature including depreciation and or the costs of repairs required to be made to the equipment and all the expenses incurred by AG in obtaining possession of equipment.”

It was argued on behalf of the plaintiff that the replacement amount of the scaffolding is a liquidated amount.

- [8] Counsel for the defendants submitted the defendants are opposed to postponing prayers 1, 3 and 5. It was argued on

behalf of the defendants that their defence is that the scaffolding was stolen on 3 August 2013. It was argued on behalf of the defendants that the applicant is obliged to mitigate his loss which he failed to do. The defendants should not pay anything to the plaintiff from 3 August 2013 to 28 February 2014 due to the fact that the defendants did not make use of the scaffolding because it was stolen.

THE LAW

- [9] In **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) it was held that the rule requires the defendant to set out in his affidavit sufficient facts, which if proved at trial, will constitute answer to the plaintiff's claim.

- [10] The court cannot decide at summary judgment stage any balance of probabilities or determine the likelihood of the deponent's allegations being true or false – **Maharahj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426A – E.

- [11] There are two considerations when deciding an application for summary judgment. The first is whether there has been sufficient disclosure by the defendants of the nature and grounds of their defence and the facts upon which it is founded. The second consideration is whether the defence is *bona fide* and good in law. If the court, in exercising its discretion, is of the view that the defence raised is not bad in law and that the case of the plaintiff is not unanswerable, it

will decline to grant summary judgment. (See Erasmus, **Superior Court practice**, Rule 32(3) (b); **Joob Joob Investments (Pty) Ltd v Stocks Mavundla ZEK Joint Venture** 2009 (5) SA 1 (SCA) at 11G – 12D.)

Summary judgment is an extraordinary and stringent remedy. The court should always keep this in mind when exercising its discretion – **Arend and Another v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C).

[12] In **Standard Bank of SA (Pty) Ltd v Friedman** 1999 (2) SA 456 at 46E – J the court said the following:

“A defendant confronted with an application for summary judgment can elect to give security to the plaintiff to the satisfaction of the Registrar of any judgment including costs that may be given or satisfy the Court by affidavit that he has a *bona fide* defence to the action. The affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon for it (Rule 32(3) (a) and (b) of the Uniform Rules of Court).”

APPLICATION OF THE LAW

[13] In this matter the defendants elected to oppose the summary judgment application by filing an opposing affidavit as envisaged in Rule 32(3) (b). The defendants alleged that the scaffolding was stolen on 3 August 2013. Although at the summary judgment stage it is not for the court to decide whether or not the defendants are telling the truth, I am of the

view that the defendants should have at least informed the plaintiff about the theft immediately. The defendants waited until they were issued with summons and only then did they allege that the scaffolding was stolen. The defendants further argued that the plaintiff should have mitigated his loss. I do not see how the plaintiff could have mitigated his loss if he did not know that his scaffolding was stolen.

[14] I am of the view that there has not been sufficient disclosure by the defendants of the nature and grounds of their defence and of the facts upon which it is founded. No information was placed before court of the circumstances under which the scaffolding was stolen and or how it was stolen. There is not an even indication of whether or not the matter was reported to the police. The defendants are only making a bold statement that the scaffolding was stolen, without offering any factual supporting factors.

[15] It was stated in **Shepstone v Shepstone** 1974 (2) SA 462 (N) by Muller J at p 467E – H:

“The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case.”

[16] Based on the evidence placed before me, the plaintiff has an answerable case. The defendants have not paid any money to the plaintiff as per the agreement between the parties. According to clause 8 of annexure “B”, the defendants have

also breached their obligations arising from the contract, viz; paying the plaintiff the current full catalogue price for the stolen scaffolding, including all expenses incurred by the plaintiff in obtaining possession of the equipment.

16.1 Although the defendants are opposed to the postponement of prayers 1, 3 and 5, my view is that the plaintiff is entitled to the postponement of the said prayers. Had the plaintiff known at the time when the particulars of claim were drafted, the said prayers might not have been included in the particulars of claim.

[17] In light of the preceding, theft of the scaffolding is not a defence to the contract in this matter. Theft of the scaffolding does not affect the defendants' liability. Based on what has been placed before me, I am not persuaded that the defendants have a *bona fide* defence. I am also not persuaded that the defendants have been open and frank with the court by disclosing the fact that theft of the scaffolding does not affect their liability.

[18] In the circumstances I am disposed to exercising my discretion to grant summary judgment in favour of the plaintiff.

[19] In the result I make the following order:

19.1 Summary judgment is granted against the first and second defendants in the amount of R270 245.91 for rental of the scaffolding. The first and second defendants are jointly and severally liable for the payment of R270 245.91 the one paying the other to be absolved.

19.2 Payment by the first and second defendants of the interest on the amount of R270 245.91 at 15, 5% per annum *a tempore morae* from date of summons until date of final payment. The first and second defendants are jointly and severally liable for the payment of such interest, the one paying the other to be absolved.

19.3 Prayers 1, 3 and 5 are postponed *sine die*.

19.4 The defendants to pay costs of application.

E.K. TSATSI, AJ

On behalf of applicant/plaintiff:

Adv L.K. van der Merwe
Instructed by:
Saffy Associates
BLOEMFONTEIN

On behalf of respondents/defendants:

Adv J.L. Olivier
Instructed by:
EG Cooper Majiedt Inc
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