

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR550/12

In the matter between:

INGWE MABALA CONSTRUCTION CC

1ST APPELLANT

SIBONGILE ENID ZUNGU

2ND APPELLANT

and

LANDANANI PLANT HIRE CC

RESPONDENT

JUDGMENT Delivered 20 May 2013

STRETCH A J

[1] Summary judgment procedure is one which enables a plaintiff with a clear case to obtain swift enforcement of his/her claim against a defendant who has no real defence to that claim. The courts have stressed the fact that this remedy is an extraordinary and stringent one because it makes inroads into a defendant's rights to have his/her case heard. The granting of a summary judgment effectively closes the court's doors on the defendant.

[2] It is therefore only accorded to a plaintiff who has a case which is not answerable because the defendant has no defence to it. The procedure is not designed to give any procedural advantage to a

plaintiff nor is it intended to enable a plaintiff to have a preview of the defendant's case.

[3] This is an application for rescission of summary judgment granted in the Vryheid Magistrates' Court for payment of the sum of R711 444,70 on the first claim and R53 629,72 on the second one. The respondents original claim in the court below was for payment of R825 910,70 under claim one and for payment of R38 563,25 and R15 066,47 under the second claim, based on claims for equipment rental and a deed of suretyship.

[4] For ease of reference I shall hereinafter refer to the appellants (being the respondents in the court below) as Ingwe and Zungu, and to the respondent (having been the applicant in the court below) as Landanani.

[5] Ingwe (being a close corporation in the business of construction) and Zungu (being a member of Ingwe) raised a number of grounds of opposition to the application for summary judgment in the court below. They include the following:

[5.1] They denied having hired a grader for R48 314,38.

[5.2] They averred that at least two payments (which had been made some two years previously) had not been accounted for (R14 466 and R100 000). This was conceded by Landanani in the court below, the effect of this being that the claim was already then

drastically reduced from R825 910,70 to R711 444,70. The correctness of this challenge alone in my view, ought to have tipped the scales somewhat in favour of Ingwe and Zungu with respect to the *bona fides* and the legality of at least some of their other claims, particularly when this challenge revealed that Landanani had not approached the court below with an accurately liquidated claim, which is a pre-requisite for an application for summary judgment (see ***Meddent Medical Scheme v Avalon Brokers (Pty) Ltd. 1995 (4) SA 862 D at 865 F – G***).

[5.3] They disputed that they always hired equipment for full hours at a time, and aver that Landanani's previous bills reflected pro rata charges as opposed to the full hour charges which were not being reflected. In this regard (and in order to motivate a counter-claim for debatement and to respond to a letter of demand), they had, on 11 April 2012, requested Landanani's time books (shortly after summons had been issued), only to receive a curt reply six days later, pointing out that summons had already been issued, and accordingly declining the request.

[5.4] They averred that Landanani's hourly rate had not been agreed upon.

[5.5] They further averred that Zungu (having been the second respondent in the court below) had not signed in her capacity as surety.

[5.6] They contended that there had been no oral agreement that Landanani would hire equipment and purchase items on behalf of Ingwe, and then charge Ingwe for their services.

[5.7] It was further contended that Ingwe had in fact paid for diesel on behalf of Landanani and that they were in the process of calculating this debt as part of their counter-claim.

[6] I do not intend traversing all the grounds of defence which were raised in the Court *a quo* and which have again been raised before this Court in an attempt to persuade it that the magistrate below had misdirected herself.

[7] What is significant is that one of these grounds had already been conceded in the course of the application for summary judgment in the court below, (viz the ground that Landanani had not done its maths properly and that a substantial portion of the debt which it was claiming had already been paid).

[8] However, before this ground was conceded, and when Ingwe in good faith attempted to reconcile its records with those of Landanani (and significantly before summary judgment was applied for), Landanani refused to make these documents available to Ingwe, dismissing its request on the rather stand-offish ground that action had already been instituted.

[9] As I have said, I do not deem it necessary to traverse the merits of each and every ground of opposition raised by the appellants when their case featured in the court below.

[10] From what has transpired in that court, taken together with Landanani's refusal to assist Ingwe to perform its own calculations, I am not persuaded that:

[10.1] Landanani has the requisite clear case which it was expected to have to enable it to obtain swift enforcement of its claim against Ingwe and Zungu;

[10.2] Ingwe and Zungu's affidavits show that they have no real defence to Landanani's claim, particularly when this Court simply does not know what a debatement (with the assistance of the documents which Landanani refused to part with) would have revealed, and more particularly because it appears that Ingwe does not dispute the fact of the claim, but its quantum only.

[11] In the premises I am of the view that the magistrate in the court below misdirected herself by granting summary judgment, in the absence of a clear case against Ingwe and Zungu who, by contrast, had raised what I perceive to be real defences (which are both *bona fide* and good in law), when an application of this nature is to be considered.

[12] In the premises I propose the following order:

ORDER

- (a) The appeal is upheld.

- (b) The respondent is directed to pay the costs of the appeal.
- (c) The order made by the Court *a quo* is set aside and it is substituted with the following order:
 - (i) Summary judgment is refused.
 - (ii) The respondents are granted leave to defend.
 - (iii) Costs are reserved.
- (d) It is directed that the *dies induciae* within which the respondents are entitled to defend in terms of the Magistrates' Court Rules, will commence running from the date of this judgment.

STRETCH A J

I agree and it is so ordered

SEEGOBIN J

Appearances /:

Appearances:

For the Applicants : Mr C. Hattingh

Instructed by : Cox & Partners
C/o Botha & Olivier Inc.
Pietermaritzburg

For the Respondent : Mr. C. Pretorious

Instructed by : G. J. Vonkemann Attorneys
C/o Tatham Wilks Inc.
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Date of Hearing : 11 February 2013

Date of Filing of Judgment : 20 May 2013