

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1116/2006

In the case between:

ALL GOOD THINGS 149 CC

Plaintiff

and

WASCON SIVIEL CC

1st Defendant

WOUTER WASSERMAN 2nd Defendant

JUDGMENT: EBRAHIM, J

HEARD ON: 4 MAY 2006

DELIVERED ON: 11 MAY 2006

[1] This is an application for summary judgment in which the plaintiff seeks against 1st and 2nd defendants jointly and severally the amount of R402 024,32 for goods sold and delivered to the 1st defendant on a open and running account between October 2005 and January 2006. The claim against the 2nd defendant is based on an alleged

suretyship undertaking given by the 2nd defendant in respect of the debts of the 1st defendant to the plaintiff.

[2] The affidavit of the defendants resisting summary judgment sets out their defence in paragraph's 4.3 to 4.6 thereof as follows:

“4.3 Tydens die gemelde termyn het dit reeds aan die lig gekom dat sekere van die fakture sekere aankope getoon het wat nie deur 1ste Verweerder gemaak en/of ontvang is nie. Hierdie fakture is nagegaan aan die hand van 1ste Verweerder se goedgekeurde bestellingsdokumente. Eiser se fakture is derhalwe op grond van verkeerde inligting opgestel en bereken.

4.4 Daar is verskeie kere met Eiser in verbinding getree na aanleiding van die foutiewe fakture en die besonderhede wat betwis word. Alhoewel hierdie aspekte gereeld met die Eiser opgeneem is en verskeie ondernemings deur die Eiser gegee is om dit reg te stel, het die Eiser eenvoudig versuim om die foute reg te stel.

4.5 Na aanleiding van Eiser se versuim om die fakture reg te stel en die nodige samewerking te gee, is daar uiteindelik gedurende Maart 2006 besluit om opdrag aan 'n finansiële adviseur te gee om 'n volledige rekonsiliasie van alle transaksies met die Eiser te doen. Vir voormelde rekonsiliasie word alle goedgekeurde bestellingsbriewe, voorraadopnames en afleweringstate in ag geneem. Alhoewel die rekonsiliasie nog nie naastenby voltooi is nie, het dit reeds aan die lig gekom dat daar op 'n verskeidenheid van die fakture vir goedere geëis word wat nie deur 1ste Verweerder bestel of ontvang is nie.

4.6 Ek het reeds fakture in die bedrag van ongeveer R400 000,00 opgespoor ten aansien van aankope vanaf Eiser welke nie deur ons kantore gemagtig is

volgens bogemelde praktyk nie, alternatiewelik nie
deur ons kantore ontvang is nie.“

- [3] It is trite that the test for the granting of summary judgment is whether or not the defendants have raised a *bona fide* defence to the plaintiff's claim. A *bona fide* defence is sufficiently disclosed where the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing or, put differently, if his or her affidavit shows that there is a reasonable possibility that the defence he or she advances may succeed on trial.

See **BREITENBACH v FIAT SA (EDMS) BPK** 1976 (2) SA 226 (T).

- [4] In essence the defendants have alleged that from a revision of invoices received from the plaintiff and performed by 1st defendant, which revision has not yet been completed, invoices in the sum of approximately

R400 000,00 worth of purchases have come to light reflecting goods not ordered and not delivered during the relevant period of the plaintiff's claim. If these facts are in fact established at trial, the plaintiff will not succeed in its claim and accordingly, the defence, if true, constitutes one valid in law for the purposes of Rule 32 of the Rules of this Court.

- [5] Mr. Williams, for the plaintiff, has argued, not without some substance and foundation, that the defence has not been raised with sufficient particularity such that it can be said that it has been fully disclosed within the meaning of Rule 32(3)(b) so as to amount to a *bona fide* defence. Rule 32(3)(b) requires that the opposing affidavit in summary judgment proceedings shall disclose

“... fully the nature and grounds of the defence and the material facts relied upon therefor.”

He has argued, understandably, that the defendant ought

to have set out details of the invoices reflecting the purchases allegedly not made and goods allegedly not delivered by the plaintiff. While the affidavit is terse and lacks particulars, in my view it does disclose the nature and grounds of the defence and, although somewhat bare, the essential material facts relied upon by the defendants, namely that the plaintiff's claim is for amounts in respect of goods not ordered by the defendants and not delivered to the defendants by the plaintiff.

See **TESVEN CC AND ANOTHER v SOUTH AFRICAN BANK OF ATHENS** 2000 (1) SALR 268 SCA.

[6] That being so it is not necessary for me to consider the separate defence peculiar to the claim against the 2nd defendant as surety.

In the result I make the following order:

1. The application for summary judgment is refused.

2. Leave is granted to the 1st and 2nd defendants to defend the action.
3. The costs of the application for summary judgment is to be costs in the cause.

S. EBRAHIM, J

On behalf of plaintiff: Adv. A. Williams
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of defendants: Adv. M.D.J. Steenkamp
Instructed by:
Claude Reid Inc.
BLOEMFONTEIN

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