



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: **2022/040657**

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

DATE: 13 September 2024

In the matter between: -

ZTE CORPORATION SOUTH AFRICA

Plaintiff

and

ARBIWIZN (PTY) LTD

First defendant

IBEX TECHNOLOGIES SA (PTY) LTD

Second defendant

RESTIPIX (PTY) LTD

Third defendant

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 13 September 2024.

M VAN NIEUWENHUIZEN AJ:

INTRODUCTION

- [1] The plaintiff instituted action proceedings against the first, second and third defendants for the delivery (*rei vindication*) of certain telecommunication equipment ("**the equipment**") as contained in annexure "POC1" to the particulars of claim.
- [2] The plaintiff withdrew its action against the third defendant as it alleged that the equipment is not in its possession, but in the possession of the first and second defendants.
- [3] The first and second defendants amended their plea, which was followed by the plaintiff's summary judgment application.
- [4] The defendants have raised the following defences in their plea: -
 - [4.1] They raised a special plea that the liquidators have not been cited in these proceedings;
 - [4.2] They alleged that a lien is held over the equipment and that they are therefore in lawful possession of the equipment.
- [5] The plaintiff contends that these defences do not raise any triable issue and therefore the plaintiff is entitled to summary judgment in accordance with rule 32 of the Uniform Rules of Court.
- [6] The plaintiff contends that the alleged debts have prescribed. The plaintiff

argues that even if the defendants were able to demonstrate any right of security over the equipment, any claim they may have against the plaintiff has prescribed.

COMMON CAUSE FACTS

[7] The following are common cause facts: -

[7.1] The plaintiff is the owner of the equipment;

[7.2] The first and second defendants ("**the liquidators**") are in possession of the equipment;

[7.3] The second defendant has been placed under liquidation;

[7.4] The plaintiff and the second defendant entered into an agreement whereby the second defendant undertook to remove old equipment and install new equipment on various sites belonging to a customer of the plaintiff;

[7.5] The second defendant subcontracted this work to the first defendant and the defendants jointly undertook this work.

DEFENCE – NON-JOINDER OF THE SECOND DEFENDANT'S LIQUIDATORS

[8] The defendants have indicated that they are not proceeding with this defence.

DEFENCE – THE FIRST AND SECOND DEFENDANTS HOLD A LIEN OVER THE EQUIPMENT AS CLAIMED BY THE PLAINTIFF

[9] The plaintiff contends that any lien the defendants may have no longer applies.

[10] It is the defendants' contention that it has a debtor-creditor's lien over the equipment and/or a salvage lien.

Debtor-creditor's lien

[11] It is the defendants' case that in terms of the written agreement, the second defendant was contractually bound to render services to the plaintiff.

[12] The services concerned the removal of old equipment and its replacement with new equipment by way of an upgrade of technology to cellphone towers. The defendants contend that: -

[12.1] The second defendant complied with its obligations and through the first defendant removed the old equipment and installed new equipment;

[12.2] In terms of the agreement, labour, expenses and costs would have been incurred in removing the old equipment and that the second defendant (and first defendant) will be entitled to be remunerated for their services;

[12.3] The new equipment could not be installed prior to the old equipment being removed;

[12.4] The removal of the old equipment directly forms part of the second defendant's (and the first defendant's) obligation in terms of the contractual arrangement between it and the plaintiff;

[12.5] If regard is had to the plaintiff's completion certificates, it is clear that the certificates confirm both the dismantling of the old equipment, installation of new equipment and the transportation of both the new and dismantled equipment (old equipment).

[13] The defendants allege that it is the old equipment that the plaintiff now claims delivery of.

[14] The defendants allege that the second defendant has a creditor's lien over the equipment of the plaintiff and that the plaintiff is not entitled to delivery thereof until payment is made.

[15] The first defendant was contracted by the second defendant to assist and execute the decommissioning and installation of the old equipment and new equipment. The defendants furthermore allege that clauses 3.2.9, 3.2.11 and 11.2 of the written agreement between the second defendant and the plaintiff make provision for the second defendant to appoint agents and subcontractors.

[16] The defendants allege that insofar as clause 20.10 provides that no subcontractor may be appointed, clause 18.7 provides that the plaintiff could cancel the agreement on three days' written notice, which the plaintiff elected not to do. Instead, it issued completion certificates.

[17] The defendants contend that even if the agreement prohibited the appointment of the first defendant, the first defendant remains entitled to its salvage lien.

The salvage lien

[18] The defendants claim that in addition to the alleged debtor-creditor's lien, the defendants hold a salvage lien by virtue of the fact that the first defendant through the second defendant removed the old equipment and in such a manner that it preserved the hardware/equipment.

[19] Furthermore, the defendants contend that the equipment was/is stored and preserved by the first and second defendants – this being a necessary expense for its alleged essential preservation.

PLAINTIFF'S CONTENTIONS

[20] The plaintiff contends the following: -

[20.1]The defendants rely on an alleged lien over the equipment – it is unclear whether this is a debtor-creditor's lien or an enrichment lien that they relied upon;

[20.2]There can be no enrichment lien because the defendants have not demonstrated any necessary or useful expenditure in respect of the equipment in their possession;

[20.3]The amounts claimed by the defendants allegedly arise out of the contract between the plaintiff and the second defendant. There is no

contractual relationship between the plaintiff and the first defendant
– the first defendant being a subcontractor of the second defendant;

[20.4] In terms of the agreement the second defendant was only entitled to payment after the equipment was in fact installed and tested and accordingly the defendants cannot claim a lien in respect of the equipment that is in their possession. It was not installed at the site in question so no amount is due to them in respect of that equipment. The defendants cannot claim a lien in respect of amounts that are not connected to the equipment in their possession, nor can they contradict the clear wording of the written agreement;

[20.5] The defendants do not address this point directly. They simply aver that they were entitled to remuneration for the removal of old equipment.

PRESCRIPTION

[21] The plaintiff furthermore alleges that any amount due to the defendants has prescribed.

[22] The plaintiff alleges that the alleged debt has therefore been extinguished and the defendants no longer have any basis for a lien over the equipment.

[23] The plaintiff argues that the first and second defendants have not dealt with the issue of prescription in the affidavit that they put up resisting summary judgment, which they easily could have done.

[24] In argument the defendants referred to section 359(2)(a) of the Companies Act,¹ which reads as follows: -

"359. Legal proceedings suspended and attachments void

...

(2)(a) Every person who having instituted legal proceedings against a company which were suspended by winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given, the proceedings shall be considered to be abandoned unless the court otherwise directs."

[25] The plaintiff contends that section 359 is not applicable as these are not proceedings that were "*suspended by winding-up*" and that the plaintiff's claim did not arise "*before the commencement of the winding-up*". The claim arises when the owner asserts its right to ownership of the equipment.

[26] The plaintiff furthermore contends that section 359 has not been raised by the defendants as a special plea in their pleadings.

[27] The plaintiff furthermore argued that the defendants referred extensively

¹ Act 71 of 2008 (as amended).

to various documents that form part of this matter to sustain the argument that their claim(s) has/have not prescribed. However, this cannot assist the defendants as none of this has been raised in the answering affidavit resisting summary judgment. The defences regarding prescription put up by the defendants do not assist them in resisting summary judgment.

DELIBERATION

[28] At this stage I am not called upon to determine on a balance of probabilities: -

[28.1] whether the defendants may exercise a lien over the equipment and what the basis of that lien is. There exists a dispute of fact whether the equipment in question is the equipment that was uninstalled or whether it was the new equipment that was meant to be installed, but which was allegedly not installed;

[28.2] whether the defendants have a claim that has prescribed or not.

[29] At this stage the court enquires into: -

[29.1] whether the defendants have "*fully*" disclosed the nature and grounds of their defence and the material facts upon which it is founded;²

[29.2] whether, on the facts so disclosed, the defendants appear to have a defence to either the whole or part of the claim that is both *bona fide*

² *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A).

and good in law.

If satisfied on these matters, the court must refuse summary judgment, either wholly or in part, as the case may be.³

[30] It has been held that it will be sufficient if the defendants swear to a defence, valid in law, in a manner which is not inherently or seriously unconvincing⁴ or, put differently, if their affidavit shows that there is a reasonable possibility that the defence they advance may succeed on trial.⁵

[31] The defendants are not at this stage required to persuade the court of the correctness of the facts stated by them or, where the facts are disputed, that there is a preponderance of probabilities in their favour.⁶

[32] The court merely considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be *bona fide*.⁷

[33] It was reaffirmed in *Absa Bank Ltd v Mphahlele*⁸ that our courts have warned to guard against injustice to a defendant who is called upon, at short notice and without the benefit of further particulars, discovery or cross-examination, to satisfy a court that such a defendant has a *bona fide* defence. On the one hand the remedy of summary judgment should be available to a plaintiff whose right to relief is being frustrated by the

³ *Maharaj v Barclays National Bank (supra)* at 426B-C.

⁴ *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

⁵ *Wright v Van Zyl* 1951 (3) SA 488 (C).

⁶ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303 – 304.

⁷ *Arend v Astra Furnishers (Pty) Ltd (supra)* at 303 – 304.

⁸ [202] JDR 1180 (GP) (unreported).

defendant who does not have a defence. However, on the other hand, our courts have always been reluctant to deprive a defendant of his right to defend an action and proceed to trial, except where there is a clear case.

[34] In the matter of *Edwards v Menezes*⁹ Van den Heever J expressed a preference for the approach that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed and that the plaintiff has an unanswerable case, that summary judgment will be granted.

[35] The fact that there exists a dispute whether the equipment in question is the old dismantled equipment or whether it is the new equipment that was meant to be installed but was not installed in terms of the agreement, gives rise to a triable issue.

[36] Regarding the issue of prescription, it is trite that the court should ignore any matters referred to in argument which are not raised in the statement of facts.¹⁰ However, where the documents clearly disclose a defence, summary judgment should not be granted, even in circumstances where the matter has not been raised by the defendant.¹¹

[37] I am called upon to view the matter as a whole and the defendants' case on the score of prescription was before me. In relation to prescription, I find that the defendants have a triable defence, which ought to be clearly

⁹ 1973 (1) SA 299 (NC).

¹⁰ *Thirion v Upington Trust Maatskappy (Edms) Bpk* 1966 (1) SA 401 (A).

¹¹ *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T).

ventilated at the trial of this matter.

- [38] I am mindful of the manner in which the plaintiff chose to raise prescription, namely in its affidavit for summary judgment as opposed to in pleadings. The proper way of raising prescription in action proceedings is by way of a plea or a special plea.¹² The party who raises prescription must allege and prove the date of inception of the period of prescription.¹³ Summary judgment proceedings are not meant to shift the burden of proof to the defendants or to deprive the defendants with a triable defence from its day in court. I am further mindful of the fact that the plaintiff only chose to issue summons against the defendants during or about October 2022, some two months after it alleges that the plaintiff's claim(s) has/have prescribed.¹⁴
- [39] A court has a discretion, even if the defendants' affidavit does not measure up fully to the requirements of subrule (3)(b), to nevertheless refuse to grant summary judgment if it deems it appropriate. This is indicated by the word "may" in subrule (5).¹⁵
- [40] Having regard to the above reasons, I am not inclined to grant summary judgment against the defendants.

¹² *Murray & Roberts Construction (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A).

¹³ *Gericke v Sack* [1978] 2 All SA 111 (A); 1978 (1) SA 821 (A); *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore N.O. and Others* 2015 ZASCA 37.

¹⁴ The plaintiff alleges that the framework agreement between the plaintiff and the second defendant lapsed during August 2019. The defendants allege that prescription could only run from at the earliest some seven months later from March 2020 on the amounts or a portion of the amounts claimed

¹⁵ *Gruhn v N Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) and the authorities therein referred to; *Tesven CC v Bank of Athens* 2000 (1) SA 268 (SCA) at 277H-I; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D-E.

ORDER

Accordingly, I make the following order: -

1. The plaintiff's application for summary judgment is dismissed.
2. The defendants are given leave to defend the action.
3. The costs of the application are costs in the cause.




M VAN NIEUWENHUIZEN

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 23 July 2024

DATE OF JUDGMENT: 13 SEPTEMBER 2024

APPEARANCES:

On behalf of plaintiff: ADV. O. BEN-SEEV

Instructed by:
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c/o Jennings Inc

On behalf of defendants: ADV. J. VORSTER

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