



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

**Reportable / Not reportable
Case No.: 1734/2024**

In the matter between:

**CAPITALBOX GREEN ENERGY FINANCE
(PTY) LTD**

PLAINTIFF

and

BARUK PETROLEUM (PTY) LTD

FIRST DEFENDENT

BARUK PROPERTY 1 (PTY)LTD

SECOND DEFENDENT

VUYOX CAPITAL (PTY) LTD

THIRD DEFENDENT

Neutral Citation:

Coram: Van Rhyn J

Heard: 19 September 2024

Delivered: 22 October 2024

ORDER

1. The first defendant is ordered to deliver/return the following equipment to the plaintiff:
 - 1.1 3 x Kodak 10kW Single Phase (3 Phase compatible);
 - 1.2 1 x Life PO4 Lithium 30/24;
 - 1.3 1 x Life PO4 Lithium 10/8;
 - 1.4 48 x 545W JA Solar;
 - 1.5 1 x GENERAC PME 30S Generator;
 - 1.6 1 x Monitoring Device.
2. Summary judgment in respect of the remainder of the plaintiff's claims is dismissed and leave is granted to the First, Second and Third Defendants to enter into the principal action.
3. Each party is liable for its own costs of the summary judgment application.

JUDGMENT

Van Rhyn J

[1] The plaintiff, Capitalbox Green Energy Finance (Pty) Ltd seeks summary judgment arising from a written Master Rental Agreement (Agreement) concluded on 21 November 2022 with the first defendant, Baruk Petroleum (Pty) Ltd. On 14 November 2022, prior to the conclusion of the Agreement, Baruk Property 1 (Pty) Ltd, cited as the second defendant and Voyox Capital Pty Ltd, the third defendant, entered into guarantee agreements with the plaintiff and bound themselves as guarantors and co-principal debtors with the first defendant in favour of the plaintiff. The Agreement, Annexure 'A' together with the two Guarantee Agreements, Annexure 'B' and Annexure 'C' are annexed to the particulars of claim.

[2] The plaintiff seeks judgement against the defendants jointly and severally, the one paying the other to be absolved, for:

1. delivery/return of
 - 1.1 3 x Kodak 10kW Single Phase (3 Phase compatible);
 - 1.2 1 x Life PO4 Lithium 30/24;
 - 1.3 1 x Life PO4 Lithium 10/8;
 - 1.4 48 x 545W JA Solar;
 - 1.5 1 x GENERAC PME 30S Generator;
 - 1.6 1 x Monitoring Device.
2. Payment of the amount of R1 351 543.28;
3. Payment of interest at the rate of 17,5% per annum from date of service of summons to date of payment in full;
4. Costs on attorney and client scale.

[3] Summons was served upon the defendants on 10 April 2024. The defendants filed their notice of intention to defend on 30 April 2024. The defendants failed to deliver a plea within the time prescribed by the Uniform Rules of Court. The plaintiffs thereupon delivered a Notice of Bar on 4 June 2024 which elicited a plea on the 11th of June 2024.

[4] The plaintiff then applied, in terms of Rule 32, for summary judgment which was delivered on 28 June 2023. The application for summary judgment did not state that the matter will be set down for hearing on a stated day not being less than 15 days from the date of delivery thereof, as provided for in subrule 32(2)(c). Furthermore, the defendants failed to file their answering affidavit timeously, and only eventually did so on 13 August 2024, subsequent to the matter being postponed to the opposed roll for hearing on 19 September 2024.

[5] The plaintiff filed heads of argument as required in terms of the Rules of Court. However, the defendants failed to adhere to the time periods and only filed their heads of argument on the afternoon before the hearing of this matter.

[6] The amended Rule 32(1) reads:

'The plaintiff may after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only -

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

Together with any claim for interest and costs.'

[7] The object of summary judgment procedure is the time and cost-effective disposal of litigation in matters that are amenable to the process and in which a defendant is not able to show that it has a legitimate defence to an action and has sought to defend it merely for the purpose of delay.¹ The procedure is aimed at preventing a defendant from raising a bogus or sham defence which is bad in law, in order to unjustifiably delay a plaintiff from obtaining what is due to it.²

[8] The plaintiff avers in its particulars of claim that the movable equipment/goods (equipment) was delivered to the first defendant upon signature of the Agreement. It was an express term of the Agreement that the first defendant would rent the equipment for a period of 10 years payable by way of monthly rental payments of R19 581.77, the first payment to be made on 21 November 2022.

[9] In the event of the first defendant failing to make payment in terms of the Agreement on the due date, such overdue amounts shall bear interest at a rate of 17.5% from the due date of payment until the actual date of payment. Paragraph 8.5 of the particulars of claim reads as follows:

'Should the First Defendant default in the punctual payment of any instalment or any other amount falling due, or fail to observe and perform any other of the terms, conditions and/or

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA) para 29.

² *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304G.

obligations of the agreement, the Plaintiff is entitled in its election and without prejudice to any rights to:

8.5.1 Require specific performance.

8.5.2 Cancel the agreement and demand return of the goods whereupon the Defendant shall forthwith return the goods to the Plaintiff and Plaintiff shall be entitled to claim as liquidated damages payment of all amounts then due in respect of the Agreement.'

[10] It is furthermore alleged that the first defendant breached the Agreement by failing to make regular payments in terms of the Agreement. On 16 January 2024 a notice of breach was sent to the first defendant demanding it to rectify its breaches of the Agreement within five business days as from date of transmission thereof, failing which, the Agreement will be cancelled.

[11] The deponent to the plaintiff's affidavit in support of the application for summary judgment stated that ownership of the equipment shall not pass to the first defendant at any time during or after the expiry of the rental period or after termination of the agreement. It is common cause that the Agreement does not fall within the ambit of the National Credit Act 34 of 2005. The plaintiff stated that, as a result of the breach by the first defendant, the plaintiff cancelled the agreement. The amount outstanding in terms of the agreement amounts to R1 351 543.28 reflected in the certificate of indebtedness appended to the particulars of claim and marked 'Annexure E'. The plaintiff alleges that the claim as set out in the particulars of claim is a liquidated amount of money which falls within the ambit of Rule 32(1)(b).

[12] The defendants oppose the application on the following grounds:
In the plea the defendants stated as that:

- (a) the first defendant would rent the goods for a period of ten years;
- (b) the agreement was a simulated agreement in that the first defendant was renting the goods and transfer of the property to the first defendant would pass upon the expiry of the 10-year period;
- (c) the first defendant furthermore pleads that 'the solar was insufficient to cover the entire property' and the first defendant's obligation to pay rental was reciprocal to

the plaintiff's obligation to ensure that the installed solar system would carry out the purpose for which it was intended.

In the answering affidavit the defendants stated that:

- (d) a request has been made for a formal breakdown of all the outstanding arrears in terms of the rental, interest and the costs which has not been supplied to the defendants;
- (e) with reference to clause 6.2.1 and 6.2.2 of the Agreement, the plaintiff is not entitled to claim the amount sought;
- (f) the plaintiff's termination and cancellation of the agreement is unlawful;
- (g) the plaintiff may not claim 'specific performance in the form of rental and interest for the entire contract period and in addition to this, claim the return of the assets and cancellation of the agreement';
- (h) the damages claimed by the plaintiff, amount to the total rental amounts and interest for the remainder of the lease period being approximately 102 months;
- (i) it is denied that the guarantors/co-principal debtors being the second and third defendants received notice of the alleged breach of the Agreement;
- (j) it is furthermore stated that it is not the operation of the assets that is insufficient but rather the power for a certain area and workshop is insufficient. A clarification will be addressed in an amendment of the plea yet to be filed by the defendants.

[13] In terms of clause 1.1.7 of the Agreement the 'commencement date' means the date upon which the last of the equipment is actually delivered to the first defendant's premises as reflected in the delivery notes executed by the first defendant, subject thereto that if the aforesaid date falls more than 14 days after the intended commencement date as set out on the schedule, then the commencement date shall be deemed to be the intended commencement date. The 'conclusion date' means the date upon which the agreement is concluded in accordance with clause 2.

[14] The Agreement was signed on 21 November 2022 by the representative of the plaintiff and the representative of the first defendant. In terms of the document with the

heading: 'First Amended Master Rental Agreement', appended to the particulars of claim, the initial term is indicated as ten years. However, the 'initial term' in accordance with the provisions of clauses 1.1.11, means:

'... the number of calendar months specified in the schedule reckoned from the commencement date. If the commencement date is not the first day of a calendar month, then the initial term will comprise the period between the commencement date and the last day of the calendar month in which the commencement date occurs plus the number of calendar months specified in the schedule (reckoned from the first day of the calendar month immediately subsequent to the calendar month in which the commencement date occurs'.

[15] In terms of the provisions of clause 6.1 the 'PERIOD OF USE AND ENJOYMENT', the Agreement will commence on the commencement date and will continue indefinitely until terminated by three calendar months written notice of termination given by either party provided such notice may not be given to be effective prior to the end of the initial term.

[16] During argument the discrepancies pertaining to the duration of the Agreement, with reference to the period of ten years stated by the plaintiff and admitted by the defendants, the definition or meaning of initial term as contained in clause 1.1.11 read with the contents of clause 6.1, were addressed by both parties. Ms De Kock contended that the defendants could have filed an exception to the particulars of claim in the event of any uncertainty, which they did not. On behalf of the defendants, it was argued that no reference was made by the plaintiff when the actual delivery of the equipment occurred, hence the period of use and enjoyment of the equipment cannot be calculated.

[17] I am of the view that, notwithstanding the fact that the defendants admitted that the first defendant would rent the goods for a period of ten years, the period for the use and enjoyment of the equipment can only be ascertained if the commencement date, with reference to the date upon which the last of the equipment was actually delivered to the first defendant's premises and as reflected in the delivery notes executed by the first defendant, has been pleaded by the plaintiff.

[18] Without due regard to the actual duration of the contractual agreement between the parties, it is not possible to calculate the damages as claimed by the plaintiff.

[19] Clause 2.1 provides that the agreement will become binding when the party signing last in time signs the agreement (signature date). Clause 2.2 provides as follows:

'Notwithstanding clause 2.1 above, clause 4 to 13 of this agreement are subject to the fulfilment of the suspensive conditions (if any) set out in the schedule, within 30 (thirty) days of the signature date'.

[20] In the document presumed to be the 'schedule' even though it is titled the 'First Amended Master Rental Agreement' (and to which the Agreement is appended), under the heading 'Suspensive Conditions' the following is stated: 'List of conditions: Personal Guaranteed from DWW DU Plessis Id xxxxxxxx. Intercompany Guarantee between Baruk Property 1 and Vuyox Capital (Pty) Ltd'.

[21] The two intercompany guarantees Annexure 'B' and Annexure 'C' are appended to the particulars of claim. No reference is made in the plaintiff's particulars of claim of a personal guarantee from D D W Du Plessis, the director of first, second and third defendants, and no such guarantee is appended to the papers.

[22] The fulfilment of a condition must be alleged and proved by the party relying on the contract.³ Clause 2.4 of the Agreement provides that the suspensive conditions have been inserted for the benefit of the plaintiff, which will in its sole discretion be entitled to waive fulfilment thereof by notice in writing to the first defendant signed by a director of the plaintiff. Clause 2.5 furthermore provides that if all of the suspensive conditions have not been fulfilled by the date for the fulfilment or such later date as may be notified in writing by the plaintiff, the agreement will not automatically lapse. The plaintiff shall thereafter be entitled to give written notice to the first defendant that unless the unfulfilled suspensive conditions are fulfilled within 14 days of the date of receipt of the notice, the period of fulfilment or waiver of the suspensive conditions will expire.

³ *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A).

[23] The plaintiff did not plead that the agreement was subject to the suspensive condition that a personal guarantee by D D W du Plessis be delivered nor that such a condition has been complied with. A copy of a guarantee by D D W du Plessis has not been appended to the particulars of claim.

[24] Even though the defendants did not rely upon the non-fulfilment of the above-mentioned suspensive condition, not in the plea nor in the answering affidavit, I am of the view that this aspect cannot merely be ignored. The particulars of claim is not a model of clarity. The same can be said in respect of the defendants' plea and answering affidavit. It is quite possible that the plaintiff waived the mentioned suspensive condition's fulfilment, however the ordinary rules relating to the proof of a waiver apply and this aspect can be dealt with during the trial.

[25] From what can be ascertained, the gist of the defendants' defence to the plaintiff's claim is that the plaintiff failed to perform its contractual obligations towards the defendants, in that the solar power is insufficient for the purpose for which the agreement was concluded. During argument Ms Froneman, counsel on behalf of the defendants, tendered the return of the equipment, as set out in prayers 1.1 to 1.6 of the application for summary judgment.

[26] In the defendants' answering affidavit deposed to by Mr D D W Du Plessis, it is furthermore stated that the first defendant did not continue with the rental payments due to the dissatisfaction with the equipment provided and the capacity thereof. According to the Mr D D W Du Plessis he engaged with the representative on behalf of the plaintiff, Adam, regarding the insufficient power provided by the equipment. It was further stated that clarification will be addressed in a proposed amendment of the plea, which until the hearing of this application, had not been filed by the defendants.

[27] I may mention that the Uniform Rules of Court allow parties to amend their pleadings. In this instance, the defendants could have amended their plea so as to align the defences raised in the affidavit. Instead, mention is made that the defendants contemplate an amendment. A defendant who intends to disclose a *bona fide* defence in its affidavit which is not raised in its plea should first deliver its notice of intention to

amend the plea in terms of Rule 28(1)(ii). The court may, in terms of Rule 28(10), at any stage before judgment grant leave to a party to amend any pleading or document.⁴

[28] Clause 4.2 of the Agreement provides that the plaintiff purchased the equipment from the supplier at the first defendant's specific request for the purpose of renting the equipment to the first defendant. Clause 4.3 provides that the first defendant agrees that it will not hold the plaintiff liable for any defects, breakdown or insufficiency in the equipment or as a result of a failure of the equipment or the first defendant's inability to use the equipment. Any rights arising from equipment related issues must be exercised against the supplier of the equipment. The plaintiff furthermore undertakes to cede to the first defendant, any rights it may have against the supplier under any guarantee or warranty furnished by the supplier in respect of the equipment.

[29] None of the parties dealt with the provisions of the Agreement, as contained in clauses 4.2 and 4.3, pertaining to the insufficiency of the equipment. The plaintiff did not identify this aspect nor the confusion pertaining to the duration of the agreement or the issue regarding the fulfilment of all the suspensive conditions as a point of law as required in terms of subrule (2)(b) and (c).

[30] In *Maharaj v Barclays National Bank Ltd*⁵ the court held as follows:

'Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is (a) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide 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.'

⁴ *Belrex 95 CC v Barday* [2020] ZAWCHC 149; 2021 (3) SA 178 (WCC).

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-D.

[31] In *Breitenbach v Fiat SA (Edms) Bpk*⁶ a full bench held that the obligation that a defendant is to 'fully' disclose the nature and grounds of its defence and the material facts upon which it is based should not be taken literally, for to do so would require the defendant to set out, in full, all the evidence which it intended to rely on in order to resist the plaintiff's claim at trial. Therefore, what a defendant can reasonably be expected to set out in its affidavit depends upon the manner in which the plaintiff's claim has been formulated.⁷

[32] In my view it is not possible, on the limited basis of the curt allegations in the particulars of claim and the responses thereto in the respondents' answering affidavit, to safely and definitely conclude exactly when the Agreement between the parties commenced with a view to calculate the amount of damages owing to the plaintiff.

[33] In this regard it is important to have regard to the allegations contained in the plaintiff's affidavit in support of the application for summary judgment that it is not necessary to set out with particularity the calculation of the amount claimed, (R1 351 543.28) as the amount represents the arrears together with the total rentals which would have fallen due in terms of the agreement.

[34] Me De Kock argued that the plaintiff is entitled to claim contractual damages, being the amount necessary to put the plaintiff, in monetary terms, in the position it would have been in if the first defendant had not breached the agreement. The plaintiff's claim is for liquidated damages on the basis that the parties agreed that the amount of the first defendant's indebtedness to the plaintiff will be determined and proved by a certificate signed by any manager or director of the plaintiff. Such a certificate will be *prima facie* proof of the amount of indebtedness, the fact that any amount is due and payable and any other matter in relation to the agreement and will be valid as a liquid document against the first defendant in any competent court for purposes of obtaining provisional sentence or summary judgment against the first defendant.

⁶ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228C-D.

⁷ *Ibid* at 229B.

[35] In order to successfully resist the summary judgment application, the defendants must satisfy the court that they have a *bona fide* defence by disclosing fully the nature and the material facts upon which the defence is premised. Whilst it is not required of the defendants to exhaustively deal with the facts and the evidence relied upon, they must at least disclose the defences and the material facts with sufficient particularity and completeness so as to enable the court to decide whether the aforesaid discloses a *bona fide* defence.

[36] The court in *Phillips v Phillips and Another*⁸ held as follows:

[38] The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial, such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met. Referring to the extraordinary and drastic nature of the summary judgment remedy, Corbett JA stated the following in the Maharaj matter:

"The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law."

[39] The test is whether on the facts before it, the court is able to conclude that the defence raised by the defendant is bogus or bad in law. What falls to be determined by this Court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment.'

[37] I am of the view that the adjudication of the issues pertaining to the determination of the initial term of the Agreement, the duration of the Agreement and the fulfilment of the suspensive condition(s) (or any one or more of them) would eventually boil down to the interpretation of the Agreement and proper ventilation of the law of contract which may very well proffer a *bona fide* defence to the defendants against the plaintiff's claim.

⁸ *Phillips v Phillips and Another* [2018] ZAECHGHC 40.

[38] The quantification of the contractual damages in the event of a contract for an indefinite period cannot be the subject of summary judgment. The summary judgment application calls for strict circumspection and judicial oversight in balancing the rights of both the plaintiff and the defendants. Summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the court to come to a decision.

[39] To a certain extent both the plaintiff as well as the defendants are successful regarding the application for summary judgment. The return of the equipment was tendered by the defendants during the hearing of this matter. I am of the view that given the partial success on both sides, each party should be liable for its own costs of the summary judgment application.

ORDER

[40] In the result, the following order is made:

1. The first defendant is ordered to delivery/return the following equipment to the plaintiff:
 - 1.1 3 x Kodak 10kW Single Phase (3 Phase compatible);
 - 1.2 1 x Life PO4 Lithium 30/24;
 - 1.3 1 x Life PO4 Lithium 10/8;
 - 1.4 48 x 545W JA Solar;
 - 1.5 1 x GENERAC PME 30S Generator;
 - 1.6 1 x Monitoring Device.
2. Summary judgment in respect of the remainder of the plaintiff's claims is dismissed and leave is granted to the First-, Second- and Third Defendants to enter into the principal action.
3. Each party is liable for its own costs of the summary judgment application.



A handwritten signature in black ink, appearing to read 'I van Rhyn', written over a horizontal line.

I VAN RHYN

JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

Appearances

On behalf of the Plaintiff:

Instructed by:

ADV. D DE KOCK

PHATSHOANE HENNEY ATTORNEYS
BLOEMFONTEIN

On behalf of the Defendants:

Instructed by:

ADV. M FRONEMAN

VAN WYK & PRELLER ATTORNEYS
BLOEMFONTEIN