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

Reportable / Not reportable

Case no: 4616/2024

In the matter between

WRT SILO 2 (PTY) LTD

APPLICANT

and

**BOUWER CONTRACTING (PTY) LTD
JOHANNES GERHARDUS BESTER**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *WRT Silo 2 (Pty) Ltd v Bouwer Contracting (Pty) Ltd and Another (4616/2024)*

Coram: Mpama AJ

Heard: 7 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be **07 February 2025** at **15H00**.

Summary: *Rent to own agreements – Material dispute of facts – Court's powers if there is a material dispute of facts*

ORDER

1. The application is granted as per prayers 2.1 to 2.5 of the notice of motion.

2. The issue of the first and second respondents' indebtedness to the applicant is referred to oral evidence and to be tried by way of action.
3. The notice of motion and its affidavit shall stand as summons.
4. The notice to oppose and the answering affidavit shall stand as entry of appearance to defend and plea
5. The replying affidavit shall stand as replication and thereafter, the applicable provisions of the Uniform Rules of the Court shall apply.
6. The late filing of the applicant's and respondents' affidavits is condoned.
7. The costs of this application, including the costs previously reserved, are reserved for adjudication during the trial proceedings.

JUDGMENT

Mpama AJ

[1] On 16 August 2024, the applicant instituted motion proceedings against the first and the second respondents and, *inter alia*, sought the following relief:

'1.1 Payment to the applicant by the first respondent and/or the second respondent jointly and severally the one paying the other to be absolved an amount of R533 693.03. The second respondent's liability being limited to only R210 000.

1.2 The applicant be authorized for purposes of perfecting and enforcing its security to enter upon and take possession, at the respondents' address being 7 Steyn Street, Excelsior, 9760, Free State and /or Commissioner Street, Excelsior or wherever they may be found the movable assets being:

(i) used 2013 SA truck bodies side tipper, VIN NUMBER A[...]⁷⁵/A[...]⁷⁶; REGISTRATION NUMBER: C[....] MY GP /C[...]⁷⁷ HX GP

(ii) used 2009 Iveco Stralis, VIN NUMBER: WJM[...], REGISTRATION NUMBER: KS 1[...]

(iii) used 2007 Freightliner Argosy, VIN NUMBER 1FV[...]; REGISTRATION NUMBER:BV 4[...]

1.3 to deal with the movable assets as owner thereof,

1.4 That the respondents pay the costs of this application, on an attorney and own client, alternatively attorney and client, further alternatively party and party scale;

1.5 Further and/or alternative relief, including referral of this matter to oral evidence on any disputes of facts that may arise pertaining to any of the relief setout above.'

[2] The applicant is a company registered in terms of the Companies Act 71 of 2008 with its registered office at Klein Street, Lakefield Benoni and conducts business by leasing and renting out commercial trucks, earthmoving equipment and trailers.

[3] The first respondent is a company registered in terms of the Companies Act with its registered office at Commissioner Street, Excelsior, Free State. The second respondent is an adult male businessman and a sole director of the first respondent.

[4] The genesis of this matter is three rent-to-own agreements (agreements) concluded by the applicant and the first respondent between the period 30 August 2023 and 31 October 2023. In terms of these agreements the applicant leased a 2013 truck body Interlink trailer, a used 2009 Iveco Stralis truck and a 2000 Freightliner Argosy (the vehicles) to the first respondent. The second respondent stood as a guarantor for the first respondent's responsibilities towards the applicant but his liability is limited to R210 000.00. The material terms of these agreements are not disputed by the applicant and the respondents.

[5] The first respondent took possession of the vehicles in terms of the agreements. It is the applicant's case that from December 2023, the first respondent defaulted with the rental payments in breach of the agreements and that as of 30 June 2024 the first respondent was R533 693.03 in arrears.

[6] Several letters were addressed to the first respondent demanding payment of the arrear rental, cancellation of the agreements and return of the vehicles. The first

respondent disputed the amount owed to the applicant and that the applicant was entitled to the return of the vehicles.

[7] The applicant arrived at the first respondents place and took the vehicles to its business address at Benoni. Aggrieved by the applicant's conduct, on 3 June 2024 the first respondent successfully applied for a *mandament van spolie* against the first respondent in Gauteng Division of the High Court. A cost order was also granted against the first respondent. There was a dispute between the parties on the interpretation of the order. The first respondent demanded that the first respondent should deliver at its own costs these vehicles to its business address at Excelsior. The applicant refuted those claims and informed the first respondent that the order did not authorize it to deliver the vehicles but to restore possession to the first respondent. After some back and forth, the first respondent collected the vehicles at the applicant's place at Benoni. To achieve this, the first respondent alleged that it spent R38 800.00 on diesel and since one of the vehicles was not in a running condition, R40 250.00 on towing services.

[8] The applicant and first respondent's relationship turned into a chequered one resulting in the applicant launching these motion proceedings. The application is opposed by the first and second respondents. On its founding affidavit, the applicant averred that the first and the second respondents owe it an amount of R533 693.03 (the 2nd respondent's liability being limited to R210 000.00) as arrear rental and despite demand, they refuse to return the vehicles. The first respondent admitted that the it owed the applicant rental money but disputed the amount claimed by the applicant. It further averred that one of the vehicles broke down, the applicant's insurance refused to pay for the repairs due to applicant's failure to lodge a proper claim and consequently it lost R640 000.00 in revenue. Furthermore, it incurred costs of R36 800.00 plus R40 250.00 when it had to collect the vehicles from the applicant in Benoni after the court order authorizing the return of the vehicles was granted. These amounts, so argued the respondents, must be set off against the applicant's claim for the arrear rental. The respondents submitted that there was material dispute of facts which cannot be resolved on the papers and warranted that this court refer the matter to oral evidence. Moreover, the respondents submitted that the applicant foresaw this, hence it conceded that some of the issues should be referred to oral evidence. It prayed for the dismissal of the applicant's application.

[9] In reply, the applicant averred that there was no material dispute of facts. It submitted that the existence of valid agreements between the applicant and the respondent was not in dispute, that the first respondent is in default with payments and that it was undisputed that the second respondent stood surety for the first respondent's responsibilities towards the applicant. It argued that all the other issues raised by the respondents were peripheral issues aimed at casting doubt to the applicant's cause. The applicant prayed for the return of the vehicles and referral of respondents' indebtedness to oral evidence.

[10] Lastly, the applicant and the respondents requested the court to condone the late filing of their respective affidavits. Another issue raised by the respondents related to non-compliance by the applicant with regulations 3 and 4 governing the Administration of the Oath. I do not consider this point deserving of any special mention as the applicant in its reply adequately dealt with it.

[11] It is undisputed that:

- (i) the first respondent is indebted to the applicant in that it failed to make rental payments to the applicant when they became due and payable;
- (ii) the ownership of all the vehicles delivered to the first respondent remained vested in the applicant;
- (iii) one of the vehicles delivered to the first respondent broke down and it was repaired by the first respondent;
- (iv) the first respondent collected the vehicles, at his own expense, from the applicant's place after the *mandament van spolie* application; and
- (v) the second respondent stood surety for the first respondent's responsibilities towards the applicant.

Accordingly, the court must determine whether there is a real/material dispute of facts, and if so decide on an appropriate order to make.

Is there a material dispute of facts?

[12] In motion proceedings, the court is confined to the facts as set out in the affidavits. Rule 6(5)(g) of the Uniform Court Rules provides as follows:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[13] If there is a material and *bona fide* dispute of fact that cannot be decided on the papers, a court is faced with three alternatives: it may dismiss the application, or refer specific issues in dispute to oral evidence or refer the matter to trial.

[14] In *Erasmus Superior Court Practice* it is commented that:

‘if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent ,together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so farfetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.’¹

[15] It is trite that motion proceedings are meant for resolution of legal issues based on common cause facts and cannot be deployed to determine probabilities.² In dealing with dispute of facts in motion proceeding, the court in *Cullen v Haupt* held:

‘I have consulted some of the better-known decisions concerning the referral of applications to evidence or trial. The leading decision in this regard is, of course, Room

¹ Van Loggerenberg *Erasmus Superior Courts Practice* 2 ed (2) at D1-70.

² *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 para 26.

Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1162, where Murray AJ said that if a dispute cannot properly be determined it may either be referred to evidence or trial, or it may be dismissed with costs, 'particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop'. The next of better known cases on this topic is that of Conradie v Kleingeld 1950(2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realized that a serious dispute of fact would develop.'³

[16] A careful analysis of the applicant's founding affidavit, the answering affidavit and the reply revealed a material dispute of facts. The respondent raised a number of 'defences' to the applicant's debt. An amount of R640 000.00 is mentioned as an amount allegedly lost as revenue when one of the vehicles broke down. As to how this amount was arrived at, only the first respondent knows. However, this amount appears to be revenue lost when the vehicle was not operational. If I am correct, this money remains an unliquidated amount as the court, if called upon to do so, must determine the amount of damages suffered, if any, by the first respondent. Furthermore, there is a dispute as to what caused the insurance company to repudiate the claim for the repairs to the vehicle. The second dispute relates to monies paid by the first respondent for the delivery of the vehicles after the application for *mandament van spolie* was successful. There exists a dispute between the applicant and the respondents as to who was responsible for the costs of delivery of the vehicles. Lastly, the first respondent questioned the applicant's calculation of the arrear rental alleging that certain costs not agreed upon were included in the amount being claimed by the applicant. My view is that the first respondent's version does not consist of bald or uncreditworthy denials. It raises issues that cannot be resolved on the papers. The applicant also conceded this point. What is, and remains undisputed is the ownership of the vehicles.

[17] I also wish to comment on the respondents' claim that the amounts owed by them can be set off against what is owed to the first respondent. As mentioned earlier in this judgment, some of the monies allegedly owed to the first respondent are for damages and therefore unliquidated amounts. It is so that one of the requirements of set off is that both debts must be liquidated.⁴ As to whether a set off is possible or not

³ *Cullen v Haupt* 1988 (4) SA 39 (C) at 40F-H.

⁴ See in this regard Wille *Principles of South African Law* 8 ed (1991) at 483.

will be left for determination by the trial court.

Order

[18] In the circumstances, I order as follows:

1. The application is granted as per prayers 2.1 to 2.5 of the notice of motion.
2. The issue of the first and second respondents' indebtedness to the applicant is referred to oral evidence and to be tried by way of action.
3. The notice of motion and its affidavit shall stand as summons.
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5. The replying affidavit shall stand as replication and thereafter, the applicable provisions of the Uniform Rules of the Court shall apply.
6. The late filing of the applicant's and respondents' affidavits is condoned.
7. The costs of this application, including the costs previously reserved, are reserved for adjudication during the trial proceedings.

L. MPAMA, AJ

Appearances

For the Applicant:

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