

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 1417/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>22/12/2025</u>	
DATE	SIGNATURE

In the matter between:

GOSCOR FINANCE (PTY) LTD

Plaintiff/Applicant

and

AFRICO BUILDING SOLUTIONS (PTY) LTD

First Respondent/Defendant

ANDRE DE JONGH

Second Respondent/Defendant

JUDGMENT

MALINDI J

Introduction

[1] This is an application for summary judgment instituted on 12 April 2023, and is opposed.

- [2] The parties are referred to as in the main action.
- [3] The issues for determination are as follows:
- 3.1. Whether the Court has jurisdiction to hear and adjudicate this application;
 - 3.2. Whether the plaintiff ought to have referred the matter to arbitration;
 - 3.3. Whether the first and second defendants are jointly and severally liable to the plaintiff;
 - 3.4. Whether the defendants have raised defences to the plaintiff's claim which meet the threshold for defences in summary judgment applications in terms of Rule 32(3)(b) of the Uniform Rules of Court.
 - 3.5. Whether the plaintiff has complied with the requirements in terms of Rule 32 of the Uniform Rules, and made out its case for the relief that it seeks.
- [4] The plaintiff's claim is based in the law of contract.

The legal framework

- [5] Rule 32(2)(b) and (3)(b) provide as follows, respectively:
- “(2)(b) The Plaintiff shall in the affidavit referred to in sub-rule 2(a) verify the cause of action and the amount, and identify any point of law relied upon and the facts upon which the Plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.”*
- “(3)(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”*
- [6] The plaintiff has set out its claims and the alleged breaches of the contract by the defendants.

[7] Jurisdiction of this court is pleaded by the plaintiff on the basis of clause 15.1 of the Master Rental Agreement,¹ which states that the plaintiff may elect to sue out of the Gauteng Local Division, notwithstanding that the court may not otherwise enjoy such jurisdiction. It is contended therefore that it is not open to the defendants to challenge the jurisdiction of the Gauteng Local Division which is specifically stipulated as the court of jurisdiction at the plaintiff's election notwithstanding lack of its jurisdiction otherwise.

[8] As to the referral to arbitration issue, the plaintiff contends that although its claims arise out of the Main Rental Agreement (the MRA) they do not constitute a dispute as contemplated in terms of clause 25 of the MRA as the MRA has been cancelled. It contends therefore that they constitute a contractual claim that has been breached and can therefore not be resolved through a non-existent agreement. It contends that clause 25.1 of the dispute resolution clause supports this contention as it states:

“In a dispute or difference arising between the parties, during the course of its agreement, (‘the dispute’) shall, within two business days of the disputes being declared, be referred...”

[9] On the other hand, the defendants refer to clause 25.7 which states that clause 25 shall remain in effect despite a termination of the MRA.

Evaluation

[10] I dispense with the plea of non-joinder first. A plea of non-joinder is competent if the order granted would adversely affect a party that is not joined to the proceedings. In this matter the entities referred to by the defendants will not be affected by any order of this court. This special plea has no merit in the circumstances.

[11] The defendants submit that the special plea of jurisdiction and arbitration constitute *bona fide* defences. They also challenge the invoiced amounts on the basis that the rented “Front-End Loader (“FEL”) needed repairs and was therefore not utilised as required. They claim, *inter alia*, that the plaintiff still

¹ POC2: CaseLines section 01-19.

charged rent when it had instructed the first defendant that the FEL was not to be used under any circumstances pending repairs.

- [12] As stated in *Maharaj v Barclays Bank Limited*² the defendant is required to disclose “a defence which is both *bona fide* and good in law.”
- [13] The defendants rely for their defence on two points of law - jurisdiction and an arbitration clause. If they are not good in law the defences will fail and will therefore not be *bona fide*. And, if they are good in law they must be *bona fide* defences.
- [14] On the question of jurisdiction the defendants rely on *Credibility Sponsors CC v Bosman*³ and *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*⁴ that jurisdiction cannot be established merely by agreement between the parties unless it exists through the traditional factors that establish jurisdiction.
- [15] Furthermore, the defendants submit that an arbitration clause survives the cancellation or lapse of a contract if a dispute arising out of the performance of such contract is arbitrable.
- [16] Clause 25.7 of the MRA is a restatement of the law in this regard. The law is that the arbitration clause is excisable from the contract and it survives it for purposes of resolving disputes arising out of the performance of the contract.⁵ This is a good point of law and will on its own result in an action being held in abeyance pending arbitration.
- [16] Whether the MRA was entered into in Kempton Park or Postmasburg is a matter in dispute between the parties. At this stage it is not required of the court to determine this in its finality. As was stated in *Maharaj* (supra):

“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

² 1976(1) SA 418 (A) at 426.

³ [2001] 2 All SA 286 (T).

⁴ 1987 (4) SA 883 (A).

⁵ *Scriven Bros v Rhodesian Hides and Produce Co. Ltd and Others* 1943 AD 393 at 401

or the other. All that the Court enquires into is: (a) whether the defendant has “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.

...It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.”

- [17] This is a genuine triable issue on jurisdiction and should not be decided in a summary judgment.

Conclusion

- [18] The defendants have raised two points of law - on jurisdiction and whether the matter is subject to arbitration and therefore that the court should refer the matter to arbitration unless compelling circumstances dictate that it should assume jurisdiction. The plaintiff has not pleaded such circumstances.
- [19] On territorial jurisdiction, a party may consent to jurisdiction of a court of another level, for example, to the jurisdiction of a higher or lower court which would otherwise have jurisdiction. They may not clothe a court with jurisdiction which it otherwise does not have.
- [19] The acknowledgement of debt, whether made before the institution of proceedings, does not determine the question of arbitration. What is required is that the dispute arises out of the execution of the MRA whether extant or terminated.
- [20] I have come to the conclusion that the application for summary judgment stands to be dismissed.
- [21] I therefore make the following order:

1. The application for summary judgment is dismissed.

2. The applicant is to pay the cost of the application, including costs of counsel at scale B.
3. The defendants are to pay the reserved costs of 14 November 2023 jointly and severally, the one paying and the other to be absolved, including costs of counsel at scale B.



G MALINDI, J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES

For the Plaintiff/Applicant:	A Whitaker
Instructed by:	Knowles Husain Lindsay Inc

For the Defendants/Respondents:	No appearance
Instructed by:	Issued notice of withdrawal

Date of hearing:	11 March 2024
Date of judgment:	22 December 2025