

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No. 1781/09

Date delivered: 27 August 2009

In the matter between:

SIBANYE BRICKS

Plaintiff

and

O'BRIEN CONTRACTORS CC

Defendant

JUDGMENT

EKSTEEN AJ:

[1] The plaintiff claims payment of the amount of R164 662,50 from the defendant in respect of goods sold and delivered. The plaintiff alleges that during February 2009 he entered into an oral agreement with the defendant, represented by one O'Brien, for the supply by the plaintiff of concrete blocks to the defendant.

[2] The essential terms of the alleged agreement are that the plaintiff would supply blocks in such quantities as the defendant may request at a purchase price of R7,50 per block inclusive of VAT and transport to Jansenville. The defendant, for its part, undertook to pay the purchase price of the cement blocks so delivered by not later than the end of the week in which the blocks were delivered to defendant, alternatively, on demand.

[3] Pursuant to the said agreement the plaintiff proceeded to deliver to the defendant concrete blocks at the special instance and request of the defendant. In consequence of the said deliveries the plaintiff contends that the defendant became liable to him in the amount of R226 800. The plaintiff has made payment of the sum of R60 000. In the circumstances the defendant claims from the plaintiff payment on the sum of R164 662,50.

[4] The defendant has entered an appearance to defend and the plaintiff proceeded to claim summary judgment.

[5] In the opposing affidavit filed on behalf of the defendant by the said O'Brien in the summary judgment proceedings the defendant admits being liable to the plaintiff but disputes the amount of his indebtedness. O'Brien contends that to the knowledge of the plaintiff the amount owing is not ascertainable and therefore not liquidated. He accordingly contends that the defendant does have a *bona fide* defence.

[6] O'Brien sets out the basis for the aforestated contentions as follows:

"It is admitted that the plaintiff and the defendant entered into an agreement that plaintiff supply cement blocks to the defendant. During delivery of aforesaid increasingly defective loads were delivered in that many of the blocks were of such poor standard and broken to the extent that it could not be used. So much so that some of the last

loads delivered were of such poor quality that the defendant invited the plaintiff to inspect the loads delivered. The plaintiff agreed that the material was not fit for the purpose and it was agreed that credit would be passed. To date no agreement was reached about the quantity of the defective blocks nor on the amount of credit that will be passed in favour of the defendant. The amount claimed is the aggregate for all the blocks delivered inclusive of the defective blocks.”

[7] Mr **Vlok**, who appears on behalf of the plaintiff, submits that this allegation does not comply with the requirements of Rule 32 (3)(b) in that it does not disclose a *bona fide* defence to the action and does not disclose fully the nature and the grounds of the defence. In particular it is argued that it is incumbent upon the defendant to state how many bricks were defective and to what extent. In the absence of such averments, it was submitted that the defendant has failed to disclose fully the nature and grounds of his defence.

[8] I consider that the defendant has set out sufficient to establish the nature and grounds of his defence and the *bona fides* thereof. The defendant contends that the plaintiff has inspected the quality of the goods and acknowledged that a large quantity of the goods were not fit for the purpose for which were purchased. He undertook to pass credit for the defective goods. The defence raised is accordingly that by the admission of the plaintiff a significant percentage of the blocks delivered were not fit for the purpose for which they were sold and that a substantial credit

would be passed. The number of bricks which the plaintiff would charge for has not been agreed.

[9] O'Brien does not state the number of bricks which he contends were so inferior as to be unfit for the purpose for which they were bought but, in my view, that does not necessarily justify the granting of summary judgment. In ***Border Concrete Company v Knickelbein*** 1982 (2) SA 648 (ECD) Zietsman J, considering a similar defence stated as follows at 651D-G:

"I do not think that the learned Judge in the *Herb Dyers* case meant to lay it down as a general rule that summary judgment should be granted in all cases where the defendant, in response to a claim for goods sold and delivered or for services rendered, states that he disputes the amount claimed by the plaintiff but is unable to state exactly what amount he does owe. If he can show that he has a *bona fide* defence to at least part of the plaintiff's claim, and if to the best of his ability he discloses the nature and grounds of his defence and the material facts he relies upon therefore, this may well be sufficient to avoid summary judgment being granted against him even if he admits that he does owe something, but cannot at that stage say precisely what sum he owes, particularly where he has tried without success to obtain details of his claim from the plaintiff. Each case must be decided on its own special facts, and it must not be forgotten that summary judgment is an extraordinary and

stringent remedy in that it permits a final judgment to be given against the defendant without trial (cf ***Arend and another v Astra Furnishers (Pty) Ltd*** 1974 (1) SA 298 (C)).”

[10]In the present case I am satisfied that the defendant has shown that he does have a defence to a material portion of the claim and the plaintiff has undertaken to provide him with particulars of the credits which will be passed. In these circumstances he is unable to state the extent of his liability.

[11]In any event, should I be incorrect in concluding that the defendant has complied with the provisions of Rule 32(2)(b) then, in any event, I am of the view that this is the type of matter where I would feel obliged to exercise my discretion against the granting of summary judgment. Compare ***Sylko Paper Company (Pty) Ltd v Castle Supermarket*** 1977 (3) SA 698 (N).

The order that I make is therefore that:

1. summary judgment is refused;
2. the defendant is granted leave to defend the action; and
3. the costs of the application for summary judgment are to stand over for determination by the trial court.

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT