



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 5691/2019

In the matter between:

SASFIN BANK LIMITED

1ST PLAINTIFF

SUNLYN (PTY) LTD

2ND PLAINTIFF

And

MAKATSANG CLEANING SERVICES (PTY) LTD

1ST DEFENDANT

VENTER, CLEANING STEFANUS

2ND DEFENDANT

DU TOIT, FRANCOIS

3RD DEFENDANT

HEARD ON: 15 OCTOBER 2020

JUDGMENT BY: MBHELE, ADJP

DELIVERED ON: 28 JANUARY 2021

- [1] The first plaintiff seeks summary judgment against the second and third defendants jointly and severally, the one paying the

other to be absolved, for an amount of R520 900. 01 including interest on the aforesaid amount at a rate of 16.25% (prime plus 6%) per annum from 1 April 2019 to date of payment. The second and third defendants are sued in their personal capacities as sureties for a debt incurred by the first defendant in terms of a rental agreement, for office equipment, it entered into with Itec Finance (Pty) Ltd (Itec) on 29 June 2016. In its particulars of claim the plaintiff alleges that the first defendant undertook to pay rental amount for the equipment at R7335.00 plus VAT per month. The second and third defendants bound themselves as guarantors and co-principal debtors for the primary and continuing obligations for the proper and punctual payment to Itec and all its subsidiaries of all amounts owing and arising from the agreement between Itec and the first defendant.

[2] It is the plaintiff's case that Itec ceded all its rights, title and interests in the rental agreement it entered into with the first defendant to Absa Technology Finance Solution (Pty) Ltd (Absa Finance). Absa Finance ceded the aforementioned rights to the rental agreement to Sunlyn Proprietary Limited (Sunlyn). Sunlyn ceded all its rights, title and interests to the first plaintiff. The first defendant was liquidated on 5 April 2018. The plaintiff's pleaded facts are that the first defendant committed a material breach of contract when it failed to maintain regular monthly payments resulting in outstanding debt totalling R520 900. 01 plus interest.

[3] Having been served with the notice of appearance to defend and plea, the plaintiffs launched the application at hand. The application is premised on the basis that the defendant does not

have a *bona fide* defence to the plaintiffs' claim and that the notice to defend and plea have been filed solely for the purpose of delay.

- [4] The application is opposed by the second and third defendants. This court is called upon to determine whether on the facts alleged by the plaintiffs in their particulars of claim, it should grant summary judgment in favour of the plaintiffs or whether the facts alleged in the defendants' plea and opposing affidavit disclose a *bona fide* defence which may persuade the court to refuse summary judgment.
- [5] The defendants deny that they owe the plaintiffs the amounts as claimed in the summons. Upon receipt of summons the defendants requested plaintiffs to furnish them with detailed statements reflecting all the payments made from the inception of the contract. From the statements the following could be gleaned:
- 5.1 The total amount owing as at 30 April 2019 is **R549,462.45** as opposed to **R520,900.01** reflected in the Certificate of Balance attached to the summons.
- 5.2. There is an amount described in the statement as 'Non Rental Charges / Past Due Amount' totalling **R168,540.95**.
- 5.3 The plaintiff further claims legal Fees / Costs in the amount of **R23 252. 75** and late charges in the amount of **R9 858. 32**, which amounts are not catered for in the contract.
- All the aforementioned amounts have not been explained nor accounted for in the summons.

[6] The defendants submitted that most information relating to payments made in respect of the contract was in the hands of the liquidators of the first defendant. They further contended that the insufficient information supplied by the plaintiffs and contradictory account of facts in support of their claim does not entitle them to such a drastic remedy in law.

[7] The court has an unfettered discretion to grant or refuse summary judgment. Whether to refuse or grant summary judgment is dependent upon the facts averred by the plaintiffs and the defence raised by the defendants. Summary judgment is an extra ordinary remedy available, by law, to the plaintiff whose case is unanswerable. In **Maharaj v Barclays National Bank Limited 1976 (1) SA 418 (A) at 423 G** the court remarked as follows when it dealt with the application for summary judgment:

“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”.

[8] Courts are reluctant to grant summary judgment where it is not clear that the plaintiff’s case is unanswerable and where the defence raised by the defendant may be sustained at trial. In **Shepstone v Shepstone 1974 (2) SA 462 (N)** at 467 the court said the following.

“The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case” and that... “a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial”.

- [9] Summary judgment proceedings are reserved for a defendant who has no defence. See **Joob Joob Investments v Stocks Mavundla 2009 (5) SA 1 (SCA)**. The defendants deny the authority of the parties who represented the plaintiffs when cession agreements were signed. In terms of the agreement between the first defendant and Itec, the Certificate of Balance, signed by a manager, is supposed to serve as the final proof of the debt owing but the one accompanying the summons contradicts the source document from which the data was collected, being the statements of payment supplied by the plaintiffs.
- [10] Mr. Groenewald, on behalf of the plaintiffs, conceded that the amount claimed for legal costs and late charges cannot be sustained and yet the said amounts form part of the total amount owing for rental. He was, further, unable to substantiate the amount of **R168,540.95** reflected on the statement supplied by the plaintiffs.
- [11] Having perused the plaintiff's particulars of claim, the affidavit in support of the summary judgment application, the defendants' plea and the opposing affidavit I am persuaded that the defendant raises a *bona fide* defence which presents an issue that has to be resolved at trial. The application for summary judgment cannot succeed.
- [12] Wherefore the following order is made

ORDER:

1. Application for summary judgment is refused
2. The second and third defendant are granted leave to defend this action
3. Costs shall be costs in the cause.

N.M. MBHELE, J

On behalf of the plaintiff

Adv Groenewald
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the defendant:

Adv. Van der Merwe
Instructed by:
Van Wyk & Preller Inc
BLOEMFONTEIN