REPUBLIC OF SOUTH AFRICA

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

CASE NO. 21/16389

(1) REPORTABLE: ~~YES~~ / NO ✓

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO ✓

4 8 2022
DATE

SIGNATURE

In the matter between:

NORIDANE FOODS AS Plaintiff

and

RIBZONE (PTY) LIMITED First Defendant

BRAVIZ FINE FOODS (PTY) LIMITED Second Defendant

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an opposed Application for Summary Judgment, wherein the Plaintiff seeks payment of €69 743.77 plus interest at 2% per month calculated from 8 January 2020 to date of payment and costs.

2. The cause of action against the First Defendant is founded upon an Agreement entered into on 25 March 2019 between the Plaintiff and the First Defendant. The cause of action against the Second Defendant is based upon an alleged Suretyship under which the Second Defendant bound itself to the Plaintiff as surety and co-principal debtor for the indebtedness of the First Defendant.

3. The relief sought for payment, as set out in the Summons, as well as in the Application for Summary Judgment, lies against the First and Second Defendants, jointly and severally, the one paying the other to be absolved, in solidum.

4. Subsequent to the launching of the Application for Summary Judgment, and in supplementary heads of argument filed on behalf of the Applicant, I am informed that the Second Defendant has gone into business rescue. As such, it is not competent for the relief to be granted as against the Second Defendant.

5. There is no reason why it would not be competent to pursue the Application as against the First Defendant, given that the liability, if any, was alleged to be joint and several. Thus were the court to find that the First Defendant is liable, it would not be precluded from granting summary judgment against the First Defendant, by virtue of the business rescue status of the Second Defendant.

6. In paragraph 6 of the summons, it is alleged that at time of conclusion of the oral agreement between the Plaintiff and the First Defendant, the First Defendant had purchased and taken delivery of consignments of frozen pork from certain Westfleisch, who had invoiced the First Defendant. It was alleged further that the Westfleisch invoices had not been paid.

7. In paragraph 7 of the Summons, the Plaintiff alleged that the express, implied or tacit terms of the Agreement were :

   7.1. The Plaintiff would, against payment to Westfleisch of invoices totalling €665 010.00 take cession of Westfleisch's claim against the First Defendant;

   7.2. The First Defendant would pay the Plaintiff the amount of €665 010.00 within ninety days;

   7.3. The First Defendant, would, in addition to the payment, pay to the Plaintiff a fee of 4.5% of theWestfleisch invoices, also to be paid within ninety days;

   7.4. Should the First Defendant fail to timeously pay, the Plaintiff would be entitled to interest at 2% per month on the outstanding balance;

8. In paragraph 8 of the Summons, the Plaintiff alleged that it had paid Westfleisch €665 010.00 on 1 April 2019 and had taken cession of Westfleisch's claims against the First Defendant;

9. As such, the Plaintiff alleged in paragraph 9 of the Summons that the First Defendant became liable to pay the Plaintiff's invoices and that it had failed to timeously make payment.

10. In paragraph 9.3, it is alleged that €656 588.02 was paid to the Plaintiff on 7 January 2020.

11. In paragraph 10 of the Summons, the Plaintiff alleges that the First Defendant became liable to pay to the Plaintiff interest, determined at 2% per month, the computation of which is annexed as annexure "A" to the Summons.

12. Accordingly, in the prayer to the Summons, the Plaintiff seeks payment of €69 743.77.

13. In the Affidavit resisting Summary Judgment, the First Defendant avers that it had purchased the frozen pork from Westfleisch to the value of €665 010.

14. In paragraph 10 of the Affidavit resisting Summary Judgment, the Defendant points out that the Plaintiff has alleged to have taken cession of Westfleisch's claims against the First Defendant, but denied that the Plaintiff had invoiced the First Defendant. The Defendant avers that all invoices received by the First

Defendant had been sent by Westfleisch. It is pointed out further, that the cession was only signed by the Plaintiff and not by Westfleisch. No Confirmatory Affidavit was produced on behalf of Westfleisch. The Defendant therefore avers that the Plaintiff has failed to prove the cession as pleaded.

15. The Plaintiff has failed to comply with rule 18(6) inasmuch as the cession upon which it relies, has not been attached to the Summons.

16. However, a document marked as annexure "PJ1" annexed to the Plaintiff's Affidavit in support of its Application for Summary Judgment, purports to be the so-called cession. This is a document in both German, with an English version in two columns. The English version appears in the column on the right of the document and purports to be an agreement between Westfleisch and the Plaintiff recording that Westfleisch has a claim against the First Defendant for payment of €665 010.00 computed under a list of separate invoices.

17. Paragraph two of such documents reads:

> "Westfleisch assigns this claim in its entirety to Noridane. The assignment only becomes effective when Noridane has paid the total amount of *€665 010.00* to Westfleisch. Noridane undertakes to pay the total amount to Iban a*ccount ..... The receipt of payment by Westfleisch is decisive."*

18. Paragraph 3 of the same document reads:

"Upon receipt of full payment, the claim shall pass to Noridane. Noridane may *freely dispose of the claim."*

19. Pertinent to note is this agreement bears a signature on behalf of Noridane on 29 March 2019 in Copenhagen. Disturbingly, the very document indicates that it has not been signed by Westfleisch. As such, if the document purports to be the very cession relied upon, it has not been signed by the cedent. Against the abovementioned background, there is more than enough evidence to enable the Defendant to present a valid and bona fide defence, on trial. The Plaintiff would be in a position to present whatever evidence and/or documents through a path of discovery, in order to prove its claims.

20. In the circumstances, the Plaintiff is not entitled to Summary Judgment at this stage.

21. Accordingly, I make the following Order

    21.1. The application for summary Judgment is dismissed and leave to defend is granted;

    21.2. The costs of the opposed Summary Judgment proceedings are to be costs in the cause of the action.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff:	Advocate A Ashworth (ashworth@law.co.za)
Instructed by:	Shepstone Wylie (bagwandeen@wylie.co.za)
On behalf of the Defenant: (michrodrigues@mweb.co.za)	Advocate M Rodrigues
Instructed by:	Farina Ducie Christofi (justin@fdclaw.co.za)
Date of Hearing:	4 August 2022
Date of Judgment:	4 August 2022

This judgment was Authored by Nochumsohn AJ and is handed down electronically by circulation to the parties/their Legal representatives by email and uploading to the electronic file of this matter on caselines. The date of this Judgment is deemed to be 4 August 2022