CASE NO: 2916/2009

NORTH WEST HIGH COURT, MAFIKENG

In the matter between:

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD **PLAINTIFF**

and

APOSTOLIESE GELOOFSENDING VAN SUID-AFRIKA t/a DEO GLORIA GEMEENTE **DEFENDANT**

J U D G M E N T

MPSHE AJ:

AD INTRODUCTION

[1] This is an application for summary judgment made on the basis of a simple summons. In this the defendant is described as "APOSTOLIESE GELOOFSENDING VAN SUID-AFRIKA t/a DEO GLORIA GEMEENTE" a church situated at PROTEA PARK,

RUSTENBURG. The amount claimed is R506, 185-58, interest thereon at the rate of prime plus 6% (per cent) per annum from date of summons to date of final payment, the return of goods and costs.

AD BACKGROUND

[1] The cause of action is set forth in the summons as follows:

> "On or about **05 MARCH 2007** and at **RUSTENBURG** the Plaintiff and Defendant entered into a written Master Rental Agreement, with number: 022743:131483 (hereinafter referred to as "the agreement")(upon the terms and conditions contained in Annexure **"B"** hereto with should be read as if specifically incorporated herein) in terms of which the Plaintiff rented to the Defendant the following:

Qty	Description of goods	Serial number/s
1	DP – C262 Panasonic Colour Copier	HFG4RF000021

3.1 The rental period would be 60 months;
3.2 The monthly rental would escalate at a rate of 15% per annum;
3.3 The Defendant would pay an initial rental in the amount of R7,601.52;
3.4 The Defendant would thereafter make payment of 59 monthly rentals in the amount of R7,601.52 per month subject to the annual escalation made mention to in paragraph 3.2 *supra*.

In support of the application plaintiff filed an affidavit deposed to by one JANNIE VERMEULEN.

[2] This application for summary judgment is opposed by the defendant. An opposing affidavit has been filed through the person A ODENDAAL in his capacity of Chief Pastor of the defendant in accordance with Rule 32 (3)(b).

[3] In this affidavit defendant denies that defendant does not have a ***bona-fide*** defence to the claim and that the appearance to defend has been entered solely for the purposes of delay. He then proceeds to set forth ground(s) on which the defendant rely as the basis of defence to the application. I refer hereto contents of paragraph 4.3 of the affidavit that reads as follows:

> "The Defendant was in possession of the master rental agreement which is attached hereto marked Annexure "A". During May 2008, I consulted our attorney of record on behalf of the Defendant, due thereto that the Plaintiff withdrew monthly rentals from our account by way of a debit order, in respect of equipment that was never delivered."

[4] He then refers to a series of correspondence between defendant's and plaintiff's attorneys as well as one Mr Heese. I will deal more with the correspondence were relevant when I deal with merits herein. Defendant further raises other issues touching on the merits.

AD MERITS

[1] It is the plaintiff's case that the cause of action is based on a Master Rental Agreement (the MRA) entered into by the parties on or about the 05th March 2007.

[2] The existence of this agreement is not in dispute. However defendant's defence is to the effect that the goods referred to in the MRA namely a DP – C262 PANASONIC COLOUR COPIER with serial number HFG4RF000021 were never received by the defendant. In the circumstances defendant is not liable for any rental

in favour of the plaintiff.

[3] Defendant argues that the plaintiff bears the onus of proving that defendant did receive the said goods.

[4] Mr Masilo for plaintiff submitted that plaintiff has complied with its obligations namely that prove of receipt of goods is established, defendant has breached the agreement and that plaintiff is entitled to accelerate payment.

[5] The defendant through Mr Pistor argues that the goods were never received and thereby disputes liability. It is important to note that the summons commencing action were issued on 02nd October 2009. As early as on the 06th June 2008 as per Annexure "B" the issue of non-delivery was raised by the defendant in the following terms:

> "It is our instructions that our client has never received the goods as described as a DP.C262 Panasonic colour copier with serial number #HFG4RF000021.
>
> We note from the terms and conditions of the contract with specific reference to clause 5.1 that a signature by the user of the acceptance certificate shall be deemed as acknowledgement that the user has inspected and approved the goods and that same are in every way satisfactory to the user."

[6] A response to Annexure "B" was received from plaintiff. This caused Annexure "E" to be written by defendant wherein the issue of non delivery is raised.

[7] Mr Masilo finds it inconceivable that the defendant would make payment starting March 2007 to June 2008 despite the fact that

defendant has not received the goods paid for. However, the defendant through Mr Odendaal makes it clear that he noticed the discrepancy during May 2008 and thereupon caused the attorney of record to investigate, refere herein to correspondence as per Annexure "B" and "E" ***supra.*** I have no doubt that further payments ensued whilst attorney of record of defendant was engaging with plaintiff. The further payments were stopped around end of June 2008 after investigations revealed the discrepancy I refer herein to Annexure "E".

[8] Mr Masilo referred to authoritative decision of ***UNION GOVERNMENT v VIANINI FERRO-CONCRETE PIPES (PTY) LTD*** 1941 AD 43 pertaining to the binding effect of written contracts as well as The Principles of the Law of Contract by Kerr, 4th Edition and case cited therein. I do not take issue with these authoritatives and I accept the same.

[9] However, it is trite law that in order to avoid summary judgment defendant has to under Rule 32 (3) either give security to the plaintiff for any judgment that may be given or satisfy the court by affidavit or with leave of the court by oral evidence by himself or any other person who can swear positively that he has a ***bona-fide*** defence to the action. The affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon.

[10] If defendant succeeds in any of the two requirements then leave to defend is to be granted. However, if defendant fails in any of the two requirements the court still has a discretion to exercise in terms of

Rule 32 (5) whether to grant or refuse summary judgment.

[11] The court has to enquire:

(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 a defference which is ***bona-fide*** and good in law. If satisfied the court must refuse the summary judgment ***MAHARAJ v BARCLAYS NATAIONAL BANK LTD*** 1976 (1) SA 418 (A).
In ***BREITENBACH v FIAT SA (EDMS) BPK*** 1976 (2) SA 226 (TPD) it was held that:

> "….it will suffice if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

AD DEFENCE

[1] Having outlined the legal requirement for defence I now turn to the defendant's defence.

[2] The defence is simply that the goods in question justifying payments (rentals) to the plaintiff by the defendant were never received.

[3] Plaintiff reliance in alleging delivery of the goods is the MRA Annexure "B". Plaintiff argues that one J I BOERMAN signed for

acceptance of the said machine copier on behalf of the defendant.

[4] The MRA has a heading entitled ACCEPTANCE CERTIFICATE. Under this the defendant through Mr Boerman "irrevocably declares to the HIRER that the goods described in the schedules above have

(a) been delivered and installed in accordance with all the conditions of the Agreement
(b) …….
(c) been inspected, are in good order and condition, free from defect and ready for use in every respect
(d) ……
(e) User confirms that the serial number(s) on the goods correspond with the serial number(s) on the schedule."

Mr Heese, the supplier signed the agreement as a witness.

[5] Plaintiff argues that in terms of the law of contract no other interpretation or meaning may be attached to the quotation above. I have already stated that one cannot take issue with this argument. However, in furtherance of the ***bona-fide*** defence defendant alleges that defendant was being misled by a third party Mr Heese. That defendant has been defrauded.

[6] It is interesting to note that the goods are said to have been delivered on the same date of signing of the contract as raised by the letter Annexure "E" which reads:

> "We confirm receipt of your letter dated 18 June 2008 to which the master agreement including the Acceptance Certificate was

attached.

You will note from the master agreement that same was signed on 5 March 2007 by the applicants. The Acceptance Certificate was signed on the same date, which is obvious that it was signed before the equipment was delivered.

It is our instructions that the Acceptance Certificate was signed by our clients on recommendation by your supplier without realizing the implications of same."

The assertain in Annexure "E" as quoted above was never addressed or disputed by the plaintiff.

[7] If I interpret and consider the facts herein through the eyes of the law of contract I will have to rule in favour of the plaintiff. However, in summary judgments the existence of a ***bona-fide*** defence may not be overlooked.
It is trite that summary judgments are stringent and should not be used to deny defendant justice.

In casu I should be satisfied that the defence as raised by defendant is ***bona-fide.*** Further that if raised in the main action it will be sufficient to constitute a defence.

[8] I have consequently, after all evidence before me, come to the conclusion that the defence will be able to stand as ***bona-fide*** defence in the main action.

The test is clearly stated by COLMAN, J in ***BREITENBACH v FIAT S.A. (EDMS.) BPK*** [1976 (2)] when referring to the judgment of MILLER, J as follows:

"I quote the following passages from the judgment of MILLER, J.,

in that case, at p. 467 E-H:

> "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."
>
> That is the first quotation, and the second is:
> ". . . a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial".
>
> The discretion under sub-rule (5) should not be exercised against a plaintiff on the basis of mere conjecture or speculation."

I come to the conclusion that application for summary judgment must be refused.

[9] In matters like the current one evidence may be analysed differently leading to a different conclusion to the one I have arrived at. Even if that may be the case, I have the discretion to grant or to refuse the summary judgment. All I need to satisfy myself on is that I have applied the discretion judiciously.

AD *POINT IN LIMINE*

I need to mention that in the opposing affidavit a ***point in limine*** was raised. The ***point in limine*** is to the effect that one Heese should have been joined in this matter as one having substantial interest.

I choose not to deal with this ***point in limine*** given the judgment I have arrived
at.

CONCLUSION

In the following result I make the following order:

(a) The application for summary judgment is refused and defendant is given leave to defend;

(b) Costs of the application for summary judgment are to stand over for determination by the trial court.

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M J M MPSHE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff	:	Adv Masilo
For the Defendant	:	Adv Pistor SC
Plaintiff's Attorneys	:	JAY MOTHOBI INC c/o KGOMO MOKHETLE & TLOU Ref: Mr Tlou A.0099/CIV
Defendants' Attorneys	:	VAN VELDEN & DUFFEY INC c/o VAN ROOYEN TLHAPI WESSELS INC Ref: MW/V0055/0829/CA

Date of hearing	:	25 March 2010
Date of judgment	:	22 April 2010