

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-CON-2017/3179

In the matter between:

MIRANDA TYRE SERVICE (PTY) LTD

PLAINTIFF

and

JIN CASINGS AND TYRE SUPPLIES CC

1ST DEFENDANT

SIMEON NEUMBO

2ND DEFENDANT

JULIA INAMUVULWA NEUMBO

3RD DEFENDANT

Neutral citation: *Miranda Tyre Service (Pty) Ltd v Jin Casings and Tyre Supplies CC* (HC-MD-CIV-ACT-CON-2017/03179) [2018] NAHCMD 247 (10 August 2018)

Coram: PRINSLOO J

Heard: 10 July 2018

Delivered: 10 August 2018

Flynote: Civil Procedure – Summary judgment Application – Rule 60 – whether the defendants have a triable defence – defence of duress alleged –

discrepancies alleged in respect of acknowledgment of debt signed – discrepancies in respect of claimed amounts by plaintiff – Court found there to be a triable defence – Summary Judgment Application refused.

Summary: The application before this court, is an interlocutory application, more specifically a Summary Judgment Application. The plaintiff instituted action proceedings against the defendants for goods sold and delivered, resulting in an acknowledgment of debt being concluded, which is also the basis of the plaintiff's claim.

The first defendant raises the defence of amongst others, duress and the authenticity of the acknowledgment of debt signed.

Held – that the first defendant raised a triable defence and therefore the summary judgment could not succeed.

Held further – the Summary Judgment Application is refused.

ORDER-

- a) Application For summary judgment is refused.
- b) Defendant is granted leave to defend the action.
- c) Cost in respect of the application in casu is reserved for the trial court.
- d) Costs: Scale of the wasted costs tendered for 28 March 2018 and 24 April 2018 to be on attorney and client scale.
- e) Case is postponed to 13 September 2018 at 15:00 for Case Plan Conference in terms of Rule 23(5).

RULING

[1] The plaintiff applied for summary judgment against the first and second defendants jointly and severally. The first and second defendant opposed this application. The second defendant as the managing partner of the first defendant filed the affidavit resisting summary judgment. For purposes of this ruling I will refer to the parties as they are in the main action.

The Plaintiff's cause of Action

[2] The plaintiff alleges in its particulars of claim, that on 30 July 2006 an oral agreement entered into between the plaintiff (duly represented by John Gary Docherty) and the first defendant (duly represented by the second defendant) for the supply of goods (more specifically tyres) to the first defendant in exchange for payment of the plaintiff's usual and customary rates. The first defendant had an open account with the plaintiff and once an order was placed with the plaintiff the goods (tyres) would be dispatched from Australia to Namibia by container per sea freight.

[3] During 1 July 2006 up to 24 July 2012 the plaintiff sold and delivered to the first defendant. The terms of the agreement as reached the parties were pleaded as background facts:¹

-
- ¹
- (a) The first defendant would from time to time order goods from the plaintiff on open account;
 - (b) Once the order has been placed by the first defendant the plaintiff would dispatch the goods from Australia to Namibia by container per sea freight;
 - (c) First defendant would be liable for payment of the goods at the plaintiff's usual and customary rates upon placing the purchase order;
 - (d) Once the plaintiff has dispatched the goods unto the sea vessel all risk and responsibility in and to the goods passes onto the first defendant.
 - (e) All costs, charges, taxes and expenses incurred and associated with transport, delivery and clearing of goods by customs and Trans World Cargo (Pty) Ltd was payable by the first defendant.

[4] Pursuant to the agreement the first defendant operated three separate accounts with the plaintiff by virtue of which it ordered and purchased goods from plaintiff as in terms of the agreement.

[5] Plaintiff complied with its obligations in terms of the agreement but the first defendant breached the said agreement by failing to effect payment for the outstanding amount for the goods sold and delivered:

[6] On 22 July 2008 the plaintiff (still duly represented by Mr. Docherty) and the first defendant (duly represented by the second defendant and the third defendant) concluded a written commercial agreement whereby the first, second and third defendant agreed to be personally liable and responsible and would guarantee payment of the debt of the first defendant in the amount of \$712,068.00 AUD to the plaintiff. The defendants however breached the commercial agreement by failing to effect payment due and payable to the plaintiff for the good sold and delivered.

[7] On 12 August 2015 the first defendant duly represented by the second defendant in writing acknowledged their indebtedness to the plaintiff in respect of the following amounts of \$682,811.85 AUD, \$43,348.63 AUD and \$ 74, 812.00 AUD. The \$682,811.85 AUD was in respect of tyres purchased from the plaintiff which was shipped to Namibia at the plaintiff's expense. It was on this acknowledgment of debt that the plaintiff bases its claim on. It is pleaded that the first and second defendants breached the acknowledgment of debt by failing to effect payment in accordance with their written undertaking and as at the dates as set out in the acknowledgment of debt and the first and second defendants are therefore indebted to the plaintiff in the amount of \$800,972.48 AUD.

[8] In respect of claim 2 plaintiff alleges that a second oral agreement

(f) It would be in the discretion of plaintiff to allocate whichever payment received to whichever account operated by the first defendant at the time.

('second agreement') was entered on 4 August 2015 between the plaintiff and first defendant, still represented as before, on the same terms as set out in respect of claim 1.

[9] In terms of the said agreement in respect of claim 2, plaintiff dispatched four more containers to the first defendant which was subsequently received by the first defendant. The first defendant allegedly breached the second agreement as at 8 December 2015 by failing and /or refusing to effect payment of the outstanding amount of \$86, 590.63

[10] The plaintiff therefore claim in respect of claim 1 from the first and second defendants, jointly and severally payment in the amount of \$800,972.48 AUD² and in respect of claim 2 the plaintiff claims against the First Defendant payment in the amount of \$ 86,590.63 AUD with a similar alternative prayer as in claim 1. The plaintiff also seeks interest at a rate of 20% per annum *a tempore morae* from date of judgment to date of final payment and costs at an attorney and own client scale.

[11] The oral agreement and commercial agreement pleaded by plaintiff is apparently not the agreements the plaintiff base its claim as the plaintiff base its claim on the written acknowledgment of debt. The other two agreements were pleaded as part of the background facts and in that regard the third defendant is merely cited as an interested party and no relief is sought from her.

Grounds of defendant's opposition of the summary judgment application

[12] The first and second defendants resist the application for summary judgment on the grounds:

- a) authenticity of the acknowledgment of debt;
- b) duress.

² In the alternative, the equivalent value of \$800,972.48 AUD in Namibian Dollars calculated at an exchange rate that will put the plaintiff in the financial position it would have occupied if payment was made when it became due.

c) denied the existence of oral agreements or terms as set out in particulars of claim.

[13] In respect of the authenticity of the acknowledgment of debt, the second defendant alleged that he and the plaintiff's representative signed the acknowledgement together with two witnesses, but the acknowledgment of debt presented attached to the particulars of claim only bear the signature of the second defendant and not that of the plaintiff's representative or that of the witnesses. The second defendant also stated that he signed the acknowledgment of debt under duress and elaborated on the issue of duress to say that he signed the acknowledgment to assist Mr. Docherty, the representative of the plaintiff. He states that Mr. Docherty's wife wanted to divorce him due to financial problems, amongst other things, and he needed a document to show his wife that he was expecting a large sum of money.

[14] Mr. Jacobs, on behalf of the plaintiff, argued that the defences in respect of the acknowledgment of debt, is nothing but questionable and that defendants fails hopelessly in their attempt to raise these defences and insisted that the oral agreements were pleaded as background facts to the claims only.

[15] The second defendant further raises issues in respect of the invoices and figures that the plaintiff is relying on in support of its claims. The second defendant avers that it was either incorrectly claimed from the first defendant or certain payments were not taken into consideration in calculating the amounts as set out in the particulars of claim. The second defendant made specific reference to the following:

Claim 1:

- a) Denies liability in respect of airfare claimed;
- b) Denies liability in respect of containers that were allegedly not received;
- c) Kalgin debt which was already paid;

- d) Payments that were made in respect of claim 1 that were not taken into account;
- e) Discount given by the plaintiff that was not taken into account.

Claim 2:

- a) Denies liability in respect of containers not delivered;
- b) Duplicated Kalgin account;
- c) Denies liability in respect of consultancy fees claimed.

[16] Mr. Jacobs agreed that the court should accept the version of the defendants as set out in the founding papers as correct and directed the court's attention to the fact that it was indicated in plaintiff's heads of argument that it will pray for summary judgment to be granted at a reduced amount, i.e. in respect of claim 1 an amount of \$ 394,371.08 AUD and in respect of claim 2 an amount of \$ 25,429.00 AUD together with interest thereon and the cost to date.

[17] At this point it should be noted that the counsel for the plaintiff did not add the alleged discount granted to the first defendant into the equation in setting out the aforementioned figures. Mr. Jacobs argued, that if the court finds that the second defendant might prove the discount allegedly received from the plaintiff, then the discount must be deducted from the claim amount, which would then still leave an undisputed amount of in respect of claim 1 in the amount of \$48,211.23 AUD. Mr. Jacobus further argued that upon simple calculation of the amounts in claim 1 and 2 it would then amount to \$73,640.23 AUD³ for which plaintiff will seek summary judgment.

[18] Mr Nekwaya on behalf of the defendants argued that the application for summary judgment is misplaced and if the court accepts what the second

³ Claim 1 \$48,211.23 plus Claim 2 \$ 25,429.00 AUD.

defendant states under oath as correct then it is clear that there is a triable defence in this matter.

[19] He further argued that the defendants raised defences that cannot be dealt with during summary judgment proceedings and the issues raised in respect of the acknowledgement of debt are issues that can only be impugned at trial.

Principles applicable to summary judgment

[20] The principles applicable to summary judgment applications has been set out in our case law many times over and it need not be restated in this ruling. It is, however, important to once again emphasise that summary judgment is an extremely extraordinary and drastic remedy which shuts the door finally to the defendants.

[21] In *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd* 1998 NR 198 (HC) at 201 D – E the court endorsed the approach that courts should only grant summary judgment in instances where the plaintiff's case is unanswerable.

[22] If the court accepts for purposes of the current proceedings that the defendants' version is correct then the plaintiff's claim amount were reduced by 90%. If the defendants have a triable defence in respect the majority of the plaintiff's claim then there is a reasonable possibility that the defendants might have a triable defence in respect of the remaining portion of the claim.

[23] At the stage of summary judgment a defendant is not required to convince the court that all the facts mentioned by him or her are correct or undisputed. The court does not now weigh or decide factual disputed issues or determine which party is favoured by the balance of probabilities.⁴

[24] I have doubt that the plaintiff has an unanswerable case and is satisfied

⁴ *Easy Life Management (Cape) (Pty) Ltd and Another v Easy Fit Cupboards Windhoek CC and Others* 2008 (2) NR 686 (HC).

that there a reasonable possibility that the defence of the defendants is good and therefore I exercised the court's residual discretion in favour of the defendant and refused the summary judgment.⁵

Costs

[25] Wasted costs was awarded in favour of the plaintiff in respect of the proceedings of 28 March 2018 and 24 April 2018 however the nature of the wasted cost had to be determined.

[26] In the matter of *Mbekeni v Jika* 1995 (1) SA 423 (TK) at 424F - G wasted cost is defined as follows:

' "Wasted costs" are additional costs incurred by a party through the fault of his opponent or costs previously incurred which have become useless by reason of his opponent's fault. . . . '

[27] In the case of *Protea Life Co Ltd v Mich Quenet Financial Brokers en Andere* 2001 (2) SA 636 (O) at 648 D – E it was held, with regards to wasted costs, that it must always be kept in mind that wasted costs do not relate only to work which has been wasted, but also to additional costs which have been incurred as a result of the actions of the party who was to blame.

[28] On the part of the defendants there were various non-compliances which resulted in the postponements for which wasted cost was tendered. The conduct of the defendants demanded that costs be awarded against them on a punitive scale of attorney and client.

[29] The cost of the current application should however be reserved for the trial court.

ORDER

⁵ *Namibia Airports Co Ltd v Conradie* above at 380 paras 21-22.

- a) Application for summary judgment is refused.
- b) Defendant is granted leave to defend the action.
- c) Cost in respect of the application *in casu* is reserved for the trial court.
- d) Costs: Scale of the wasted costs tendered for 28 March 2018 and 24 April 2018 to be on attorney and client scale.
- e) Case is postponed to 13 September 2018 at 15:00 for Case Plan Conference in terms of Rule 23(5).

JS Prinsloo
Judge

APPEARANCES

PLAINTIFF: S J Jacobs (with him J Visser)
instructed by Koep & Partners, Windhoek

DEFENDANT:

E Nekwaya (with him R Shipindo)

instructed by Metcalfe Attorneys, Windhoek