

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

CASE NO: 56138/2014

8/12/2014

In the matter between:

CARGO CARRIERS LIMITED

PLAINTIFF/APPLICANT

and

MOOTSO INVESTMENTS 9 CLOSE CORPORATION

DEFENDANT/RESPONDENT

J U D G M E N T

KUBUSHI, J

[1] The plaintiff and the defendant entered into a written sale agreement ("the agreement") in terms of which the defendant, *inter alia*, purchased a Hitachi ZX 120 Loader and a Bell 220A Cane Loader ("the loaders") for a purchase price of R991 151.12 ("the purchase price").

[2] In terms of the agreement, the purchase price was to be paid in instalment payments over a period of six months while the defendant had possession of and the use of the loaders. It is the plaintiff's claim that the defendant has not paid a single cent for the said loaders even though he is in possession of them and has been utilising them since they were delivered. As a result of the persistent breach, the plaintiff allegedly cancelled the agreement on 31 March 2014 and is in these proceedings claiming the payment of the full purchase price.

[3] The defendant filed a notice of intention to defend and the plaintiff in retaliation applied for the summary judgment on the basis that the defendant does not have a defence to the claim and has entered appearance to defend solely for delaying the proceedings.

[4] In trying to fortify its claim that the defendant has no *bona fide* defence, the plaintiff brought to my attention recent separate proceedings that it instituted against the defendant in which the plaintiff sought an order allowing it to retain the loaders, and other ancillary relief, pending the final resolution of the main action. The defendant having filed a notice to oppose in that action, failed to file an answering affidavit but filed a notice in terms of uniform rule 35 (14) instead. By the time that application was heard on 21 October 2014 the defendant had still not filed its answering affidavit,

resulting in the plaintiff being awarded the relief sought in that application. The plaintiff further alleges that the defendant had to date of the hearing of this current application not complied with that court order.

[5] In resisting the application for summary judgment, the defendant is raising a point *in limine* and has also raised numerous defences against the merits of the application.

[6] It is said that a duty rests upon a defendant when formulating his or her defence in opposing the application for summary judgment, to present a *bona fide* defence to the plaintiff's claim. Such *bona fide* defence must be set out in such a nature and with such clarity to enable a court to be in a position to establish if the facts alleged, if proved at trial, would present a good defence.¹

[7] It is also trite that in a summary judgment application, where the question of whether the respondent has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The respondent is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed, that there is a preponderance of probabilities in his or her favour.²

¹ *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 266 (T)

² *Nair v Chandler* 2007 (1) SA 44 (T) at 47B –C and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A – E.

[8] All that a court requires, in deciding whether the respondent has set out a *bona fide* defence, is: ³

1. whether the defendant disclosed fully the nature and grounds of the defence and the material facts relied upon.
2. whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

[9] The defences raised by the respondent are that:

1. The point raised *in limine* by the defendant is that the plaintiff's claim is for damages and is not for a liquidated amount in money. The defendant's submission is that in terms of clause 15 of the agreement, the agreement may be declared cancelled, and if it is the seller, the seller retains all monies paid and resumes possession of the loaders and claims such damage as the parties may have suffered by virtue of cancellation. According to the defendant, the plaintiff's claim is for damages and by operation of law, cannot be a claim for a liquidated amount in money, due to it being subject to the determination of value of the loaders before establishing damages.

³ Uniform Rule 32 (3) (b) read with the judgment in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 426

2. On the merits, the defendant raised the following defences:

a. the defendant disputes ownership of the loaders and allege that the plaintiff was not entitled to sell the loaders and transfer rights that it did not possess.

b. the defendant denies that the vehicles described in paragraph 5.1.1 and 5.1.2 of the particulars of claim, were sold in terms of the agreement the plaintiff is relying on in these proceedings.

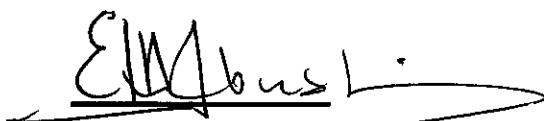
c. in the alternative, the defendant claims that, if it is found that the plaintiff is the owner of the loaders and that the agreement is valid, which is still denied, it is entitled to a reduction of the purchase price with regard to the Hitachi vehicle which was found, immediately after delivery, to have latent defects while it was an implied term of the agreement that the Hitachi Loader would be free of any latent defects.

[10] It is my view that the defendant has advanced facts in resistance to the applicant's claim with a sufficient degree of clarity to enable me to ascertain that it has deposed to good defences. The defences are *bona fide*, good in law and in my opinion if raised at trial they may constitute a defence to the plaintiff's claim.

[11] It may be that the defendant's conduct as stated in paragraph [4] of this judgment, gave the plaintiff an impression that the defendant does not have a *bona fide* defence, however, the defences raised in this application do not depict that to me. As already stated, the defences are *bona fide*, good in law and if raised at trial may constitute a defence to the plaintiff's claim.

[12] In the premises I make the following order:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend the action.
3. Costs of this application are to be costs in the main case.



EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE:

04 NOVEMBER 2014

DATE OF JUDGMENT:

08 DECEMBER 2014

FOR PLAINTIFF/APPLICANT:

ADV D A TURNER, instructed by WERKSMANS
ATTORNEYS

FOR 2ND DEFENDANT/RESPONDENT:

ADV P DE KLERK, instructed by DU PREEZ'S
ATTORNEYS

C/O LINGENFELDER AND BALOYI ATTORNEYS