IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

15/12/16

CASE NO: A464/2016

(1) REPORTABLE: YES (NO)

(2) OF INTEREST TO OTHER JUDGES: YES (NO)

(3) REVISED

15/12/2016

DATE SIGNATURE

In the matter between

UV POWER (PTY) LTD — **APPELLANT (First Defendant a quo)**

and

STEPHANUS JOHANNES PAULUS KRUGER — **RESPONDENT (Plaintiff a quo)**

JUDGMENT

VILAKAZI, AJ:

[1]. This is an appeal against an order by the Potchefstroom Magistrate Court ("the court a quo") granting summary judgment on 26 January 2016 in favour of the Respondent.

[2]. Appeal before us is with leave of the court a quo. The respondent opposes the appeal.

[3]. On 10 September 2015, the respondent issued summons against the appellant seeking the following relief;

1. Confirmation of the cancellation of the agreement between the parties;

[4]. Payment in the amount of R 150 000 plus interest thereon calculated at 9% per annum a *temporae morae* and costs of suit.

[5]. The respondent avers that on 15 April 2015, the parties entered into a verbal contract in terms of which the appellant was to supply and install 10KWatt solar energy system; solar water geyser pre- feeder and battery box in the total amount of R190 380. The quotation issued on 13 April 2015, which was annexed to the application of summary judgment indicates the following; an 80 % upfront deposit on acceptance hereof, installation would take place within 7 days from receiving the deposit and this price was valid for 10 days only.

[6]. On 15 April 2015, the respondent paid a deposit of R 150 000 and the appellant proceeded with the installation of the system at the respondent's residential premises.

[7]. When the appellant entered an appearance to defend the action, the respondent applied for summary judgment for the amount claimed plus interest and costs. In support of this application, annexed were, the quotation, proof of payment of a deposit and the email from Mr Jan Grobler dated 22 June 2015 addressed to the respondent. The respondent avers that this email is proof that the agreement between the parties was cancelled by mutual consent and it is an acknowledgment of debt and further confirms a refund of R150 000 to him due and payable by the appellant.

[8]. The appellant opposed the application for summary judgment and the magistrate held that the appellant failed to disclose a bona fide defence and granted summary judgment in favour for to the respondent for the amount claimed with costs on party and party scale.

[9]. On 22 June 2015, Mr Jan Grobler, a representative of the appellant addressed an email to the respondent. In the email, the said Grobler undertook to remove the system and refund the money paid. The email further stated that the system would be packaged in the respondent's garage until the refund is made. I quote this email verbatim"Jy sal aanhou om foute te soek maar dit is nie meer nodig nie. Ek wag vir n betaling dan sale k met jou gesels hoe die stelsel kan hom uithaal en hoe ek geld in jou rekening terugbetaal. In teen deel sale ek graag die stelsel wou kom uithaal en verpakking plaas in jou garage totdat ek die geld kan betaal. Jy het in elkgeval geen nut van die stelsel huidiglik nie.Kan ons dit so reel asb Paul".

[10]. In the particulars of claim, the respondent's claim is based on a breach of the agreement. It further alleges that the appellant is in breach of the agreement in that: Firstly, he alleges that the manner in which the solar system was installed did not meet the material terms and conditions of the agreement between the parties. Secondly, the appellant's failure to rectify the faults thereof amount to breach. Thirdly, there was mutual cancellation and he has accepted repudiation. In support of cancellation of the agreement he relies on the email dated 22 June 2016, written by Mr Jan Grobler, the director of the appellant addressed to him. Relying on mutual cancellation he claims confirmation of cancellation of the agreement, restitution, that is he tenders the system and claims refund in the amount of R 150 000, being the deposit paid.

[11]. The appellant in his opposing affidavit denies that he is in breach. It was averred by Mr Jan Grobler, in his representative capacity as the director, that due to the failure of the respondent to pay the balance of the 80% deposit in the amount of R 2 304 .00 and the balance in the amount of R37 696, it did not provide the respondent with a switch over installation switch, battery box and a geyser pre- feeder system. As a result of the respondent' breach in that he failed and neglected to pay the aforesaid amount, a 15KW back up system and a switch over system were not installed.

[12]. The appellant furthers makes a counter claim in the amount of R2 304 and tenders completion of the installation against payment of this amount.

[13]. After the application was heard, the magistrate concluded that the email dated 22 June 2015 by Mr Jan Grobler addressed to the respondent constitute a liquid document for purposes of summary judgment proceedings. He held the view that it is an acknowledgment of indebtedness, and the amount payable and owing to the respondent is R150 000. It concluded that the appellant had no bona fide defence to the respondent's claim and granted summary judgment.

[14]. The appellant in its heads of argument contended that the email by Mr Jan Grobler dated 22 June 2015 addressed to the respondent is not an acknowledgment of debt in that it does not specify the amount that will be paid to the respondent, the time frame and the terms of payment. It was contended that on reading this email alone, it is apparent that the parties were in negotiations regarding this subject matter before us. It was submitted on behalf of the appellant that the magistrate erred in allowing this email as a supporting document to the summary judgment application.

[15]. It was further contended on behalf of the appellant that the respondent's claim is based on a breach of a contract and consequently summary judgment cannot be granted.

[16]. This then brings me to the next question, that is, whether the appellant disclosed a bona fide defence. Rule 14 of the Magistrate 's Court Rules enables the plaintiff to apply for summary judgment where the claim is:

On a liquid document;

1. For a liquidated amount in money;
2. For delivery of a specified movable property;
3. For ejectment.

4. Together with any claim for interest and costs. The defendant, on the other hand, must set out a defence that is bona fide and good in law and also disclose fully the nature and grounds of his or her defence.

[17]. The legal principles governing summary judgment proceedings are well-*established.* ***In Maharaj v Barclays National Bank Ltd 1976(1) SA 418 (A)*** Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

' ...[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon the facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant had "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, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment either wholly or partly as the case may be."

[18]. Turning to the respondents' claim, which in essence is a breach of the terms and conditions of the agreement and his reliance of the content of the email by Mr Grobler as proof of mutual cancellation, he is entitled to a refund of the R 150 000 deposit paid to the appellant on 15 April 2015. In my view the respondent has conflated his remedies. In a restitution claim, the respondent does not have to plead any breach. When the parties agree to mutual cancellation of the contract the status quo must prevail.

[19]. It is my view that my reading and interpretation of the email by Mr Grobler does not provide the explanation of what led to him writing this note to the

respondent. I am not persuaded that this email confirms cancellation standing on its own. It is my conclusion that this email is equivocal and creates uncertainty. The magistrate proceeded on a wrong premise that there was mutual cancellation. I am of the view that the magistrate misdirected himself in concluding that Mr Grobler email constituted a liquid document.

[20]. I now turn to deal with the defence of the appellant. It alleges that the respondent has breached the agreement in that it has failed to pay an amount of R 2 304, being a short payment toward the deposit and further neglected to pay the outstanding balance of R37 696, which amount the appellant is entitled to. The appellant averred that it has completed 99% of the installation. It makes a counterclaim in the amount of R2 304 against the respondent's claim.

[21]. ***In Joob Joob Investments (Pty) Ltd v Stocks Mavundal Zek Joint Venture [2009] zasca 23(27 March 2009)*** **Navsa JA** stated that summary judgment procedure was not intended to shut a defendant out from defending, unless it was very clear indeed that he had no case in the action. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his day in court.

[22]. In this matter before us, I am satisfied that there is a discernable sustainable defence raised the appellant. There is a dispute between the parties regarding the terms of the contract. There is a possible counterclaim by the appellant. The quotation issued by the appellant on the 13 April 2015 in respect of the 10KWatt solar system requires 80% deposit on acceptance of the quotation. The parties did not indicate when is the balance of the 20% payable and neither are we told when does ownership of the system vest on the respondent. The court a quo in its judgment alluded to this fact and stated that it is in issue whether the respondent failed to discharge his contractual obligation as raised by the appellant and in dispute whether the appellant was excused from fulfilling its contractual obligation.

[23]. In the circumstances, the following order is made:

1. The appeal succeeds;
2. The judgment of the court a quo is set aside and replaced with the following:
    a. "Summary Judgment is refused;
    b. Leave to defend is granted with costs to be cost in the cause."

VILAKAZI AJ
ACTING JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

I agree it is so ordered.

N. P MALI J
JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

DATED AND SIGNED AT PRETORIA ON 9 DECEMBER 2016

For The Appellant	:	**Advocate J.M Bezuidenhout**
Instructed by	:	**Chris Liebenberg Attorneys**
For The Respondent	:	**A. Van Eck**
Instructed by	:	**Van Eck Windell - Attorneys**
Date Heard	:	**9 December 2016**
Date Delivered	:	**15 December 2016**