IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 9787/ 2008

In the matter between:

PASCO PACKAGING CC PLAINTIFF

and

WOOD FIBRE PRODUCTS CC t/a

MULLER PRODUCTION MACHINES DEFENDANT

JUDGMENT DELIVERED ON THIS 3rd DAY OF MARCH 2009

NDITA, J

INTRODUCTION:

[1] This is an application for summary judgment against the Defendant for the payment of an amount of R430 632.72, together with interest at 15.5% per annum, *a tempore morae.*

[2] The Plaintiff is a close corporation duly incorporated as such in accordance with the provisions of the Close Corporations Act No. 69 of 1984, with its main place

of business at the corner of Trans Oranje Road & Junction Street, Tygerberg Business Park, Parow Industria, Western Cape.

[3] The Defendant is a close corporation duly incorporated as such in accordance with the provisions of the Close Corporations Act No. 69 of 1984, with its registered office situated at Unit 7, Canal Edge 3, Tyger Waterfront, Carl Cronje Drive, Bellville, Western Cape.

[4] The parties entered into a partly written and partly oral agreement on 16 August 2005 in Cape Town. In terms of the agreement the Defendant undertook to design, manufacture, commission and install a folder gluer machine ("the machine") for the plaintiff at a price of R755 496.00, excluding vat.

[5] The relevant terms of the agreement were the following:

1. A deposit of 50% of the contract price including vat was payable on confirmation of the order;
2. On completion, the machine would be set up, tested and commissioned at the premises of Muller Joubert Manufacturing, Somerset West;
3. On compliance with the functional and performance specifications, the Plaintiff would be obliged to accept the machine prior to the transit thereof to the Plaintiff's premises for installation;

4. An amount equal to 45% of the contract price, including vat, was payable on acceptance of the machine prior to the machine leaving the premises of Muller Joubert Manufacturing;
5. The balance of the contract price would be payable on installation;
6. The machine would be delivered within 12 to 16 weeks from the date of the confirmation of order, depending on the availability of bought out materials and equipment.

[6] The Plaintiff made staggered payments of the deposit as follows:

1. R120.000 on 26 August 2005;
2. R50 000 on 4 October 2005;
3. R150 000 on 1 November 2005;
4. R110 632.72 on 27 January 2006.

[7] On 19 June 2008, the Plaintiff instituted an action for the return of the amount of R430 632.72 with interest *a tempore morae* on the grounds that the Defendant failed to comply with its obligations in terms of the agreement by *inter alia,* failing to deliver the machine within 16 weeks from the date of confirmation of the order (which order was confirmed on 16 August 2005), or at any time thereafter.

[8] In the alternative, the Plaintiff alleges that, on or about 28 February 2008, the Defendant repudiated the agreement by informing the plaintiff that the Defendant has made the machine available to Dynamic Converting Solutions (Pty) Ltd ("DCS") to operate on a commercial basis. Further, that the Defendant was in the process of

negotiations to sell the machine to an undisclosed third party and that the Defendant would only comply with its obligations in terms of the agreement with the Plaintiff in the event of its negotiations with the undisclosed third party being unsuccessful and then only if DCS was agreeable thereto and certain other conditions were agreed to or complied with by the Plaintiff. After delivery of the Defendant's notice of intention to defend, the plaintiff launched an application for summary judgment.

[9] In the affidavit filed in opposition to the application for summary judgment, the Defendant pertinently denies that he failed to deliver the machine within the stipulated time. He states that the Applicant could not afford to pay the 50% deposit upon confirmation of the order. The parties then orally agreed that the Applicant would pay the deposit over a period of a few months and that delivery would take place at an undetermined time. The effect of this oral agreement varied the written agreement. On the Applicant's own version, the payment of the deposit went beyond the 16 week period stipulated in the written agreement.

[10] Another reason cited by the Defendant for varying the 16 week delivery period was the uniqueness and novelty of the machine necessitating a lengthy and extensive trial period of adjustments to meet the Applicant's requirements and specifications. The Applicant was informed about this and visited the Defendant's workshop approximately once a week in addition to the several meetings and numerous telephonic discussions pertaining to the design, progress as well as the difficulties posed by the requirements and specifications and ways to resolve such difficulties.

[11] The defendant further states that the machine was ready for delivery on 16 November 2007 (that being the date on which delivery had to take place as stipulated in the Applicant's letter of demand dated 14 November 2007), and, that it is in fact the Plaintiff who failed to perform in terms of the agreement and as such rendered the delivery of the machine impossible.

[12] The Defendant annexed letters addressed to and from the Plaintiff's attorneys in support of this fact and also to prove that prior to the institution of this action the Plaintiff's attorneys were fully aware of the Defendant's defences against the claim.

[13] A reading of the said letters reveals that the Defendant responded to the Plaintiff's letter of demand on the same day (as the date on the letter of demand) indicating its readiness to deliver upon compliance by the Plaintiff with its side of performance in terms of the agreement. Furthermore, the Defendant alleged that it incurred costs relating to the manufacturing and the storage of the machine in a warehouse in Paarl, as well as the moving of the machine, which can only be done by a professional rigging company.

[14] The crisp issue in this matter turns on whether the Defendant has complied with the provisions of Rule 32(3)(b) of the Uniform Rules of Court, which requires a full disclosure of the nature and the material facts upon which it relies and whether the defence raised is *bona fide.*

THE LAW:

[15] It is trite that, in order to be successful in a defence, the defendant must, of course, comply with the provisions of Rule 32(3)(b) of the Uniform Rules of Court, which requires a full disclosure of the nature and the material facts upon which it relies. Failure to comply with these provisions will not necessarily mean, however, that summary judgment will follow. In accordance with the provisions of Rule 32(5), the court retains an overriding discretion to refuse summary judgment.

[16] With regard to the discretion to refuse summary judgment, even where the defendant's affidavit does not measure up to the requirements of Rule 32(3)(b), it has been said that, in view of the extraordinary and stringent nature of the summary judgment remedy, discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is good. (See **Maharaj v Barclays Bank Ltd 1976** (1) SA 418 (A) at 425H; **Tesven CC and another v South African Bank of Athens** 2000 (1) SA 268 SCA) at 277H–J.)

[17] The reason why the remedy of summary judgment is referred to as "stringent" and "extraordinary" is because it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of a trial. What should concern the court faced with an application for summary judgment is whether the defence raised is *bona fide* and not whether it is likely to succeed.

ANALYSIS:

[18] The argument raised on behalf of the plaintiff was that the Defendant had failed to disclose fully the nature and grounds, as well as the material facts relied upon, as required in terms of Rule 32(3)(b). The evaluation of this argument requires a somewhat more detailed analysis of the particulars of claim and the Defendant's opposing affidavit. According to the particulars of claim, the Plaintiff's claim of the amount of R430 632.72, together with interest at 15.5% per annum *a tempore morae*, is mainly for the deposit paid to the Defendant by the Plaintiff. The Defendant acknowledges receipt of the amount. In his opposing affidavit, the Defendant disputes the material allegations in the particulars of claim, namely, that the delivery of the machine had to take place within the 16 week period stipulated in the written agreement as the said agreement was varied orally. Further, the payment of the deposit went beyond the 16 week period. The Plaintiff was involved in the process of the manufacture and was fully aware of the difficulties encountered in the process.

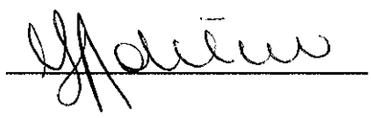
[19] The Defendant further states that the machine was ready for delivery on the date stipulated in the letter of demand, but could not deliver it because the Plaintiff had not performed.

[20] In the light of the aforegoing, I find myself in disagreement with the argument raised by the Plaintiff in this Court, namely, that the Defendant failed to "disclose fully the nature and the material facts relied upon". The success or otherwise of the defence raised in the opposing affidavit is a matter for the trial court and should not at all be the concern when considering whether or not to grant summary judgment.

[21] In my view, the Defendant has fully disclosed the nature and grounds as well as the material facts upon which it relies and, as such, has complied with the requirements of Rule 32(3)(b).

[22] Accordingly I make the following order:

1. The application for summary judgment is refused.
2. The Defendant is granted leave to defend the action.
3. Costs to be costs in the main action.



NDITA, J