IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 5941/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20 APRIL 2023

DATE **EJ FRANCIS**

TRENCON CONSTRUCTION (PTY) LTD Plaintiff

and

PM AFRICA PROJECT MANAGEMENT (PTY) LTD First Defendant

PADAYACHEE, NALENTHEREN MOONSAMY Second Defendant

Neutral Citation: *Trencon Construction (Pty) Ltd v PM Africa Project Management (Pty) Ltd and Another* (Case No: 5941/2019) [2023] ZAGPJHC 352 (20 April 2023)

JUDGMENT

FRANCIS J

1. This is an application for summary judgment by the plaintiff against the first and second defendants, jointly and severally in an amount of R2 108 066.25 alternatively for R716 066.25, and costs on an attorney and client scale.

2. The application was opposed by the defendants on the grounds that the claim has prescribed. Further that the plaintiff and the first defendant concluded oral agreements in terms of which the first and second defendants would render certain services for the plaintiff and any amounts due to the defendants in respect of those services would be used to effect the amounts owed in terms of loan agreements and/or the acknowledgment of debt. Further that there is a clear dispute of fact and triable issues that cannot be resolved on paper, let alone summarily.

3. It is common cause that on 25 September 2009 a loan agreement was concluded between the plaintiff as a lender and the first defendant as a borrower incorporating a suretyship by the second defendant.

4. The first defendant signed an acknowledgment of debt for the amount owing in terms of the loan agreement on 20 January 2011. In terms of the aforementioned acknowledgement of debt, the second defendant stood surety for the debts of the first defendant to the plaintiff.

5. On 24 October 2018 the plaintiff sent the defendants a letter of demand and the defendants responded on 21 November 2018 to the said letter of demand. A summons and particulars of claim was issued on 20 February 2019 and was served on the first defendant. Default judgment was granted against the first defendant on 23 May 2019.

6. On 25 October 2019 an application for rescission of judgment was served on the plaintiff. And a rescission of judgment was granted on 3 June 2021 by Vally on the grounds that he had found that there is a *bona fide* defence in the form of an existence of an oral contract raised by the defendants but that there was no need for the court to pronounce on the strength of the validity of the defence and that the defence was not frivolous.

7. On 19 July 2021 the defendants served their notice of intention to defend on the plaintiff and their plea on 2 August 2021. An application for summary judgment was served on 3 August 2021 and a notice to oppose the summary judgment was served on 16 April 2021. The defendants opposing affidavit was served on 6 September 2021.

8. The parties contended in their joint practice note that this court needs to determine the following issues:

   8.1 Whether the plaintiff's claim has prescribed, whether the running of prescription was interrupted in terms of section 14 of the Prescription Act, as a result of the defendants' acknowledgment of their indebtedness.

   8.2 Whether the indebtedness of the plaintiffs has been reduced by way of agreements entered into by the parties in August 2012 and May 2018.

   8.3 Whether the aforesaid agreements, if they do exist, are of any force and effect in the light of the non-variation provisions contained in the loan agreement and the acknowledgment of debt, and in the written part of the agreement of May 2018.

9. This court is required to determine the summary judgment application brought by the plaintiff against the defendants. The application is brought in terms of rule 32(3) of the Uniform Rules of Court. The defendant is required to satisfy the court by affidavit or with leave of the court by oral evidence that the defendant has a *bona fide* defence to the action and such an affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

10. It was held in *Joob Joob Investments (Pty) Ltd vs Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 SCA that the rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. The question is whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.

11. It is common cause that the plaintiff had obtained default judgment against the defendants. They brought a rescission application that was opposed by the plaintiff. The defendants did not in their founding affidavit raise the issue of prescription but did so in their replying affidavit. The plaintiff then filed a supplementary affidavit dealing with the issue of prescription. The rescission application served before Vally J who on 3 June 2021 rescinded the default judgment and found that there is a *bona fide* defence in the form of the

existence of an oral contract raised by the applicants (defendants in this application), and that there was no need for him to pronounce on the strength or validity of the defence. He said that it was not a frivolous one. The contention of the respondent relied on factual matter that was best explored at trial.

12. Vally J said the following in paragraph 10 of his judgment:

"On the issue of whether there exists an oral contract between the first applicant and the respondent, the respondent is correct in its contention that the correspondence attached to the replying affidavit does not support the applicants claim that such a contract came to be. The applicants accept that this is so. However, it is important not to lose sight of the fact that the applicants' contention is that there is an oral contract. The document attached to the replying merely evidences the fact that the parties were engaged in discussions regarding the liquidation of the debt. The documents do not in themselves prove that such a contract had actually been concluded nor that it was not concluded. After all, the contract being oral would need to be proven by having recourse to the oral evidence from both parties. For purposes of this application the applicants have put up sufficient evidence to show that its defence is bona fide and worthy of consideration. The applicants have not merely put it up to escape the consequences of the judgment. They have attached the evidence showing that the parties were engaged in discussions regarding the payment of commission to the first applicant for work done by the second applicant, which payment would be set-off against the debt of the first applicant. In the result there is clearly purpose in rescinding the judgment since the outcome of the trial may be different from the judgment issued as a result of the first applicant's default".

13. The defendants are required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea it cannot in the absence of an explanation for the inconsistency be said to be *bona fide*.

14. I have referred to the rescission judgment of Vally J above. In both rescission applications and summary judgment applications the question to be determined is whether there is a *bona fide* defence. Vally J's finding that there is a *bona fide* defence has not been taken on appeal. I accept that it is not binding on me but based on the facts that were placed before me in this summary judgment application nothing much has changed as far as the facts are concerned and I also come to the same conclusion that the defendants have a triable issue which can only be determined by the trial court. They have set out fully the basis of their defence and it is not for this court at this stage to second guess their defence.

15. The application for summary judgment is refused.

16. In my view the question of costs should be cost in the trial. The trial court would be in the best position to decide the issue of costs once evidence had been led before it.

17. In the circumstances I make the following order:

17.1 The application for summary judgment is dismissed.

17.2 Costs are costs in the trial.

FRANCIS J
JUDGE OF THE HIGH COURT

FOR PLAINTIFF	:	K LAVINE INSTRUCTED BY ANDREW GARRAT INC
FOR DEFENDANTS	:	K MAGAN INSTRUCTED BY SOONDER INC
DATE OF HEARING	:	7 NOVEMBER 2022
DATE OF JUDGMENT	:	20 APRIL 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 20 April 2023.