IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A5005/2005

In the matter between:

PCL CONSULTING (PTY) LTD t/a
PHILLIPS CONSULTING SA Appellant

and

TRESSO TRADING 119 (PTY) LIMITED Respondent

J U D G M E N T

TSOKA, J:

[1] "*The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the court to the defendant.*" These are the remarks of Marais J made some 46 years ago in this Division in *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Limited* 1959 (3) SA 362 (W) at page 366E-F.

[2] These words were relevant then and are still relevant today. Section 34 of the Constitution of the Republic of South Africa, Act 108 of 1996 guarantees this right of access to the courts. Summary judgment proceedings appear to be in conflict with the provisions of section 34. However in reality this is not so as Rule 32(3)(a) and (b) of the Uniform Rules of Court make provision for a party to either furnish security to the plaintiff to the satisfaction of the registrar for any judgment that may be given or satisfy the court by affidavit or by oral evidence establishing fully the nature and grounds of the defence as well as the material facts relied thereon. Such a defence must also be ***bona fide***. Once a party succeeds in doing this, such party would be entitled to go to trial.

[3] However, if the plaintiff has an unanswerable claim against the defendant and the defendant has no ***bona fide*** defence to the claim of the plaintiff, and the notice of appearance to defend was filed solely for the purposes of delay, the plaintiff would be entitled to summary judgment. The plaintiff is entitled to a quick remedy rather than to wait for a long period. The waiting period for allocation of a trial date, which takes place after the close of pleadings, is currently not less than eleven months in this division.

[4] The appeal in this matter is with leave of the Supreme Court of Appeal and concerns summary judgment granted in favour of the respondent. The respondent as plaintiff instituted an action against the appellant as the defendant. In its particulars of claim the respondent claimed payment of arrear rental and ancillary relief. The respondent's claim is based on a written lease agreement entered into between the parties. The respondent further claimed

rectification of the lease agreement to reflect the leased premises as "*4th Floor*" instead of "*6th Floor*" as recorded in the lease agreement.

[5] The appellant filed a notice of its intention to defend whereupon the respondent filed an application for summary judgment. In the said application the respondent prayed for rectification of the lease agreement and payment of the amount of R396 188,35 in respect of arrear rental and other charges. The appellant elected to proceed in terms of Rule 32(3)(b) by filing an affidavit resisting summary judgment. The defence set out in appellant's affidavit were threefold: (a) that rectification is not a competent order under Rule 32 of the Uniform Rules of Court; (b) any dispute relating to rectification or proposed rectification as well as any dispute relating to the rights and obligations of the parties to the agreement must be referred to arbitration; (c) the appellant has a counterclaim against the respondent arising out of theft of goods belonging to the appellant which theft was as a result of the collusion of respondent's security personnel with the thieves that perpetrated the theft. I now proceed to deal with each of these defences.

Rectification

[6] Rectification is not a competent prayer in summary judgment proceedings. In terms of Rule 32 of the Uniform Rules of Court, summary judgment may be applied for claims only -

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment; together with any claim for interest and costs.

The respondent must have appreciated this, for, although rectification was raised as a defence, the respondent did not proceed with the prayer for rectification at the hearing of the application for summary judgment. The respondent proceeded with its claim for payment of the amount of R396 188,35 in respect of rental and other related charges arising out of the lease agreement. The appellant argued that this claim flows from the rectified agreement. The court *a quo* understood the appellant to be saying that the unrectified lease agreement does not support respondent's claim for payment of the money. The court *a quo* did not accept the appellant's argument in this regard and found against the appellant on this point.

[7] I agree with the finding of the court *a quo* that the respondent's claim does not only flow from the lease agreement as rectified. Clause 36.8.1 of the lease agreement precludes the appellant from relying on the incorrect description of the leased premises. The said clause reads:

> "*Should the lessee take occupation of any other premises in the building, in addition to and/or instead of the leased premises, then until such time as a written lease has been entered into in respect of such additional or alternative premises, the provisions of this lease shall mutatis mutandis apply*, *save that the rental for such additional or alternative premises shall be the greater of …*"

[8] The respondent's summons claims payment of rental in respect of 4th Floor, Fedsure Towers. The lease agreement describes the leased premises

as 6th Floor, Fedsure Towers, while the return of service of the summons states appellant's premises as 4th Floor, Fedsure Towers. The appellant does not deny having signed the lease. It does not deny that it occupies offices on respondent's premises. It furthermore does not admit or deny paying rental since the inception of the lease. What is clear however is that the respondent did sign a debit order authorization to pay rental to the respondent. The debit order authorization reflects 6th Floor as the leased premises. It is clear that the appellant is in occupation of offices on respondent's premises. In the circumstances the appeal must fail on this ground.

Arbitration

[9] Clause 32 of the lease agreement provides that a dispute relating to rectification or proposed rectification of the agreement as well as the parties' rights and obligations arising from the lease agreement must be referred to arbitration. It is apparently on this clause that the appellant relied.

[10] The appellant must prove that there is a dispute regarding the parties' rights and obligations arising out of the lease agreement that need to be referred to arbitration. As the respondent did not proceed with the proposed rectification, there was no dispute to be referred to arbitration. The appellant's affidavit does not set out any other dispute that must be referred to arbitration. The appellant does not admit or deny entering into the lease agreement. It neither denies or admits occupying the 4th or 6th Floor Fedsure Towers. It does not deny receipt of the summons that were served by the Sheriff on the

4th Floor. It neither denies or admit paying rental as per the debit order authorization. It does not deny or admit owing the money claimed by the respondent. In the circumstances there is no dispute to be referred to arbitration.

[11] As a matter of law an arbitration clause does not oust the jurisdiction of the court and is no automatic bar to legal proceedings. See *Nick's Fishmonger Holdings (Pty) Ltd v De Souza* 2003 (2) SA 278 (SECLD).

[12] In any event, if the appellant intended to rely on section 6 of the Arbitration Act, Act No 42 of 1968, it should have applied for a stay of the proceedings in the court *a quo* simultaneously with the filing of the appearance to defend. I am mindful of the fact that the appearance to defend and the application for summary judgment were filed on the same day. However, as at the hearing of the application for summary judgment no application for the stay of the proceedings was filed. The appeal on this ground would also have failed.

Counterclaim

[13] Both counsel agree that the appellant did not pursue this defence in the court *a quo*. I however point that clause 24 of the lease agreement precluded the appellant from claiming damages against the respondent arising out of theft from the leased premises. On this ground also the appellant would not have succeeded.

[14] It is clear that the appellant had no defence, let alone a *bona fide* defence against the claim of the respondent. If the respondent had a defence this should have been set out in the affidavit as required in terms of Rule 32(3)(b) of the Uniform Rules of Court. Nothing is said to dispute the liability for payment of R396 188,35. The three defences raised as stated above are not *bona fide*. I can only conclude that the purpose of raising these defences is solely for the purposes of delay. In the circumstances of this case there is no basis whatsoever why the respondent should not have been granted summary judgment.

[15] In the result I would make the following order -

15.1 The appeal is dismissed.

15.2 The appellant is ordered to pay the respondent's costs of appeal.

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M P TSOKA
JUDGE OF THE HIGH COURT

I agree:

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K M SATCHWELL
JUDGE OF THE HIGH COURT

I agree:

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B H MBHA
JUDGE OF THE HIGH COURT

Date for Judgment : 26/09/2005