



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: I 1016/2014

In the matter between:

ANDERSON TRANSPORT (PTY) LTD

APPLICANT

And

WINGS INNOVATIVE SOLUTIONS

1ST RESPONDENT

PAUL S. VAN DER MERWE

2ND RESPONDENT

ELLA CATHARINA SLABBERT

3RD RESPONDENT

Neutral citation: *Anderson Transport (pty) Ltd v Wings Innovation Solutions* (I 1016/2014) [2014] NAHCMD 227 (25 July 2014)

Coram: DAMASEB, JP

Heard: 24 July 2014

Delivered: 25 July 2014

ORDER

1. The application for Summary judgment is refused;
2. Defendant is granted leave to defend the action;
3. Costs of suit, to include costs of one instructing and one instructed counsel;
4. The matter is postponed to **30 September 2014 at 14:15** for case planning conference and parties are directed to comply with their obligations in respect of the case planning conference.

REASONS

DAMASEB, JP [1] The applicant issued simple summons on 17 March 2014 against the three respondents for services rendered in the amount of N\$ 150 751.44. The third respondent defended the action on 6 May 2014 and the application for Summary judgment was brought on 14 May 2014. Once again, the third respondent opposed the application and proceeded to file opposing papers to the application for summary judgment.

[2] The applicant alleges that the third respondent does not have a bona fide defence to the claim and that the opposition is solely for purposes of delay. The applicant's case can be summed up as follows:

- a) That the third respondent made legal submissions in her opposing affidavit without obtaining and attaching a confirmatory affidavit from her legal representatives.
- b) That the third respondent signed a special condition of surety as surety and co-principal debtor in *solidium* for the debts of the first defendant as attached to the affidavit in support of the summary judgment.

- c) That no suretyship has been entered into and as such the special condition agreement attached to the affidavit in support of the summary judgment is not subjected to Stamp duties.
- d) That the third respondent is sued in her capacity as surety and not in her personal capacity.

[3] The third respondent denies that the opposition is solely for delay purposes and states that she has a bona fide defence against the liquidated claim of the applicant. The third respondents defence is based on primarily the fact that the so called special condition is a suretyship and as such subjected to the Stamp duties Act, 15 of 1993. In addition, the third respondent alleges that she never contracted with the applicant in her personal capacity and that the issuing of simple summons without attaching the relevant documentation to sustain a cause of action is fatal. Accordingly, attaching the so-called special condition to the affidavit in support of the summary judgment only is an attempt to introduce a new cause of action and that since this document did not form part of the summons, the applicant would be acting outside the scope of his summons.

[4] Counsel on behalf of both parties filed supplementary heads of arguments reflecting the above position. I refused summary judgment and indicated that reasons will follow. Here are the reasons.

Ruling

[5] In order for the court to be able to grant summary judgment, the cause of action must be complete and perfected in the sense that all the necessary elements for finding liability on the part of the respondent must exist. In the case before us, the applicant proceeded by way of simple summons, alleged that third respondent is sued in her capacity 'as a business woman and as a surety and co-principle debtor in *solidum* for the debts of the first defendant'.

[6] The instrument of suretyship is not attached to the simple summons. Same was only attached to the affidavit in support of the summary judgment. An affidavit in support of summary judgment is not a summons and is only an explanation for why summary judgment must be granted. The third respondent has specifically raised the defence that the plaintiff's summons does not disclose a cause of action because (1) suretyship

agreement was not attached to the summons and (2) it does not comply with the Stamp Duties Act 15 of 1993. In the sense that the agreement was not attached to the summons, the third respondent's objection has merits. Besides applicant itself now rather incongruously argues that the document relied on is not a surety in order to escape the peremptory provisions of the Stamp Duties Act, 15 of 1993.

[7] A suretyship in terms of s 25, read with Item 15 of the Schedule 1 of the Stamp Duties Act attracts stamp duties. Not only was the so-called suretyship not attached to the summons but the document attached to the application for summary judgment, on the face of it, bears no Stamp duty. Section 12 further reads:

'12 Invalidity of instruments not duly stamped

Save as is otherwise provided in any law, no instrument which is required to be stamped under this Act shall be made available for any purpose whatsoever, unless it is duly stamped, and in particular shall not be produced or given in evidence or be made available in any court of law, except-

(a) in criminal proceedings; or

(b) in any proceedings by or on behalf of the State for the recovery of any duty on the instrument or of any penalty alleged to have been incurred under this Act in respect of such instrument:

Provided that the court before which any such instrument is so produced, given or made available may permit or direct that, subject to the payment of any penalty incurred in respect of such instrument under section 9(1), the instrument be stamped in accordance with the provisions of this Act and upon the instrument being duly stamped may admit it to be produced or given in evidence or made available.'

[8] The exceptions under which the suretyship could have been received under the *proviso* to s 12 are absent because (1) such relief was not asked for by counsel for the applicant and (2) the suretyship never constituted part of the summons, thus rendering the summons bad in law as a basis for granting summary judgment.

[9] It is for the above reasons that I refused summary judgment and granted leave to the third respondent to defend the action.

PT Damaseb
Judge-president

APPEARANCE:

FOR THE APPLICANT:

OF

M PETHERBRIDGE

PETHERBRIDGE LAW CHAMBERS

FOR THE THIRD RESPONDENT

INSTRUCTED BY

AJB SMALL

MB DE KLERK & ASSOCIATES