IN THE HIGH COURT OF SOUTH AFRICA
{EASTERN CAPE DIVISION, GRAHAMSTOWN}

Case No. 546/18

In the matter between:

AFRI-COAST ENGINEERS SA (PTY) LTD Plaintiff /Applicant

And

THE AMATOLA WATER BOARD Defendant/Respondent

JUDGMENT

TONI AJ

[1] In this matter the plaintiff / applicant, a limited liability company, seeks summary judgment against the defendant/respondent for payment of a sum of R2 297 907.76, interest on the aforesaid sum at the prescribed legal rate of 10.5% per annum, calculated from the date of demand to the date of payment and costs.

[2] The application is a sequel to summons sued out by the plaintiff / applicant against the defendant / respondent on 23 February 2018 in terms whereof the prays for payment of the aforesaid sum, interest and costs. For the sake of simplicity and convenience, I will refer to the parties in this Judgment as they are referred to in the summons.

[3] The application is premised on Rule 32 (1) of the Rules of court which provides that:

> *"32 (1) Where the Defendant has delivered notice of intention to defend, the plaintiff may apply to the court for summary judgment on each of such claims in summons as is only -*
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> *(a) on a liquid document;*
> *(b) for liquidated amount in money;*
> *(c) for delivery of specified movable property;*
> *(d) for ejectment; together with any claim for interest and costs".*

[4] In support of the summary judgment application is an affidavit deposed to by one Kevin T. Mcrae, "Mcrae", ostensibly a director of the plaintiff. In the said affidavit, Mcrae verifies the plaintiff's cause of action and confirms the defendant's indebtedness to the plaintiff before stating that in his opinion the defendant does not have a *bona fide* defence to the plaintiff's claim and that the notice to defend has been filed solely for the purpose of delay.

[5] The action is defended by the defendant and upon filing a notice of intention to defend on 13 March 2018, the plaintiff lodged the application for summary judgment on the grounds that the defendant does not have a *bona fide* defence to its claim and that the defendant has filed the notice to defend for the purpose of delay.

[6] The application is opposed by the defendant in support whereof it filed a notice to oppose on 25 April 2018. It is not so clear from the said notice when was it served on the plaintiff. What is apparent on the ultimate page thereof is that it was served at 12h25.

[7] The application was initially set to be heard on 17 April 2018 but was postponed to 24 April 2018 and the defendant was ordered to pay the costs occasioned by the postponement. On 24 April 2018 it was postponed *sine die* and once again the defendant was ordered to pay the wasted costs.

[8] On 23 April 2018, a day before the date to which the application was postponed, the defendant filed its opposing affidavit which is deposed to by one Vuyo Zitumane, "Zitumane", who is ostensibly the defendant's Chief Executive Officer. In the said affidavit Zitumane sets out what is referred to therein as "Issues in Dispute" and in which the defendant's opposition to summary judgment is ostensibly premised. Zitumane further seeks condonation for the late filing of the defendant's opposing affidavit.

[9] I am required to determine whether, on the facts alleged by the plaintiff in its particulars of claim, I should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that I should refuse summary judgment. My first task is to deal with the application for condonation. I will deal with the defendant's opposition to summary judgment later in this Judgment.

[10] The condonation application stems from the defendant's failure to file its affidavit opposing summary on time. Rule 32 (3) provides a defendant which wishes to oppose summary judgment with steps to follow, namely; (a) it must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given[1] or (b) it may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence)

[1] Rule 32 (3) (a)

that he has a *bona fide* defence to the claim on which summary judgment is sought or has a *bona fide* counterclaim against the plaintiff[2].

[11] The reasons proffered by Zitumane are embedded in paragraph 7 of the defendant's opposing affidavit and these include, *inter alia*, that she is new in the office, having been appointed only on 9 April 2018, and thus she needed to familiarise herself with the issues involved in the application and brief the defendant's Board. On the reasons advanced by Zitumane I am satisfied that the defendant was not in willful default and I granted condonation. No prejudice would be suffered by the plaintiff if condonation is granted as the matter was postponed on two occasions with the defendant having been mulcted with an appropriate order for the costs. In any event the application was not opposed by the plaintiff and the parties agreed that the summary judgment application should proceed.

[12] The plaintiff's claim against the defendant is based on contract for the provision of professional consulting engineering services for one of the defendant's projects, known as "the Upgrade of Binfield Water Supply Scheme: AW 2013/14/02", concluded on 22 July 2014[3]. The plaintiff was appointed by means of a letter from the Supply Chain Manager of the defendant dated 22 January 2014, annexed as "A" to the plaintiff's particulars of claim. The value of the contract is R9 025 049.29.

[13] The material terms of the agreement between the plaintiff and the defendant are in writing and are contained in a "Standard Professional Services Contract", annexed as "E" to the plaintiff's particulars of claim. It was agreed as between the parties that the Standard Professional Services Contract (September 2005) (second edition of CIDB document 1014) would be applicable to the contract, subject to the variations, amendments and additions set out in annexure "D" to the particulars of claim.

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[2] Rule 32 (3) (b)
[3] Par. 4, plaintiff's particulars of claim, par.; Record p.5

[14] It is common cause, it having been specifically pleaded by the plaintiff in its particulars of claim and it having been raised in defence by the defendant in its opposing affidavit, that the contract was of a limited duration of 36 months from the date of appointment and will extend "*until the completion of all instructions that were issued during this period, subject to the availability of the funding for the Project*"[4].

[15] It is further common cause that the Standard Professional Services contract contains a dispute resolution Clause that is binding on both parties. The dispute resolution mechanism is provided for in Clause 12.1 of the contract as follows:

> "*12.1* ***Settlement***
>
> *12.1.1 The Parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to the Contract and may not initiate any further proceedings until either Party has, by written notice to the other, declared that such negotiations have failed;*
>
> *12.1.2 Any dispute or claim arising out of or relating to Contract which cannot be settled between the Parties shall[5] in the first instance be referred by the Parties to either mediation or adjudication as provided for in the Contract Data".*

[16] Clauses 12.2, 12.3 and 12.4 set out broadly the process to be followed before referring the dispute to either mediation, adjudication and arbitration. It is not necessary for the purpose of this Judgment to dwell much on the above processes as such intricate detail may only serve to cloud issues.

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[4] 2. Clause 8.7
[5] 3. My emphasis

[17] To make a determination whether to grant or refuse summary judgment, I will confine myself to the facts averred by the plaintiff as against the defence raised by the defendant, even though open to some doubt. The plaintiff's claim is crystallized in paragraph 16 of its particulars of claim annexed to the summons. In said paragraph the plaintiff avers that it "*has performed in terms of its obligations to the defendant in terms of the contract during the envisaged 36 months and thereafter*". In paragraph 17 the plaintiff further avers that "*the defendant, until July 2017, paid the plaintiff for the services it rendered, in respect of the project, in terms of the contract*".

[18] It is clear in mind, therefore, that the period for which the plaintiff has not been paid is for services it has rendered beyond the period of 36 months envisaged by the contract. This has been conceded to as much by both Counsel during their argument. What falls to be determined, therefore, is whether the defence raised by the defendant in its opposing affidavit is *bona fide*. The defendant's defence is threefold, namely;

18.1 Upon expiry of the 36 months period envisaged by the contract, the plaintiff was obliged to approach the defendant and confirm the availability of further funds before rendering further services. This, according to the defendant is in keeping with Clause 8.7 of the contract. As the plaintiff has failed to confirm the availability of further funds at the end of the contract and it is thus not entitled to claim any further services allegedly rendered in terms of the contract.

18.2 The defendant further relied on Clause 12.1 and 12.2 of the contract which makes a provision for a dispute resolution mechanism in the event of dispute arising between the parties. The defendant's contention is that the plaintiff

was obliged under the said clause to resort to mediation before approaching the court.

18.3 The defendant also sought to rely on section 3 (1) (b) of the Institution of Legal Proceedings Against Certain Organs of the State Act, 2002, Act 40 of 2002, "the Act", in that before instituting the said proceedings, the plaintiff was obliged to first give notice of the intended legal action to the Minister of Water and Sanitation.

[19] I do not agree with the defendant in respect of its last line of defence. During argument Counsel for the defendant conceded as much, and correctly in my view, that such notice was not necessary in the circumstances and that the defendant would no longer pursue its defence on this leg. The plaintiff's claim is not a debt as defined in the Act as debt is confined to a claim for damages[6].

[20] The court is saddled with a responsibility to examined the above two defences and determine whether within the meaning and contemplation of Rule 32 (3) (b) they are *bona fide* enough to avoid summary judgment. It is trite that for the Defendant to resist summary judgment he may satisfy the court on affidavit that he has a *bona fide* defence to the Plaintiff's claim. The affidavit must disclose the nature of defence and the material facts relied upon[7].

[21] The Defendant need not deal exhaustively with the facts and evidence relied upon to substantiate them but he must at least disclose his defence and

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[6] See The unreported Judgment of Vna Zyl AJA in Vhembe District Municipality v Stewards & Lloyds Booysen (Pty) Ltd and Ano (397/2013) [2014] ZASCA 93 (26 jUNE 2014); Also Nicor IT cONSULTING (Pty) Ltd v North West Housing Cooporation 2010 (3) SA 90 (NWM); Director General, Department of Public Works V kOVAC investments 2010 (6) SA 646 (GNP); Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs 7 ano 2012 (4) SA 91 (KZD)

[7] Oos Rande Bantoesakke Adminstrasie Raad v Santam Versekeringsmaatskappy Bpk en andere 1978 (1) SA 164 (W); Slabert v Volkskas Bpk 1985 (1) SA 141 (T)

the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence or not. The discretion to grant or refuse summary judgment, even if the requirements resisting summary judgment have not been met, rests with the court[8].

[22] In Maharaj v Barclays National Bank Limited[9], the words of Corbett JA are resonating. He said:

> "The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law"[10].

The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law.

[23] Courts are extremely loath to grant summary judgment unless satisfied that the Plaintiff has an unanswerable case. It is only when there is no doubt about the Plaintiff's claim that the court can revisit its leniency and grant summary judgment[11].

[24] In this case the defendant has raised two defences, referred to in its opposing affidavit as "*issues in dispute*", which if advanced at trial have the potential to dislodge the plaintiff in its claim. I am not minded by the manner in which these defences are referred to in the opposing affidavit or with the fact that the defendant may not have disclosed all its defences. The defendant is not

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[8] Mahomed Essop (Pty) Ltd v Sekhukhulu and sons 1967 (3) SA 728 D.First National Bank of South West AfricaLtd v Graap 1990 NR 9 (HC)
[9] 1976 (1) SA 418 (A)
[10] 1976 (1) SA 418 (A) at 423G
[11] Per Cobertt J in Arend & another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304F – 305

obliged to disclose all its defences in the opposing affidavit. Similarly a court is also not necessarily bound to the manner in which the defendant has presented his case and is entitled to ascertain from the content of the affidavit itself and draw an inference[12] of what the defendant actually intended to say.

[25] Although the two defences raised by the plaintiff are of a legal nature, these cannot be said to be far-fetched, bogus or bare denials designed only to delay the plaintiff from obtained a quick remedy. Both defences are founded in the contract the terms whereof are sought to be enforced by the plaintiff. It seems to me that the appropriate forum to have these defences properly ventilated is the trial court itself.

[26] Clause 8.7 of the contract creates a condition upon which the contract between that parties may be extended and makes the availability of funds a *sine qua non* to the extension of the contract. It is not clear in the contract which of the parties has an obligation to confirm the availability of funds. However, it being a repository of a discretion whether to extend the contract or not, it would be safe to assume that the defendant bears that responsibility. The defendant is the custodian of its own budget and funds to be allocated to the project. In this regard I do not agree with the defendant's contention that the plaintiff had an obligation to confirm the availability of funds before proceeding with the project beyond its term of 36 months.

[27] The above having been said it does not, however, shift the focus on whether the defendant has a *bona fide* defence to the plaintiff's claim.

[28] Clauses 12.1 and 12.2 to the contract further creates an obligation on both the plaintiff and the defendant to first exhaust internal remedies provided

[12] Fashion Centre v Jasat 1960 (3) SA 221 (N) at 222G

for in the contract to first attempt to resolve any dispute arising out of the agreement, through negotiations and failing negotiations through mediation and failing mediation through adjudication up to a stage of arbitration in the event that the above processes have failed. Clause 12.1 specifically provides that:

12.1.1 The parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to the Contract and may not initiate any further proceedings until either Party has, by written notice to the other, declared that such negotiations have failed;

[28] Clause 12.2 sets out in succinct detail the process to be followed when referring the matter to mediation, the process to be followed in selecting the mediator, the costs of the mediator, the process to be followed by the mediator in attempting to resolve the dispute, powers of the mediator to end the mediation process as well as referral of the dispute to arbitration in the event of failure of the mediation process. Clause 12.3 and 12.4 deals with the adjudication and arbitration processes.

[29] In the light of the above it would seem to me that the most appropriate forum to determine whether or not the defendant would be successful with its defence is the trial court. I am, therefore, convinced that the defendant has raised a *bona fide* defence to the plaintiff's claim. The summary judgment application should fail.

The Costs

[30] With regard to the issue of the costs, the usual costs order where summary judgment is refused is to reserve the costs for determination by the trial court and

to make such order for costs to be in the main action. I see no reason to deviate from such position.

[31] In the result, I make the following order:

1. Summary Judgment is refused.

2. The defendant is granted leave to defend the action.

3. Costs to be costs in the cause.

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TONI AJ
ACTING JUDGE OF THE HIGH COURT

Counsel for the plaintiff	:	Adv Boswell
Instructed by	:	Van Zyl's Inc c/o NETTELTONS GRAHAMSTOWN
Counsel for the defendant	:	Adv Stretch
Instructed by	:	Ntsiki Pakade Attorneys c/o WHEELDON RUSHMERE & CLOETE ATTORNEYS GRAHAMSTOWN
HEARD ON	:	02 MAY 2018
DELIVERED ON	:	08 MAY 2018