IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO: 1438/2018

In the matter between:

MFURA TRADING & PROJECTS CC Applicant

and

CONSTANT FLOW ELECTRICAL (PTY) LTD Respondent

JUDGMENT – LEAVE TO APPEAL

MBABANE AJ

Introduction

[1] This matter appeared before me on the 05th February 2019 for summary judgment. I subsequently handed down a judgment in which I granted a summary judgment being convinced that the applicant's defence was sketchy and in consequence it did not demonstrate a bona fide defence.[1]

[2] The applicant has since lodged an application for leave to appeal. I shall deal later with the specific grounds of appeal for now it is necessary that I sketch the background to this matter which has culminated into this application.

[1] Paragraph 17 of the judgment.

Background

[3] On 17 May 2018, the respondent issued summons in which it claimed against the applicant a sum of R810 387.08 for the supply of goods and/or services to the applicant at the latter's special instance and request. The respondent alleges in the summons that during the period between May 2017 and February 2018, the respondent supplied goods and services to the applicant. The respondent commenced and completed its work for the applicant. There were thirteen invoices issued by the respondent at different intervals during the period in which the goods were delivered and services rendered. The invoices date back from the period between 28 September 2017 and 20 February 2018. All these invoices have not been paid. The aforesaid summons was issued on 17 May 2018 and served on the applicant on 05 June 2018.

[4] On 13 June 2018 the applicant delivered its notice of intention to defend which was accompanied by a notice in terms of rule 35(14) requiring the respondent to make available for inspection and for the purpose of pleading all documents referred to and making up the claim as against the applicant. This was followed by an application for summary judgment which was delivered by the plaintiff on 21 June 2018. The applicant reacted to the application for summary judgment by delivering, on 16 July 2018, a notice to oppose simultaneously with a notice in terms of rule 30 read with rule 18(6) contending that the application for summary judgment constituted an irregular step as the respondent failed to comply with the applicant's notice in terms of rule 35(14), and that the particulars of claim were vague and embarrassing due to the respondent's failure to comply with rule 18(6) as they did not state: (1) whether the contract is written or oral; (2) when, where and by whom it was concluded; and (3) if reliance is on a written contract, a true copy was not annexed on the particulars of claim.

[5] This resulted in the matter being removed from the roll, with the respondent subsequently amending its particulars of claim and such amendment was perfected on 15 August 2018. After the amendment was perfected, the matter was re-enrolled for the

application of the summary judgment using the same application and verifying affidavit that was filed on 21 June 2018, that is, before the amendment was effected.

[6] In its opposing affidavit, the applicant raised two points *in liminae*. They were framed as follows:

"*Application to Strike Out*

8. At the hearing of the matter, my legal representatives will move for an order striking out paragraphs 4, 5, and 6 of the affidavit of Mr Pretorius, on account of the fact that they offend the provisions of Uniform Rule 32(4) which provides that no evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross examine any person who gives evidence viva voce or on affidavit.

9. Furthermore, Uniform Rule 32(2) provides that the plaintiff shall within 15 days after the date of delivery of Notice of Intention to Defend, deliver notice of application for summary judgment, together with an affidavit:
   9.1 made by himself or by any other person who can swear positively to the facts;
   9.2 verifying the cause of action and the amount, if any, claimed; and
   9.3 stating that:
      9.3.1 in his opinion there is no bona fide defence to the action; and
      9.3.2 notice of intention to defend has been delivered solely for the purpose of delay.

10. The applicant, self-evidently, in the paragraphs enumerated hereinbefore, seek to adduce further evidence, beyond the ambit allowed by the provisions of Uniform Rule 32(4) and, as such, these paragraphs are to be struck out.

11. …

Defendant's notice in terms of Uniform Rule 30, read with Uniform Rule 18(6):

12. On 13 July 2018, the legal representatives of the respondent caused to be served a notice in terms of Uniform Rule 30, that was prepared on 25 June 2018, and filed on 16 July 2018.

13. The notice was prepared, I am informed, on 25 June 2018, but due to a family emergency of the respondent's Grahamstown attorney, necessitating his absence from the province for a week, was not delivered.

14. The aforementioned notice in terms of Uniform Rule 30, is based on two causes of complaint namely:

14.1 that the defendant called for inspection of all documents referred to in the plaintiff's particulars of claim, and upon which the claim is based, and that these documents are required for the purposes of pleading, which rendered the delivery of the plaintiff's application for summary judgment, without complying with the defendant's notice in terms of rule 35(14), an irregular step; and

14.2 that the plaintiff failed to comply with the provisions of Uniform Rule 18(6), which requires a plaintiff to state whether the contract is written or oral, when, where and by whom it was concluded, and if the contract is written, to be annexed to the particulars of claim a true copy thereof, or the part relied on in the particulars of claim, rendering the particulars of claim vague and embarrassing and excipiable, the defendant being prejudiced in its defence by the failure of the plaintiff to comply with the provisions of Uniform Rule 18(6), read with Uniform Rules 23(1) and 35(14).

15. The complete grounds are set out in annexure "MK 1" and the content thereof is incorporated herein by reference.

16. I have been advised, and verily believe, that an application for summary judgment will be refused in circumstances where the particulars of claim are excipiable. Furthermore, for the reasons set out in the defendant's notice in terms of Rule 30, the plaintiff's application for summary judgment constitute an irregular proceeding, and as such, ought to be set aside."

[7] On the date of the hearing of the summary judgment application, counsel for the respondent informed me from the bar that he is no longer pursuing these points in *liminae* in their entirety. It then became my understanding that these points were no longer before me to rule on their validity. It will be essential in this judgment that I deal with the abandonment of these points since the applicant herein has now added a new ground of appeal for the first time in his heads of argument to the effect that I was not bound by his decision to abandon these points and that I ought to have dealt with them

even though he abandoned them. This, as already indicated, appears for the first time in the heads of argument and not in the notice of application for leave to appeal. I shall deal with this later in this judgment.

Application for leave to appeal

[8] There are eleven grounds of appeal as set out in the application for leave to appeal and they all pertain to the question of the applicant's bona fide defence on the merits. The grounds of appeal are outlined as follows:

> "1. The learned Judge erred in misconstruing the defendant's defence as that of non-payment.
>
> 2. The learned Judge erred by failing to find that the defendant averred that there was a material contractual term, that was not disputed by the plaintiff, which determined the time and place of the defendant's performance of its obligations.
>
> 3. The learned Judge further erred in failing to have due regard to the fact that each invoice represented work done on behalf of a separate individual municipality and at different times.
>
> 4. The learned Judge erred in failing to have due regard to the fact that the plaintiff did not dispute that the payment of each invoice would be rendered by the individual municipality to the defendant, who would in turn, render such payment as was due to the plaintiff.
>
> 5. The learned Judge erred by failing to consider that the plaintiff did not dispute that the performance of the defendant's obligations to the plaintiff, were reliant on performance of the individual municipality's obligations to the defendant.
>
> 6. The learned Judge ought to have ruled that the plaintiff's failure, in argument, to dispute an essential term of the oral contract, which related to time of the performance of the defendant's obligations to the plaintiff, led credence to a mutually destructive version.
>
> 7. The learned [Judge] ought to have found that the plaintiff's case was not unanswerable and that the defendant had created doubt in the mind of the court.

8. The learned Judge erred by drawing an inference that each of the invoices rendered by the plaintiff must have been paid by the individual municipalities, thereby concluding that the defendant was retaining the sums due to the plaintiff without duly entitled thereto.

9. The learned Judge erred by failing to rule that the defendant had disclosed a bona fide defence.

10. The learned Judge ought to have dismissed the plaintiff's application for summary judgment with costs.

11. In the premises, it is respectfully submitted, that there is a reasonable prospect that another court may come to a different conclusion to that of the court a quo."

[9] As it is apparent from the above listed grounds of appeal, the issue about the abandoned points *in liminae* is not raised. At the hearing of the application for leave to appeal, the applicant sought to revive the abandoned points *in liminae* and counsel for the applicant submitted that leave to appeal is also sought on the grounds of the points *in liminae* that were abandoned.

[10] The question is, thus, whether it is permissible for the court dealing with an appeal to consider a point of law for the first time in circumstances where it was abandoned in the court of first instance. The *locus classicus* seems to support the proposition that a point *in liminae* can be raised for the first time during an appeal.

[11] In this regard, the *dictum* of Innes J in the case of *Cole v Government of the Union of South Africa*[2] is relevant. It was held as follows at 272-3 F:

> "[I]t has been suggested that the appellant should not be allowed to take advantage of the point on appeal. But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can

[2] 1910 AD 263.

exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong."

[12] In *Paddock Motors (Pty) Ltd v Igesund*[3] at 24B-C the court held that:

"If the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."

[13] In *Greathead v SA Commercial Catering and Allied Workers Union*[4]*,* the Supreme Court of Appeal allowed the law point that was raised for the first time on appeal on the basis that its consideration was not going to be unfair on the respondent.

[14] All these cases point to the conclusion that a point *in liminae* can be argued for the first time during the appeal. The points *in liminae* raise some questions about:

(a) whether summary judgment can be granted in circumstances where the particulars of claim do not comply with the provisions of Rule 18(6);

(b) whether a verifying affidavit that was used in support of the application for summary judgment in respect of the unamended particulars of claim can be used in support of a summary judgment application after amending the particulars of claim or whether summary judgment should have been brought on a perfected claim.

[15] In considering the aforesaid, it is important to first make an assessment whether, on the point *in liminae*, the applicant will have reasonable prospects of success on appeal. The points *in liminae* raised by the applicant are predicated on the non-compliance by the respondent with rule 18(6) of the Uniform Rules in respect of the

[3] 1976 (3) SA 16 (A) at 24 B-C.
[4] 2001 (3) SA 464 at 470 E-G.

unamended particulars of claim. Rule 18(6) provides that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

[16] In the unamended particulars of claim, the following is pleaded by the respondent:

> "3. During May 2017 to February 2018, the plaintiff supplied goods and services to the defendant at its special instance and request.
>
> 4. When supplying the goods and services, at all material times:
>
> 4.1 An order was placed by Mr Mfundo Kwani, sole member of the defendant, duly authorised thereto to act;
>
> 4.2 The order was received and processed by Geoffery James Pretorious, duly authorised to act;
>
> 5. Each order constituted an agreement between the plaintiff and the defendant for the supply of goods and/or services from the plaintiff to the defendant.
>
> 6. The following were the express, alternatively implied, further alternatively tacit, material terms each time an agreement was reached:
>
> 6.1 The goods and services were supplied by the plaintiff;
>
> 6.2 The plaintiff would prepare a VAT invoice and present it to the defendant;
>
> 6.3 The defendant would pay to the plaintiff cash on delivery of the goods and/or after the utilisation of its services, alternatively, on presentation of a VAT invoice.
>
> 7. In compliance with the terms of the orders placed, and therefore agreements, the plaintiff commenced and completed its work for the defendant, up to and including February 2018.
>
> 8. In further compliance of its obligations, the plaintiff presented the following VAT invoices to the defendant:
>
> 8.1….
>
> 9. Despite the presentation of these valid invoices on the defendant, it has failed, refused or neglected, without explanation, to settle its indebtedness to the plaintiff."

[17] The perfected amendment inserts paragraph 5A that reads as follows:

> ”5A.1 At all material times, each agreement was:
>
> 5A.1.1 concluded by Mr Geoffrey James Pretorius or Sarel Coetzee, duly authorised thereto to act on behalf of the plaintiff;
>
> 5A.1.2 concluded by Mr Mfundo Kwani, sole member of the defendant, duly authorised thereto to act on its behalf;
>
> 5A.1.3. concluded orally, and at
>
> 5A.1.4. Queenstown.

[18] In my view, both the amended and the unamended particulars of claim contain the factual averments that are sufficient to support the respondent's cause of action. The amendment did not alter the cause of action that was pleaded by the respondent in the unamended particulars of claim. In *Standard Bank of South Africa v Roestof*[5], it was held that if the verifying affidavit is not technically correct due to some obvious or manifest error which caused no prejudice to the defendant and there had been substantial compliance with the rules, it is difficult to justify an approach that refuses the application, especially in a case where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him.

[19] In *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and another*[6], Rogers J (Traverso DJP concurring) held as follows:

> "The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law."

[20] It was further held in paragraph 11 of the *Zalvest* case that the rules of court exist to facilitate the ventilation of disputes arising from substantive law. The non-compliance with rule 18 (6) by the respondent, in my view, was unrelated to the question whether

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[5] 2004 (2) SA 492 (W) at 496 F-H, followed in Coetzee v Nassimov 2010 (4) SA 400 (WCC) at 402B-403A.
[6] 2014 (2) SA 119 (WCC) at 122 para 9.

there was a cause of action. The respondent's cause of action is based on the breach of contract, and both the amended and unamended particulars of claim clearly establishes the substance of the respondent's cause of action.

[21] The material terms of the contract as outlined in both the amended and unamended particulars of claim which were not disputed by the applicant in its opposition of the summary judgement are:

(a) The existence of a valid agreement.

(b) The services were rendered, and goods delivered to the applicant by the respondent.

(c) When supplying the goods and services, an order was placed by Mr Mfundo Kwani, sole member of the applicant and processed by Geoffery James Pretorious, sole member of the respondent, all of whom were duly authorised to act on behalf of their respective companies.

(d) The respondent prepared VAT invoices and presented them to the applicant for payment.

[22] The affidavit in support of an application for summary judgment is standard as it requires the plaintiff in an action to (i) swear positively to the facts verifying the cause of action, (ii) specify the amount claimed, (iii) state that in his opinion there is no bona fide defence to the action, and (iv) that the notice of intention to defend has been delivered solely for the purpose of delay.[7] It, therefore, does not matter whether the verifying affidavit that was used by the respondent in support of the application for summary judgement was in respect of the amended or unamended particulars of claim. What is more important is whether the particulars of claim disclose the cause of action. In my view both the amended and unamended particulars of claim do disclose the cause of action.

[23] In the result, the application for leave to appeal on this ground must fail.

[7] Rule 32(2) of the Uniform Rules.

[24] The eleven grounds of appeal that are raised by the applicant in the application for leave to appeal hinges on the purported condition of the agreement that the respondent will only be paid once the municipality pays the applicant. In its opposition for summary judgment, the applicant contended that it has bona fide defence to the respondent's claim because the contract between the parties was on condition that the applicant will pay the respondent only when the applicant received payment from the various municipalities. The applicant's affidavit in opposition of the summary judgment read as follows:

"Bona fide defence

18. The defendant has, I have alluded to above, a bona fide defence to the plaintiff's claim.

19. The defendant renders various services to municipalities in the Eastern Cape, particularly services relating to the provision of professional services for, inter alia, the maintenance of infrastructure. These are rendered by the defendant's employees personally and, if they do not have the necessary capacity, are outsourced to service providers. The plaintiff is one of those service providers.

20. The defendant, as a black-owned business entitled to benefit in terms of the legislation aimed at advancing broad-based black economic empowerment, is often a beneficiary of tenders and or quotes. The plaintiff, as a white-owned business, is not as a matter of course, entitled to those benefits. As such, it is not often favoured with government business.

21. For a number of years, the plaintiff and the defendant have had a business relationship in terms whereof the defendant, if it is awarded a tender or a quote to render certain services, and the plaintiff is able, by virtue of its capacity to render those services, and the defendant is unable to do so, that the defendant would subcontract the work out to the plaintiff.

22. The plaintiff would render an invoice to the defendant, who would then, in turn, invoice the client municipality. Once the client municipality pays the defendant, the plaintiff's invoice is settled.

23. The defendant, represented by me, and both the directors of the applicant, Mr Pretorius and Mr Coetzee, agreed, right at the outset of our business relationship, that in respect of municipality work, the plaintiff would be paid once the defendant has been paid.

24. The plaintiff has, over the years, secured hundreds of thousands of Rands' worth of work through the defendant, for which it was paid in due course. It will, in respect of such invoices as are due to it, similarly be paid.

25. Since the Respondent has not been provided by the source documents called for, I am unable to conduct a reconciliation of the amounts claimed by the applicant. Some of the amounts claimed by it, however, appear to be duplications of amounts already paid.

26. I requested my Queenstown attorney, Mr Zolile Sontshi, to set up a meeting with the plaintiff's Queenstown attorney, Mr Wesley Hayes, with a view to performing a reconciliation and to be provided with copies of the source documents relative to the claims set out in the particulars of claim. A meeting was duly set up for 18 June 2018, but Mr Haynes did not attend. On 21 June 2018, the respondent was served with the application for summary judgment.

27. As far as I am aware, we have paid all the invoices due to the plaintiff, arising from the municipality work, and where we received payment. In respect of any invoice that we did not pay, we have not received payment.

28. The defendant has, accordingly, complied with its end of the bargain.

29. As such, such amounts as are due to the plaintiff, are not yet payable on account of the agreement between the plaintiff's representatives and the defendant's representatives that invoices in respect of municipality work are only payable on receipt of the payment from the municipality concerned.

30. When, in due course, we are provided with the source documents, we will be in a position to identify the duplications and follow up with the municipalities on the outstanding payments. Until such time, we are constrained to do so. By refusing to provide the documents, the plaintiff has cut off its nose to spite its face."

[25] In my judgment, I made a finding that it is not sufficient for the applicant to merely say that 'I have not been paid by the municipality' as such amounts to a bare denial. I held a view that if the applicant relies on a defence that there was a condition in a contract that the respondent would be paid only after the applicant is paid by its client municipality, it must substantiate its claim that it has not been paid or, at the bare minimum, it must produce proof that it has forwarded the respondent's invoices to the relevant municipalities for payment. This finding was based on the fact that, although the applicant was presented with the invoices, it did nothing to facilitate their payment or to state clearly which ones out of the thirteen invoices presented to it were disputed. All what the applicant says is that it wanted a meeting with the respondent to verify the invoices and to determine whether there were no duplications and it is thus not clear whether the applicant is defending the whole claim or part thereof. There is no denial that (i) there is an agreement between the applicant and respondent to render services and/or deliver goods, (ii) services were rendered as agreed, (iii) invoices were presented by the respondent to the applicant for payment.

[26] However, in an application for summary judgment, all that the court is required to do is to enquire whether the defendant has fully disclosed the nature and grounds of its defence and the material facts upon which it is founded. In addition, the court must enquire whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. In *Maharaj v Barclays National Bank Ltd*[8]*,* Corbett JA, as he then was, held as follows:

> "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly

[8] 1976 (1) SA 418 (A) at 426 A-E.

> or in part, as the case may be. The word 'fully' as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and 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… At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading."

[27] In its opposing affidavit, the applicant contended that it was a condition of the agreement that the invoices will be paid after the municipality pays the applicant. This is a trial issue which the court is not entitled to decide on a balance of probabilities. The purported condition of the agreement is indicative of the fact that the date of payment was to be the date when the municipality pays and there is no evidence on papers to suggest that payment was received from the municipality. I am of the view that the applicant's case is arguable and not hopeless.

[28] In terms of section 17(1) of the Superior Courts Act[9], leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success, or failing that, where there is some other compelling reason justifying the matter receiving the attention of the court of appeal. I am satisfied that the applicant has succeeded in demonstrating that it has reasonable prospects of success on appeal in respect of the grounds that are outlined in its application for leave to appeal.

[29] In the result I make the following order:

(i) The applicant is granted leave to appeal to the Full Court of this Division, with the costs of the application for leave to appeal to be costs in the appeal.

[9] Act 10 of 2013.

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JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Applicant:	**Adv W.H. Olivier**
Instructed by	**Mabece Tilana Inc.**
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Counsel for the Respondent:	**Adv D. Smith**
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Date heard: 03 May 2019

Date of Judgment: 14 May 2019