



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

Case No: 468/2015

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

26 May 2015

EJ FRANCIS

In the matter between:

ALOECAP (PTY) LTD

Plaintiff/Applicant

And

MOGALE CITY LOCAL MUNICIPALITY

Defendant/Respondent

JUDGMENT

FRANCIS J

1. This is an application for summary judgment by the plaintiff based on a Service Level Agreement (the agreement). The defendant has applied for condonation for the late filing of its affidavit resisting summary judgement. It is not necessary to repeat what the grounds for condonation are. I am satisfied that a proper case has been made out for condonation and condonation is in the circumstances granted.
2. The plaintiff instituted an action for damages against the defendant. It pleads that the plaintiff on 17 April 2012 then represented by Joe Mthimunya entered

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into an agreement with the defendant represented by Tsheleki Tebjane in his capacity as a project manager. The material terms of the agreement, whether express, alternatively implied, further alternatively tacit, included the following terms:

- 2.1 the plaintiff was appointed by the defendant to render services to the defendant under the terms and conditions of the agreement in terms of clause 3.1;
- 2.2 the plaintiff would provide the following services which were split into three distinct phases in terms of clause 5:
 - 2.2.1 Phase 1: the Structuring Process;
 - 2.2.2 Phase 2: the Implementation of the Structure; and
 - 2.2.3 Phase 3: the Administration of the Structure.
- 2.3 the fee payable to the plaintiff by the defendant for the aforementioned services, were exclusive of value added tax (VAT) and were payable in arrears, in terms of clause 10, as follows:
 - 2.3.1 a structuring fee of R2 000 000-00, payable according to milestones outlined in the table below;
 - 2.3.2 legal fees to a maximum budget of R200 000-00;
 - 2.3.3 a success fee of 2% of the gross proceeds received by the defendant on the implementation of the aforementioned structure in terms of clause 10.3.1;
 - 2.3.4 an administration fee of 1% of the gross collections received by the defendant will be payable to the plaintiff for the duration of the collection agreement and this will be borne by the

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defendant in terms of clause 10.4.1

- 2.4 the agreement would terminate on the conclusion of the transaction in terms of clause 14.
- 2.5 should the defendant cancel the agreement prior to its conclusion for any reason whatsoever, other than a material breach by the plaintiff, a cancellation fee equal to the structuring fee, shall be payable immediately by the defendant to the plaintiff in terms of clause 14;
- 2.6 should either party breach the agreement and in the event of the defaulting party failing to remedy such breach within a period of 10 days after receipt of written notice from the aggrieved party requiring it to do so, then the aggrieved party shall be entitled to terminate the agreement with immediate effect by written notice to the defaulting party, provided that if the defendant terminated the agreement in terms of clause 15 other than for a material breach by the plaintiff, the cancellation fee in terms of clause 14.1 shall remain payable to the plaintiff by the defendant in terms of clause 15.7.2;
- 2.7 no relaxation or indulgence which either party may show to the other, shall in any way prejudice its rights hereunder in terms of clause 18.1.

- 3. The plaintiff alleges that pursuant to the foregoing it duly performed all its obligations in terms of the agreement and carried out the stipulated milestones in accordance with the agreement and the defendant paid the plaintiff R1 450 000-00 exclusive of Vat in respect of Financial Advisory Services.

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4. In terms of claim A, the plaintiff states that on 24 February 2014, the plaintiff submitted to the defendant a Tax Invoice in respect of the milestones completed in the sum of R570 000-00 as appears from Annexure POC2. Notwithstanding demand the defendant has refused, failed and or neglected to effect payment to the plaintiff in the sum of R570 000-00 and which amount is due, owing and payable.

5. In terms of claim B the plaintiff alleges that during or about June 2014, the defendant repudiated the agreement through its conduct in electing not to pursue the agreement. The defendant further sent a letter dated 17 June 2014 notifying the defendant that it has terminated the agreement with immediate effect, and which repudiation has accepted. The plaintiff subsequently issued a cancellation fee invoice, namely Annexure POC 3, in the sum of R2 000,000-00 plus VAT, in terms of clause 14.1 and 15 of the agreement and submitted same to the defendant on or about 24 June 2014. The defendant has failed, refused and or neglected to effect payment of the R2 000 000-00 and formal notice was given on 8 July 2014 in terms of section 3(2)(a) read with sections 4 and 5 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 as appears from Annexure POC4 and 30 days was afforded to the defendant to pay the aforesaid amount failing which action would be instituted after a lapse of 30 days. Notwithstanding demand the defendant has refused, failed and or neglected to liquidate its indebtedness to the plaintiff.

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6. The defendant entered an appearance to defend and filed an affidavit resisting summary judgement. The affidavit was deposed to by Dan Metlana Mashitisho who describes himself as the township manager of the defendant. He said that he has read the combined summons and particulars of claim with annexures and the summary judgement application and affidavit in support of the application for summary judgment. He states that the defendant has a *bona fide* defence and that it did not enter an appearance to defend merely to delay the granting of the plaintiff's relief. He states that there are serious disputes and contentious issues in the action and that by entering an appearance to defend is not balking or a delaying tactic.

7. The relevant portion of the affidavit resisting summary judgment reads as follows:

- “5. *The plaintiff's summons are misleading and suffer an irregularity which affects its validity in that the Plaintiff in Claim A, claims payment of R570 000.00 plus VAT and on paragraph 2 of Claim A: “interest on the aforesaid amount of R855 000-00 plus VAT”.*
6. *This discrepancy cast doubt on whether Plaintiff knows what exactly the Defendant owes and whether Defendant were truly and lawfully indebted to the Plaintiff on the grounds set out in the Summons in its application for Summary Judgement. It is questionable if the Plaintiff could indeed be said also to have verified the amount claimed with the necessary exactitude.*
7. *The Plaintiff's Particulars of Claim lacked the forthrightness, a candid disclosure, as well as the particularity that would allow the Honourable Court to get a proper perspective of the dispute between the parties. The Plaintiff claims the Defendant cancelled and omits to state the dispute or its own culpability in the action.*
8. *In essence the defence of the Defendant to the Plaintiff's Particulars of Claim is that the Defendant justifiably cancelled the agreement on the 17th June 2014 because the Plaintiff breached the agreement.*

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9. *The Plaintiff has failed to comply with the provisions of clause 10.2 of the Service Level Agreement (the Agreement) as it was supposed to be. There were several meetings between the Plaintiff and Defendant's representatives wherein the latter asked the Plaintiff to remedy the breach. The Plaintiff ignored the request, failed and/or refused to comply. As a result, the Defendant invoked the provisions of clause 8 of the Agreement and cancelled the Agreement.*
10. *The Plaintiff's breach is material in terms of clause 5, process and objectives of the agreement as it encapsulated the work the Plaintiff was to perform, which formed the basis of the deliverables between the parties. The Defendant invokes the exception non adimpleti contractus. The Plaintiff cannot claim performance from the Defendant when it owes antecedent and correlative performance and has not performed. Therefore, the Plaintiff is not entitled to the cancellation fee or any outstanding amount it alleges is due and payable to it.*
11. *The Defendant is contemplating a Counter Claim and reserves its right in its Plea to the Plaintiff's claim owing to the latter's breach, and to recover the ratepayers' money.*
12. *The Plaintiff was at all times aware of the Defendant's contention and the breach the Defendant complained of and called upon the Plaintiff to remedy. Despite awareness of the dispute, it issued Summons and is now applying for Summary Judgement knowing the application to be without merit. The Plaintiff is also aware of the basis and the contention which entitles the Defendant to defend.*
13. *Plaintiff is trying to shut the door of the court to the Defendant without an opportunity to ventilate the issue in dispute. The Honourable Court should not allow such opportunistic conduct.*

CONCLUSION

14. *I humbly and respectfully submit that the Application for Summary judgement is an abuse of the process of the Rules of the Honourable Court by Applicant. I request and implore the Honourable Court to deprecate such abuse and dismiss this Application.*
 15. *I ask the Honourable Court to grant the Defendant leave to defend the action and order that the Plaintiff to pay the costs of this Application particularly on the reasons set out in paragraph 11 above".*
8. The defendant's affidavit under rule 32(3) must disclose fully the nature and grounds of the defence and the material facts relied upon therefore. The court

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has a discretion in terms of rule 32(5) whether to grant summary judgment or not. See *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58. Where the defence is based on upon facts, in the sense that the material alleged by the plaintiff in his summons or combined summons, are disputed or new facts are alleged constituted 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 one of the requirements is satisfied the Court must refuse summary judgment, either wholly or in part, as the case may be. The word ‘fully’ connotes 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. In this regard see *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E. 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. See *Estate Potgieter v Elliott* 1948 (1) SA1084 (C) at page 1087.

9. The plaintiff’s claim is that it has performed in terms of the agreement and that

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the agreement was cancelled by the defendant and that as a result of such cancellation the defendant has repudiated the agreement and is therefore entitled to the damages that it has claimed.

10. The defendant denies that it repudiated the agreement and states that the plaintiff has breached the agreement. It was called to remedy the breach which it failed to do as a result of which the defendant cancelled the agreement. It has indicated that it may institute a counterclaim.

11. The question that arises is whether the defendant has fully set out its defence. The crux of the dispute is who has breached the agreement. This is a matter that will have to be decided at the trial. I have set out the defendant's affidavit resisting summary judgement and am of the view that the defendant has disclosed its defence and the material facts upon which it is based with sufficient particularity and completeness. I am satisfied that based on the explanation that the defendant has a *bona fide* defence.

12. It follows that the application for summary judgment stands to be dismissed. This is not a matter where costs should follow the result and cost should be costs in the action.

13. In the circumstances I make the following order:

13.1 The defendant's late affidavit resisting summary judgement is

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condoned.

13.2 The application for summary judgement is dismissed.

13.3 The defendant is granted leave to defend the action.

13.4 Costs are costs in the action.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR DEFENDANT	:	M NOWITZ INSTRUCTED BY NOWITZ ATTORNEYS
FOR DEFENDANT	:	R S MOTHIBE INSTRUCTED BY BHIKA INC
DATE OF HEARING	:	11 MAY 2015
DATE OF JUDGMENT	:	22 MAY 2015