

2/12/2009
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,
PRETORIA

Case Number 57690/2009

In the matter between:

HEIGHTSAFETY INTERNATIONAL (PTY) LTD PLAINTIFF

and

BURGER EMOYENI SKYLIGHTS (PTY) LTD DEFENDANT

JUDGMENT

- [1] The Plaintiff claims payment of the amount of R790 985,46, being an amount allegedly due to it by the Defendant for (*inter alia*) rope access and height safety services rendered by the Plaintiff to the Defendant.

- [2] When the Defendant entered appearance to defend, the Plaintiff on or about 1 October 2009 proceeded with an application for summary judgment, which is the matter currently before me.
- [3] The Defendant raises a number of defences against the Plaintiff's application, but as a result of the finding that I have reached regarding one of these defences and the circumstances of the case, it is not necessary and would perhaps be imprudent to deal with the remainder of the defences.
- [4] A number of the defences raised by the Defendant namely relate to the question whether the Plaintiff's summons and particulars of claim are excipiable. I consider these as matters that should best be resolved should the Defendant in due course file an exception. My premature comments regarding these matters may unduly influence one or another of the parties, and are best avoided in the circumstances.
- [5] The Defendant alleges in paragraph 31 of the Opposing Affidavit that the services that the Plaintiff was contracted to render involved specialist

labour, being labourers qualified and competent to do work at elevations high above the ground where cladding had to be affixed, and the equipment required to enable these labourers to do the work.

[6] The Defendant then alleges (in paragraph 33 of the Opposing Affidavit) that -

[a] the Plaintiff was unable to do the work that it was contracted to do;

[b] the Plaintiff *inter alia* failed to keep to agreed time limits;

[c] the Plaintiff failed to do the work to an acceptable standard; and

[d] in the premises, the Plaintiff breached the agreement between the parties.

[7] As a result of the Plaintiff's breach of their agreement, so the Defendant contends, the Defendant has suffered damages in the amount of

R2 715 190,30. The amount concerned was withheld from the Defendant by the third party to whom it was in turn contracted in the construction of a soccer stadium in Durban.

- [8] Although the calculation of the amount of the damages is not set out in the Opposing Affidavit, the nature thereof is thus disclosed by the Defendant.
- [9] The Defendant in addition alleges that the Plaintiff was at all relevant times aware of the Defendant's obligations to the third party, and more particularly the time limits which the Defendant had to comply with, and also that the Plaintiff was aware that if the Defendant did not comply with its obligations, it would suffer damages. In short, the Defendant is alleging that the damages that it has allegedly suffered was at all relevant times within the contemplation of the parties, and thus not too remote.
- [10] The Defendant expressly states that it intends recovering the amount concerned from the Plaintiff by way of an intended counterclaim.

- [11] It is trite that the Defendant is entitled to rely on an intended counterclaim for an unliquidated amount which exceeds the Plaintiff's claim, to oppose the application for summary judgment.
- [12] The question thus arises whether the Defendant has set out the intended counterclaim in sufficient particularity to enable me to find that the defence against the application is *bona fide* and good in law.
- [13] As I understand it, the test is not whether the Defendant could have said more, but rather whether it has said enough. In finding that the Defendant has crossed this threshold, I take *inter alia* the following into consideration:
- [a] The Defendant is not expected to formulate his opposition with the precision that would be required of a pleading.
 - [b] The Defendant has however made an allegation regarding each of the *facta probanda* required for a claim for damages arising from breach of contract, being the existence of the agreement, the terms

relied upon, the fact of the breach of the terms concerned and the nature of such breach, the fact that damages were suffered and the causal element, and the fact that the damages were not too remote.

[c] The Defendant has also stated the extent of the counterclaim, and although the exact calculation thereof has not been disclosed, the amount concerned is clearly not just a rough estimate or a figure plucked out of the air. In addition, the nature of the damages has been disclosed.

[d] The Defendant is not at this time enjoined to prove the counterclaim, and is thus not obliged to provide the *facta probantia* regarding its counterclaim.

[e] The Defendant's counterclaim exceeds the Plaintiff's claim more than threefold.

[14] In the premises the Defendant has to my mind raised *bona fide* triable

issues and I cannot shut it out. I thus make the following order:

- [a] Leave is granted to the Defendant to defend the action.
- [b] The costs of the application for summary judgment are costs is the cause.



S. D. Wagener

Acting Judge of the North Gauteng High Court, Pretoria.