IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 23576/2020

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

In the matter between:

ADAPT IT (PTY) LTD Plaintiff

(Applicant in the summary judgment application)

and

LANDIS + GYR (PTY) LTD Defendant

(Respondent in the summary judgment application)

JUDGMENT

BASSON, J

[1] On 1 June 2020, the plaintiff (Adapt It (Proprietary) Limited – the applicant in the application for summary judgment) issued summons against the defendant (Landis + GUR (Proprietary) Limited – the respondent in the application for summary judgment) claiming payment of various amounts pursuant to a contract concluded between the parties. After an exception to the particulars of claim was dismissed, the defendant filed its plea. The plaintiff thereafter filed an application for summary judgement and the defendant filed an affidavit resisting summary judgment.

[2] The essence of this application is whether the Respondents, in their opposing affidavit, disclose a *bona fide* defence that is good in law, wherein is stated –

(i) the nature and grounds of the defence; whilst
(ii) disclosing the material facts on which the defences are based,
in accordance with the peremptory provisions of Rule 32(3) of the Uniform Rules of Court:

> *"… 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. …….. The word "fully", as used in the context of the Rule 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."*[1]

[3] The plaintiff moves for summary judgment in respect of three principal claims:

[1] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 B-E.

Claim 1: Approximately R12 million is claimed in respect of past services rendered under a contract for services.

Claim 2: Approximately R155 000.00 is claimed in respect of damages flowing from the early termination of the contract for services. The plaintiff claims damages consisting of a notice period payment which the plaintiff was required to pay to one of its service providers upon the early termination of the Specific Teaming Agreement ("STA" – referred to in more detail herein below); and

Claim 3: Approximately 1.3 million being the profit the plaintiff would have earned over the remaining period of the STA but for its early termination because of the defendant's repudiation. Claim 3 no longer forms the subject of the summary judgment application in light of the plaintiff's concession that this claim is no liquidated.

[4] The defendant raised various preliminary points regarding compliance with the Practice Manual and with the requirements of the Rules. The defendant, *inter alia*, claims the plaintiff has failed to satisfy the requirements of rule 32(1) of the Rules in that the claims are unliquidated. I deal with this issue herein below. The defendant claims that the plaintiff failed to comply with Rule 32(2)(b) in that the plaintiff said that the defence raised "*does not raise any genuine triable issues for trail*". (Rule 32(2)(b) of the Rules the *"defence as pleaded does not raise any issue for trial"*.) There is no merit in this contention as explained by the court in *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd.*[2] The court held with reference to rule 32(2)(b) that these words cannot be taken literally:

"[21] The requirement that the plaintiff's supporting affidavit should explain briefly why the pleaded defence 'does not raise an issue for trial' is of more interest. It cannot be taken literally, for a plea that did that would be excipiable, and there is no indication that the amended summary judgment procedure is intended as an alternative to the exception procedure. For the reasons given later with regard to the cases before me, I consider that the amended rule

[2] (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020).

32(2)(b) makes sense only if the word 'genuinely' is read in before the word 'raise' so that the pertinent phrase reads 'explain briefly why the defence as pleaded does not genuinely raise any issue for trial'. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That much is implicit in what the Task Team said in para. 8.3 of its Memorandum. The position would have been made clearer had the words 'does not make out a bona fide defence' been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)(b) and (3)(b). That there be such a connection is necessary if the amended rule as a whole is to be workable."

And further:

"[23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact."

The merits

[5] The crux of the plaintiff's argument is that the defendant has not demonstrated that it has a *bona fide* defence to the action and that it does not fully disclose the nature and grounds of its defence and the material facts relied upon therefore, as required by rule 32(3)(b) of the Rules. It is further submitted that the defendant avoids answering

the points of substance raised by the plaintiff in its founding papers which, so it is submitted, demonstrate that there are no genuine triable issues in the matter.

[6] The plaintiff bases its cause of action on the conclusion of two written agreements: the one is the so-called "Teaming Agreement" ("TA") and the other the so-called "Specific Teaming Agreement" ("STA") which were both concluded in Durban on 28 May 2015. The present claims are founded on the STA.

[7] The plaintiff explains in its particulars of claim that the STA that was concluded between the parties was based on an "opportunity" as defined in the TA for services to be rendered to the EThekwini Municipality as client in respect of a project relating to the metering of electricity supplies to customers. On the strength of the opportunity and the STA, the defendant concluded a client agreement with the EThekwini Municipality in terms of which services related to the opportunity would be provided to the client.

[8] The plaintiff claims that it had duly complied with its obligations under the STA and rendered the required services to the defendant and to the EThekwini Municipality. From time to time the plaintiff then invoiced the defendant for services rendered. The defendant paid for the services in respect of invoices rendered from August 2015 until October 2018. However, in breach of the STA, the defendant thereafter failed to pay the amounts invoiced from October 2018 until 30 March 2020. When the defendant did not comply with a breach notice issued because of this failure, the plaintiff accepted the defendant's repudiation of the STA *alternatively* cancelled the STA with effect from 28 April 2020.

[9] Having regard to the affidavit resisting summary judgment, it does not appear to be in dispute that the parties have entered into the TA. The defendant also does not dispute that the TA is the overarching framework agreement to the STA and that the TA provides for opportunities that may arise in the future. It also does not appear that the defendant disputes that the STA was to be a separate agreement in which the parties recorded the material terms and conditions regarding the STA that may arise.

[10] The parties, however, differ on whether the STA has, in fact, been concluded.

First defence: Existence of the STA

[11] The high-water mark of the defendant's defence is contained in paragraph 5 of its plea (responding to paragraphs 6 to 25 of the plaintiff's particulars of claim). The defendant pleads that no STA was concluded between the parties in respect of the EThekwini Municipality in compliance with the TA. With reference to Annexure 2 of the TA, the defendant pleads that the STA on which the plaintiff relies does not establish the agreement on which claims 1, 2 and 3 rest in a cognisable manner. More in particular, the defendant pleads that the agreement attached to the papers, *inter alia*, fails to identify the opportunity description in clause 4; the effective date of the STA (at clause 5), the services and/or projects to be rendered and/or supplied by the Team Member to the Team Leader for purposes of the opportunity (at clause 6); the cost schedule (at clause 7); the quotation / proposal attached as Appendix 1 (at clause 8); the service levels required from the Team Member (at clause 9). The defendant further pleads that the plaintiff failed to plead its alleged obligations in terms of the STA and the alleged payment terms and conditions.

[12] The defendant submits that it has clearly raised a triable issue in respect of whether the STA as pleaded by the plaintiff ever came into existence and if so, on what terms. It is further submitted that the plaintiff bears the burden of proof at trial to establish the terms and conditions of the STA it purports to reply on and submitted that to grant summary judgment in these circumstances would deny the defendant its opportunity to confront and test the evidence of the plaintiff on this core issue.

[13] The plaintiff disagrees and submitted that this defence about the existence of the STA does not raise a genuine, *bona fide* triable issues particularly because the defendant avoids responding to why it made payment to the plaintiff over a period of three years in respect of invoices in relation to services rendered on the EThekwini Project. If no STA was ever concluded, why was payment made for services rendered to the Municipality from August 2015 to October 2018? That the STA was concluded and that such payments were owed to the plaintiff for services rendered to the Municipality (the client) is consistent with what is contained in the TA (which is not disputed by the defendant) that under no circumstances would the parties commence with the execution of any opportunity unless an STA has been concluded and that no

oral, implied or tacit agreement relating to an opportunity would be binding between the parties.

[14] Although the STA annexed to the TA cannot be said to constitute a perfect example of what should be included in an agreement, it is significant that the STA was concluded on the same day the TA was concluded and that both agreements were signed by the same parties namely the Chief Executive Officers of the plaintiff and the defendant. The STA also identifies the "client" as the EThekwini Municipality. And, as already pointed out, the plaintiff has rendered services to the client for a period of three years and has been paid when invoices were submitted to the defendant. Also telling that such an agreement has been concluded is a letter from the defendant to the applicant dated 19 February 2019 in which the defendant (as per the CFO and the Senior Legal Counsel of the defendant) expressly refer to *"Annexure 2 of the Agreement"* which is the STA and further specifically identifies the client as the *"eThekwini project"* and confirms the payment arrangement provided for in clause 7.2 of the TA. This letter further states that (as of 19 February 2020), the defendant was awaiting payment from the *"customer"* and that they *"understand that this is currently going through a municipal approval process"*.

[15] More in particular, as already pointed out, the defendant offers no explanation why it was happy to make payments to the plaintiff of invoice for three years – which is not an insignificant time period – if the STA has not been concluded.

[16] I am consequently not persuaded that the defendant raised a triable issue in respect of whether the STA as pleaded by the plaintiff ever came into existence and if so, on what terms. The agreement clearly was concluded, and services rendered over many years to the client identified in the STA.

<u>Second defence: Termination of the STA by effluxion of time</u>

[17] The defendant pleads that, to the extent that the plaintiff opts to rely on the terms of the TA, this agreement has terminated by effluxion of time. The plaintiff can therefore not, considering this, claim payment for invoices that fall outside of the period of subsistence of the TA.

[18] The plaintiff's responds to this defence by pointing out that the STA is a self-standing agreement and not dependent upon the existence of the TA. Moreover, the plaintiff is not relying on the TA for payment but on the STA. The plaintiff is correct. Also, the defendant does not explain on what basis it continued to pay invoices after the effluxion of the TA if no other agreement – more in particular the STA – was concluded between the parties. Despite the fact that this is being pertinently raised in the founding affidavit, the defendant has failed to answer to it.

Third defence: Non-compliance with clause 7.2 of the TA

[19] The defendant contends that even where the duration of the TA has been lawfully extended and even where the STA had come into existence, this would not suffice since there is a condition contained in the TA (clause 7.2) which makes it plain that the plaintiff's invoices would only fall due if and when the defendant receives payment of the client.

[20] The defendant merely restates the terms of clause 7.2 in the affidavit resisting summary judgment but does not expressly state that it has not received payment from the client. Even if regard is had to the letter of 19 January 2020 it merely states that the defendant was awaiting payment from the client and that it is currently going through a municipal approval process. Even though summons was only served on 1 June 2020 – some five months after this letter – nothing was placed before the court to show that the plaintiff was advised that the client has not paid the defendant. Also, the defendant does not dispute the correctness of the invoices upon which the plaintiff relies.

[21] Accordingly, no triable issue has been raised with reliance of clause 7.2 of the TA.

[22] In arriving at my decision that the plaintiff has not raised any triable issues in respect of claim 1, I had regard to the well-established legal principles governing summary judgment proceedings. In *Maharaj* v *Barclays National Bank Ltd*[3] the court

[3] 1976 (1) SA 418 (A) at 426 A-D.

explained what a defendant must establish in order to successfully oppose a claim for summary judgment:

> *"…[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 had "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 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."*

[23] As stated, I am not persuaded that the plaintiff has disclosed a bona fide defence in respect of the non-payment of the amounts claimed in terms of claim 1. I should also mention out that I am acutely aware of the caution expressed by the court in *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture*[4] namely that it is not the purpose of summary judgment to shut a defendant from defending it position:

> *"[31]…The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of*

[4] *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary."

[24] But, where a defendant does not have a defence and does not raise any triable issues (in respect of claim 1), there is no reason why a court should not grant summary judgment (in respect of claim 1).

Claim 2

[25] The defendant submitted that claim 2, similarly to claim 3 (which the plaintiff conceded cannot be the subject of summary judgment) is not a liquid claim and hence the plaintiff is not entitled to summary judgment. In this regard the defendant relied on the principle that contractual damages cannot be the subject of summary judgment.

[26] I am not persuaded that summary judgment should be granted in respect of claim 2. The amount claimed, in my view, constitutes contractual damages which is a claim that is subject to the plaintiff's reasonable efforts to mitigate its damages. This much was recognised in *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd*[5] where the court set out the principles, with which I am in full agreement, as follows:

"[25] The correct computation of contractual damages can never, in principle, be mere arithmetic; a value judgment is an element of the computation of the quantum, which computation embraces the effects of a reasonable effort to mitigate the damages. The figure of damages cannot under such circumstances be determined until that debate is exhausted, as a rule, before a court. In this regard the remarks of Binns-Ward AJ in Solomon NO and Others v Spur Cool Corporation (Pty) Ltd and Others 2002 (5) SA 214 (C) ([2002] 2 All SA 359) are instructive (at paras 34 and 46):

[5] 2015 (2) SA 89 (GJ).

'The fundamental principle in the quantification of contractual damages is that the object is, as far as it is possible without undue hardship to the party in breach to do so by an award in money, to place the innocent party in the position that party would have been had the contract not been breached or repudiated. See, for example, Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 22; Culverwell and Another v Brown 1990 (1) SA 7 (A) at 29F; and Rens v Coltman 1996 (1) SA 452 (A) at 458E. How that object is to be achieved will depend on the peculiar facts of a case.

…

The judgments in Culverwell and Rens (supra) illustrate that, while on the facts of a case the dates of due performance, repudiation cancellation may well be important in the appropriate computation of contractual damages, the overriding consideration is the calculation of a figure which fairly achieves the object of putting the innocent party in the position it would have occupied had the agreement been fulfilled. See also Mostert NO v Old Mutual Life Association Co (SA) Ltd 2001 (4) SA 159 (SCA) at 187B – E. Whichever approach to quantification achieves that object most effectively in the context of the peculiar facts of a case is the appropriate one. This entails the application of pragmatism and common sense rather than formalism. It will in general be appropriate in quantifying contractual damages which, from the perspective of the dates of breach or cancellation, involve a component of prospective loss, to have regard to the effect of relevant events intervening between those dates and the trial insofar as that will facilitate a more accurate achievement of the object.'"

[27] In light of the above, summary judgment in respect of claim 2 is refused and leave to defend is granted.

Order

[28] In the event the following order is made:

(i) Summary judgment is granted against the defendant / respondent for payment of the sum of R 12 411 717.80 (claim 1) (less the amounts of R 7 107 119.79 and R 889 421.95 already paid).

(ii) The defendant / respondent is ordered to pay interest compounded monthly on each invoice rendered, from the date that invoice fell due, until the date of payment thereof at the minimum prime overdraft lending rate from time to time of Standard Bank.

(iii) The defendant / respondent is granted leave to defend claims 2 and 3.

(iv) Costs to be costs in the action.

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JUDGE A C BASSON

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 June 2021.

Case number	: 23576/2020
Matter heard on	: 25 May 2021 (Virtual hearing)
For the Applicant	: Adv Alistair Franklin SC
Instructed by	: Garlicke & Bousfield Inc
For the Respondent	: Adv Salim Nakhjavani
Instructed by	: Kapditwala Inc t/a Dentons