Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: 3352/2019

In the matter between:

QUANTIBUILD (PTY) LTD Plaintiff

And

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY Defendant

JUDGMENT

MAKOTI AJ

INTRODUCTION

[1] Summary judgment procedure is intended to give a plaintiff having an unanswerable case, speedy judgment against a defendant who does not have a defence. When granted, summary judgement curtails delays that have become customary in action cases. Another benefit of summary judgement is that it usually leads to inexpensive resolution action matters.

[2] The procedure for summary judgement is contained in rule 32(2)(b)

of the Uniform Rules of Court (*'the rules'*). Over the years, summary judgement has proven potent to prevent a defendant who has no genuine and *bona fide* defence from delaying the finality of civil action.

[3] The plaintiff, Quantibuild (Pty) Ltd (*'Quantibuilt'*) has invoked the procedures in rule 32(2)(b) in search for expeditious determination of its claim against Ngaka Modiri Molema District Municipality ('*the Municipality'*), the defendant. The claim is for payment of an amount of **R2, 153,630.85** plus interest, and value added tax of **R286, 220.08**. The basis for this summary judgement application is that the Municipality's plea does not contain a genuine and *bona fide* defence to the claim.

[4] As expected, the defendant is opposing the application for summary judgement. Its contention is that its pleaded defence to the plaintiff's claim is not only valid, genuine and *bona fide*, but that it has also raised an important counter-claim that has the potential of completely collapsing the plaintiff's claim. The nub of the defendant's opposition is that the plaintiff has failed to satisfy the requirements to secure summary judgement, therefore, the application should be dismissed with costs.

SUMMARY OF FACTS

[5] Quantibuild's case is that it and the Municipality have been parties to a contract that was concluded on 07 January 2013, for services that were to be rendered at the Groot Marico Waste Water Treatment Plant. The Municipality admitted the existence of the

contract under contract numbers NMMDM 11/12/44/PMU (B), but disputes its validity.

[6] The exact terms of the contract, in which Quantibuild was appointed by the Municipality as a contractor, were not disputed by the Municipality. As indicated, the Municipality took the view that the contract was marred by serious illegality and therefore unenforceable. As part of the defence, the Municipality's plea was accompanied by a counter-claim seeking an order to review and set aside the contract. It also says that Quantibuild should be ordered to pay all the amounts that were irregularly paid, which are still to be quantified.

[7] Paragraph 2.3.8.1 of the plea sets out the Municipality's substantive defence to the claim, and it states that the contract was illegally and unlawfully awarded to Quantibuild. The illegality pleaded stems from an allegation that the person who signed the contract on behalf of the Municipality did not have authority to bind it to the contract. Alternative defences were that the duration of the contract was extended beyond the initial period of six months to six years. Furthermore, the Municipality also contended that the scope and monetary value of the tender were unlawfully extended in breach of s 217 of the Constitution, the MFMA and applicable treasury regulations. For these reasons the Municipality has refused to pay the amount that was claimed by Quantibuild as balance for the work that has been completed.

[8] Properly construed, Quantibuild's pleaded claim is for enforcement of adjudication award or orders, which found that the Municipality is

liable to pay Quantibuild for services that were allegedly rendered at its instructions and instance, and for which the Municipality has since September and November 2018 failed, withheld or refused to pay. At paragraph 6 of the particulars of claim it is alleged that:

"The Plaintiff duly executed the works and completed all of its obligations in terms of the contract on 21 November 2018 and on 13 August 2019 in respect of the additional works. The completion certificates in respect of the main contract and Wetlands are annexed hereto marked "POC3" and "POC4" respectively."

[9] The Municipality's corresponding plea boldly denies the allegation that Quantibuild did complete the works that were assigned to it, and cross-refers to paragraphs 2.2 and 2.3 of the plea. There are two identifiable problem with this plea:

(a) First, it does not provide any version as to whether work was done or not; and

(b) Second, it does not deny that the Municipality issued instructions and received services. The services were certified by the Municipality's engineers.

These paragraphs merely challenge the legality of the contract, but without disputing that work was actually performed as alleged by Quantibuild. For instance, paragraph 2.2 of the plea reads as follows:

"The Defendant specifically denies that "Contract No. NMMDM11/12/44/PMU (B) constitutes a valid, binding and enforceable agreement between the Plaintiff and the Defendant for reasons as set out infra."

[10] In paragraph 2.3 the Municipality sets out legislative prescripts that it alleges were not complied with in awarding an extension of the

contract to Quantibuild. As pointed out above, there is no dispute that services were indeed rendered in compliance with the terms of the contract. Also, the Municipality has not provided a version to deny that the payment certificates were issued by it engineer of project manager for services that were rendered by Quantibuild at the instance of the Municipality, that is, apart from the question of validity of the contract.

[11] When it became clear that the Municipality was unwilling to settle the amounts due as per payment certificates, Quantibuild referred the dispute for determination by an Adjudicator. It relied on the provisions of the General Conditions of Contract for Construction Works, Second Edition, 2010 (*'GCC 2010'*) to refer the dispute for determination by the Adjudicator.

[12] Recently Binns-Ward J restated the applicable summary judgment principles in the case of **Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd**[1] in which he held as follows:

> *"A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant."* (Emphasis

[1] Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020). Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A). Also, Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture [2009] ZASCA 23 (27 March 2009); [2009] 3 All SA 407 (SCA); 2009 (5) SA 1 (SCA).

added)

[13] Though the Municipality objected to the adjudication process, it attended and participated in the proceeding, raising a number of other defences. Upon consideration of the facts from both parties, the Adjudicator ruled that the Municipality was liable to pay for services that it received from Quantibuild. As indicated, this claim seeks enforce the award. The Municipality continued with its refusal to pay Quantibuild for the services. Its contention being *inter alia* that the contract is *void ab initio*. Further, the Municipality contends that it is entitled to ignore or refuse to comply with the obligations created in terms of the invalid contract.[2]

CONSIDERATIONS OF LAW

[14] Despite the recent amendment to the rules governing summary judgement applications, one of the principles that remains applicable is that summary judgement will be granted where a defendant has not shown the existence of a genuine and *bona fide* defence to the plaintiff's claim. It is settled that a defendant need not deal exhaustively with the facts and evidence relied upon for its defence but must at least disclose a defence and the material facts upon which the defence is based with sufficient particularity[3] and completeness to enable the Court to determine whether the affidavit discloses a genuine and *bona fide* defence or not.

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2 Municipal Manager: Qaukeni and Others v F V General Trading CC (324/2008) [2009] ZASCA 66; 2010 (1) SA 356 (SCA); [2009] 4 All SA 231 (SCA) (29 May 2009) at para [26].

3 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).

[15] The Municipality sought to rely on the authority in in **Premier, Free State and Others v Firechem Free State (Pty) Ltd**,[4] and advanced an argument that it was under a legal duty *'not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement' applicant.'* The authority as adopted in **MEC for Health, Eastern Cape and Others v Kirland Investments (Pty) Ltd**[5] has evolved the question slightly in that a party in the position of the Municipality may not ignore the consequences of a procurement that offends the principles of legality.[6] By resisting compliance, the authority obviously implies the taking of steps to review and set aside the offending contract and the decision that preceded it.

[16] The contention that the contract is *void ab initio* also seems incongruent with recent legal authorities. For instance in **Njongi v MEC, Department of Welfare, Eastern Cape**[7] the Constitutional Court seems to have put this question to rest when it held that:
'… until an act is found to be unlawful it is presumed valid, in accordance with the maxim omnia praesumuntur rite esse acta, and agreed that only a court of law can make the authoritative determination of whether an administrative act alleged to be "void" is lawful'. (Emphasis added)

[17] Under the circumstances, the argument that the contract is *void ab initio* avails no triable defence for the Municipality. However, that is

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4 Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA).

5 MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014).

6 Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 14.

7 Njongi v MEC, Department of Welfare, Eastern Cape [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at paras 44 – 45.

not the end of the inquiry as there is still the question of the counter-claim to determine. In line with its legality defence, the Municipality prayed for the awarding of the contract to be declared invalid, reviewed and set aside.

[18] It is also not clear as to when did the Municipality first become aware of the issues of illegality with the contract. However, it seems that the issue had already come to light when the dispute was referred to the Adjudicator, on or about 24 January 2019, for determination. In fact this was one of the principal issues that were pertinently raised for determination by the Adjudicator, with the Municipality being legally represented. The final award was made on 26 July 2019 and thereafter sent to the parties.

[19] The Court has been requested to find that the Municipality is non-suited by the unreasonable delay in issuing the counter-claim. There is no explanation as to why did the Municipality not take up the legality challenge between the period between 26 January 2019 and 25 February 2020. It was contended for Quantibuild in this regard that the Municipality's counter-claim is a palpably weak reaction that was influenced entirely by the desire to avoid payment for services that were rendered at its facilities by Quantibuild. Also, it was argued that it was only when this case was instituted that the Municipality suddenly remembered that it had a legality challenge against the contract.

[20] I do not believe that a party in action proceedings should simply be closed out of Court without evidence on why it did not institute its counter-claim action sooner. No doubt, the Municipality took long to

initiate the legality challenge, a period of approximately twelve months after it ought reasonably to have become aware of the challenges with the contract. The trial Court, if the matter gets there, will be able to determine the reasonableness of the delay after hearing evidence. One is not ignorant of what the Constitutional Court said about undue delay in the case of **Khumalo and Another v MEC for Education: KwaZulu Natal**[8] when it held that:

"[50] In terms of the first leg of the enquiry, any explanation offered for the delay is considered. We know in the present matter that the MEC has made no attempt to explain why she was idle for so long. Considering the typically short time frames for challenges to decisions in the context of labour law, the MEC's delay of about 20 months, if taken from the time of the receipt of the Task Team Report, is significant in itself. Furthermore, in the absence of any explanation, the delay is unreasonable." (Emphasis added)

[21] What seems decisive in this matter is the question relating to the legal effect of the adjudication award. The Municipality did not challenge the award and there is no explanation why it did not do so, either through process of arbitration or by approaching Court to review and set it aside. All that the Municipality raised as a defence against the award was that:

"4.3.3 the Defendant did not contractually, or otherwise consented to the jurisdiction of and/or the execution and/or the conducting of and/or to be bound by any "… adjudication proceedings …" and as such same cannot have any binding force or effect vis-à-vis the Defendant."

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[8] Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).

[22] This defence calls for the Court to simply turn a blind eye to a process in which the Municipality fully participated. I do not believe that it is open for the Court to ignore the award, which, whether it was decided by the Adjudicator rightly or wrongly, finally determined the question of validity of the contract and the Municipality's liability for service rendered. Our courts have consistently held the view that, as long as the Adjudicator acted generally in accordance to the usual rules of natural justice and without bias and within his terms of reference, the Adjudicator's decision should be enforceable.[9]

[23] In **Tubular Holdings (Pty) v DBT Technologies (Pty) Ltd**[10] the court held that a dissatisfied party must still comply promptly with the Adjudicator's determination, notwithstanding the party's delivery of a notice of dissatisfaction. The notice preserves the party's right to require arbitration but does not affect the binding nature of the adjudicator's determination. The plea contains no prayer or attempt to review and set aside the findings of the Adjudicator, and that seems fatal against the Municipality.

[24] What remains to be determined is a question whether, on the established facts, the Municipality has displayed the existence of a genuine and *bona fide* defence. I don't think that the Municipality has been able to provide a genuine and bona fide

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9 Ekurhuleni West College v Segal and Another (1287/2018) [2020] ZASCA 32 (2 April 2020); also, Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd (12/7442) [2013] ZAGPJHC 407 at paragraph 11.

10 Tubular Holdings (Pty) v DBT Technologies (Pty) Ltd 2014(1) SA 224 (GSJ).

defence as to why it should not be ordered to pay in terms of the Adjudicator's award. I did state in the beginning of this judgement that this matter is concerned with payment for services rendered and the enforcement of the adjudication award.

[25] While the Municipality has raised a defence based on illegality of the contract, I find that it has failed to provide a genuine and *bona fide* defence as to the enforcement of the adjudication award. This is especially so because the award deals specifically with services that were rendered at the Municipality's properties, in respect of which only a bald defence was raised.

COSTS

[26] It is trite that costs are awarded at the discretion of the Court, which discretion is to be judiciously applied. The general principle is that costs of litigation follow the suit, save in circumstances where the Court may find reason to deviate from the general principle. I find no reason for the costs not to follow the event. The plaintiff is to pay the costs of this application.

ORDER

[27] I make the following order:

1. Summary judgment is granted against the Defendant in the amount of R2, 153,630.85 (exclusive of VAT) plus interest calculated thereon at the applicable rate;

2. The Defendant is ordered to pay the costs of suit.

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MAKOTI M Z

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	**:**	**20 NOVEMBER 2020**
DATE OF JUDGMENT	**:**	**02 MARCH 2021**
COUNSEL FOR APPLICANT	**:**	**ADV SWANEPOEL SC & ADV C A BOONZAAIER**
COUNSEL FOR RESPONDENTS	**:**	**ADV LAUBSCHER**