



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2021/38362

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

DATE: 6 December 2022

In the matter between: -

MMK KHUMALO TRADING & PROJECTS (PTY) LTD
(REGISTRATION NUMBER: 2016/272359/07)

Plaintiff/Applicant

and

MAOPENG ELECTRICAL (PTY) LTD
(REGISTRATION NUMBER: 2012/106264/07)

Defendant/Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 6 December 2022.

F. BEZUIDENHOUT AJ:

THE APPLICATION

- [1] This is an application for summary judgment where the applicant (plaintiff) seeks judgment against the respondent (defendant) for payment of the amount of R973 356.92, together with interest and costs.
- [2] The respondent, although it served its answering affidavit resisting summary judgment, failed to file its affidavit. Condonation for its failure was granted.

PLEADINGS

- [3] The applicant instituted an action against the defendant on the 26th of August 2021. On the 7th of September 2021 the respondent entered an appearance to defend the action. On the 21st of September 2021 the respondent filed a notice to remove cause of complaint in terms of rule 23(1). A notice of exception was filed on the 18th of October 2021.
- [4] Following the exception, the applicant filed a notice of intention to amend its particulars of claim on the 18th of October 2021. The respondent filed a notice of objection to the proposed amendment. The respondent repeated a complaint that the proposed amendment would render the particulars of claim excipiable.
- [5] On the 13th of November 2021, the applicant filed a notice in terms of rule 30 on the basis that the respondent's notice of objection was served out of time. The rule 30 process was not pursued any further.

- [6] On the 12th of December 2021 the applicant filed a second proposed amendment to its particulars of claim. No objection was made and as a consequence, the amendment was effected on the 27th of January 2022.
- [7] On the 28th of February 2022, the respondent filed its plea. The application for summary judgment was brought on the 22nd of March 2022.
- [8] The respondent's attorneys of record withdrew on the 9th of May 2022. The respondent failed to file an affidavit resisting the summary judgment and as a result, the application for enrolled for hearing on the unopposed roll on the 8th of September 2022. However, the application was removed from the unopposed roll once new attorneys were appointed for the respondent and the application for summary judgment became opposed.

THE APPLICANT'S CASE

- [9] The applicant's cause of action is founded on an oral subcontract agreement concluded between the applicant and the respondent. The respondent secured a tender project with City Power to attend to the auditing of retail metering services within its jurisdiction. The applicant and the respondent agreed that the respondent would subcontract to the applicant to attend to the auditing of the retail metering as the applicant has the requisite expertise and capacity.
- [10] The applicant alleges at paragraph 5.3 of its amended particulars of claim that in exchange for the rendering of these retail auditing services, it would be entitled to receive a fee equal to 60 % of the fees invoiced by the respondent to City Power. The applicant would be paid within 48 hours after

the respondent had received payment from City Power.

[11] At paragraph 5.5 of the particulars of claim, the applicant pleads that it was a tacit, alternatively, an implied term of the oral agreement that the applicant would perform the retail auditing services on behalf of the respondent on the City Power account and upon completion, a completion certificate would be issued by City Power to the respondent before payment of the services rendered had been effected.

[12] The oral agreement between the applicant and the respondent was confirmed by the respondent in a letter attached to the particulars of claim as annexure "MMK1". It confirms that the applicant would be the subcontractor on City Power contracts numbered 4600002441 and 4600002440, and that it would be entitled to a 60 % share in the invoiced amount rendered to City Power. It furthermore confirmed that the applicant would be paid by the respondent within 48 hours after having been paid by City Power.

[13] It is the applicant's case that subsequent to the applicant's performance and the rendering of satisfactory services to City Power, City Power issued certificates of work completion to the respondent, whereafter the respondent instructed the applicant to invoice for services rendered, which was done on the 28th of June 2021. The amount due and payable as at the 21st of July 2021 was the sum of R973 356.92.

[14] The applicant pleads that the respondent received payment from City Power on the 21st of July 2021 and was accordingly obliged to make payment to

the applicant of its 60 % share within 48 hours from receipt of such payment. Notwithstanding demand made on the 26th of July 2021, the respondent has failed to make payment of any portion of the amount owing and payable.

THE RESPONDENT'S CASE

[15] The respondent admits that annexure "MMK1" to the particulars of claim records the terms of the subcontract agreement concluded between the applicant and the respondent.

[16] The respondent denies that the applicant performed in terms of the oral agreement. In amplification of its denial, the respondent pleads that the applicant has failed to plead when, where and how it performed under the agreement. The respondent pleads further that the respondent has not rendered any services to the applicant for which the respondent has not been paid (paragraph 8.2 of the plea).

[17] The respondent baldly denies the applicant's allegation that City Power issued certificates of work completion to the respondent and that the respondent in turn instructed the applicant to render its invoice (paragraph 9 of the plea).

[18] It also baldly denies that the respondent is indebted to the applicant, although it admits receipt of the invoice rendered by the applicant.

[19] To the specific averment contained in the particulars of claim that the respondent received payment from City Power and failed or refused to make

payment to the applicant, the respondent does not plead at all. It merely states as follows at paragraph 12 of its plea: -

"12. The Defendant admits demand but denied that it is indebted to the Plaintiff in the amount as claimed or in any amount at all."

ANALYSIS OF RESPONDENT'S DEFENCE

[20] The respondent admitted the terms of the subcontract as pleaded by the applicant. A material term of the subcontract is that the applicant would render the retail auditing services, whereafter City Power would issue completion certificates. Thereafter the applicant would render an invoice to the respondent. Annexure "MMK2" to the particulars of claim is a tax invoice rendered by the applicant to the respondent on the 21st of July 2021. The rendering of an invoice is all that is required. It is not a material term of the agreement that the applicant must state when, where and how it performed under the subcontract agreement.

[21] During argument Ms Crisp, the legal representative for the applicant, referred me to certain annexures attached to the first proposed amendment of the particulars of claim that was not pursued. Mr Matlala for the respondent recorded that he had no objection to a reference to these annexures.

[22] The three annexures that the court was referred to are work completion certificates issued by City Power to the defendant on the 28th of June 2021. The certificates reflect the following purchase order numbers: 4501351428,

4501351422, 4501351426 and 4501351430. These certificates emanated from City Power, was sent to the respondent's representative, Mr Sam Moerane, who forwarded it on to the applicant's representative, Ms Paulus.

[23] The purchase order numbers appearing on the work completion certificates correspond with the purchase order numbers appearing under the heading "*description*" on the applicant's tax invoice attached to the particulars of claim as annexure "MMK2".

[24] The work completion certificates were received from the respondent and were issued to the respondent. The purchase order numbers reflected on the work completion certificates correspond with the purchase order numbers appearing on the applicant's tax invoice. These documents have to be considered against the backdrop of the plea where the respondent does not deny that it received payment from City Power.

[25] The respondent seems to change its tune in the affidavit residing summary judgment. Mr Samuel Moerane is the deponent. At paragraph 6 of the answering affidavit the deponent denies that annexure "MMK1" constitutes a valid agreement or alternatively a confirmation of the oral agreement. In support, the respondent refers to the wording of annexure "MMK1" and places specific emphasis on the words "*I would like to subcontract...*", thereby implying that the wording of the aforesaid letter does not confirm the conclusion of the subcontract agreement. Accordingly, so the respondent argues, evidence must be led to confirm whether a valid agreement was concluded between the parties.

[26] Mr Moerane, the deponent, states further at paragraph 9 of the answering affidavit that: -

"Though a proposal of the agreement was made, there was never acceptance or performance on the part of the applicant, as a result, I deny that I am liable for the sum as claimed by the applicant."

[27] At paragraph 21 of the answering affidavit, the deponent makes the following allegation: -

"Simply put, the respondent has no knowledge that the applicant has rendered services at its special instance and request, as a result, the applicant must prove the same by leading evidence."

[28] The version put forward in the respondent's affidavit resisting summary judgment materially contradicts the plea. The respondent seeks to withdraw an admission of the existence of a validly concluded oral subcontract agreement. The respondent has not indicated that it intends to amend its plea and has failed to explain the material contradiction.

THE LAW

[29] In *Standard Bank v Rahme and Another*¹ the court held that the amended rule 32 appears to have raised the bar and onus for securing summary judgment. By implication a plaintiff must satisfy the court that the defendant has no defence on the merits, whereas under the old rule it was

¹ [2019] ZAGPJHC 287 (3 September 2019).

sufficient to show that a defendant lacked a *bona fide* defence.²

[30] The Supreme Court of Appeal describes the rationale for summary judgment proceedings as follows:³ -

"[32] ... 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 application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E."

² See also *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP), paragraph [40].

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).

[31] This court in *Raumix Aggregates (Pty) Ltd*⁴ had occasion to scrutinise the purpose of summary judgment proceedings after the promulgation of the amended rule: -

"The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution."

DELIBERATION

[32] I am satisfied that the applicant's affidavit in support of the application for summary judgment complies with the provisions of the amended rule 32. The applicant has done more than present a "*formulaic*"⁵ affidavit and has engaged with the content of the plea in order to substantiate its averment that the defence is not *bona fide* and has been raised only to delay the claim.

[33] On the other hand, the respondent failed to engage meaningfully with the additional material now required to be dealt with by the applicant in the affidavit for summary judgment. Considering the contradiction in the

⁴ *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and similar matters* 2020 (1) SA 623 (GJ).

⁵ *Standard Bank Ltd and Another v Five Strand Media (Pty) Ltd and Others* [2020] ZAECPHC 33 (7 September 2020); *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

answering affidavit and the plea and the absence of any explanation for such contradiction, I am of the view that the bare denial of the applicant's claim is not *bona fide* and that the respondent has failed to raise any triable issues.

[34] In the circumstances, summary judgment should be granted.

COSTS

[35] The general rule is that costs follow the result and that this rule should not be deviated from, except where there are good grounds advanced to do so.⁶

[36] The subcontract concluded between the parties does not provide for attorney and client costs. In my view no facts in support of a punitive costs order have been advanced in either the particulars of claim or the affidavit in support of the summary judgment application.

[37] Accordingly, I am not inclined to grant a costs order as prayed for.

ORDER

[38] I therefore make the following order: -

"Summary judgment is granted against the defendant for: -

- 1. Payment of the amount of R973 356.92;*
- 2. Interest on the amount of R973 356.92 at the rate of 7.75 % per annum from 26 August 2021, being the date of service of*

⁶ *Myers v Abramson* 1951 (3) SA 438 (C) at 455.

summons, until payment in full.

3. *Costs of suit on the scale as between party and party."*



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 14 November 2022

DATE OF JUDGMENT: 6 December 2022

APPEARANCES:

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