



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5526/2016

In the matter between:

BARTSCH CONSULT (PTY) LTD

Applicant

and

ERIC THULANI MAPHALALA N.O.

1st Respondent

WANDILE GXABUZA N.O.

2nd Respondent

BAFANA STEPHEN TSHABALALA N.O.

3rd Respondent

MMAMPHENI MARTHA MGIJIMA N.O.

4th Respondent

CORAM: NICHOLSON, AJ

HEARD ON: 16 MARCH 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 16 MARCH 2017

- [1] This is an opposed application for summary judgment in terms of Rule 32 of the Uniform Rules of Court for the sum of R 2 290 854.68 pursuant to a summons issued in case number 5526/ 2016. The Respondents' application for condonation of late filing of the opposing affidavit is not opposed and thus condonation is granted. Likewise, condonation for the late filing of the application for condonation and the supporting affidavit is also granted.
- [2] The Applicant in this matter avers that it rendered professional architectural services to the Respondents and that the amount claimed is the sum owed to it in respect of services rendered by it to the Respondents pursuant to an agreement between the parties entered into on or about 13 February 2014, (the agreement) which agreement was subsequently terminated by the Respondents on 1 October 2015.
- [3] In terms of the agreement, Respondents were to remunerate the Applicant in accordance with the recommended tariff of fees published annually. (See clause 4 of the agreement). On termination of the agreement, Applicant prepared and submitted to the Respondents, an invoice for services rendered to date of termination and demanded payment of same. The Respondents refused to pay the amount claimed and Applicant instituted action in this court to recover the sum they allege the Respondents owe it. It is Applicant's contention that the Respondents have no *bona*

fide defence to the action and that they have entered an appearance to defend solely for the purpose of delay.

- [4] The Applicant takes issue with the irregular nature of the opposing affidavit, however, the court is at liberty to permit the Respondents to give oral evidence in defence of the application or to afford the Respondents an opportunity to re-attest the affidavit. (*Radue Weir Holdings Ltd. v Galleus Investments CC* 1998 (3) SA 677 (EC) 682H-J). It should also be noted that the Respondents are not confined to the issues they have raised in their affidavit in resisting the application. (Rule 32(3) *Erasmus Superior Court Practice* B 1-221)
- [5] Furthermore, the Applicant asserts that the Respondents have not set out facts in their opposing affidavit that can establish for the court, that they have a good and *bona fide* defence to the application. They rely on *Maharaj v Barclays National Bank Ltd* (1976 (1) SA 418 (A) at 426) for this contention. Applicant further asserts that the manner in which the Respondents have sworn to their defence is so unconvincing that it should be rejected. (*Shepstone v Shepstone* 1974 (2) SA 462 (n) at 467)
- [6] Respondents do not contest that they had a contractual relationship with the Applicant but assert that the Applicant's services were terminated at the conceptual stages of the project (par 2 of 1st Respondent's affidavit (R's affidavit)) as a consequence of their dissatisfaction with the work done by the

Applicant. They assert (par 3 R's affidavit) that the Applicant's work was defective ("wrong drawings of the wrong sizes" (par 3) and "incomplete" (par 4) and thus could not be used. Respondents thus challenge the amount claimed by the Applicant in respect of the work that was done pursuant to the contract. They contend that the amount to be paid was considerably less than that claimed by Applicant and that the amount claimed is vastly inflated. (R's affidavit pars 5-7)

[7] The Respondents also raised in their argument, the following technical issues:

- (a) The Applicant's supporting affidavit in this motion is defective as the deponent refers to himself as the Applicant's employer rather than employee.
- (b) The Applicants fail to identify themselves as professional architects in the particulars of claim, an averment that they allege is essential to the Applicant's claim.
- (c) The application for summary judgment was filed out of time.
- (d) The document on which summary judgment is being sought is not a liquid document for a liquid amount as it is not an agreed amount or an amount capable of speedy ascertainment. The amount will require evidence to prove.

[8] It is clear to the Court that aside from the technical issues in this case, there are issues of both quantum and proper performance of contractual obligations that arise.

- [9] Whilst it is now accepted that this is not a “drastic and extraordinary remedy” (*Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] All SA 407 (SCA) par 34; 2009 (5) SA 1 (SCA) at 12 A-D), summary judgment may only be granted where the applicant sues on a liquid document or a liquid amount either agreed by the parties or capable of speedy ascertainment, for delivery of a specific movable property or for ejectment.
- [10] The applicant has a period of 15 court days after delivery of the notice of intention to defend within which to file the application. The application was out of time as the intention to defend was delivered on 15 December 2016. The application was thus indeed served out of time on 12 January 2017.
- [11] Furthermore, the Respondents have disclosed an arguable defence. It is not required that the defence be proven but, it is sufficient to establish a defence which, if proven at trial would constitute a defence to the action. The defence put forward is not so bald, sketchy or vague as to compel the court to dismiss it. The court accepts that the Respondents have the *bona fide* intention to rely on the defence so disclosed.
- [12] The Respondents have sufficiently set out the nature and grounds of their defence and disclosed sufficient material facts in support thereof. It is not necessary for them to have set out their entire defence. (Erasmus *Superior Court Practice* B1-226; *Maharaj v*

Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 at pars C-D “... the Respondent 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”.

- [13] That is not to say the court can act “capriciously” and deny summary judgement where appropriate. The court must, in exercising its discretion, satisfy itself that the grounds for the defence are sound in law, that the defence is *bona fide* and, that sufficient material facts have been offered. If the court is unconvinced on one or both of these, the court has a discretion to find in the defendant’s favour if it feels that the defence may be good. This is the position in which this court finds itself as a consequence of the unorthodox nature of the defendant’s affidavit. As the 1st Respondent is a layperson who was acting without proper legal assistance it is hardly surprising that the affidavit does not comply with the strict formalities required in summary judgment proceedings. To prejudice the Respondents for their late realization that they required legal assistance in this matter would be to perpetrate an injustice on the Respondents. There exists a reasonable apprehension that an injustice may be done in the present case should summary judgment be granted.

Based on the material before the court, it is reasonably possible that the Respondents have a good defence and the Court must, therefor, find in Respondents’ favour.

[14] Despite Applicant's reliance on *Shepstone* (*Shepstone v Shepstone* 1974 (2) SA 462 (N)) as authority, this same case states that (at 467) where a court is not certain that sufficient material facts have been disclosed to it, it is not obliged to condemn the respondent summarily without the benefit of a trial of the action but has a discretion whether or not to grant summary judgment.

[15] As there is both an irregularity as regards plaintiff's application in that it was served out of time and the Respondent has offered a possible defence that appears to the court to be both *bona fide* and good in law, the Court is not persuaded that the Plaintiff has an unanswerable case.

[16] In light of the above and having considered the papers before it and the argument presented, the court orders that:

1. The Respondents' application for condonation of late filing of the opposing affidavit and for the late filing of the application for condonation and supporting affidavit is granted.
2. Application for Summary Judgment is rejected.
3. The Defendants are granted leave to defend the Plaintiff's action.
4. The costs of the application, including the costs of the postponement to be costs in the cause of action.

C. NICHOLSON, AJ

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