

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:1344/15

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| (1) | REPORTABLE: YES /NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |

2/4/2015

IN THE MATTER BETWEEN:

OFFICESCAPE INTERIOR CONTRACTORS

PLAINTIFF

AND

WAYMARK INFOTECH (PTY) LTD

DEFENDANT

J U D G M E N T

KUBUSHI, J

[1] In this summary judgment application, the plaintiff seeks judgment against the defendant for payment of an amount of R218 809, 24 being for monies due and payable. The claim is based on a final payment certificate issued by the defendant in terms of a JBCC building agreement.

[2] The defendant had appointed the plaintiff to attend to its tenant installation. Pursuant to such appointment, the plaintiff and the defendant signed a JBCC agreement to regulate the appointment. Even though the written JBCC agreement was never signed by the parties but the work was executed in terms thereof.

[3] In terms of the JBCC agreement the plaintiff, as contractor, would perform the work as specified by the defendant and/or its agents; the defendant's principal agent would certify the plaintiff's progress with the work and issue a payment certificate in line with the progress made; the plaintiff would then issue a tax invoice to the defendant corresponding with the payment certificate which the defendant would be liable to pay within 14 days from the date of the payment certificate.

[4] It is common cause that on 4 October 2013 the defendant's principal agent issued and signed a final payment certificate in terms of which he certified that an amount of R368 809, 24 was payable. Based on the final payment certificate, the defendant made a payment in the amount of R150 000, which left a balance of R218 809, 24 – the amount claimed by the plaintiff.

[5] The defendant is resisting the summary judgment, and alleges that: the workmanship of the plaintiff was defective; and that, the principal agent was not supposed to have issued a final payment certificate prior to the issue of a certificate of final completion, as this somehow renders the final payment certificate "a moot point". A further assertion by the defendant's counsel is that the plaintiff should allege and prove full performance. There is as such no proper cause of action as full performance was not alleged in the plaintiff's particulars of claim, so it is submitted.

[6] According to the plaintiff the points raised by the defendant in resisting the summary judgment do not offer the defendant any defence valid in law. The submission by the plaintiff's counsel is that once a principal agent has issued the final payment

certificate to the contractor, the principal agent cannot purport to amend it by issuing a subsequent certificate, nor cancel it by issuing a document that purports to render it null and void; the only ground upon which an employer could challenge a finality that is conferred by a final certificate would be to allege that the principal agent had no authority to issue it or that it has been issued fraudulently – and neither is alleged. In the circumstances, no defence is offered to the plaintiff's claim and the summary judgment as prayed for should be granted, so he argued.

[6] In terms of uniform rule 32 (3) upon the hearing of an application for summary judgment the defendant may satisfy the court by affidavit that he or she has a *bona fide* defence to the action; such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon.

[7] In a summary judgment application, what is required is for the defendant to raise a *bona fide* defence. Where the question of whether a defendant has a *bona fide* defence, arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The defendant is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed that there is a preponderance of probabilities in his or her favour.¹

[8] All that a court requires, in deciding whether the defendant has set out a *bona fide* defence, is whether the defendant has disclosed the nature and grounds of his or her defence, and whether on the facts so disclosed the defendant appears to have, a defence which is *bona fide* and

¹ See *Nair v Chandler* 2007 (1) SA 44 (T) at 47B-C and *Maharaj v Barclays National Bank Ltd* (1976 (1) SA 418 (A) at 426A-E.

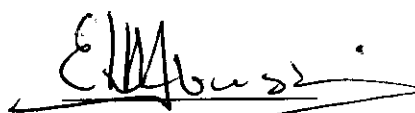
good in law.² It is sufficient if the defendant swears to a defence, valid in law, which if advanced may succeed on trial.

[9] I am of the view that the defendant has advanced its contention in resistance to the plaintiff's claim with a sufficient degree of clarity to enable me to ascertain that it has deposed to a good defence. The defence is *bona fide*, good in law and my view is that if raised at trial it may constitute a defence to the plaintiff's claim.

[10] As regards the issue of costs my view is that an appropriate cost order should be costs in the cause.

[11] In the premises I make the following order:

- (a) The application for summary judgment is dismissed.
- (b) The defendant is granted leave to defend the matter.
- (c) Costs are costs in the cause.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

² See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426b and *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 949E-F.

APPEARANCES**HEARD ON THE****DATE OF JUDGMENT****PLAINTIFF'S COUNSEL****PLAINTIFF'S ATTORNEY****DEFENDANT'S COUNSEL****DEFENDANT'S ATTORNEY**

: 20 MARCH 2015

: 02 APRIL 2015

: ADV. A G SOUTH

: MACROBERT INCORPORATED

: J DE BEER

: PHILIP COETZER INCORPORATED