

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4517/2011

In the matter between:-

ROADMAC SURFACING (PTY) LTD
(REGISTRATION NO: 1992/001299/07)

Plaintiff

and

THE CONSTRUCTION EDUCATION AND
TRAINING AUTHORITY

Defendant

HEARD ON: 9 FEBRUARY 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 16 FEBRUARY 2012

[1] This is an application for summary judgment. The plaintiff's claim against the defendant is for payment of R504 400-00, being the outstanding amount for services rendered by the plaintiff in terms of the written agreement, concluded on 6 July 2010.

[2] The plaintiff avers in the particulars of claim that on 6 July 2010, at Bloemfontein, the plaintiff, represented by C. Steyn

and the defendant, represented by P. Maoko, concluded a written agreement, a copy of which is attached to the particulars of claim.

[3] The defendant filed the opposing affidavit in which it raises its defence, which consists of three legs, namely:

- 3.1 that the document attached to the Plaintiff's particulars of claim does not constitute a legally binding agreement, as it was not signed by the respondent or by anyone on its behalf;
- 3.2 that, in the alternative, should the court find that the said document constitutes a legally binding agreement, then the plaintiff is in terms of clause 20 of the said agreement, precluded from issuing summons in court before referring the dispute for arbitration; and,
- 3.3 thirdly, that the respondent is not in possession of the plaintiff's invoices and reports as required by the agreement before payment could be made. Further, that the defendant is conducting a forensic investigation of the suspicious projects it has funded and that the plaintiff's claim is also subjected to such investigation.

- [4] On the first issue, it is common cause that *ex facie* the document, no one signed the said document on behalf of the defendant, as no signature appears on the space left for signature by the representative of the defendant.
- [5] Mr. Hefer, appearing on behalf of the plaintiff, argued that the signature of both parties is not required by statute for the agreement to be binding on the parties.
- [6] It is correct that, save as are required by statute or custom, a contract does not have to be in writing for it to be binding on the parties; but, the parties may agree that their agreement shall not be binding until it has been put in writing and signed by themselves. The writing and signature is then a condition precedent to the validity of the contract. **GOLDBLATT v FREEMANTLE** 1920 AD 123 at 128-129; and **WESTINGHOUSE BRAKE AND EQUIPMENT (PTY) LTD v BILGER ENGINEERING (PTY) LTD** 1986 (2) SA 555 (A) at 573.
- [7] Paragraph 4.1 of the agreement relied upon by the plaintiff reads as follows:

“This Agreement shall become of force and effect on the latter date of **signature** hereof by **both** parties subject to the terms and conditions set out in this Agreement”. (my own emphasis).

- [8] On the basis of this clause, I am satisfied that the defendant has discharged its onus that the parties agreed that their agreement must be in writing and signed by both parties.
- [9] In the light hereof, I do not find it necessary to deal with other legs of the defendant's defence, as, only on the basis hereof, summary judgment cannot be granted.
- [10] The further issue that I have to deal with is the question of costs.
- [11] Mr. Snellenburg, who appeared on behalf of the defendant, argued that the court should, when dismissing the application for summary judgment, do so with costs, instead of the customary order that costs be costs in the cause.
- [12] He based his argument on the fact that the plaintiff should

not have proceeded with the application on an opposed basis, as it became aware of the defendant's defence, after receipt of the opposing affidavit. He referred the court to the case of **TREDOUX v KELLERMAN** 2010 (1) SA 160 (CPD).

[13] In the said case, however, the court decided that the appellant's claim did not fall within the meaning of Rule 32 (1) of the Uniform Rules of Court, in that the said claim was not for a liquidated amount in money, nor was it based on a liquid document.

[14] The court further found that the appellant knew of the defence of the respondent before the appellant issued summons.

[15] There is no evidence in this case that the plaintiff knew the defendant's defence before it issued summons. As stated before, Mr. Snellenburg's argument is that the plaintiff be ordered to pay the costs occasioned by the matter being heard on an opposed basis.

[16] I do not think that a party should be mulcted with costs only

for proceeding with a case that he or she believes to be a good one, at this stage of the proceedings. I am therefore not persuaded to depart from the customary cost order in applications for summary judgment.

[17] I consequently make the following order:

17.1 Application for summary judgment is dismissed;

17.2 Defendant is granted leave to defend the matter; and

17.3 Costs of this application will be costs in the main case.

N.W. PHALATSI, AJ

On behalf of plaintiff:

Adv.J.J.F. Hefer
Instructed by:
L & V Attorneys
BLOEMFONTEIN

On behalf of defendant:

Adv. N. Snellenburg
Instructed by:
Phatshoane Henney Inc
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/sp