REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 15218-21

1. REPORTABLE: ~~YES~~/ NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED: ~~YES~~/ NO

DATE: 30 April 2025
SIGNATURE OF JUDGE: [redacted]

In the matter between:

MPHO DANIEL LEBOGO APPLICANT

and

LADYBUG CONSULTING (PTY) LTD FIRST RESPONDENT

KHANYISA MDLULI SECOND RESPONDENT

ORDER

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1. The application for summary judgment is dismissed.
2. The Defendant is granted leave to defend the Plaintiff's claim.
3. The cost is the cost in the cause

JUDGEMENT

FLATELA J

Introduction

[1] This is an opposed application for summary judgment brought by the Applicant/Plaintiff against the First and Second Respondents/Defendants for an order in the following terms:

1. Declaring that the First and Second Defendants are in breach of the building and renovations contract between the Plaintiff and the First and the Second Defendants.
2. The First and the Second Defendants pay to the Plaintiff the sum of R236,000(Two hundred and thirty-six thousand Rands only), being the pre-commencement fees paid to the defendants by the Plaintiff outside the provisions of the building and renovations contract between the parties.
3. The First and the Second Defendants paid to the Plaintiff the sum of R328,381, being the amount paid by the Plaintiff for the cost of aluminium window frames, glazing, roof covering and labour costs.
4. The First and Second Defendants pay to the Plaintiff an amount of R115 000, being the amount paid by the Plaintiff to cure the defects occasioned by the premature termination of the contract and perform workmanship.
5. That the First and Second Defendants pay to the Plaintiff an amount of R4200, being the cost of insurance for a period of 18 months, covering the building and renovations contract.
6. The First and Second Defendants to pay interest on the sum of R683,581 at the prescribed rate of the Interest Act, a *tempore morae* to run from the date of issue of the summons to the date of payment.

7. Costs of suit.

Factual Background

[2] On 31 March 2021, the Plaintiff initiated action proceedings against the Defendants seeking payment of various sums arising from a building construction agreement made between the parties on 10 May 2018.

[3] The Applicant appointed the First Respondent, a contractor duly represented by the Second Respondent, to renovate his property. The parties concluded a building renovation contract in which the First Respondent agreed to renovate the Applicant's property in terms of the schedule and specifications detailed in the quotation agreement. Both the building contract and the schedule of specifications are annexed to the application. For convenience, the parties will be referred to as the Plaintiff and the Defendants.

[4] According to the particulars of claim, the First Defendant was responsible for supplying all labour, specific metal works, and roofing materials, as well as providing the necessary equipment and plant. The First Defendant was to be remunerated by the Plaintiff in accordance with the schedule and manner stipulated in the agreement. This was referred to as the contractor's sum.

[5] In consideration of the work to be performed by the First and Second Defendants, the Plaintiff agreed to pay the Defendants a contract price of R1 093 020.00 as set out in Annexure A (the construction allowances) and B (the payment schedule) annexed to the agreement.

[6] According to the Plaintiff, he made the following payments to the Defendants:

a. An amount of R236 000 which was a Pre-commencement fee
b. An amount of R2999 886.08, an amount paid by the Plaintiff for glazing and roof covering (interim withdrawal)
c. An amount of R328,381 described as out-of-pocket expenses, including labour costs (interim withdrawal)

d. An amount of R63,500 for the compilation of the over and assessment report.
e. An amount of R115,000 out of pocket paid for remedial work;
f. An amount of R4,200 for insurance.

[7] The Defendants filed their notice to defend and their plea on 15 April 2021 and 13 May 2021, respectively. In their plea, the Defendants raised special pleas of jurisdiction, arbitration, and *res judicata*. The Defendants denied liability for the various amounts claimed by the Plaintiff. They raised several defences in their plea, which can be summarized as follows:

a. The quotation was not conclusive when it was submitted to the Plaintiff. The Plaintiff was responsible for providing water, electricity, storage facilities, and security, which were all provided on 3 August 2018.
b. There was insufficient information available to the Defendants to estimate the costs of the structural works accurately. A structural engineer was engaged on 3 August 2018.
c. The defendants only received a complete structural design report on 15 August 2018, three months after the contract commenced.
d. Errors occurred in the calculation of costs for the boundary wall due to the absence of a structural engineer's report. Variation orders were allowed in accordance with the contract.
e. The project expenditure was current at the time of the cancellation of the contract, meaning that the Defendant had rendered and was paid for work done until the cancellation of the contract.
f. The windows and roofing were not due at the time the contract was cancelled.

[8] On 3 June 2021, the Plaintiff delivered a replication to the Defendant’s plea. On 18 June 2021, the Defendant delivered a notice under Rule 30(2)(b) of the Uniform Rules of Court, raising objections regarding the Plaintiff’s replication.

[9] The Plaintiff addressed a letter to the Defendant outlining that the Rule 30(2)(b) notice was an irregular step and that it should be withdrawn. There was no response

to the letter, and the Plaintiff issued a Rule 30 notice to set aside the Defendant's Rule 30(2)(b) notice. The Defendant filed the notice to oppose the application. Pleadings were exchanged. The matter was set for a hearing on 07 February 2022. The parties continued to negotiate and settled the interlocutory application. The parties settled the matter out of court, and it was removed from the roll on 26 January 2022.

[10] On 4 July 2022, the Plaintiff applied for summary judgment. The Defendant filed a notice in terms of Rule 30(2)(b) to set aside the Rule 32 application as an irregular step. The defendant contended that by filing a replication, the Plaintiff waived his right to apply for summary judgment. On the day of the hearing, I was informed that the Defendant had abandoned the Rule 30 application.

[11] I deem it prudent to first deal with the legal principles pertaining to summary judgment. This procedural mechanism allows a court to resolve a case or specific issues within a case without the need for a full trial, thereby promoting judicial efficiency and reducing unnecessary legal costs.

Legal Principles Applicable to Summary Judgment

[12] Rule 32 of the Uniform Rules of Court was amended with effect from 19 July 2012. The new Rule 32 now stipulates that:

> '(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-
>
> (a) on a liquid document.
>
> (b) for a liquidated amount in money.
>
> (c) for delivery of specified movable property; or
>
> (d) for ejectment.
>
> together with any claim for interest and costs.
>
> (2) (a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.
>
> (b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial;
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> (c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall

state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may-

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.'

[13] The legal principles applicable to the determination of whether to grant a summary judgment have long been settled. In *Shepstone v Shepstone*[1], Miller J said the following:

> 'The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that… "a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial.'[2]

[14] Despite the changes introduced by the amendment of rules governing summary judgment, *Maharaj v Barclays National Bank Limited*[3] remains authoritative. Corbet JA said the following:

> 'Accordingly, one of the ways in which a defendant may successfully oppose summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Whether the defence is based upon facts in the sense that material facts alleged by the plaintiff in his summons or combined summons are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to

[1] *Shepstone v Shepstone 1974 (2) SA 462 (N)*.
[2] Ibid at 467 E-H.
[3] *Maharaj v Barclays National Bank Limited 1976(1) SA 418 A*.

> determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have as either whole or part of the claim, a defence which is both bona fide and good in law.'[4]

[15] Referring to the extraordinary and drastic nature of the summary judgment remedy in *Maharaj*[5] Corbett JA reasoned that:

> 'the grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable, and that the defendant's defence is bogus and bad in law'.[6]

[16] I now turn to deal with the pleaded case in support of the application for summary judgment, both in their form as particulars of claim and plea respectively, and similarly, the affidavit filed in support of and against the relief sought in the application.

[17] The Plaintiff's particulars of claim and his founding affidavit in support of summary judgment were a model of clarity. The basis of the Plaintiff's claims is that the Defendants breached several clauses of the building and renovation contract. The Plaintiff relies on Annexure A to the agreement, which sets out the construction allowance, and Annexure B, which provides for the payment schedule under the Housing Consumer Measures Act 95 of 1998. In essence, the Plaintiff seeks restitution of various monies that were paid by him to the plaintiff and out-of-pocket monies that he paid to cure the defects and building materials.

[18] In his opposition to summary judgment, the Defendant challenged the competence of the Applicant's Rule 32 application. The Defendant also sought the invocation of Rule 32(9).

[19] The Respondents oppose the application on the following grounds, namely:

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[4] Ibid at at 426
[5] *Maharaj supra n 3.*
[6] Ibid at 423.

a. Whether the declaratory relief sought is competent to be granted in terms of Rule 32(1).
b. The documents relied upon by the Plaintiff are not liquid, and the claim is not for a liquidated amount of money; thus, the provisions of Rule 32(1)(b) are not applicable.
c. Rule 32 is not available to the Plaintiff after filing a replication.

[20] The Plaintiff seeks an order declaring the First and Second Respondents to be in breach of the contract. The relief sought by the Plaintiff is a declaratory order. In Absa Bank v *Mphahlele*,[7] the court held as follows:

> '[A] Summary judgment is *sui generis*. It has always been (and remains to this day, despite amendment) a self-contained procedure with its own well-established principles. As such, it is not bound by those principles governing other procedures as contained, *inter alia,* in the Uniform Rules of Court. It is for this reason that great caution should be exercised when seeking guidance, to one degree or another, from the provisions of other rules when interpreting Rule 32.'[8]

[21] The declaratory order is governed by section 21(1)(c) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). In terms of the provision of Section 21(1)(c) of the Superior Courts Act, the High Court may grant a declaratory order without any consequential relief sought. The section provides the following:

'**21. Persons over whom and matters in relation to which Divisions have jurisdiction**

(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offence triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) ….

(b) ….

(c) In its discretion, and at the instance of any interested person, to enquire into and – determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.

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[7] *Absa Bank Limited v Mphahlele N.O and Others (45323/2019, 42121/2019) [2020] ZAGPPHC 257.*

[8] Ibid para 28.

[22] The declaratory order in the circumstances of this case is incompetent in these proceedings.

[23] The next question that the Court must answer is whether the document relied upon by the Plaintiff is a liquid document.

[24] Dealing with the meaning of a liquidated amount for purposes of summary judgment, Griesel J in *Tredoux v Kellerman* [9] held at paragraph 18 as follows:

> '…A liquidated amount of money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or, put differently, where ascertainment of the amount in issue is 'a mere matter of calculation'.
>
> [19] Furthermore, it has been held that the court is entitled to have regard to the defence raised by a defendant in opposition to a claim for summary judgment in deciding whether or not the claim is liquidated:
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> If from the defence as disclosed, it appears to the Judge that proof of the claim may be protracted and difficult rather than prompt, then it seems to me that that is a matter which he may take into account in deciding whether or not the claim is liquidated.'

[25] The Plaintiff's claim arises from a breach of contract, specifically referencing Annexure A, which entails a construction allowance, and Appendix B, which is a payment schedule. A key challenge faced by the Plaintiff is the assertion that the claim is a liquidated claim, which entails a straightforward matter of calculation. I disagree. The claim encompasses various sums that the Plaintiff has disbursed for completed work, albeit with defects. In addition, the Plaintiff alleges that he suffered damages due to out-of-pocket expenses incurred to address defects and rectify inadequate workmanship. The other amount claimed arose from unauthorized withdrawals, as well as damages suffered from the premature termination of the contract. These amounts are difficult to ascertain.

[26] Another difficulty with the Plaintiff's case is that he asserts that the Defendant has not presented a *bona fide* defence, only offering a cursory denial of the claims. I disagree. The Defendants disputed that they are liable to the Plaintiff and have raised

[9] *Tredoux v Kellerman* 2010 (1) SA 160 (C).

several defences, which were already mentioned above. The Defendant's defence cannot be labelled as bogus and bad in law.

[27] Having considered the pleadings and the arguments advanced by the parties' respective counsel, it seems to me that the claim against the Defendants is for damages. An enquiry into the nature and extent of the services rendered is needed to determine the claim. This dispose of the matter. It is not necessary to deal with the remaining issue of whether Rule 32 is available to the Plaintiff in a case where the Plaintiff has filed a replication. The Defendants abandoned the Rule 30 application regarding this issue.

Costs

[28] Rule 32(9) provides that the court may make such order as to costs as may seem just. Normally, in a Summary Judgment application, the court's order is cost in the cause. Rule 32(9)(a) provides for a deviation from the normal order. It states that "where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend." The Defendants have presented several defenses, primarily contesting the amounts claimed. I cannot conclusively say that the plaintiff knew that the contention the defendant relied on would entitle them to leave to defend due to the way the defendantsconducted the litigation. They served notice in terms of Rule 30 on two separate pleadings, only to abandon these positions before the court. In my assessment, there are no justifiable reasons for deviating from the normal order in this matter.

[29] As a result, I make the following order:

1. The application for summary judgment is dismissed.
2. The Defendant is granted leave to defend the Plaintiff's claim.
3. The cost is the cost in the cause

[redacted]

FLATELA LULEKA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 30 April 2025.

Appearances

Counsel for the Applicant:	Adv MM Sono
Instructed by:	Sijako Attorneys Inc.
Counsel for the 1st & 2nd Respondent:	Adv T Snyders
Instructed by:	Macrobert Attorneys
Date of the Hearing:	14 October 2024
Date of the Judgement:	30 April 2025