

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-057903

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
01/09/2025 DATE	
SIGNATURE	

In the matter between:

Type text here

PEIKKO SOUTH AFRICA LTD

Plaintiff

and

JCO CONSTRUCTION (PTY) LTD

Defendant

JUDGMENT

N S KRÜGER AJ:

Summary

Summary Judgment- Rule 32(2)(b)- allowance of additional evidence- including documentary evidence-Tumileng Trading CC v National Security and Fire (Pty) Ltd; E&D Security Systems CC v National Security and Fire (Pty) Ltd 2020- (6) SA 624 (WCC)- Absa Bank Limited v Saunderson 2024 (4) SA 582 (NCK)- Special plea for stay of proceedings and referral to arbitration in terms of arbitration

agreement in contract- Bona fide defence remains to be established as before with due regard to the effects of the amended rule.

Introduction and background

- [1] On or about 7 December 2021, a minor works agreement framed as a Joint Building Contracts Committee Series 2000 was concluded between the plaintiff and the defendant (*“the contract”*). In terms of the contract, the defendant employed the plaintiff to render construction services at a specified site in Randburg. A principal agent was appointed with full authority to act in terms of the contract. He was obliged, amongst others, to administer the contract, monitor the progress of the works and to render a payment certificate monthly, certifying the amount due by the defendant to the plaintiff or *vice versa* as the case may be. The principal agent was also obliged to issue completion certificates. The defendant was obliged to pay to the plaintiff the amount certified by the principal agent within seven calendar days from the date of issue of the certificate.
- [2] According to the plaintiff a payment certificate was issued by the principal agent for payment by the defendant in the amount of R 1 050 477,88 (*“the amount”*) in respect of construction work performed by the plaintiff. The defendant is alleged to have failed to pay the amount. The plaintiff issued summons for payment of the amount together with interest *a tempore morae* from date of demand, as well as costs.
- [3] The contract contains an arbitration agreement. The defendant raised a special plea that the court proceedings be stayed and the dispute referred to arbitration. In its plea over, the defendant denies liability for payment of the amount claimed. According to the plea over, the payment certificate attached to the particulars of claim was wrong and withdrawn by principal agent on 22 September 2023. An amended payment certificate was issued in its stead. In terms of the amended payment certificate, the principal agent certified the sum of R 879 403,82 to be due by the plaintiff to the defendant. In a counterclaim, the defendant claims payment from the plaintiff in the sum of R879 403,82.

- [4] The plaintiff did not raise an exception to any of the defendant's pleadings. On 17 October 2023 the plaintiff delivered an application for summary judgment against the defendant for payment of the amount, together with interest and costs. Its plea to the defendant's counterclaim was delivered on the same day. The plaintiff denies the principal agent issued an amended payment certificate. It further denies that the principal agent is entitled to amend a payment certificate as the contract does not empower him to do so. The plaintiff also avers the amended payment certificate attached to the defendant's plea and counterclaim does not bear the signature of the principal agent.
- [5] In its affidavit supporting the application for summary judgment, the plaintiff alleges it was terms of the contract that the defendant was supposed to commence with construction on 7 October 2021, but delayed doing so by four months in that the bulk earth works and foundations were defective and required repair. In addition, it is alleged the defendant did not timeously arrange concrete foundations for tower cranes which caused delays. To substantiate its allegation that construction was supposed to have begun on 7 October 2021, it relies upon a Nedbank payment guarantee, a copy of which is annexed to the affidavit. None of these were alleged in its particulars of claim, nor in its plea to the counterclaim (*"the additional terms"*).
- [6] On 16 April 2025 the defendant filed a notice of intention to amend its plea and counterclaim. The amended pages were filed on 16 May 2025. Attached to the amended plea is the same amended payment certificate attached to its initial pleadings, now bearing a signature which purports to be that of the principal agent. It also contains allegations as to the basis upon which it is alleged the certificate relied upon by the plaintiff is wrong. It is pleaded, amongst others, that the practical completion date of the construction works to be rendered by the plaintiff was 28 July 2022, which the plaintiff failed to do. No extension of time was sought by the plaintiff. The construction works was only completed on or about 29 November 2022. In the result, according to the defendant, practical completion of the construction works was delayed by 124 calendar days. In terms of the contract data to the contract, it was agreed that penalties for late completion of the works would be calculated at R 13 873,35 per calendar day.

In consequence, so the defendant alleges, penalties due by the plaintiff to the defendant equals R 1 720 295,83 (*“the penalties”*) as determined by the principal agent. The principal agent applied the penalties to the amount previously certified by him due to the plaintiff. The amended payment certificate was issued in terms of which the principal agent certified R 878 403,82 to be due by the plaintiff to the defendant.

- [7] The defendant filed its affidavit resisting summary judgment on 29 May 2025. Therein defendant denies the allegations made by the plaintiff in its supporting affidavit are true and correct. It contends the court should disregard the Nedbank payment guarantee annexed to the supporting affidavit as well as the allegations pertaining to the defendant having delayed commencing construction due to the bulk earth works and foundations being defective and requiring repair. The defendant confirms in detail the allegations pleaded in its amended plea and counterclaim pertaining to the plaintiff’s failure to complete the construction work at the agreed time, not having obtained an extension, the project being delayed by 124 days, contract data to the contract providing for a penalty of R 13 873,35 per calendar day and the principal agent withdrawing his previous certificate and amending it. A confirmatory affidavit by the principal agent is annexed to the resisting affidavit.

The parties’ pertinent arguments and submissions in summary

- [8] Regarding the issue of arbitration the plaintiff contends there in fact is no real dispute between the parties which would trigger the arbitration agreement. It is argued, with reference to *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*¹ that the object of arbitration is the resolution of disputes. For arbitration to arise, a dispute must exist. The plaintiff’s case is that the defendant has not set out any legal basis to impugn the payment certificate upon which it relies for its claim in that the claim is not disputed in the sense there are competing considerations. If such disputes are found to exist, the matter would be subject to arbitration in terms of the arbitration clause.

¹ 1980 (1) SA 302 (D&CLD) at 304E-G, per Didcott J

- [9] On behalf of the plaintiff it was argued that the contract does not provide for the principal agent to withdraw his certificate as relied upon by the plaintiff in its claim. Nor to amend it or issue a further certificate. In addition, the delay alleged by the defendant upon which its defence and the counterclaim are based by virtue of the resultant penalties, was not caused by the plaintiff, but by the defendant. Further it is contended the resisting affidavit lacks particularity and such facts as are presented, do not constitute a defence even if proved at trial. It was also contended the amount claimed by the defendant in its counterclaim is illiquid in that the contract data to the contract as alleged by the defendant is not before court. It was submitted that the defendant failed to explain the “*amended payment certificate-10 and the annexures thereto.*” In the result, the defendant’s version is bald, sketchy, untenable and does not constitute a *bona fide* defence.
- [10] On behalf of the defendant the argument was that the plaintiff has not met the peremptory requirements of Rule 32(2)(b) for it to place further evidence before court. Rule 32 does not permit further evidence to be produced by way of the supporting affidavit or for the cause of action to be amplified. In consequence, the additional terms alleged by the plaintiff and the Nedbank payment guarantee should be disregarded.
- [11] The defendant contended the principal agent was at liberty to issue a further certificate. It was pointed out that the plaintiff in its affidavit in support of summary judgment accepted that the principal agent may issue a further certificate in having alleged “*Only the principal agent was entitled to issue a further payment certificate...*”
- [12] In addition, in terms of the contract the principal agent is entitled to adjust the net amount certified to include, amongst others, amounts due to the defendant or to the plaintiff. In any event, so it is argued, it is not clear on what grounds the plaintiff alleges the principal agent was not entitled to amend the initial certificate. Even if the principle agent was not so entitled, the plea and counterclaim discloses the plaintiff to be indebted to the defendant in the liquidated amount of R 1 720 295,93 which is indicative of the defendant having a *bona fide* defence.

Consideration

[13] Since the amendment of Rule 32,² an affidavit in support of summary judgment is required, amongst others, to identify any points of law relied upon and to briefly explain why the defence pleaded does not raise any issue for trial.³ Plaintiff's counsel referred the court to *Absa Bank Limited v Saunderson* 2024 (4) SA 582 (NCK)⁴ wherein Olivier AJ held, with particular regard to *Tumileng*,⁵ that "...in view of the fact that more is expected of a Plaintiff in summary judgment proceedings post-amendment, a more liberal approach is necessary in as far as the allowance of additional evidence is concerned as long as the evidence that is provided by the plaintiff serves only to support the contentions by the Plaintiff as to why the defences raised by the Defendant, do not raise issues for trial and in the event of this evidence being documentary in nature, same is attached to the supporting affidavit so that the Defendant in the matter is in a position to answer thereto."

[14] In *Tumileng* Binns-Ward J considered the amended rule 32(2)(b) "...makes sense only if the word 'genuinely' is read in before the word 'raise' so that the pertinent phrase reads 'explain briefly why the defence as pleaded does not genuinely raise any issue for trial'...The position would have been made clearer had the words 'does not make out a bona fide defence' been used"⁶

[15] I find myself broadly aligned with these judgments. In my view, the additional allegations and the Nedbank payment guarantee should not be disregarded in adjudicating whether or not a *bona fide* defence has been made out.

[16] Much of previous judgments relating to summary judgment remains authoritative, but must be read and interpreted with due regard to the changes wrought by the amended rule. A court considering summary judgment is not required to determine the substantive merits of the case before it. It should not

² The amendments to rule 32 has been in effect since 1 July 2019

³ Rule 32(2)(b): "*The plaintiff shall, in the affidavit..., 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.*"

⁴ At [37]. An application for leave to appeal was dismissed.

⁵ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E&D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC)

⁶ *Tumileng* at [21]

become involved in determining disputes of fact on the merits. A court is charged with adjudicating whether a defence as pleaded and set out in the affidavit resisting summary judgment is not a sham, raised for purposes of delay.⁷

[17] An opposing affidavit is required to fully set out the nature and grounds upon the defence relied upon and the material facts in support thereof. Such facts and evidence need not be exhaustively particularised- it would be sufficient if the court is enabled to discern the existence of a *bona fide* defence.⁸ Having regard to the amended rule 32(2)(b), depending on a plaintiff's explanation why the defence does not raise any issue for trial, a defendant may be expected to engage with such averments.⁹ However, the test to be applied remains whether or not a defendant has set out facts that if proved at trial, will constitute a valid defence against the claim.¹⁰

[18] The defendant is obliged only to disclose a genuine defence and not a 'sham'. In 2023, the Supreme Court of Appeal confirmed that what the prospects of success might be is irrelevant. Provided the defence is legally cognisable "*...in the sense that it amounts to a valid defence if proved at trial, then an application for summary judgment must fail.*"¹¹

⁷ Tumileng at [23]

⁸ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E: "Where 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 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 ground 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 to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant 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 . . . "

⁹ Tumileng [24]

¹⁰ *Visser and Another v Kotze* [2013] JOL 29985 (SCA) at [11]: "As already indicated, one of the ways in which a defendant can avoid summary judgment, is to satisfy the Court by affidavit that he or she has a *bona fide* defence to the claim on which summary judgment is being applied for. The word "satisfy" does not mean "prove". What the rule requires is that the defendant must set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim."

¹¹ *Cohen N.O and Others v Dean* [2023] JOL 58657 (SCA) at [29]. The plaintiff in the supporting affidavit had dealt with the defences raised in the plea, as required by the amended rule 32(2).

[19] In *Liquor Network Agency*¹² a full court recently confirmed that in summary judgment proceedings a defendant is not required to persuade the court of the correctness of the facts alleged in its defence or, where the alleged facts are disputed, there exists a preponderance of probabilities favouring the defence. Nor does a court need to endeavour weighing or deciding disputed factual issues on a balance of probabilities. A court “...*merely considers whether the facts alleged constitutes a good defence in law and whether that defence appears to be bona fide.*”¹³

[20] In my view, the additional terms and the Nedbank payment is not indicative of the absence of a *bona fide* defence. The plaintiff appears not to deny the construction works was not completed on the date specified in the contract, namely 28 July 2022. Nor that no extension for the date of completion was sought or granted by the principal agent as provided for in the contract. Regarding the contract data which the defendant alleges is part of the contract and which stipulates the extent of the daily penalty for late completion, the plaintiff's complaint is that it is not on the papers before me. Its existence is not denied.

[21] The crux of the plaintiff's case is that the reason for the delay is to be laid at the door of the defendant. It frames the additional terms and the Nedbank payment guarantee as “...*material express, alternatively tacit, further alternatively implied terms...*” Considering the manner in which these allegations are set out, they clearly were not terms of the contract:

- a. “10.17 *The applicant was supposed to start the construction on the site on 7 October 2021 as per the Nedbank payment guarantee issued to the Applicant attached hereto marked **Annexure “SJ2”***”

The date of the Nedbank payment guarantee is 24 June 2022, long after the conclusion of the contract. It follows it was not a term of the contract.

- b. “10.18 *The Respondent delayed the Applicant's start date of construction by four months in that the bulk earth works and foundations were*

¹² *Liquor Network Agency CC and Another v Skylin Beverages CC* 2025 (2) SA 507 (GJ)

¹³ *Liquor* at [29]

defective and required repair. The Respondent's concrete foundations had latent defects and had [sic] to be repaired."

"10.19 Additionally, the Respondent did not timeously arrange concrete foundations for the tower cranes which caused the delays."

"10.20 Despite this, the Applicant duly complied with all of its obligations in terms of the Agreement."

This all allegedly occurred subsequent to the conclusion of the contract. They are not terms of contract, but rather allegations of facts which followed upon the conclusion of the contract.

[22] The additional allegations are denied by the defendant in its affidavit, albeit not directly, but by way of a general denial- the defendant denies the allegations contained in the plaintiff's supporting affidavit are true and correct. Nevertheless, the version put up by the defendant in its plea and counterclaim as well as its resisting affidavit directly contradicts the plaintiff's version, in particular as regards the cause of the delay in completing the construction works.

[23] On the one hand, a plaintiff's right to relief ought not to be frustrated by a defendant's delaying strategy in contriving a defence. On the other hand, a court should be resistant to deprive a defendant of his right to defend, unless the contrary is indicated when applying the tests referred to before. I take to heart the full court's view in *Liquor* that a court must guard against injustice to a defendant who is called upon without the benefit of further particulars, discovery or cross examination to satisfy it of the existence of a *bona fide* defence.¹⁴

[24] It is not clear to me upon what basis the plaintiff contends the principal agent were not at liberty to have done as he did, save upon an interpretation of the contract as it stands. In *University of Johannesburg v Auckland Park*

¹⁴ *Liquor* at [26]

*Theological Seminary and Another*¹⁵ the Constitutional Court confirmed that in interpreting a contract, even in the absence of ambiguity, an expansive approach should be taken to the admissibility of evidence pertaining to the context in which it is used and the purpose of a disputed term, though extrinsic evidence is not always permissible in terms of the rule against parol evidence. The factual matrix of a contract is important in interpreting its terms. I do not propose to deal with *University of Johannesburg* in any particularity. It is mentioned to illustrate that in interpreting a contract context may well need to be considered upon presentation of extrinsic evidence.

[25] In *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* it was held that the conduct of the parties in implementing their contract may provide evidence as to how reasonable business people construed a disputed term.¹⁶ With all this in mind, I am loathe to venture into interpreting the contract in the absence of the parties having had the benefit of a full ventilation of the context of the contract assisted by discovery, possible *viva voce* evidence and the like. In any event, at the summary judgment stage, it is not the court's function to interpret disputed contractual terms.

[26] On the papers before me it is apparent the principal agent, who was appointed with full authority and with the obligation to act in terms of the contract, recanted on the certificate issued by him and relied on by the plaintiff.

Conclusion

[27] The principal agent's change of heart is significant in the context of the applicable requirements and tests relating to the consideration of an application for summary judgment. In terms of the contract, amongst others, the principal agent was seized with administering and monitoring the progress of the works, meeting regularly with the contractor to inspect and facilitate the progress of the works, recording all actions taken by the parties including discussions held, progress of the works, contract instructions and decisions regarding delays and payment in the contract minutes at the periods stated in the contract data. He

¹⁵ See also *Capitec Bank Holdings Ltd and Another v Coral Lagoon Inv all actions taken by theestments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA)

¹⁶ [2012] ZASCA para 15

was obliged to issue contract minutes to the parties for action. The contract minutes were to be tabled for approval at the following meeting. To my mind, these are indicative of the principal agent having intimate knowledge of the works and its progress, as well as delays, what caused it and what the parties decided in respect of it. The issuing of an amended certificate favouring the defendant lends weight to the contention that the delays were the result of the plaintiff's conduct, rather than the defendant's.

[28] For these reasons, I find sufficient particularity has been provided by the defendant to establish a *bona fide* defence. I decline to grant summary judgment. Having regard to all of the above, I grant an order as set out below.

Order

1. The application for summary judgment is dismissed;
2. The defendant is granted leave to defend;
3. Costs are costs in the cause.

██████████

N. S. KRÜGER
NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **1 September 2025**.

For the plaintiff:	Adv R Pottas instructed by Cavanagh & Richards Attorneys
For the defendant	Adv SN Davis instructed by Casper le Roux Incorporated
Date of hearing:	12 June 2025
Date of judgment:	1 September 2025

