

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING: SUMMARY JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017-02972

In the matter between:

ZONE FOUR ELECTRICAL CONTRACTORS CC

PLAINTIFF

and

THE KUNENE REGIONAL COUNCIL

FIRST DEFENDANT

CHAIRPERSON OF THE REGIONAL TENDER BOARD FOR

THE KUNENE REGIONAL COUNCIL

SECOND DEFENDANT

THE MINISTER OF REGIONAL AND LOCAL

GOVERNMENT, HOUSING AND RURAL DEVELOPMENT

THIRD DEFENDANT

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

FOURTH DEFENDANT

WML CONSULTING ENGINEERS (PTY) LTD

FIFTH DEFENDANT

Neutral citation: *Zone Four Electrical Contractors CC v The Kunene Regional Council* (HC-MD-CIV-ACT-CON-2017/02972) [2018] NAHCMD 111 (26 April 2018)

Coram: PRINSLOO J

Heard: 23 March 2018

Delivered: 25 April 2018

Reasons: 26 April 2018

Flynote: Civil Practice – Application and Motions – Summary Judgment – Opposition to — Requirements in terms of Rule 60 of the High Court rules — Respondent required to show and satisfy court that he/she had bona fide defence to claim — Material facts upon which defence based must be disclosed with sufficient particularity and completeness to enable court to decide whether bona fide defence disclosed — Not required to disclose all details as would be case in trial proceedings.

Summary: The plaintiff and the first defendant concluded a written agreement for the construction of electrical infrastructure in Otuzemba, Opuwa. In terms of the agreement, the plaintiff was appointed as the contractor and would carry out the work as set out in the agreement. Further in the agreement, the fifth defendant was appointed as the principal agent for the project and would oversee the progress of the project on behalf of the first defendant. The total remuneration in terms of the agreement that would be paid to the plaintiff once the project was completed would be NAD 5,232,214.30.

Upon completion of the project, the fifth defendant would issue interim, penultimate and final payment certificates in regards to the progress of the works, for payment of the sum stated in the relevant certificate due to the plaintiff payable by the first defendant within the period stated in the relevant certificate. The afore-pleaded certificates, once duly issued, represent acknowledgments of debt.

The plaintiff duly complied with the terms of the agreement and finalized the project. The fifth defendant (acting as agent for the first defendant) issued a final payment certificate in the amount of NAD 286,867.17 (annexure ZF to the particulars of claim).

The first defendant breached the terms of the agreement and final payment certificate, in failing to pay the plaintiff the amount of NAD 286,867.17.

The first defendant in its defence argues that the plaintiff failed to comply with the peremptory provision as set out in Rule 45(7) to attach the written contract relied upon, which renders the plaintiff's claim and/or summons defective as it constitutes an irregular proceeding.

Held – the defence raised in terms of Rule 45(7) is purely technical and has no merits.

Held – Summary judgment procedure is not intended to shut the defendant out from defending his claim however it is very clear that it has no sustainable defence in this matter

ORDER

Application for summary judgment is granted against the First Defendant in the following terms:

- a) Payment in the amount of NAD 286,867.19;
- b) Interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of final payment;
- c) Cost to include cost of one instructed and one instructing counsel limited to Rule 32(11).

JUDGMENT

Prinsloo J:

Introduction

[1] The plaintiff is the applicant in the application for summary judgment, launched on 25 January 2018. The application for summary judgment followed the first defendant's noting of its defence to an action initiated on 17 August 2017.

[2] Summary judgment is sought against the first defendant for payment in the amount of NAD 286,867.19 plus interest and costs¹.

The Plaintiff's cause of Action

[3] The cause of action against the first defendant essentially entails the following:

a) During or about 19 July 2011 the plaintiff (represented by the Mr. Leonard Asser in his capacity as the sole member of the plaintiff) and the first Defendant (represented by Mr. Katoma) concluded a written agreement for and in relation to the provision of electrical infrastructure by the plaintiff in Otuzemba, Opuwa Town (the project). In terms of the agreement:

- i) the plaintiff was appointed as the contractor and would carry out the work more fully set out in the agreement, specifically the project;
- ii) the fifth defendant was appointed as the principal agent for the project and would oversee the progress of the project on behalf of the first defendant;
- ii) the total remuneration in terms of the agreement that would be paid to the plaintiff in terms of the agreement was NAD 5,232,214.30;

¹ Application for summary judgment dated 25 January 2018, prayers 1 to 3.

- iii) the fifth defendant would issue interim, penultimate and final payment certificates in regards to the progress of the works, for payment of the sum stated in the relevant certificate due to the plaintiff payable by the first defendant within the period stated in the relevant certificate;
 - iv) the period of payment by the first defendant to the plaintiff of any payment certificate would be 30 days from the date of issue of the certificate;
 - v) the afore-pleaded certificates, once duly issued, represent acknowledgments of debt.
- b) The plaintiff duly complied with the terms of the agreement and finalized the project. Hereafter on 21 August 2014 the fifth defendant (acting as agent for the first defendant) issued a final payment certificate in the amount of NAD 286,867.17 (annexure ZF to the particulars of claim).
- c) The first defendant breached the terms of the agreement and final payment certificate, in failing to pay the plaintiff the amount of NAD 286,867.17.
- d) The final payment certificate (annexure ZF to the particulars of claim)
- i) was issued by the fifth defendant (in its capacity as the first defendant's principle agent;
 - ii) constitute an acknowledgment of indebtedness by the first defendant towards the plaintiff;

- ii) reflects the outstanding balance of remuneration due to the plaintiff by the first defendant in respect of the plaintiff's performance in respect of the project;
- iii) in its own terms, expressly and unconditionally records a 'promise to pay the amount on this Certificate' to the plaintiff.

Grounds of defendant's opposition of the summary judgment application

[4] The first defendant resists the application for summary judgment on the grounds that the:

- a) there was non-compliance with Rule 45(7)
- b) reliance on section 2(1) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.
- c) reliance on 'government protocol and systems' and 'general operation protocols'

[5] At the commence of the hearing in this matter Mr Ndlovu, on behalf of the respondent, concede that the reliance on the section 2(1) of Limitation of Legal Proceedings (Provisional and Local Authorities) Act is not applicable to the matter at hand and I am therefor not concerned with the aspect of the case.

Principles governing summary judgment

[6] The practice relating to summary judgments is governed by Rule 60 of the High Court Rules. Rule 60(5) provides as follows.

- (5) On the hearing of an application for summary judgment, the defendant may -
- (a) where applicable give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given; or
 - (b) satisfy the court by –
 - (i) affidavit which must be delivered before 12h00 on the court day but one preceding the day on which the application is to be heard); or
 - (ii) by oral evidence given with the leave of court, of himself or herself or of any other person who can swear positively to the fact

that he or she has a *bona fide* defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied on.’

Defence to be set out fully

[7] It is the case of the applicant that the first respondent does not fully set out its defence to the claim but instead reverted to purely technical defences in an effort to defeat the application for summary judgment.

[8] It is trite that opposing affidavit has to contain a sufficient exposition of the facts which, if they were later to be proven and accepted by the trial court as true, would constitute a good defence in law.²

[9] The matter of *Kukuri v Social Security Commission SA17/2015* Mainga JA referred to the matter of *Maharaj v Barclays National Bank*³ where Corbett JA had this to say about the ambit of the rule of disclosure as it applies to the remedy of summary judgment:⁴

² Breytenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 227.

³ 1976 (1) SA 418 (A) at 426C

⁴ At 426 A -426 E

'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 the whole or part of 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.'

[10] The principle generally requires that details of the defence, the grounds thereof and the underlying material facts must be disclosed with sufficient particularity and completeness in the defendant's opposing affidavit.

Facts undisputed

[11] With regards to the sufficient particularity and completeness of the opposing affidavit the following issues were not addressed and is therefore regarded as undisputed. The first defendant-

- a) does not deny or dispute that the plaintiff has in its possession a Certificate of payment to the Contractor by the Employer ('ZF1');
- b) does not deny or dispute that it is in possession of the written agreement;
- c) does not deny or dispute the conclusion of the agreement or its material terms as set out in paragraph 3.2 supra;

- d) does not deny or dispute that the plaintiff duly complied with its obligations in terms of the agreement (relevant to the relief sought);
- e) does not deny or dispute that the plaintiff attended to and finalized the project;
- f) does not make out a case for prejudice suffered in the answering affidavit.

Purely technical defence

[12] The issues left undisputed cuts to the heart of this matter and if these facts remain undisputed is there then merits in the argument on behalf of the applicant that the defence of the respondent is purely technical?

[13] As is clear from paragraph 4 supra the defences of the respondent is now limited to a) non-compliance with Rule 45(7) and b) reliance on 'government protocol and systems' and 'general operation protocols'. The defence clearly does not go to merits of the matter before me.

[14] In the matter of *Liberty Group Ltd v Singh and Another* 2012 (5) SA 526 (KZD) at 538 B-H Swain J stated as follows:

'[43].....The approach to be adopted to procedural or technical irregularities in a plaintiff's cause of action in summary judgment proceedings has been dealt with in a number of cases. The high-water mark in an insistence upon procedural or technical regularity on the part of a plaintiff in summary judgment proceedings is found in the remarks of Marais J in the case of *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of South Africa Ltd* 1959 (3) SA 362 (W) at 366F, where after pointing out that summary judgment is a stringent remedy and that it can only be granted if there is no doubt that the plaintiff has an unanswerable case, said the following:

“If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant.”

However, in *Van den Bergh v Weiner* 1976 (2) SA 297 (T) at 300B–C the full bench endorsed the view of Boshoff J, in *WM Mentz & Seuns (Bpk) v Katzake* 1969 (3) SA 306 (T) at 311A, that the passage in *Mowschenson* was intended to allow a defendant to raise any technical point, no matter how insignificant, and thereby defeat the grant of summary judgment. It was never the intention to give weight to purely technical defences, because that would defeat the object of summary judgment proceedings.’

[15] Reliance on the non-compliance with rule 45(7)⁵ appears to be purely technical. It is the case of the applicant that it does not have the agreement as set out in para 3.2 which sets out the terms of the agreement and that it verily believes that same is with the first respondents, alternatively the fifth respondent.⁶ However the first respondent neither confirm nor denies this.

[16] Instead the first respondent argues that the plaintiff failed to comply with the peremptory provision as set out in Rule 45(7) to attach the written contract relied upon, which renders the plaintiff's claim and/or summons defective as it constitutes an irregular proceeding.

[17] First respondent referred the court to *Moosa and Others NNO v Hassam and Others NNO* 2010 (2) SA 410 (KZP) where it was held that a party basing its cause of action upon a written agreement should obtain a true copy of the agreement before advancing its claim so as to comply with rule 18(6).⁷

⁵ Rule 45(7) states as follows:

(7) A party who in his or her pleading relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or part relied on in the pleading must be annexed to the pleading.

⁶ Paragraph 7 of the Particulars of Claim.

⁷ Wording of South African Rule 18(6) is similar to Namibian Rule 45(7).

[18] This issue was considered in the matter of *Namene v Khomas Regional Council*.⁸ One Mr. Namene opposed the action and filed a plea and counterclaim in which he relied on a written lease agreement for his occupation of the property and counterclaimed for improvements. Mr. Namene was unable to attach the agreement or a copy thereof because it had become lost or was not available to him. The Khomas Regional Council excepted to the pleadings as lacking in the necessary averments to sustain the defence and counterclaim because rule 18(6) of the erstwhile High Court Rules required the written agreement relied upon to be attached to the pleadings.

[19] The High Court upheld the exception to the counterclaim and found that the wording in rule 18(6) is peremptory. On appeal Smuts JA (Hoff JA and Chomba AJA concurring) stated the following:

[18] The approach of the High Court is however incorrect. The elements of a cause of action or defence are determined by the substantive law and not with reference to the rules which set out procedural requirements. Occupying property with consent in the form of a lease agreement is a defence to a claim for eviction as a matter of substantive law. Where it is impossible for a party relying upon an agreement to produce the original written agreement or copy, the rules of evidence permit that party to prove its execution and terms by other evidence.

And further at:

[21] An exception similar to that taken in this matter was roundly rejected by a full court in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC). The court's well-reasoned approach is captured in these paragraphs:

[9] The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing

⁸ 2016 (3) NR 701 (SC) at par [18].

(eg a contract for the sale of land or a suretyship), what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

[10] In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded, and the general rule is thus that the original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. . . .

[11] That then is the substantive law. The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463B – E and authority there cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules (see *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) para 12). . . .

[12] A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be ultra vires. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. (I may add that it was only in 1987 that rule 18(6) was amended to require a pleader to annex a written copy of the contract on which he relied. Prior to that time the general position was that a pleader was not required to annex a copy of the contract — see, for example, *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 194B – H; *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* D 1975 (3) SA 944 (W) at 950D – H.)”

[20] I am of the opinion that the *Moosa*-matter is distinguishable from the matter *in casu*. In *Moosa* an application to set aside a pleading as an irregular step in conflict with the rules was brought. The approach of the court in *Moosa* should be seen within that confined and limited context of non-compliance with rule 18(6) as an irregular step therefore reliance upon the *Moosa* is not apposite.

[21] First respondent cannot rely on irregular step as in terms of Rule 61(1) the respondent had to, within 10 days from becoming aware of the irregularity apply to the managing judge to set aside the step or proceeding. Such interlocutory application must be on notice to all parties and applicant in such an application must specify in the notice the particulars of the irregularity and allege as well prejudice claimed to be suffered as a result of the alleged irregular step (Rule 61(2)). Prejudice must specifically be alleged and no reference is made in the opposing affidavit to prejudice.

[22] I am of the opinion that the defence raised in terms of Rule 45(7) is purely technical and has no merits.

Payment certificate

[23] The plaintiff attached the certificate of payment to the particulars of claim. The first defendant can hardly now, whilst apparently being in possession of the written agreement, cry foul that the plaintiff did not attach same to the particular of claim and then argue that as no contract setting out the express terms has been attached that the court cannot interpret the attached certificate to constitute an acknowledgment of debt.

[24] Surely if the terms as set out in the particulars of claim was incorrect in the averments made the first respondent should have raise that in it its defence. The defendant queries the assertion that the certificated ZF1 constitutes an acknowledgment of debt and avers that it does not constitute one as it bears only one signature and does not have any counter signatures whose addition to the certificate would render it an acknowledgment of debt.

[25] For purposes of this ruling I will recreate the relevant portion of the certificate in question:

CERTIFICATE

OF PAYMENT TO THE CONTRACTOR BY THE EMPLOYER
THIS CERTIFICATE OF PAYMENT TO BE PRESENTED BY THE CONTRACTOR TO
THE EMPLOYER FOR PAYMENT

I, as the duly authorised Principal Agent of the Employer, certify in terms of the contract dated July 19, 2011

For work described in the Contract as THE PROVISION OF ELECTRICAL INFRASTRUCTURE IN
OTUZEMBA- OPUWO TOWN

Situated at OPUWU-KUNENE REGION

Payment a set out is due by the KUNENE REGIONAL COUNCIL under the auspices of MINISTER
OF MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND
HOUSING

of (address of Employer) Private Bag 502, OPUWO

to the contractor ZONE FOUR ELECTRICAL CONTRACTORS CC

of (address of Contractor) P O BOX 877, ONDANGWA

and accordingly this Certificate is an acknowledgment of debt by the Employer to the Contractor and a promise to pay the amount of this Certificate to the Contractor, at the Contractor's address as set out above within 30 days of the date of issue of this Certificate (unless otherwise stated in the Contract)

[26] The calculations that follows hereafter is not repeated however the total amount due as calculated was indicated as N\$ 286 867.19. The certificate was signed on behalf of the fifth defendant WML Consulting Engineers on 21 August 2014.

[27] From the certificate it is clear that the fifth defendant was the authorised principal agent of the first defendant.

[28] The issue that the first defendant has with this certificate is that it was not co-signed by it or the line ministry or the plaintiff and thus government protocol was not followed.

[29] In the matter of *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* 1973 (4) SA 181 (D) at 183H - 184H, the court found that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence

that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor.

[30] The final certificate quite clearly creates a debt due. Such a debt may be sued for without a prior demand.⁹

[31] Van Heerden J further states the following in the *Randcon* case at page 184 G-H: 'It makes no difference, in my view, whether a debtor 'acknowledges' that an indebtedness is due by him to another or whether he 'certifies' to that effect. In both instances he admits that he owes an amount which is due.'

[32] The terms of the agreement in alleged in the particulars of claim was not denied and is taken to be admitted. Therefore, whether first respondent signed the final certificate or not, it remains indebted by virtue of the signature of its agent.

[33] I am satisfied that upon proper construction of the certificate, evidences by its terms it amounts to an unconditional acknowledgment of indebtedness in the amount as set out in the particulars of claim.

Conclusion

[34] Summary judgment procedure is not intended to shut the defendant out from defending his claim however it is very clear that it has no sustainable defence in this matter. The work was done by the plaintiff and certified to be correctly done. Plaintiff is entitled to payment as clearly set out in the final certificate. Government protocol and technical defences cannot be allowed to undermine the plaintiff's claim.

[35] My order is therefore as follows:

⁹ Cf. *Jammie and Another v Emil*, 1951 (4) SA 460 (T)

Application for summary judgment is granted against the First Defendant in the following terms:

- a) Payment in the amount of NAD 286,867.19;
- b) Interest on the aforesaid amount at the rate of 20% per annum *a tempore morae* from date of judgment to date of final payment;
- c) Cost to include cost of one instructed and one instructing counsel limited to Rule 32(11).

JS Prinsloo
Judge

APPEARANCES:

PLAINTIFF:

D Obbes
instructed by Fisher, Quarmby and Pheiffer,
Windhoek

DEFENDANTS:

M Ndlovu
of Government Attorneys, Windhoek