



NOT REPORTABLE

CASE NO: SA 11/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RADIAL TRUSS INDUSTRIES (PTY) LTD

Appellant

and

AQUATAN (PTY) LTD

Respondent

Coram: SHIVUTE CJ, SMUTS JA and NKABINDE AJA

Heard: 19 March 2019

Delivered: 10 April 2019

Summary: This appeal arises from a summary judgment granted by the court *a quo*. The issue on appeal is whether the appellant as defendant *a quo* met the requisites of rule 60(5) of the rules of the High Court to resist an application for summary judgment in that it satisfied the High Court that it had a *bona fide* defence to the respondent's action by disclosing fully the nature and grounds of the defence and the material facts relied upon.

The court *a quo* found that the appellant did not meet the standard of disclosure required to resist the summary judgment application. It refused to allow the appellant to adduce factual evidence from the Bar and that the appellant was confined to its opposing affidavit.

Applying *Maharaj v Barclays National Bank Ltd*, the court held that, in a summary judgment application, the court is not called upon to decide factual disputes or express any view on the dispute. It is called upon instead to determine firstly whether a defendant has 'fully' disclosed the nature and grounds of the defence and the material facts upon which that defence is founded. In the second instance the court is to determine whether on the facts set out by the defendant that it appears to have – as to either the whole or part of the claim – a defence which is *bona fide* and good in law. If satisfied upon these two criteria, the court must refuse summary judgment. This position is confirmed in *Kukuri v Social Security Commission*.

It is held that, the court below rightly ruled that the appellant was confined to its opposing affidavit.

It is further held that, the court below correctly found that the defence set out in the appellant's opposing affidavit fell short of the requisites of rule 60(5) dispute.

The appeal is dismissed with costs.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and NKABINDE AJA concurring):

[1] The issue to be determined in this appeal concerns whether the appellant as defendant met the requisites of rule 60(5) of the rules of the High Court to resist summary judgment by satisfying to the High Court that it had a bona fide defence to the respondent's (plaintiff's) action by disclosing fully the nature and grounds of the defence and the material facts relied on. For the sake of clarity, the parties are referred to as plaintiff and defendant.

[2] Masuku, J of the High Court found that the defendant's opposing affidavit fell short of meeting the requirements of that sub-rule and granted summary judgment in the sum of N\$440,228.30, plus interest and costs against the defendant. The defendant appeals against that judgment.

The plaintiff's claim

[3] The particulars of claim plead that the parties entered into an agreement in terms of which the defendant accepted the plaintiff's quotation to supply and install a specialised (and specified) geo-membrane lining for 7 dams at a fish farming project in the Omaheke region. Aspects of the quotation were subsequently varied and accepted by the defendant. The plaintiff proceeded with the supply and installation of the membrane lining of the dams and alleged that it complied with all the terms and conditions of the agreement, claiming payment of an amount of

N\$440,288.30 representing the outstanding balance due to it, together with interest and costs.

[4] After the defendant entered an appearance to defend, the plaintiff applied for summary judgment under rule 60.

The defendant's opposing affidavit

[5] The defendant's opposing affidavit was deposed to by one of its shareholders and directors. It is an engineering concern. The deponent confirms that the parties entered into an agreement for the supply and installation of the geo-membrane lining and does not dispute any of the terms of the agreement set out in the particulars of claim. The deponent however asserts that there were certain further terms including a 5% retention (in the sum of N\$41,480.41) to be held for 12 months after the completion of the works which would then be payable provided there were no defects. The deponent also asserted the existence of a term to the effect that the plaintiff would only receive payment once 'the client consultant engineer had signed a certificate of acceptance of completed work for the work done'.

[6] The defendant states that the works were completed during December 2015. Then follows the statement setting out its defence:

'The work done by the plaintiff was defective and not signed off by the client engineer.'

[7] There is a further statement that the defendant was entitled to withhold payment as the work done 'was defective' and the 'client consulting engineer did not sign a certificate of acceptance of completed work.'

[8] On the basis of these assertions, the affidavit states that the defendant is not liable to the plaintiff 'for the amount claimed or at all.'

[9] A further point is raised that the amount claimed included a retention sum of N\$ 41,480.41 which would not be due as the 12 months period had not expired. The affidavit was deposed to on 16 November 2016.

Approach of the High Court

[10] The application for summary judgment was heard on 7 February 2017 and the court's reasoned judgment granting summary judgment was promptly delivered on 1 March 2017.

[11] The High Court referred to well established authority on the standard of disclosure required by defendants resisted summary judgment and found that the terse statement contending for a defective performance fell far short of satisfying the existence of a *bona fide* defence by disclosing fully its nature and grounds and the material facts relied on. The court referred to the fact that it was not stated in what respect(s) the performance was said to be defective and to the failure to include any facts in support of that contention. The court deprecated the attempt by the defendant's legal representative to introduce factual matter in argument which was not contained in the opposing affidavit and stressed that a defendant is

confined to its opposing affidavit.¹ The court declined to permit counsel to adduce evidence of defects from the Bar. As to the partial defence relating to retention, the court found that insufficient facts were put before it to support that defence.

Counsel's submissions

[12] Ms R Mondo, who appeared for the defendant, argued that the High Court erred in finding that the defendant's opposing affidavit did not sufficiently disclose its defence as required by rule 60(5). Ms Mondo submitted that the defendant's defence is based on the *exceptio non adimpleti contractus* which permitted the defendant to withhold its performance until the plaintiff had duly performed or tendered proper performance of its obligations.

[13] Ms Mondo contended that the nature of the defendant's defence is 'factual and not one based on law' and that the 'material fact' of the breach is that the lining was defective. Ms Mondo further argued 'whether the defects were material or immaterial defects, the law is that the right to reject a defective or incomplete performance does not depend on the seriousness of the defect or the extent of the shortfall'.

¹ This is evident from the transcription of the proceedings a quo where the following discussion appear:

"COURT: You know one of the issues will be that there must be no defects . . . [if] I am of the view . . . that the works is defective I should at least say in what respects and also another point . . . Mr Jacobs . . . submitted . . . that the plaintiff was never even alerted to what the Defence[s] were and was never even given an opportunity to go and remedy those defects. The issue of the defects alleged without any particular . . . appears for the first time in the Answering Affidavit.

MS MONDO: My Lord I would actually submit that that is in fact not true.

COURT: Yes.

MS MONDO: Because it is a Summary Judgment Application . . . My Lord *we did not attach any evidence to that effect but . . . I can competently say and I have documentation in my file . . . that the Plaintiff was indeed informed of the defects and what happen[ed] is that the Plaintiff sent an additional quotation . . . to what is actually being claimed.* Radial Trust requested Plaintiff to come and rectify the works and because . . . the Plaintiff charged and additional ninety thousand . . . Radial Trust was not happy about that My Lord."

[14] Ms Mondo further contended that the defendant was not entitled to payment until a certificate of completion of the work had been signed by the 'client consulting engineer'. As for the retention defence, Ms Mondo argued that the 12 month period would only start to run once the certificate of acceptance of completed work is signed by the 'client consultant engineer'.

[15] As for the court's refusal to accept evidence tendered from the Bar, Ms Mondo stated in her written argument that she was entitled to 'put the record straight when (an) issue was raised' and that the further 'information' provided concerning defects (from the Bar) should have been taken into account by the court, seeking to rely on *Soller NO v G and another*.² After members of the court raised this issue with her, Ms Mondo correctly conceded that it was not open to her to rely on factual matter not properly placed before the court in the defendant's opposing affidavit.

[16] Ms Mondo further argued that the court had failed to exercise its discretion properly in deciding whether to grant summary judgment or not, contending that even if the court determined that the opposing affidavit did not meet the requisites of rule 60(5), it was still incumbent upon it to exercise its discretion whether or not to grant summary judgment and that it failed to exercise that discretion.

[17] Ms Y Campbell, who appeared for the plaintiff, pointed out in her submissions that not one fact was alleged in support of the conclusion of defective performance in the defendant's brief opposing affidavit and argued that the defendant had failed to meet the requisites of the rule. She further argued that the

² 2003 (5) SA 430 (W) at para 32.

defendant had failed to place any factual matter before the court upon which a court could exercise a discretion in its favour, citing *Moder v Teets t/a Neyer's Garage Nachfolger*³ and *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*.⁴

Applicable legal principles

[18] The wording of rule 60(5) closely resembles that of the erstwhile rule 32(3). The differences are merely of drafting style. The essential content and requirements of the sub-rule are identical to the former sub rule. Rule 60(5) provides:

- '(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 interest and costs; or
 - (b) satisfy the court by –
 - (i) affidavit, which must be delivered before 12h00 on the court day but one before the day on which the application is to be heard; or
 - (ii) oral evidence, given with the leave of the 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 the affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied on.'

³ 1997 NR 122 (HC) at 125E-F.

⁴ 2009 (5) SA 1 (SCA) at para 30-33 [2009] ZASCA 23 (27 March 2009 (SCA)).

[19] If a defendant fails to so satisfy the court (or provide security), rule 60(7), like the erstwhile rule 32(5), states that the court 'may enter summary judgment for the plaintiff'.

[20] In discussing the identical requirement under the former rule 32(3), this court recently in *Kukuri*⁵ approved of the leading South African judgment on the issue (*Maharaj v Barclays National Bank Ltd*)⁶ to the effect that the remedy of summary judgment is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bad in law or bogus. In this context, a defendant has the opportunity to successfully oppose such an application by satisfying the court in an affidavit that it has a *bona fide* defence to the claim. The court in *Maharaj* made it clear that the court is not called upon to decide factual disputes or express any view on the dispute. It is instead to determine firstly whether a defendant has 'fully' disclosed the nature and grounds of the defence and the material facts upon which that defence is founded. In the second instance the court is to determine whether on the facts set out by the defendant that it appears to have – as to either the whole or part of the claim – a defence which is *bona fide* and good in law. If satisfied upon these two criteria, the court must refuse summary judgment.

[21] As to the requirement of 'fully' disclosing the defence, the court in *Maharaj* reiterated that whilst a defendant 'need not deal exhaustively with the facts and evidence relied upon to substantiate them', at the very least it is incumbent upon a defendant to disclose its defence and the material facts upon which it is based

⁵ *Kukuri v Social Security Commission* SA 17/2015 [2016] NASC 29 November 2016 unreported at para 10.

⁶ 1976 (1) SA 418 (A) at 423F-G at para 10 of *Kukuri*.

'with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.⁷ This is not an onerous threshold for a defendant to meet. A plaintiff has no right to reply. Nor is the procedure intended to deprive a defendant with a triable issue or a sustainable defence of its day in court as was correctly stressed by Navsa JA in *Joob Joob*.⁸ I agree with Navsa JA that the characterisation of 'extraordinary' or 'drastic' concerning summary judgment would no longer apply after the successful application of this remedy for some 100 years in our courts and that it cannot be stated as weighted against a defendant, given the threshold a defendant is to meet. The remedy is only granted against defendants when it is clear that no defence is raised in response to a claim, thus preventing sham defences from defeating a creditor's rights by delay.⁹

[22] The introduction of judicial case management reinforces the need to disclose the defence and the material facts with sufficient particularity and completeness as it presupposes that parties at an early stage properly disclose their claims and defences to apprise their opponents and the court as to what is in issue in cases and must do so with specificity and not vaguely or evasively.

Application of principles

[23] The plaintiff's particulars of claim reasonably fully sets out its cause of action. In support of its averments as to the contractual regime between the parties, quotations and correspondence are attached. These averments span some nine paragraphs and include nine attachments.

⁷ At p 426D.

⁸ *Joob Joob* at para 32.

⁹ *Id* at para 32.

[24] In alleging that the plaintiff duly performed its obligations, the plaintiff attached a certificate of acceptance of completed work. That certificate included a statement to the effect that the work was completed according to specification and of no damage to the lining and that the measurements of the work were correct. There is provision on the certificate for the defendant to list exceptions. But no exceptions or qualifications were made to the defendant's representative's signature on the form who only inserted 'site is clean' next to the signature, although not signing at the place for client representative on the form.

[25] The particulars also allege that the defendant's non-payment was attributed to cash flow constraints and an email from the person who contracted on behalf of the defendant to that effect was attached to the particulars of claim.

[26] In the defendant's answering affidavit, none of the contractual terms pleaded in the particulars of claim is denied. Instead, the defendant contended for two further terms as being express alternatively implied or tacit terms. These were the retention term referred to and that the plaintiff would only receive payment once 'the client consultant engineer' had signed a certificate of completed work. No documentation or correspondence is attached in support of these terms. The affidavit proceeds to assert that the performance was defective and not payable because 'the client consultant engineer' had not signed the completion certificate.

[27] The defendant does not state in what respect(s) the work was defective. Nor is any correspondence attached concerning that issue or the certificate of the

'client consultant engineer' contended for. Nor is that position explained with reference to the term 'client' or identifying such a person or firm of engineers.

[28] The defendant does not deal with the certificate of completion referred to and attached to the plaintiff's particulars of claim which included a signature of its representative accepting the work as set out above. This crucial allegation is not denied. Nor is it explained at all. It is not sufficient for Ms Mondo to rely upon the fact that the defendant's representative did not sign at the designated place and instead next to the comment made under exceptions, in the absence of any explanation provided for this in the opposing affidavit. Nor is the allegation concerning cash flow problems being the reason for non-payment addressed or dealt with even though it is supported by an email addressed by a person purporting to be an engineer and who contracted on behalf of the defendant. Significantly no mention is made of any defects in this email. Nor is this email denied or explained in any manner at all.

[29] Presumably realising that the sketchy nature of the defence, so lacking in particularly, and thus failing to meet the requirements of rule 60(5), Ms Mondo in the course of her oral argument at the High Court referred in argument to factual aspects of alleged defects which were not contained in the opposing affidavit.¹⁰ The court below rightly ruled that the defendant was confined to its opposing affidavit. In actual fact, the defendant's legal representative correctly conceded *a quo* that they did not attach any evidence to that effect. In her written argument, Ms Mondo submitted that the court erred in so ruling by referring to *Soller* as authority for adducing evidence through submissions from the Bar in order to

¹⁰ See in this regard fn 1.

clarify or supplement information. That case concerned an opposed custody dispute in respect of a 15 year old boy who himself sought a variation of a custody order and in which s 28(1)(h) of the South African Constitution was invoked which affords every child the right to a legal practitioner in proceedings affecting him or her. The unusual proceedings also involved the Family Advocate, acting under the Mediation in Certain Divorce Matters Act, 24 of 1987 to assist the court in dealing with facts and considerations before it. The passage relied upon in this context was the following:

[32] In the second week of December 2002 received the affidavits of Mr Soller, K and Mrs G. There were numerous annexures. Subsequently I have received a further affidavit from Mrs G and an affidavit from Mr G. I had the opportunity to receive an address from Advocate Brenda Makganyoha, a Family Advocate, and had certain private discussions with her in Chambers concerning the appointment of the s 28 legal practitioner. I heard argument (supplemented by evidence) from the Bar from both Mr and Mrs G (who represented themselves). (It should be noted that Mr G has been declared a vexatious litigant.)'

[30] The passage from that judgment explains the procedure followed and the fact that the presiding judge in that context heard argument from the protagonists themselves – and not their lawyers – which was supplemented by evidence from the Bar in amplifying their respective positions in addition to the numerous affidavits, addresses and private discussions which the presiding judge took into account in the context of that unusual type of proceeding. This statement in the judgment is to be read within the confined context of that case and is not authority (nor intended to be) in any sense at all that counsel can amplify hopelessly inadequate affidavits in application proceedings with evidence from the Bar,

particularly in the present context, an opposing affidavit in summary judgment proceedings.

[31] Ms Mondo for the defendant accepts that its defence is 'factual'. But no facts in support of it are raised. A mere description of the performance being defective is a far cry from fully disclosing the nature and grounds of the defence and the material facts upon which the assertion of being defective are based. The nature of the defence is merely hinted at without any grounds for that assertion being disclosed, let alone fully disclosed, and no facts at all are referred to in support of that contention. As was aptly stated in *Kukuri*:¹¹

'Where the statements of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.'

[32] The defence relating to retention moneys is also not supported by any facts and singularly lacks particularity, especially in the context of the particulars of claim and attached correspondence. The defendant comprehensively fails to meet the first criterion of the sub-rule. It also fails to satisfy that its sketchy defence is *bona fide* and good in law, given the failure to deny or explain the certificate of completion signed by its own representative and the averment that its reason for failing to make payment was because of cash flow problems, supported by an email written by the person who acted for the defendant in contracting with the plaintiff.

[33] The High Court correctly held that the defence set out in the appellant's opposing affidavit fell far short of the requisites of rule 60(5) dispute.

¹¹ At para 13.

Discretion of the High Court

[34] Ms Mondo correctly contends that the High Court has a discretion whether or not to grant summary judgment, even where a defendant fails to meet the requisites of rule 60(5). This is by virtue of the wording of rule 60(7). She further argues that the court below in this instance failed to exercise its discretion and that this failure constitutes an irregularity.

[35] Ms Mondo's reference to *Tesven CC and another v South African Bank of Athens*¹² does not however find application. In that matter the court found that sufficient was said to set out the nature and grounds of a defence but that there was a lack of particularity regarding all material facts relied upon to assess the defendant's *bona fides*. That court held that there was however sufficient evidentiary material to believe that the plaintiff's case may not be unanswerable and that the case fell into an exceptional category where the court below should have exercised its discretion to refuse summary judgment.

[36] Ms Mondo's reliance on this decision is misplaced. Firstly the appellant did not sufficiently set out the nature and grounds of its defence. Only the nature of the defence was vaguely alluded to without any grounds raised to support it. Furthermore, there was no basis in the form of evidentiary material placed before court to believe that the plaintiff's case was not unanswerable. On the contrary, the contentions about defective performance and a completion certificate are raised without addressing allegations in the particulars supported by contemporaneous correspondence which contradict them.

¹² 2000 (1) SA 268 (SCA).

[37] Ms Campbell argued that the defendant had not placed any evidential matter before the court upon which a discretion could be exercised in its favour. As was stated by Hannah J for the full bench in *Moder*,¹³ in approving an unreported judgment, a court cannot exercise a discretion in favour of a defendant on a hunch that there could be a defence lurking somewhere in papers. There would need to be factual material placed before court sufficiently placing in doubt that the plaintiff's case is unanswerable.

[38] Ms Mondo was unable to refer to any factual material or consideration upon which the court should have exercised its discretion to refuse summary judgment. Plainly the exercise of the court's discretion to grant the remedy cannot be faulted.

Conclusion

[39] Consequently, I would dismiss the appeal with costs, including the costs of one instructing and one instructed counsel.

SMUTS JA

SHIVUTE CJ

¹³ At 125E-F. See also *Di Savino v Nedbank* 2012 (2) NR 507 (SC).

NKABINDE AJA

APPEARANCES

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RESPONDENT:

Y Campbell

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