


REPUBLIC OF SOUTH AFRICA



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED.	
	<u>2014.06.23</u>	
	DATE	SIGNATURE

CASE NO: 12808/2014

23/6/2014

In the matter between:

BRAIN SERVICES CC

Plaintiff

and

THE CITY OF TSHWANE MUNICIPALITY

Defendant

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application. The plaintiff instituted action against the defendant for payment of R343 026 for services allegedly rendered to the defendant. In its particulars of claim, the plaintiff alleges that it concluded an agreement with the defendant on 21 January 2013 for rendering of services referred to as 'audit command language (ACL).

[2] It is alleged that the agreement was concluded by the acceptance by the defendant of a quotation by the plaintiff on 21 January 2013. The quotation in issue is annexure 'A' to the particulars of claim. The quotation, dated 18 January 2013, was submitted under the name of '*A. Bouwer Data Analytics*'. On 12 April 2013 a tax invoice from an entity named '*Brain Services A. Bouwer Data Analytics*', was submitted to the defendant for services allegedly rendered by that entity. The plaintiff alleges that the officials of the defendant thereafter acknowledged the defendant's indebtedness to the plaintiff for the services rendered.

[3] The affidavit supporting summary judgment was deposed to by Mr. Anton Bouwer, who states that he is a 'member and director' of the applicant. In an affidavit opposing summary judgment on behalf of the defendant, several points were relied on for resisting summary judgment. However, during argument, the defendant's attorney, Ms *Mbanjwa*, confined her contention to the one denying the existence of an agreement between the parties. It is argued that, *ex facie* annexure 'A', there is no reference to the plaintiff, and therefore that the plaintiff could not have been the contracting party. In response, Mr *Stevens*, counsel for the plaintiff, contended that it is clear that Mr Bouwer is the directing mind of Brain Services, the plaintiff, and had submitted the quotation on behalf of the plaintiff.

[4] The jurisprudential framework within which an application for summary judgment should be considered, is trite and established. The defendant must satisfy the court that he has a *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof. In *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk*¹ it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade

¹ 1978 (1) SA 164 (W) at 171

it that he has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is *bona fide* and good in law. See *Maharaj v Barclays National Bank*².

[5] In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence. This means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88).

[6] In the present matter, as stated earlier, the quotation was submitted under the name of *A. Bouwer Data Analytics*. The tax invoice was submitted under a different entity, *Brain Services A. Bouwer Data Analytics*. The plaintiff is cited as '*Brian Services CC, Registration no CK 88/027982/23*'. These, *prima facie*, are three distinct entities. The apparent confusion can only be determined through evidence. This renders irrelevant then, the plaintiff's allegation that the representatives of the defendant have acknowledged the defendant's indebtedness, as the same question would be asked: In respect of which of the three parties has such acknowledgement been made? But in any event, the plaintiff is wrong in this assertion. The document on which reliance is placed for this contention, is annexure 'E' to the particulars of claim. It appears to be an internal email dated 28 June 2013, from Mr Ronny Shilenge, a manager of the defendant, addressed to Ms Gloudi Visagie, in which the following is stated:

² 1976 (1) 418 (A) at 426

'Be advised that Anton no longer answers or returns my call as a result I am unable to secure the invoice. The entry sheet has been created in order to finalise the commitment, you will have to take over from here.'

[7] This is a far cry from the bold assertion by the plaintiff in its particulars of claim that Mr Shilenge 'confirmed ... that the payment entry sheet had been created to finalise the payment to the plaintiff. It does not say so. There is certainly no mention of the plaintiff in that email. It is also by no means clear on the papers as to what is meant by the statement by Mr Shilenge's statement that he is 'unable to secure the invoice'. Which invoice was he referring to? It should be borne in mind that by that stage, the invoice referred to in para [2] above, had already been submitted.

[8] Given the above, I fail to understand how it can tenably be argued for the granting of summary judgment. One must bear in mind the nature of the remedy of summary judgment. It is an extraordinary and drastic one, which has the hallmark of a final judgment in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial.

[9] In *Dowson and Dobson Industrial Ltd v Van der Werf*³ it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain*⁴, and *Standard Krediet Korporasie v Botes*⁵. Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude*⁶.

[10] In the present matter, I am more than satisfied that the defendant has disclosed a *bona fide* defence. There is nothing inherently untenable about the defendant's defence. If established at the trial, it will be a complete answer to

³ 1981 (4) SA 417 (C) AT 419

⁴ 1984 (4) SA 544 (C) AT 550

⁵ 1986 (4) SA 946 (SWA)

⁶ 2009 (4) SA 669 (E) at 672C-676D

the plaintiff's claim. I therefore take a view that the defendant's point regarding the identity of the contracting party with the defendant, has merit, and thus constitutes a defence worthy of ventilation in a trial.

[11] Considering the conspectus of all the relevant factors – the facts and the proper approach to applications for summary judgments, I am satisfied that the defendant's defence is *bona fide* and not raised solely for the purpose of delay.

[12] In the result the following order is made:

1. The application for summary judgment is refused;
2. The defendant is granted leave to defend.
3. Costs are in the main action.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 JUNE 2014

JUDGMENT DELIVERED : 23 JUNE 2014

FOR THE PLAINTIFF : ADV. B.D. STEVENS

INSTRUCTED BY : HACK STUPEL & ROSS, PRETORIA

FOR THE DEFENDANT : MS L MBANJWA

FIRM : L MBANJWA INC., PRETORIA