

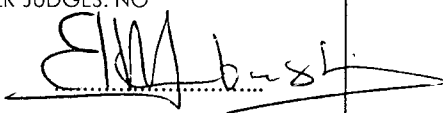
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

25/1/2016
CASE NO: 77333/15

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
25/1/16	
DATE	SIGNATURE

In the matter between:

SIYAYA DB CONSULTING

APPLICANT

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

RESPONDENT

J U D G M E N T

KUBUSHI, J

- [1] This is an opposed summary judgment application. When I commenced with the drafting of this judgment I noted that the applicant's heads of argument were not in the file. Labouring under the impression that the heads of argument may have been misplaced and/or misfiled, I asked my clerk to request a copy thereof from the applicant's counsel. The applicant's counsel provided me with the heads of argument but brought it to my attention that at the time of the hearing of the summary judgment application there were no heads of argument prepared for the applicant. I decided on that basis not to consider the heads of argument provided by the applicant's counsel. I thank counsel for having promptly responded to my request and apologise for the inconvenience occasioned.
- [2] The factual matrix to this application is that the parties entered into an agreement whereby the applicant was to perform services of Technical Assistance for the Supervision of National Resignalling Project, to the respondent. The agreement was a fee-based contract based on the fees related to the days actually worked for the contract. Payment to the applicant for services rendered was to be made in terms of the conditions set out in clause 23.2 of the agreement read with clause 26.5 thereof. In terms of the two clauses, the amounts invoiced by the applicant must be consistent with timesheets which the applicant was required to keep and which were to be approved by the respondent's representative. The timesheets were to comprise the number of days worked as well as the performed activities. It was a further requirement that, when a claim for payment is requested, the applicant's invoices be accompanied by copies or excerpts from such timesheets.
- [3] When the agreement expired, the parties concluded a written addendum to the agreement, which, amongst others, increased the scope of work and the value of the agreement and revised the completion date. The addendum also set out a payment schedule, which according to the respondent amended the payment method set out in the main agreement.

- [4] Pursuant to the said agreement and addendum thereto, the applicant issued summons against the respondent claiming payment of the sum of R8 374 893, 31 together with delayed penalties in the sum of R27 144, 44, which amounts, according to the applicant, were due, owing and payable by the respondent to the applicant. Subsequent to the respondent entering a notice to defend the matter, the applicant applied for summary judgment.
- [5] It is common cause between the parties that subsequent to the respondent entering an appearance to defend, it paid to the applicant an amount of R2 987 740,22 being payment in respect of invoice number B000027 attached to the particulars of claim as Annexure "POC6". The said payment as such reduced the amount claimed by the applicant in its particulars of claim to the amount of R5 387 153, 09 excluding the claim for delayed penalties. The claim for the penalty interest was also later abandoned by the applicant. Accordingly, the summary judgment application before me is only for the amount of R5 387 153, 09.
- [6] The applicant's contention in the summary judgment application is that the respondent has no *bona fide* defence to its claim and has entered appearance only to delay payment of the amount claimed.
- [7] The respondent is opposing the application and as *per* its answering affidavit, has raised several points *in limine*. Before me, and as *per* the respondent's heads of argument, only one point *in limine* was argued, namely, the defective particulars of claim. The contention by the respondent's counsel is that on this point alone the applicant's application for summary judgment ought to be dismissed.

- [8] I must add that from the heads of argument the respondent's counsel argued two cases, namely case number 77333/2015 and case number 73934/2015. Only one case, case number 77333/2015, was placed and argued before me.

IN LIMINE

- [9] It is the respondent's case that the applicant relies on what it (the applicant) says is a fee-based agreement, the fees of which are based on the days actually worked by the applicant. According to the respondent, in terms of clause 23.2 of the General Conditions of Contract for Service ("the GCCS") contained in the agreement, the amounts invoiced by the applicant must be consistent with timesheets which the applicant is required to keep and which must be approved by the respondent or its representative. The timesheets should also comprise the number of days worked as well as the performed activities. Clause 26.5 of the GCCS provides that the applicant's invoices have to be accompanied by the copies or excerpts from the timesheets as stated in clause 23.2.
- [10] The submission by the respondent is that the invoices on which the applicant relies in its claim are not accompanied by the timesheets as contemplated in clause 23.2 of the GCCS. It is further argued that the applicant does not allege in its particulars of claim that its invoices are consistent with the timesheets approved by the respondent or its representatives. The applicant's claim cannot be made, so the argument goes, if there are no timesheets which are attached to the invoices and the particulars of claim. In the premises, the contention is that the applicant's particulars of claim do not disclose a cause of action, alternatively, they are vague and embarrassing and as such the summary judgment application should be dismissed with costs. The respondent's counsel referred me to two reported judgments of *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) and *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* 1998 (1) SA 679 (O)

wherein it was stated that a summary judgment application may not be granted where the pleadings are technically defective.

[11] In counter argument, the submission by the applicant's counsel is that the applicant's claim is not based on the fee-based contract but on an addendum to the initial agreement. And, in terms of the addendum, payment due is based on a payment schedule set out in the addendum. The initial agreement having been amended by the addendum, all its terms are, therefore, absolute and cannot be relied on.

[12] My view is that from the reading of the applicant's particulars of claim it is clear that the applicant is relying not on the initial agreement between it and the respondent but on the addendum which is the one that has been breached by the respondent. Payment in terms of the addendum is as *per* the payment schedule attached to the addendum as Annexure "C". The point *in limine* can, thus, not succeed.

MERITS

[13] On the merits, the respondent denies the applicant's contention that it (the respondent) does not have a *bona fide* defence to the applicant's claim and has entered appearance solely to delay the finalisation of the applicant's claim. The respondent raises a number of defences in its answering affidavit, but, before me it only argued one defence which I shall deal with hereunder.

[14] In support of its assertion that it has a *bona fide* defence, the respondent's submission is that the purported extension of the agreement is constitutionally invalid and unenforceable in that, the respondent being an Organ of State, is in terms of s 217 of the Constitution required to procure goods and services in

a manner which is transparent, competitive, cost-effective, fair and equitable. According to the respondent, the addendum upon which the applicant relies was concluded for purposes of procuring services which were not provided for in the main agreement and such services ought to have been procured in accordance with the requirements of s 217 of the Constitution – and this was not done.

[15] The submission by the applicant's counsel is that the respondent's defence is spurious and not *bona fide* and as such the respondent should not be granted leave to defend the matter.

[16] In a summary judgment application, a respondent is required in accordance with uniform rule 32 (3) to deliver an affidavit which fully discloses the nature and grounds of its *bona fide* defence and the material facts on which such defence is based. The respondent is not necessarily required to prove the defence. All it is required to do is to set up facts which would constitute a defence at the trial.¹

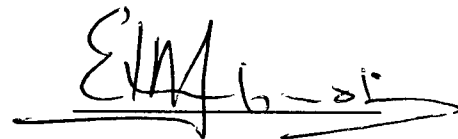
[17] I am sufficiently persuaded that the respondent has alleged facts which are material and which if proved at the trial will constitute a defence to the applicant's claim. The respondent should on the premises be granted leave to defend the matter.

[18] It is trite that where summary judgment application is refused costs are ordered to be costs in the cause. I see no reason to deviate from this rule. Costs in this matter should be in the cause.

¹ See *Breitenbach v Fiat SA (Pty) Ltd* 1976 (2) 226 (T) and *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A).

[19] I as a result make the following order:

1. The summary judgment application is refused.
2. The respondent is granted leave to defend the matter.
3. Costs are costs in the cause.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

WQDDWA

APPEARANCES

HEARD ON THE	: 18 November 2015
DATE OF JUDGMENT	: 25 January 2016
APPLICANT'S COUNSEL	: Adv C Van Der Merwe
APPLICANT'S ATTORNEY	: Mathopo Attorneys
RESPONDENTS' COUNSEL	: Adv M. Maritz SC
RESPONDENTS' ATTORNEY	: Diale Mogashoa Attorneys