

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<p>03.10.2016. <i>EIM</i></p>	

3/6/2016.

CASE NUMBER: 9825/16

In the matter between:

C15 PROTECTION SERVICES CC

APPLICANT/PLAINTIFF

and

**NORTHWEST TRANSPORT INVESTMENTS
(SOC) LTD**

RESPONDENT/DEFENDANT

J U D G M E N T

KUBUSHI, J

[1] This is an application for summary judgment in a claim in which the plaintiff alleges to have entered into a written agreement of professional service with the defendant. In terms of this service level agreement, the plaintiff would render forensic investigation services to the defendant. The plaintiff would do that by investigating certain allegations of acts of misconduct, maladministration and corruption within the defendant by certain of its officials. The crux of the plaintiff's claim is that the defendant has failed to comply with some of its obligations in terms of the agreement by failing to make payment of invoices rendered to it by the plaintiff in respect of the services already rendered.

[2] The defendant in opposing the summary judgment application has raised the following defences:

- i. The agreement in question is *void ab initio* in that the accounting authority ignored, before the agreement was entered into, certain legal prescripts relating to public procurement, namely, s 217 of the Constitution read with the provisions of the PFMA, PPPFA, BBEEE and the Treasury Regulations; and
- ii. When leave is granted, the defendant will launch two counterclaims which are for:
 - a. A declarator that the contract is *void ab initio*; and
 - b. The review of the accounting authority's decision and set the agreement aside.

[3] In argument before me the plaintiff's counsel submits that the defendant has no defence in law and has entered appearance to defend in order to delay the matter. The contention is that the appointment of the plaintiff as a service provider for the defendant was done by Adv K G Mapotse in his capacity as the accounting authority of the defendant; and such a decision, according to counsel, amounts to an administrative action. When an administrative action has been performed it is of force and effect until set aside by judicial review. The argument on behalf of the plaintiff is that since there is an existing administrative action taken by the accounting authority which the defendant claims to be illegal, the defendant should have applied for the review of that decision. There is no indication in the defendant's defence that it has applied or intends to apply for a review of the decision taken by the accounting authority as such its defence must fail.

[4] A further submission by the plaintiff's counsel is that the counter claim will also not stand since the defendant has not applied for the review of the accounting authority's decision to appoint the plaintiff as a service provider.

[5] The defendant's counsel on the other hand submits that the defendant has in its defence raised facts which if proved at the trial will constitute a defence and should as such be afforded an opportunity to defend the matter.

[6] Both counsel referred me to the following judgments: *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26 and *Member*

of the Executive Council for Health, Eastern cape and Another v Kirkland Investments (Pty) Ltd [2014] ZACC 6 from para 62.

[7] It is trite that an affidavit opposing summary judgment must depose to facts that if accepted as the truth, or proved at the trial, with admissible evidence, would constitute a defence to the plaintiff's action.¹

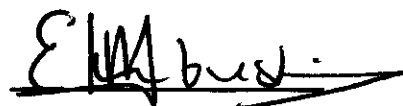
[8] Having extensively studied the two judgments, *Oudekraal* and *Kirkland*, to which the parties have referred me to, I am of the view that the defendant has raised a *bona fide* defence. The facts the defendant has raised in its defence, if proved at the trial, will constitute a defence to the plaintiff's action. The defendant must, therefore, be granted leave to defend this action.

[9] I do not find it necessary to deal with the issues raised by the parties in their respective heads of argument and/or oral argument in court as these are issues that require to be dealt with at the trial.

[10] In the circumstances I make the following order:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend this matter.
3. Costs are costs in the main action.

¹ See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE

: 27 MAY 2016

DATE OF JUDGMENT

: 03 JUNE 2016

APPLICANT'S COUNSEL

: ADV. P FERREIRA

APPLICANT'S ATTORNEYS

: DM GLOBAL LEGAL PRACTICE

RESPONDENTS' COUNSEL

: ADV. T SEBEKO

RESPONDENTS' ATTORNEY

: RAMBEVHA MOROBANE ATT.