

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

18/8/16.
Case No. 5529/16

In the matter between:

EXTRA DIMENSIONS 1464 CC

Applicant

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2016 -08- 18
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

and

SUID-AFRIKAANSE POSKANTOOR LIMITED

Respondent

JUDGEMENT

- [1] In a summary judgement application which served before me on 30 May 2016 I granted summary judgement in favour of the Plaintiff against the Defendant in the amount of R1 064 415.39 with interest *a tempore morae* at the rate of 9% until date of final payment from 18 November 2016. I further ordered the Respondent to pay the costs of the application for summary judgement. The summary judgement application served before me in the unopposed Motion Court. Respondent applied for reasons for the aforesaid order, and this judgement is therefore in response to the Respondent's request for reasons for the order dated 30 May 2016 referred to *supra*.

- [2] In the Plaintiff's particulars of claim the Plaintiff's cause of action is based on a partly written and partly verbal contract, and Plaintiff pleads that the material express *alternatively* tacit terms of the agreement were as follows:

"4.1 The Plaintiff would render services to the Defendant for the collection, transporting and delivery of Goods for Courier and Freight Group and Speed Services and all other things ancillary thereto;

4.2 The Defendant would remunerate the Plaintiff for its services, which remuneration was set out in a letter of acceptance of the Plaintiff's tender proposal. A copy of the letter of acceptance is attached hereto marked "POC1", the terms of which are specifically incorporated herein and read as such;

4.3 Remuneration would take place within 30 (thirty) days of receipt of an invoice by the Defendant."

- [3] The Plaintiff further pleads that the written portion of the agreement is contained in a draft agreement delivered to the Plaintiff by the Defendant which agreement was duly signed by the Plaintiff and returned to the Defendant, and further pleads that Plaintiff is not certain whether the agreement was signed by the Defendant as no return copy was received by Plaintiff from the Defendant. Plaintiff annexed a copy of the written draft agreement to the particulars of claim as Annexure "POC2". Plaintiff then pleads that Plaintiff duly performed in terms of the aforesaid agreement by rendering services to the Defendant on an ongoing basis from on or during

January 2011 to November 2015 and that the Plaintiff has supplied the Defendant with invoices in respect of the services duly rendered.

- [4] Plaintiff pleads that the Defendant has defaulted in that it has failed to make payment since March 2015 despite services being rendered up and until November 2015. Plaintiff annexed a copy of an updated statement reflecting the total amount outstanding for services rendered in terms of which it transpires that the Defendant, according to the Plaintiff, is indebted to the Plaintiff in the amount of R1 064 415.39 from the 31st of March 2015 until 2 November 2015. Plaintiff further annexed a copy of a letter of demand dated 18 November 2015 addressed on behalf of the Plaintiff by the Plaintiff's attorneys of record in this application to the Defendant for the attention of a certain Mr Kenneth Ramphela which letter was sent per email. From the contents of the aforesaid letter it appears that a statement confirming the amount owing by the Defendant to the Plaintiff was attached to the aforesaid letter. The Plaintiff avers in paragraph 9 of the Plaintiff's particulars of claim that the Defendant has failed, neglected or refused to make payment of the full amount due and owing to the Plaintiff despite the aforesaid demand.

- [5] On 15 February 2016 a Notice of Intention to defend was delivered on behalf of the Defendant as a result of which the Plaintiff applied for summary judgement and an affidavit in support of the application for summary judgement deposed to by a certain Brian Peerimal who, *ex facie* such affidavit, is the Financial Manager of the Plaintiff contained the averment that the cause of action and the amount as claimed in the

summons is verified by such deponent and that he verily believed that the Defendant has no *bona fide* defence against the claim and that appearance to defend has been entered solely for purposes of delay as is required in terms of the provisions of Rule 32(2) of the Uniform Rules of Court.

- [6] The Defendant filed an Answering Affidavit to resist the application for summary judgement deposed to by a certain Cynthia Mofokeng who, *ex facie* such affidavit is the Manager, Legal Services, of the Defendant. At the outset I must remark that this affidavit is somewhat confusing and vague, and clearly an attempt to introduce each and every possible conceivable "*defence*" to avoid summary judgement, and the different "*defences*" raised by this affidavit shall be dealt with *infra* more fully. In support of the impression that is gained from the aforesaid affidavit, the following must be noted:

- [6.1] Paragraph 2 of the affidavit contains a heading which reads: "**POINTS IN LIMINE OR PRELIMINARY POINTS**" and thereunder a following sub-heading which reads: "**2.1 NO VALID SERVICE AGREEMENT**". The deponent then proceeds to aver that the alleged draft agreement entered into by the Plaintiff and the Defendant (i.e. Annexure "POC2" to the summons) is not signed on behalf of the Defendant and without dealing with the Plaintiff's averments as set out in par [3] *supra*, concludes that "*therefore there is clearly no written agreement by the Applicant and the Respondent.*" Deponent further proceeds to aver that the

agreement was dependant on the fulfilment of certain conditions precedent, which, according to the deponent was not complied with, and then further avers that the Defendant is a State owned company and that all services are contracted in compliance with *inter alla* the Preferential Procurement Policy Framework Act no. 5 of 2000 and that the procurement process is not based on oral agreements, particularly in the form and substance alleged by the Applicant. These defences are clearly neither points *in limine* nor "*preliminary points*" but, insofar as it may be found that these are in fact defences, they go to the root of the Plaintiff's cause of action and are therefore defences based on the merits of the action. It is clear that the deponent is confused on the true meaning of "*point in limine*";

- [6.2] Paragraph 2.2 of the affidavit contains the heading: "**LACK OF VALID OR LIQUIDATED CLAIM**" and the deponent then in essence avers that the Defendant does not have the invoices reflected on the Plaintiff's statement, that the Defendant is therefore unable to determine whether or not the amounts are indeed due and payable to the Plaintiff, avers that the Plaintiff did not include as part of its Summons Invoices or detailed accounts on which the claim is based, and then concludes that the Plaintiff's claim is therefore not based on a liquid document, that the Plaintiff's claim is "*invalid*" and in the alternative that the claim is not liquidated. Again, this is

indicative of a complete lack of understanding of the legal term
"liquidated claim" for purposes of summary judgement.

- [7] In terms of Rule 32(3) of the Uniform Rules of Court the Defendant should satisfy the Court by affidavit or with leave of the Court by oral evidence of himself or any other person who can swear positively to the fact that he 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 upon therefore. This specific sub-rule has been the subject of various judgements, and it has been held that "*fully*" means that while the Defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, the Defendant must at least disclose its defence and the material facts on which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.

Vide: Maharaj v Barclays National Bank Ltd 1976 (1) SA 419 (A)
at 426 C - D

It was further held that the affidavit should contain material facts which are set out in adequate detail, and that such facts should not be bold, vague or sketchy.

Vide: Standard Bank of S A Limited v Freedman 1999 (2) SA
456 (C) p. 462

It was held that a *bona fide* defence is disclosed if the Defendant swears to a defence, valid in law, in a manner that is not inherently or seriously unconvincing.

**Vide: *Breytenbach v Flat SA (Edms.) Beperk 1976 (2) SA 226 (T)*
at 228 B - C**

[8] The affidavit deposed to on behalf of the Defendant essentially does not contain a defence to the Plaintiff's cause of action, but is clearly an attempt to proverbially create a "*smoke screen*" of vague generalised averments and clearly does not comply with the requirements as set out in the authorities quoted *supra*, for the following reasons:

[8.1] The Defendant's affidavit resisting summary judgement must be considered with due regard to the averments as pleaded by the Plaintiff in the Plaintiff's particulars of claim. The Plaintiff's cause of action is clearly based on the averments that a tender of the Plaintiff was accepted (paragraph 4.2 of the Plaintiff's particulars of claim; copy of letter of acceptance, Annexure "POC1" to the Plaintiff's particulars of claim), that an agreement was thereafter delivered to the Plaintiff by the Defendant, signed by the Plaintiff, and returned to the Defendant, (a copy of the agreement attached to the Plaintiff's particulars of claim as Annexure "POC2"), that the Plaintiff thereafter duly performed in terms of the agreement by rendering services to the Defendant on an ongoing basis from January 2011 to November 2015, and that the Defendant failed to effect payment for the period March 2015 until November 2015 with the clear implication that both parties duly performed in terms of the agreement from January 2011 until February 2015;

[8.2] The Defendant's affidavit resisting summary judgement does not deny the averments relating to the acceptance of the tender, the fact that the Defendant forwarded to the Plaintiff an agreement which the Plaintiff signed and returned to the Defendant, nor the fact that payments were effected by the Defendant to the Plaintiff for the period January 2011 to February 2015. Instead, the deponent to the affidavit (*ex facie* her affidavit the Manager, Legal Services of the Defendant and who avers that it is part of her duties and responsibilities to advise and act in "*protection of furtherance of the interest of the Respondent in Court or legal matters*") simply avers that because the agreement between the Plaintiff and the Defendant annexed to the particulars of claim is not signed on behalf of the Defendant "*.... therefore there is clearly no written agreement between the Applicant and the Respondent*". This is a clear example of a bald, sketchy and vague defence, considering the other averments referred to *supra* in the Plaintiff's particulars of claim which the Defendant does not deny in the affidavit resisting summary judgement;

[8.3] In paragraph 2.1.4 of the affidavit resisting summary judgement deponent refers to a "CONDITION PRECEDENT" and avers that nowhere in the Applicant's particulars of claim is it indicated that the condition precedent was fulfilled and therefore any agreement on the terms contained in the draft agreement is void for lack of fulfilment of the condition precedent. Deponent then states that this

can only militate against the existence of any agreement, be it oral or written. This is clearly speculative, and having regard to the fact that the deponent does not deny that services were indeed rendered by the Plaintiff as alleged by the Plaintiff, and further does not deny that the Defendant effected payments to the Plaintiff up and until February 2015, this defence clearly lacks merit. I further find it strange that the deponent can state under oath that no documentation regarding the contract could be found at the time when the affidavit was deposed to but is in a position to swear that none of the "*conditions precedent*" were met;

- [8.4] In paragraph 2.1.7 of the Defendant affidavit resisting summary judgement, deponent avers that the principles relating to the procurement practices in terms of the relevant legislative framework are not maintained in a procurement process based on an oral agreement, "*particularly of the form and substance alleged by the Applicant*" and then conclude that it is therefore denied that the Respondent entered into an oral agreement. However, deponent does not deny the Plaintiff's averment that a tender was awarded to the Plaintiff and in fact does not even deal with the averments pertaining to the letter of acceptance addressed by the Defendant to the Plaintiff annexed to the Plaintiff's particulars of claim as Annexure "POC1", or the averment that the contract was returned to Defendant, duly signed on behalf of Plaintiff;

[8.5] In paragraph 2.2 of the deponent's affidavit resisting summary judgement, the deponent simply states that *"the Respondent does not have the invoices reflected on the Applicant's statement"*. Deponent then avers that the Defendant is unable to determine whether or not the amounts are indeed due and payable to the Plaintiff or have not already been paid by the Defendant to the Plaintiff, and on the strength thereof submits in paragraph 2.2.5 of the affidavit that the claim is *"invalid, alternatively not liquidated"*. It is notable that the deponent does not deny that invoices were in fact rendered, and the significance of a lack of denial by the deponent that payments were effected by the Defendant to the Plaintiff up and until February 2015 renders these allegations of the deponent vague, sketchy and not *bona fide*. In terms of generally accepted accounting practices, the Defendant should be in a position to pertinently deal with the averments made in paragraphs 7 and 8 of the Plaintiff's particulars of claim. Failure to do so, in my opinion, is not *bona fide*;

[8.6] Significantly, in paragraph 6 of the affidavit resisting summary judgement the deponent makes the following allegation: *"Perhaps the services may have been rendered without a valid agreement, but should this be so, which is not admitted, the Applicant may have a claim not based on contract but perhaps delict"*. The deponent's averments in this regard (albeit it legally untenable) clearly contains

an admission that the services were indeed rendered, and in the context of this factual admission the averments of the deponent regarding the alleged lack of information as set out in paragraph 7 of the deponent's affidavit resisting summary judgement is simply bald, vague and sketchy. It is untenable to suggest that an Institution such as the Defendant would allow the Plaintiff to render services to it for a period of 4 years from January 2011 until February 2015, without complying with the procurement process referred to in paragraph 2.1.6 of the deponent's affidavit resisting summary judgement, would continue to effect payments to the Plaintiff during such period without receiving proper invoices, and would thereafter not be in a position to determine whether or not invoices were in fact presented for services rendered for the period in respect of which the Plaintiff instituted the claim against the Defendant. In any event, the fact that the Defendant is not able to source documentation as averred by the deponent in paragraph 7 of the affidavit resisting summary judgement does not constitute a valid defence to the Plaintiff's cause of action, but simply serves to confirm that the deponent is not able to adduce any evidence in support of a proper defence to Plaintiff's cause of action. An inability to adduce evidence contradicting a cause of action which *prima facie* appears to be sustainable, based on the pleadings and documentation annexed thereto, is not a defence in law.

[9] In the premises, summary judgement was granted in terms of the order
dated 30 May 2016.



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