IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

CASE NO.: 44333/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

..... 20/09/2022.....
SIGNATURE DATE

In the matter between:

MOVING FORWARD TRADING AND PROJECTS 154 CC **Applicant**
(Registration No: 2010/113974/23)

CANAAN ELECTRICAL CONTRACTORS (PTY) LTD **Respondent**
(Registration No: 2012/193621/07)

JUDGEMENT

MFENYANA AJ:

Introduction

[1] This is an application for summary judgement.

[2] The application is opposed by the respondent.

[3] On or about 10 September 2020 the applicant and the respondent concluded a written agreement in terms of which the applicant would render services, termed "Credit Control Actions" to the City of Tshwane Municipality (the Municipality) on behalf of the respondent. In terms of the agreement, the respondent would pay the applicant 60% of the gross amount of invoices billed by the respondent to the Municipality. The applicant alleges that the respondent breached the agreement in that it failed to make payment to the applicant in the sum of R481 360.00 being 60% of the gross for invoices billed and submitted by the respondent to the Municipality between 31 October 2020 and 30 April 2021 less an amount of R77 000.00 being the actual amount paid by the respondent to the applicant between 3 December and 24 January 2021.

[4] The respondent has defended the action and on 9 November 2021 filed a plea and counterclaim. In its plea the respondent admits that in terms of the agreement between itself and the applicant, the applicant would be entitled to 60% of the gross of invoices billed but avers that payment would only be due and payable to the applicant on settlement of each and every invoice by the Municipality. As such the respondent avers that payment to the applicant was not automatic upon submission of each and every invoice and that the applicant's claim is therefore premature.

[5] In addition, the respondent contends that the applicant is liable to the respondent in the amount of R310 000.00 as contained in its counterclaim for six telephone devices which the respondent provided to the applicant, the cost of which the respondent is entitled to set off against the amount it owes to the applicant, as well as salaries for the applicant's employees, which the respondent paid out of caution, to avoid jeopardising its relationship with the Municipality. The respondent avers that these actions by the applicant amounted to a breach of the agreement between them.

[6] From the aforegoing, the respondent's defence/s can be summed up as follows:

(i) that the applicant's claim is premature.

(ii) that the applicant owes the respondent an amount of R310 000.00 which it is entitled to set off from the amount it owes to the applicant.

[7] Having received the respondent's plea and counterclaim, the applicant filed an application for summary judgement in terms of Rule 32 of the Uniform Rules of this court. In the relevant part rule 32(3) provides:

> The defendant may –
>
> (b) satisfy the court by affidavit … that the defendant has a *bona fide* defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[8] In the founding affidavit the applicant avers that the respondent ought to have paid it an amount of R558 360.00 but only paid R77 000.00 on 3 December 2020, 4 January, and 24 January 2021 in three payments of R20 000.00, R22 000.00 and R35 000.00 respectively. The applicant submits that this amount ought to be deducted from the amount due to it. Thus, the applicant avers that the respondent is indebted to it in the sum of R481 360.00. The applicant contends that none of the defences provided by the respondent in its plea constitute a valid and *bona fide* defence against its claim and that the respondent delivered the plea and counterclaim solely to delay the matter.

[9] Concerning the respondent's contention that the claim is premature, the applicant argues that the agreement did not specify the date and time of payment and that by demanding payment and issuing a summons, it placed the respondent in *mora*. It is further the applicant's submission that set- off can only be claimed on a liquidated amount which the respondent's counterclaim is not, as it has failed to prove that there was an agreement between the parties for the respondent to pay its employees' salaries. Regarding the set- off for the telephone devices in the possession of the applicant, the applicant avers that it is entitled to withhold the devices until the respondent has performed its obligations in terms of the agreement.

[10] In its affidavit resisting summary judgement, the respondent contends that it has valid defences to the applicant's claim and that the matter can only be resolved through trial. This is in amplification of what it has set out in the plea and counterclaim; that while it has not received payment from the municipality allegedly as a result of shoddy workmanship by the applicant, it in any event has a defence of set- off against the applicant's claim. It is not a requirement that the respondent must prove that every one of the defences it has raised is *bona fide* and good in law. It also does not matter whether the respondent will be successful in proving that defence on trial or not. That is not the test. All that the court has to determine is "whether the respondent has fully disclosed the nature and grounds of his defence and the material facts upon which that defence is founded, and whether on the facts so disclosed the respondent appears to have… a defence which is both *bona fide* and good in law."[1] Even a single defence will suffice, so long as that defence passes the threshold set out in the rule.

[11] It has long been settled that what the word 'fully' connotes is that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence.[2] Thus the merits of the plea itself are not a matter for the court to enquire into in deciding whether or not summary judgement should be granted.

[12] The respondent states that the applicant's claim is premature as it has not yet received payment from the Municipality. If as it appears, the respondent wishes to rely on some or other condition as it appears to be the case, it should substantiate its claim and as a bare minimum provide proof of submission of the invoices, setting out which invoices have been paid and which have not. This, the respondent has done. It concedes that it submitted the invoices to the Municipality and that four of the ten invoices, to the tune of R510 110.40 have not been paid by the municipality and provides details of those invoices. In fact, the respondent places the cause for the non-payment at the doorstep of the applicant, as it states that the municipality withheld

[1] *Maharaj v Barclays National Bank Ltd, 1976 (1) SA 418 A at 426B-C:*
[2] *supra at 426 C – D.*

payment as a result of poor workmanship by the applicant. Similarly, the veracity of these allegations is not a matter that the court this court is seized with. Suffice it to state that what the respondent has tendered appears to be a full disclosure of the grounds of this defence and the facts it relies upon.

[13] Whether the replacement value for the telephone devices in the possession of the applicant is what the respondent claims it to be is immaterial. What is of relevance for purposes of summary judgement is that the respondent has disclosed a *bona fide* defence and has fully set out the nature and grounds of its defence and the material facts upon which that defence is founded. In my view it has. It is also not an issue to be determined by this court whether the applicant is entitled to retain possession of the devices in satisfaction of the *lien* it contends to have. This in itself is a matter for evidence that requires proper ventilation at trial.

[14] Deciding on whether the defence of set-off constitutes a valid defence, the Canadian court in *Larry's Refrigeration & Appliance Repairs Inc. v Woodward's Oil Ltd*[3] concluded that the defence of set- off is not suitable for determination by the summary judgement court. Whether or not the respondent will ultimately be entitled to set that amount off is a matter for the trial court to determine.

[15] I do not agree with the suggestion made on behalf of the applicant, that the respondent's defences are set out barely and vaguely. Quite to the contrary, they are set out clearly and concisely and this appears to be a thread that runs from the plea through to the affidavit resisting this application. I am in the circumstances satisfied that the defences raised have fully disclosed the nature and grounds relied upon by the respondent.

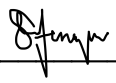
[16] While there is no dispute raised in respect of the services to be provided and the amount of compensation therefor, there is clearly a dispute as to when the applicant should be compensated. This dispute is not only apparent on the part of the respondent. It is conceded by the applicant. It is created by a lacuna in the agreement

[3] *2016 NLTD(G) 152*

concluded by the parties as it is silent on this aspect. Neither of the parties can legitimately claim to know *ex facie* the agreement when the time for payment is. Whether this is when the applicant completes the work as it avers, or whether as contended by the respondent this should be once payment has been received from the municipality, is a matter of contention between the parties. It is a clear and genuine dispute which calls for proper ventilation of issues and final determination by the trial court. It follows therefore that summary judgement would in the circumstances not be the appropriate remedy.

[17] In the premises I make the following order:

The application is dismissed with costs.



S.M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Applicant	: Adv MN Davids
Instructed by	: Ndziane Inc. Attorneys
For the Respondent	: Adv. D Keet
Instructed by	: SJ Van den Berg Attorneys
Heard on	: 22 March 2022
Judgement handed down on	: 20 September 2022