



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL PROVINCIAL DIVISION, PIETERMARITZBURG**

CASE NO: 10365/15

In the matter between:

ALLENBY HOUSING CC

Plaintiff

vs

MEC: DEPARTMENT OF HEALTH, KZN

Defendant

JUDGMENT

Date of Hearing: 24 March 2016

Date delivered: 01 April 2016

BEZUIDENHOUT, AJ

1] Plaintiff has applied for summary judgment against defendant for payment of the amount of R520 358-84 and interest thereon from the date of service of summons at the legal rate of 9%p.a. to date of payment and costs of suit.

1.1 Defendant has opposed the application and filed an opposing affidavit.

2] It has been submitted on behalf of plaintiff that the defences raised by defendant are not real defences. It was submitted that the complaint regarding the differences in the invoices had been addressed by subsequent invoices and that the amount claimed in the latest invoice that was sent after the letter of demand makes up the difference.

2.1 It was further submitted that the defence raised that the park home did not comply with the tender specifications was a bold unsubstantiated averment.

3] It was submitted on behalf of the defendant that it did raise a bona fide defence as the plaintiff did not respond to a letter requiring clarification of an invoice. Further that he has not completed the work as per the contract.

3.1 It was further submitted that defendant is not expected to formulate its opposition with the precision required of a plea and that it fully disclosed its defence and that the defendant should accordingly be granted leave to defend.

4] Before considering the affidavit filed by defendant it is necessary to consider the principles which should be borne in mind when assessing defences raised in the said affidavit.

4.1 In *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) it was held at 426b:

"All that the court enquires into is (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence, which is both bona fide and good in law."

Referring to the word 'fully' it continued at 426d

"It connotes, in my view, 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."

- 4.2 In *Breytenbach v Fiat South Africa Edms Bpk* 1976 (2) SA 226 (T) it held at 228e:

"What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bold, vague or sketchy, that will constitute material for the court to consider in relation to the requirements of bona fides."

- 4.3 In *Independent Electoral Commission v Krans Ontspanningsoord* 1997 (1) SA 244 (TPA) it was held at 249g

"Dit word verder van die verweerder verwag om nie slegs die aard van sy verweer uiteen te sit nie maar die gronde daarvan."

- 4.4 In *Soorju v Pillay* 1962 (3) SA 906 (NPD) it was held at 908g

"The defendant must set out his defence honestly, disclose fully the nature and grounds of it, and, in so far as it relies upon facts, lay before the court the facts which if proved, will be a good defence."

- 4.5 From the above decisions it is clear that merely raising a defence is not sufficient but that it should contain particularity as to the material facts on which it is based. These facts must indicate a reasonable possibility that the defence may succeed at trial. Merely indicating a defence without setting out the grounds upon which it is based and the material facts relating thereto would accordingly be insufficient.

- 5] The defences raised in the opposing affidavit were as follows:

- 5.1 In paragraph 14 of the opposing affidavit it sets out that the invoices which were received were responded to by the project leader who raised concerns on the values versus the work done and refers to a letter of the project leader, annexure "G".

- 5.1.1 In the letter he indicated that the invoices must be detailed as to what has been charged for example clearing of site of over growth. It also stated "How one is to justify a claim for half a built unit will have to be discussed with our management." This relates to the first invoice which was provided. It is apparent from what has been set out that there was no dispute that the amount was owing but merely that it had to set out more detail.
- 5.2 In paragraph 16 it is alleged that there were charges for windows which the park home did not contain. This was however rectified by a subsequent invoice from plaintiff where this was deleted.
- 5.3 In paragraph 19 of the affidavit it refers to a letter dated 31 July 2014 from plaintiff demanding outstanding money. It is alleged that this amount differs from that which is claimed in the summons. It is apparent that the difference relates to an invoice which was provided during December 2014 in the amount of R112 299-12 after the said letter had been sent. This discrepancy is therefore explained. I will however deal with this invoice later.
- 5.4 In paragraph 22 it is stated that invoices can only be paid if the amounts claimed are in terms of the approved tender. In paragraph 23 it is alleged that it must be in accordance with the schedule of rates and the schedule of rates is then annexed as annexure "M".
- 5.4.1 However, it does not set out what prices were incorrect but merely attaches a document containing various prices for a number of items without specifying which of the amounts were incorrect and

which of them did not comply with the said specifications. It also fails to set out why it is alleged that it was not done as tendered.

5.5 In paragraph 26 it is alleged that the park home was not built in compliance with the tender document and could not be used for its intended purpose.

5.5.1 Once again it does not set out in what manner it did not comply with the tender document and why it could not be used for its intended purpose. It is once again a bold unsubstantiated allegation without providing material facts.

5.6 It is also alleged that the park home had to be removed by plaintiff. Annexures "O" and "P" however refers to materials which had to be removed and which was removed at a cost of R22 493-00. It is alleged that plaintiff failed to pay the said R22 493-00. This is however not a defence to the claim

6] From what has been referred to above it is apparent that no detail is provided as to why it is alleged that the park home could not be used, why it did not comply with the tender documents and why the specifications were not complied with. Further, although the schedule of rates is attached as annexure "M", a document of approximately 14 pages, nowhere in the affidavit does it set out which prices were not complied with and in which manner the contract was not complied with.

6.1 There is an allegation that the building was not built according to specifications and cannot be used but no facts are provided to indicate what the basis therefore is. The allegation that it did not comply is

merely a bold allegation and it does not disclose the grounds upon which it is claimed that it is not in compliance with the tender documents.

6.2 The opposing affidavit accordingly does not disclose the nature and grounds of the defence and the material facts upon which it is based.

6.3 If a court has to exercise its discretion in the defendant's favour it must do so on the basis of the material placed before it and not on mere conjecture or speculation.

See Soil Fumigation Services v Chemfit Technical 2004 (6) SA 29 (SCA) at 39J-40A.

6.3.1 In the present matter no material facts were placed before court and it is not for this court to speculate as to what was the non-compliance with the tender documentation, specification and pricing which is not dealt with in the opposing affidavit.

6.4 It is also not stated in the affidavit why if plaintiff abandoned the site as is alleged it is not entitled for payment for the work done. If there was such a clause in the agreement or if plaintiff was not entitled to such payment one would have expected this to be set out in the opposing affidavit.

7] The letter of demand which was sent to defendant on 31 July 2014 refers to three invoices which amount to the sum of R408 059-72. The last paragraph of the said letter at page 62, annexure "L", reads:

"Furthermore, part of our invoices are for earthworks and siteworks and hereto the site has been prepared to receive all the structures."

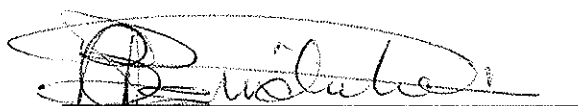
The fourth invoice was only sent on 11 December 2014 approximately five months after this letter of demand which I have just referred to. This invoice was in the sum of R112 299-12 and in the invoice, annexure "M", it refers to the fill and compacting of layers and poisoning as well as cutting existing banks for the erection of retainers, clearing the site and removing of fences. This would appear to be the work referred to in the last paragraph of annexure "L". It would therefore appear to me that there is a dispute in this regard when this invoice was only sent approximately five months later and should have been available prior to the erection of the park home. Was it not included in the other three invoices as stated in annexure "L".

7.1 In my view, the invoice dated 11 December 2014 in the sum of R112 299-12 should be excluded.

8] The defendant has failed to comply with Rule 32 in that it has not disclosed the material facts it relies on. No bona fide defence was therefore raised.

I accordingly make the following order:

1. Summary judgment is granted against defendant in favour of plaintiff for:
 - 1.1 payment of the sum of R408 059-72;
 - 1.2 interest thereon at the legal rate of 9% p.a. from the date of service of summons to date of payment;
 - 1.3 Costs of suit


BEZUIDENHOUT, AJ

APPEARANCES

Date of Appeal: 24 March 2016
Date of Judgment: 01 April 2016

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