



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

In the matter between:

Case no: I 1405/2015

STRAUSS GROUP CONSTRUCTION CC

PLAINTIFF

and

OCEAN 102 INVESTMENTS CC

DEFENDANT

Neutral citation: *Strauss Group Construction CC v Ocean 102 Investment CC (1405-2015) NAHCMD 279 (19 November 2015)*

Coram: MILLER, AJ

Heard: 4 August 2015

Delivered: 19 November 2015

Flynote: Summary Judgment – Defendant must have a bona fide defence and not for purposes of delay – International agreement containing arbitration clause – Court to honor such clause unless validity of arbitration in dispute – Such triable and arguable issue – Summary judgment refused.

ORDER

1. Application for summary judgment is dismissed;
 2. Defendant is granted leave to defend the action;
 3. Costs be costs in the cause;
 4. The matter is postponed to **26 November 2015 at 15h30** for case planning conference.
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JUDGMENT

MILLER AJ:

Factual background

[1] The plaintiff instituted action against the defendant in terms of a building contract concluded between the parties on 17 February 2014. In terms of the agreement, the defendant would construct a building comprising of residential units in Walvisbay in accordance with the specified conditions. The defendant would in return pay the amount of N\$ 47 381 459.54. The parties further agreed that the Principal Agent would be a certain Brynard Kotze of KB Designs Architects Associates who would provide the plaintiff with interim, penultimate and final certificates stating the amount due to the plaintiff which such payment should be paid within 14 days of the issue of a certificate. The parties on 14 April 2014 amended the price to be N\$ 45 381 459.54. It is further an agreed term that if payment is not affected within 14 days, or within 7 days after notice to the defendant, the plaintiff may terminate the contract and vacate the site with all its machinery and goods and that the defendant would be liable for the works completed on the date of such determination as well as reasonable costs occasioned by such removal. As at 31 October 2014, five certificates were issued and payment was effected in respect of these certificates.

[2] During November 2014, the parties entered into a further oral agreement that the plaintiff would complete the basement structure, be certified once completed and payment would be done in a deferred manner to accommodate defendant's cash flow problems at that point in time. Certificate 6 was dully paid for but not certificate 7, which amounts to N\$ 2 926 101.58 and which was due on 29 February 2015. A final certificate was again issued by the principal agent on 11 March 2015 reflecting the amount of N\$ 1 835 662.38 as the contract value of the works completed at the date of determination and the reasonable costs of removal. Despite demand, the defendant did not pay the amounts as reflected on certificate 7 and the final certificate, totaling to N\$ 4 822 722.60 (N\$ 4 761 763.96).

The defence

[3] The defendant defended the action whereafter the plaintiff filed an application for summary judgment on the basis that the defendant does not have a *bona fide* defence to the claim and that appearance to defend has been entered solely for purposes of delay. In its affidavit opposing the summary judgment, the defendant denies that it has no *bona fide* defence to the claim as alleged by the plaintiff.

[4] Firstly, its defence is based on clause 26 of the agreement which states that parties must first arbitrate any dispute before approaching a court. The defendant therefore takes the position that this matter be stayed pending the finalization of the arbitration. Secondly, the defendant denies any oral amendments to the original agreement as regards deferred payment, unless reduced in writing. Accordingly, the practice is that any amendments to the original agreement should be in writing. Thirdly, the plaintiff is accordingly not entitled to the payment since the basement structures remain incomplete and is as a result liable for penalties and damages towards the defendant. Such damages are estimated around N\$ 4 million. Lastly, the defendant states that the plaintiff did not comply with the certification procedure in that authority was given by the defendant to issue any certificate and in the absence of such

certificate, no payment is due to the plaintiff. The defendant states that these are all *bona fide* defences and that a counterclaim will be instituted against the plaintiff.

The submissions

[5] During the hearing of the application, counsel on behalf of the plaintiff, Mr Jacobs, commenced by highlighting the efforts made to comply with rule 32(9) and (10) and that since no cooperation was forthcoming from the defendant, such non-compliance should not be fatal to the application for summary judgment so as to deprive the plaintiff of the cost-effective and speedy resolution of the dispute.

[6] Counsel further pointed out that the defendant's opposing affidavit falls short of the requirements of rule 60 in that it does not set out a *bona fide* defence, does not disclose the nature and grounds of the defence and further does not set out the material facts relied on. Accordingly, no material facts underlining the dispute are raised; the affidavit contained vague allegations; the defence was not stated unequivocally and that there was no factual basis affording any substance to the defence. The defence is accordingly not *bona fide* because the allegations are inherently unconvincing and should not be believed.

[7] As regards the defence of arbitration, counsel submitted that no matter has been referred to mediation by the defendant that justifies a stay in these proceedings. As regards the denial of an oral agreement, counsel submitted that even in the absence of an oral agreement, the certificates were received and the amounts fell due. Counsel further pointed out that the nullification of the certification process by the defendant is meritless because the agreement, to which the defendant is a party, states that certificates would be issued by the Principal agent and thereafter to be presented for payment. Accordingly, the certificates were sent via registered post to the defendant or alternatively, were attached to the summons. In terms of the agreement, the plaintiff is therefore entitled to payment of the work done on the date of such determination as certified by the principal Agent. This much is supported by the terms of the agreement.

No authorization was thus needed from the defendant. As regards the incomplete basement structures, counsel submitted that this did not result in a breach of the agreement and that no damages may thus be claimed. No date as regards the calculation of penalties allegedly owed to the defendant is mentioned and no counterclaim is to date being filed with the court.

[8] Counsel on behalf of the defendant, Mr Namandje, was adamant on the point that the dispute ought to be subjected to arbitration first in terms of clause 26 of the agreement and that since the validity of the arbitration clause is not challenged, the claim instituted is premature and that the procedure, as agreed to, must be followed. Accordingly, this court has no jurisdiction on the basis of the parties' autonomy to choose their own dispute resolution mechanism. As regards all other grounds, counsel submits that there is a *bona fide* defence in that the allegations, if proved, would result in a successful defence to the claim.

Analysis

[9] The arbitration clause in the agreement reads:

'26.1 If any dispute or difference shall arise between the employer or principal agent on his behalf, and the Contractor, either during the progress or after completion of the Works...then the Principal Agent shall determine such dispute or difference by a written decision given to the Contractor and Employer.

26.2 The said decision shall be final and binding on the parties, unless the Contractor of Employer within fourteen days of the receipt thereof by written notice to the principal Agent disputes the same, in which case or in case the Principal Agent for fourteen days after a written request to him by the Employer or the Contractor fails to give a decision as aforesaid, such dispute or difference shall be and is hereby referred to adjudication in accordance with the attached rules of Adjudication. . . .'

[10] With the increase in International trade agreements, parties would normally enter into contracts containing arbitration clauses and if national courts are faced with such

agreements, the courts will honor the parties' agreement indicating that disputes be determined by arbitration proceedings, unless the validity of the arbitration clause is in question¹, which is not the case in this matter.

[11] Granting default judgment is a matter of discretion from the court. Summary judgment is a drastic measure to obtain judgment against the defendant and the court need only be satisfied in the exercise of its discretion that on a balance of probabilities, the defendant raises a fairly triable and arguable issue. The courts are further slow in disallowing a new point as a defence, unless it becomes clear to the court that the defendant is clasping at straws and that the defence is an afterthought.² In *Ritz Reise (Pty) Ltd v Air Namibia (Pty) Ltd*³, the court held that summary judgment may be granted in cases where there are too many loose ends creating doubts which can only properly be resolved in an ordinary trial action on the basis of a reconciliation. Accordingly, at this stage, the defendant is not required to plead his case fully.

[12] I am of the view that, having regard to all the circumstances of the case, the defendant has raised, in its answering papers with sufficient clarity, issues which are on a balance of probabilities, triable and arguable. It would not be proper or justified in my view to shut the doors of the court to the defendant.

Order

[13] In the premises, the following order is made:

1. Application for summary judgment is dismissed
2. Defendant is granted leave to defend the action;
3. Costs be costs in the cause
4. The matter is postponed to 26 November 2015 at 15h30 for case planning conference.

¹ See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

² *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC), para (36).

³ 2007 (1) NR 222 (HC).

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Miller, AJ
Acting

APPEARANCE

Plaintiff

SJ Jacobs

Instructed by Van Der Merwe-Greef Andima Inc

Defendant

S. Namandje

Of

Sisa Namandje & Co Inc.