

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SUMMARY JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2017/004545

In the matter between:

AFRICA TODAY BUILDING ENTERPRISE CC APPLICANT/PLAINTIFF

and

AMUPOLO BUILDING CONSTRUCTION

RESPONDENT/DEFENDANT

Neutral Citation: *Africa Today Building Enterprise Close Corporation vs Amupolo Building Construction* (HC-MD-CIV-ACT-CON-2017/04545) [2018] NAHCMD 218 (13 July 2018)

CORAM: PRINSLOO J

Heard: 22 JUNE 2018

Delivered: 13 JULY 2018

Reasons: 18 JULY 2018

Flynotes: Practice — Judgments and orders — Summary judgment — Opposition to — Requirements — Respondent required to show and satisfy court that he/she had bona fide defence to claim — Material facts upon which defence based must be disclosed with sufficient particularity and completeness to enable court to decide whether bona fide defence disclosed — Not required to disclose all details as would be case in trial proceedings.

Summary: The parties entered into an agreement wherein the plaintiff was appointed as a domestic subcontractor for purposes of cutting and filling for construction of a platform for the new ante-natal maternity ward of the Onandjokwe State Hospital.

The plaintiff complied with the terms of the agreement and duly invoiced the defendant for the services rendered. However, the defendant allegedly failed to make payment to the plaintiff for services rendered. The defendant, (represented by Ms. Rachel Gabriel, in her capacity as director of the defendant) at a later stage drew up at her special instance an acknowledgement of debt wherein she acknowledged defendant being indebted to the plaintiff in the amount of N\$ 530,177.98 (Five hundred and thirty thousand one hundred and seventy seven Namibian Dollars and ninety eight cents) for services rendered. The payment terms of the acknowledgement of debt were that the defendant would affect payment to the plaintiff no later than 31 July 2017.

Based on the agreement and the acknowledgment of debt by the defendant, the plaintiff pursued an application for summary judgment, which the defendant opposed on the following grounds, being that the summons is excipiable, the citation of the defendant differs materially on the combined summons and the particulars of claim, the quotation which doubles as an agreement between the parties is not signed by the plaintiff, annexure A to the particulars of claim, i.e. the acknowledgment of debt does not comply with s. 12 of the Stamp Duties Act¹ as it was not stamped, the interest clause of the prayers of the particulars of claim does not indicate how the 20% interest shall be

¹ Act 15 of 1993.

calculated, the plaintiff must choose its remedies as the plaintiff attached an agreement as basis for its claim for damages suffered and then proceed to claim same amount in terms of the acknowledgment of debt also attached to particulars of claim. As on the merits, the defendant further submitted without much detail that it had a bona fide defence against the plaintiff's application for summary judgment.

Held – It is trite that opposing affidavit has to contain a sufficient exposition of the facts which, if they were later to be proven and accepted by the trial court as true, would constitute a good defence in law.

Held – with respect to the argument on the description of the defendant, it is sufficiently clear who the plaintiffs' intended to sue as the defendant and, this approach by the defendant is overly technical and is not conducive to having real issues between the litigants decided in as speedy and cost effective manner as possible.

Held further – If the contract does not include an express or tacit statement of the date when payment is due, a demand for payment within a reasonable time must be sent before interest starts accumulating. Summons in this instance would constitute demand.

Held further that – If the claim is based on a liquid document but the plaintiff omits to attach it to the summons, the application will be defective and summary judgment can as a result not be entered. However, should the liquid document relied upon be attached to the summons, the omission to again superfluously attach it to the summary judgment application cannot prejudice the defendant and is accordingly not fatal to the application.

ORDER

Summary judgment granted in the following terms:

- a) Payment of the amount of N\$530 177.98;
 - b) Interest at the rate of 20% *a tempore morae* on the aforesaid amount from date of judgment to date of final payment;
 - c) Cost of suit.
-

RULING

PRINSLOO, J:

Introduction:

[1] The parties before me are Africa Today Building Enterprise Close Corporation and Amupolo Building Construction Close Corporation, both duly registered in terms of the Closed Corporation Act, Act 26 of 1988. I will for purposes of this ruling refer to the parties as they are in the main action.

[2] This court is called upon to adjudicate on the application for summary judgment. Defendant also filed an application for condonation for the late filing of its opposing affidavit and heads of argument. This application was initially opposed by the plaintiff but when the issue was addressed in court Mr. Rukoro indicated that plaintiff will not pursue its initial opposition to the application for condonation. In order to expedite the matter the court granted the application for condonation. I will therefor deal no further with the issues raised therein.

[3] On the 30th of November 2017, the plaintiff instituted an action against the defendant claiming for:

- 'a) Payment of the amount of N\$530 177.98;
- b) Interest at the rate of 20% a tempore morae on the aforesaid amount to date of final payment;
- d) Cost of suit;
- e) Further and/or alternative relief.'

[4] The summons was served on the defendant on 16 February 2018 and this application for summary judgment followed the defendant noting its defence on 28 February 2018.

The plaintiff's cause of action:

[5] The plaintiff's cause of action essentially entails the following:

During or about 20 October 2016 the plaintiff (represented by Tjipena Mbutu in his capacity as managing member of the plaintiff) and defendant (represented by Erasmus Gabriel) concluded a written agreement² in terms whereof the plaintiff was appointed as a domestic subcontractor for purposes of cutting and filling for construction of a platform for the new ante-natal maternity ward of the Onandjokwe State Hospital. In terms of the agreement:

- i) the plaintiff would carry out the work as fully set out in the letter of appointment, specifically in respect of the project;
- ii) the contract amount including VAT amounted to N\$ 532,818.00 (Five hundred and thirty two thousand and eight hundred and eighteen Namibian Dollars).

² Annexed to the Particulars of Claim as Annexure A.

- iii) The performance in terms of the agreement was time sensitive and no extension of time for the subcontractor to perform the work would be allowed without the execution of a written amendment to the agreement;
 - iv) The commencement date of the agreement was 21 October 2016 and the anticipated completion date was 27 October 2016.
- (b) The plaintiff complied with the terms of the agreement and duly invoiced the defendant for the services rendered.
- (c) Defendant failed to make payment to the plaintiff for services rendered.
- (d) During May 2017 the defendant, (represented by Ms. Rachel Gabriel, in her capacity as director of the defendant) drew up at her special instance and request an acknowledgement of debt³ wherein she acknowledged defendant being indebted to the plaintiff in the amount of N\$ 530,177.98 (Five hundred and thirty thousand one hundred and seventy seven Namibian Dollars and ninety eight cents) for services rendered.
- (e) The payment terms of the acknowledgement of debt were that the defendant would affect payment to the plaintiff no later than 31 July 2017.

Grounds for Defendant's opposition to the summary judgment application:

- [6] The defendant resisted the application for summary judgment on the following grounds:
- i. That the summons is excipiable as the :
 - a. The citation of the defendant differs materially on the combined summons and the particulars of claim. On the combined summons the defendant is a

³ Annexed to the Particulars of Claim as Annexure B.

- different legal entity whereas on the particulars of claim the defendant is a close corporation;
- b. The quotation which doubles as an agreement between the parties is not signed by the plaintiff.
 - ii. Annexure A to the particulars of claim, i.e. Acknowledgment of debt does not comply with s. 12 of the Stamp Duties Act⁴ 1993 as it was not stamped.
 - iii. The interest clause of the prayers of the particulars of claim does not indicate how the 20% interest shall be calculated.
 - iv. The plaintiff must choose its remedies as the plaintiff attached an agreement as basis for its claim for damages suffered and then proceed to claim same amount in terms of the acknowledgment of debt also attached to particulars of claim. In terms of the acknowledgment of debt the defendant is indebted to the plaintiff. This cause the particulars of claim to be vague and embarrassing and renders the particulars of claim excipiable.
 - v. A copy of the liquid document the plaintiff relies on for its summary judgment application must be attached to the application.

[7] On the merits the defendant states as follows:

- '3. I submit that I have a bona fide defence in this action and I did not defend the action for purposes of delay.
4. There was a very strict time limit to the agreement in terms whereof the plaintiff renders its services to the defendant. The plaintiff was late in finalization of the services rendered. It has thus cause me damages. I have a counterclaim against it.
5. The exact amount of the counterclaim must still be computed.'

⁴ Act 15 of 1993.

Principles governing summary judgment

[8] The practice relating to summary judgments is governed by Rule 60 of the High Court Rules. Rule 60(5) provides as follows.

'(5) On the hearing of an application for summary judgment, the defendant may –

- (a) where applicable give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given; or
- (b) satisfy the court by –
 - (i) affidavit which must be delivered before 12h00 on the court day but one preceding the day on which the application is to be heard); or
 - (ii) by oral evidence given with the leave of court, of himself or herself or of any other person who can swear positively to the fact that he or she 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 on.'

[9] The *bona fides* requirement pertains to the defence raised by the defendant and same is determinable on the merits of the defence so raised. That in essence means that the defendant must disclose the facts upon which his/her defence is based.

Defence to be set out fully

[10] In the matter *in casu* defendant does not fully set out its defence to the claim but instead reverted to purely technical defences in an effort to defeat the application for summary judgment.

[11] It is trite that opposing affidavit has to contain a sufficient exposition of the facts which, if they were later to be proven and accepted by the trial court as true, would constitute a good defence in law.⁵

[12] The matter of *Kukuri v Social Security Commission* SA17/2015 Mainga JA referred to the matter of *Maharaj v Barclays National Bank*⁶ where Corbett JA had this to say about the ambit of the rule of disclosure as it applies to the remedy of summary judgment:⁷

'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 either the whole or part of claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. 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.'

[13] The principle generally requires that details of the defence, the grounds thereof and the underlying material facts must be disclosed with sufficient particularity and completeness in the defendant's opposing affidavit.

Facts undisputed:

[14] From the affidavit opposing summary judgment a number of issues averred in the particulars of claim are not addressed and I must therefore regard it as undisputed.

⁵ *Breytenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)* at 227.

⁶ *1976 (1) SA 418 (A)* at 426C.

⁷ At 426 A -426 E.

[15] The defendant:

- a) does not deny or dispute the agreement or its material terms reached between the parties as set out in paragraph 5 *supra*;
- b) does not deny or dispute that the plaintiff attended to and finalized the project;
- c) does not deny or dispute the acknowledgement of debt and the averments made therein;
- d) does not deny the indebtedness of the defendant to the plaintiff.

[16] The extent of what the defendant is saying in his opposing affidavit is that the plaintiff was late in finalization of the services so rendered and that it suffered damages and left it at that.

Discussion of grounds raised in opposing summary judgment

The citation of the defendant:

[17] The defendant has taken issue with the fact that the citation of the defendant differs materially on the combined summons and the particulars of claim. In the combined summons the defendant is cited as 'AMUPOLO BUILDING CONSTRUCTION' and on the particulars of claim as 'AMUPOLO BUILDING CONSTRUCTION CLOSE CORPORATION, duly incorporated in terms of the Close Corporation Act, 26 of 1988 in the Republic of Namibia with its given place of business...'

[18] Mrs. Petherbridge acting on behalf of the defendant argued that this is contradictory which makes the pleadings vague and embarrassing.

[19] Mr. Rukoro argued that the summons is a generic document created by the E-Justice system and that it only encapsulates the essential particulars of the litigant and that there is no requirement in the rules that requires the details of the litigant to be fully set out in the summons.

[20] It should be noted that a summons should be read together with the contents of the Particulars of Claim in each case as a composite document, then there is no doubt who is intended to be sued.

[21] In terms of Rule 7(4) the summons consist of two parts namely the first part which is addressed to the sheriff and the second part which contains particulars of claim. Rule 7(9)⁸ deals with the second part of the summons and what must be contained therein.

[22] The rule does not prescribe that the actual Form 1 (combined summons) should contain the same detailed particulars regarding the parties as is required in respect of the second part of the summons.

[23] In my view, it is sufficiently clear who the plaintiffs' intended to sue as the defendant and, this approach by the defendant is overly technical and is not conducive to having real issues between the litigants decided in as speedy and cost effective manner as possible.

Acknowledgment of debt does not comply with s. 12 of the Stamp Duties Act 1993

⁸ (9) A combined summons must set out -

- (a) the name and, where known, the first name or initials by which the defendant is known to the plaintiff, his or her residence or place of business and, where known, his or her occupation and, if he or she is sued in any representative capacity, that capacity and the summons must also state the defendant's sex;
- (b) the full names, sex, occupation and the residence or place of business of the plaintiff, and where he or she sues in a representative capacity, that capacity;
- (c) if the plaintiff elects to receive any subsequent document by electronic means through e-justice, he or she must state his or her electronic address; and
- (d) the cause of action and the relief claimed.

[24] The agreement, the defendant submits, is such that needs to be stamped in terms of the Stamp Duties Act of 1993 as amended in terms of s 12. As a result, the defendant submits that the agreement therefore cannot be relied upon by the plaintiff until and when it is accordingly so stamped.

[25] Furthermore, the argument by the defendant that the plaintiff cannot rely on a written document that is not stamped cannot be sustained. In *Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others* 2017 (4) NR 1173 (SC) the Supreme Court made the following observations:

'[48] The High Court's approach as regards the effect of non-compliance with the Stamp Duties Act accords with the modern trend in interpreting a provision which places an obligation on a legal actor to do something. That approach is to consider if the legislative intent was to visit non-compliance with a nullity. The learned judge approached the matter on correct principle. He held (para 41):

"I am of the view that the existence of sections 12 and 13 [of the Stamp Duties Act] is an indication that the legislature did not intend that if a document is not stamped such failure would lead to a nullity of the document. I am of the further view that the court when faced with a document which is not stamped may order that the document be stamped in accordance with the Stamp Duty Act, 1993."

[26] The submission therefore lacks any resemblance of merit. The relevant case law is clear to the effect that an unstamped document can be stamped retrospectively and even after judgment on or appeal⁹.¹⁰ As soon as penalty stamps have been attached to a document, the sanction of invalidity falls away the document obtains, with retrospective effect the status it would originally have had if it had been properly stamped¹¹.

⁹ *De Meyer v Bam* 1951 4 SA 68 (N) 72 D, *Mullan v Vladislavich* 1961 (1) SA 364 (T) 369

¹⁰ *Lee v Tobias* (HC-MD-CIV-ACT-CON-2016/04131) [2017] NAHCMD 204 (31 July 2017) at par 5 and The Law of Evidence Issue 4 at page 11-11 paragraph 11 3.

¹¹ *Badat v Corondimas* 1947 2 SA 170 (N) 176, *Gleneagles Farm Dairy v Schoombee* 1947 4 SA 66 (O) 71, *Buyers Guide (Pty) Ltd v Dada Motors (Mafikeng) (Pty) Ltd* 1990 4 SA 55 (B): The Law of Evidence

The interest clause of the prayers

[27] The defendant advanced an argument that the interest clause of the prayers of the particulars of claim does not indicate how the 20% interest shall be calculated.

[28] The initial agreement reached between the parties did not agree on the issue of interest nor did it deal with the exact date that payment would be due. However, in all contracts, even in those contracts where nothing is said on the question of performance, there is a time when, or a period within which performance is due. If a party to a contract delays in performing a contractual obligation that party is said to be in *mora*.¹² The consequences for a debtor who is in *mora* are that interest is payable on liquidated amounts.¹³ If the contract does not include an express or tacit statement of the date when payment is due, a demand for payment within a reasonable time must be sent before interest starts accumulating. Summons in this instance would constitute demand.

[29] In *Bellairs v Hodnett and Another*¹⁴ the Full Bench discussed *mora* interest as follows:

'As previously pointed out, *mora* interest in a case like the present constitutes a form of damages for breach of contract. The general principle in the assessment of such damages is that the sufferer by the breach should be placed in the position he would have occupied had the contract been performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party. Accordingly, such damages only are awarded as flow naturally from the breach or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (Victoria Falls and Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines Ltd., 1915 AD 1 at p.22)'. In awarding *mora* interest to a creditor who has not received due payment of a monetary debt owed under contract, the Court seeks to place him in the position he would have occupied had due payment been made. The

¹² Issue 4 at page 11-11 paragraph 11 3.

¹³ GA Mulligan 'Mora' (1952) SALJ 276.

¹⁴ Kerr The Principles of the Law of Contract 6 ed (2002) at 616.

¹⁴ 1978 (1) SA 1109 (A)1978 (1) SA p1147

Court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor during the period of *mora* and the interest consequently represents the damages flowing naturally from the breach of contract.

[30] However, due to the omission in the agreement and in the prayer of the plaintiff as the date on which the interest would run I am of the opinion that it would be justified to order that interest be calculated from date of judgment.

The plaintiff must choose its remedies

[31] The defendant further submits that the plaintiff has chosen to rely on the written agreement, the quotation marked annexure "A" and the acknowledgement of debt which it also attached to the particulars of claim. In this regard, the defendant submits that the plaintiff must choose its remedy and decide whether it relies on the written agreement or on the acknowledgement of debt. The defendant submits that the two documents differ materially and as a result, renders the particulars of claim vague and embarrassing and therefore excipiable.

[32] I failed to see why the defendant would submit that the plaintiff cannot rely on the written agreement and the acknowledgement of debt by the defendant for its claim. In my mind, the written agreement indicates what the parties have agreed and the duties and expectations required from either party to fulfil as per the contract whereas the acknowledgement of debt is where the defendant admits that indeed it hasn't performed and offering to make good as per the agreement.

Failing to attach liquid document to the summary judgment application

[33] If the claim is based on a liquid document but the plaintiff omits to attach it, the application is defective and summary judgment cannot be entered. However, should the liquid document relied upon be attached to the summons, the omission to again

superfluously attach it to the summary judgment application cannot prejudice the defendant and is accordingly not fatal to the application.¹⁵

[34] The summary judgment procedure is not intended to shut the defendant out from defending its claim, however it is very clear that the defendant has no sustainable defence in this matter. Plaintiff did the work and the defendant took no issue with it and this is clear from the acknowledgment of debt where the following was stated by MS Rachel Gabriel on behalf of the defendant:

'The meeting held on 16th of May 2017 I, furthermore acknowledge that Amupolo Building Construction CC is committed to pay and settle the above amount in full by not later than 31st of July 2017. I have no argument with the said debt as it is stated above.'

The Plaintiff is therefore entitled to payment as set out in its claim.

[35] In the result, I then make the following order:

Summary judgment granted in the following terms:

1. Payment of the amount of N\$530 177.98;
2. Interest at the rate of 20% *a tempore morae* on the aforesaid amount from date of judgment to date of final payment;
3. Cost of suit.

J S Prinsloo
Judge

APPEARANCES:

¹⁵ Summary Judgment: A Practical Guide: van Niekerk, Geyer and Mundell, Service issue 11 at page 3-3.

FOR THE PLAINTIFF:

R Rukoro

of EnsAfrica Namibia Inc., Windhoek

FOR THE DEFENDANT:

M Petherbridge

of Petherbridge Law Chambers, Windhoek