

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

APPLICATION FOR SUMMARY JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/00317

In the matter between:

THE HOME DOCTOR CC

PLAINTIFF/APPLICANT

and

KAVANGO EAST REGIONAL COUNCIL

DEFENDANT/RESPONDENT

Neutral citation: *The Home Doctor CC v Kavango East Regional Council* (HC-MD-CIV-ACT-CON-2020/0317) [2020] 400 NAHCMD (4 September 2020)

CORAM: NDAUENDAPO

Heard: 4 September 2020

Delivered: 4 September 2020

Flynote: Civil procedure-Application for summary judgment-Respondent raised issues which are triable-Application refused.

Summary: The applicant sued the respondent for N\$ 1 067 463.20 on a building certificate issued by the architect. The parties entered into a building contract whereby the applicant was to construct an office block for the respondent. A final certificate was issued by the architect. The respondent refused to pay. The applicant instituted an action. The respondent opposed the action. The applicant then applied for summary judgment. The respondent opposed the application and filed a comprehensive affidavit setting out the defenses. Mr. Thikusho who deposed to the affidavit stated that the certificate was issued erroneously as the applicant did not complete the work as per the contract. There were, *inter alia*, defects that the applicant failed to rectify. The respondent has a counterclaim against the applicant for the payment of a penalty fee for the incomplete work by the applicant in the amount of N\$ 1 746 600.

Held, that the respondent raised issues which are triable and point to the possibility that some injustice may be visited on the respondent by the grant of summary judgment without a full trial.

Held, further, that the application for summary judgment is refused.

Held, that costs shall be costs in the main action.

ORDER

1. The application for summary judgment is refused.
2. Costs shall be costs in the main action.

JUDGMENT

NDAUENDAPO, J

[1] Before me is an application for summary judgment. The applicant sued the respondent for an amount of N\$ 1 067 463, 20 for payment on a certificate issued by an architect on a building contract.

Background facts

[2] The applicant and respondent entered into a written building contract for the construction of the Divundu local authority's offices in the Kavango East Region. The amount payable in terms of the contract was N\$ 9 329 174.91. That amount was later increased to N\$10 089 391, 73. The architect and managing agent in respect of the project was Mr. Agostino Ferreira Architects who were authorized to issue regular payment certificates and those payments had to be paid within one month by the respondent. On 20 June 2019, the architects issued certificate no. 20, serial no. 77519 to the applicant and the architect stated that the respondent was required to pay in terms of the said contract an amount of N\$ 1 067 463.20 to the applicant as part payment of the building contract. The respondent failed to pay the said amount and the applicant sued the respondent for that amount.

[3] The respondent opposed the action. The applicant then launched this application for summary judgment. The respondent filed an opposing affidavit. The affidavit was deposed to by Mr. Ludwig Kathoyima Thikusho:

'...the Chief Regional Officer in the employ of the defendant/Respondent, who has been authorized to oppose the application for summary judgment. He denies that the defendant/respondent has no bona fide defence. He sets out the defense as follows: He states that the payment certificate issued by the appointed architects Agostinho Ferreira architects and valuated by the quantity surveyors David Nel was erroneously issued as acknowledged by David Nel Quantity Surveyors who recommended the rescission of the said certificate as the amount stipulated on the certificate is not due, owing and payable. A letter confirming same is annexed as Exh "A". There are confirmatory affidavits from both the architect and the quantity surveyors.'

Defense on the merits

Erroneous release of retention amount:

[4] He states that the retention amount included in the payment certificate in the amount of N\$248 757.65 (excl. vat) has been erroneously included in the said certificate by the quantity surveyor, as such amount may only be due and payable to the Applicant after the rectification of the defective works identified and outlined by the architect in the defects list issued in terms of clause 13 of the building contract to the Applicant on the 19th of October 2017. A copy of the defects list issued by the architects marked as Annexure B is attached. The said defects have not been rectified as instructed by the architects and therefore the applicant is not entitled to claim for the payment of the retention amount as included in the payment certificate. The architects have also confirmed in their letter dated 20 March 2020 and 12 February 2020 respectively, that the defects have not yet been rectified by the applicant. The said letters marked as Annexure C and Annexure D are attached. Both the architect and quantity surveyor were under the mistaken belief that the defects as per the defects list had been rectified by the applicant. It is therefore disputed by the Respondent that the Applicant is entitled to payment of additional preliminaries and Generals as such costs were not approved by the Respondent.

Deduction of penalty fee by Respondent

[5] He states that in terms of clause 19 of the building contract, the Respondent is entitled to deduct a penalty fee from any monies due or to become due to the Applicant under the building contract.

[6] Considering that the penalty fee due, owing and payable to the Respondent is in the amount of N\$1 746 600, the Respondent is entitled to demand from the Applicant for a deduction of the penalty fee from any monies due or to become due to it alternatively demand for payment of the penalty fee owed by the Applicant. Annexure E, the architect's letter dated 3 November 2017 stipulates the sum of the penalty fee incurred up until the 19th of October 2017.

[7] In the premises, the penalty fee owed to the Respondent is in excess of the amount claimed for by the Applicant. The Respondent therefore has a counterclaim against the Applicant for the payment of the penalty fee.

Unauthorized, unilateral increment of contract amount

[8] He states that on 18 June 2019, the architect unilaterally and without approval by the Respondent revised the contract amount agreed to between the Respondent and the Applicant from N\$9 329 174.91 to N\$10 089 391.73. The architect is not authorized to unilaterally revise the contract amount as such conduct would be ultra vires its powers and/or authority.

[9] The unauthorized increment of the contract amounts as relied on by the Applicant in its particulars of claim is herein disputed by the Respondent as such amount was never approved by the Respondent.

Disputes and Arbitration procedure as per clause 26 of the Building contract

[10] He states that as per clause 26, the parties to the building contract have agreed to resolve their disputes as per the dispute and arbitration process as outlined therein.

[11] The institution of the main action by the Applicant in this honorable court without exhausting the processes as agreed to between the parties is therefore contrary to clause 26 of the building contract and renders the main action dismissible as the wrong platform has been approached by the applicant.

The applicable legal principles to an application for summary judgment

[12] In *Kotze¹v Lemure*, Masuku J said the following:

‘Summary judgment has often been described as an extra ordinary and stringent remedy. In this regard, the court, it has been said must be on the qui vive and not grant summary judgment where the defendant has in the affidavit in opposition to the summary judgment raised issues which are triable and point to the possibility that some injustice may be visited on the defendant by the grant of summary judgment without a full trial.’

[13] In *Air Liquide Namibia (Pty v Afrinam Investments (Pty) Ltd*)² Ueitele, J held that:

¹ NAHCMD 164(16 June 2017).

² [2018]NAHCMD 123(11 May 2018).

‘Summary judgment is a very stringent and final remedy which closes the doors of the court for a defendant and should be granted only if it is clear that the plaintiff has an unanswerable case... that it has often been stated by the courts that, even if the defence of the defendant does not sufficiently comply with the requirements of Rule 60(5) of the Rules of Court, the court still has a discretion to refuse summary judgment.’

Submissions by the applicant

[14] Mr. Vaatz argued the quantity surveyor merely says in paragraph 2 of his letter Annexure “A” ‘that based on the above’ the certificate can be rescinded because he does not state what he means by “based on the above”. He further does not say what defects were not attended to. The list of defects is dated 19 October 2017, that is nearly two years before the architect issued the certificate and therefore the architect was satisfied when he issued the certificate. Mr Vaatz argued that in terms of paragraph 25.7 of the contract “a final certificate shall be conclusive evidence as to the sufficiency of the said works and materials and the value thereof”, Mr Vaatz relied on the case of *Ocean Diners (Pty) Ltd vs Golden Hill Construction CC*.³

[15] Where the court held that: on page 340 D-E:

‘It (the certificate) constituted (in the absence of a valid defence) conclusive evidence of the value of the works and the amount due to the Respondent. It embodied a binding obligation on the part of the appellant to pay the amount...’ The appellant failure to pay within the time stipulated entitled the respondent to ‘sue on the certificate.’^{345.} ‘A final certificate is not open to attack, because it was based on erroneous reports of the agent of the employer or the negligence of his architect.’

Amlers⁴ summarize the effect of the following South African court decisions as follows:

‘It is apparently not a defence that the work was defective or that the employer has an unliquidated counterclaim for damages. A liquidated counterclaim may be set off against the amount of the certificate.’

³ 1993(3) SA (A) at340D-E.

⁴ Amlers: *Precedents of pleadings*. 6ed at 37.

“A final certificate is not open to attack, because it was based on erroneous reports of the agent of the employer or the negligence of his architect.”

[16] Mr. Vaatz submitted that as far as the erroneous release of the retention monies is concerned, the architects refer to two letters dated 12 February and 20 March 2020 in which he complains that he did not receive satisfactory feedback from the contractor to his letter dated 12 February 2020. The final certificate was issued by the same architect on 21 June 2019 and only in 2020 does he writes that he did not get a satisfactory response from the contractor that:

‘We are gravely concerned with the lack of progress on site ... would like to express our dismay with the main contractors performance, we have come to the conclusion that the contractor is not able to complete the contract’.

That was after the summons were issued, two and half years after the certificate was issued. He does also not state what works need to be completed.

[17] Mr. Vaatz further argued that the architects and the quantity surveyors were the agents of the defendant. They authorized the payment of the preliminaries and generals and therefore the respondent cannot now come and say those amounts should not be in the certificate. Thus there is no basis why the amount of N\$ 679 470 00 should not be allowed and paid. The penalties are not a quantified claim that can be deducted from the amount due to the plaintiff.

[18] As far as the unilateral increments in the contract amount is concerned, Mr. Vaatz argued that the architect was the agent of the respondent and if he was not authorized to increase the amount ,then that is an issue between the respondent and the architect.

[19] On the argument that the matter should have been referred to arbitration, Mr. Vaatz argued that the amounts claimed were not disputed. The certificate is a liquid document. In terms of para 26.2:

'The decision of the principal agent shall be final and binding on the parties unless the contractor or the employer within 14 days of the receipt thereof by written notice to the principal agent disputes same'.

The final payment certificate is a decision by the principal agent and if the respondent was not satisfied with the decision, then the respondent should have in terms of the said paragraph sent a letter within 14 days complaining and it has not done that. There is no merits in that submission.

Submissions by the respondent

[20] Counsel argued that as per the contract, the respondent is entitled to retain a portion of the value of the work executed by the applicant. The retention amount is to be withheld for purposes of being utilized by the respondent for the rectification of any defects and insufficiencies in the works or materials delivered by the applicant. To date there are defects on the buildings that have not been rectified. The inclusion of the retention amount of N\$248 757.65 in the certificate was an error made by the architect and the quantity surveyor who were under the mistaken belief that the defects were rectified.

[21] Counsel further argued that the additional preliminaries and generals in the amount of N\$ 679 417.20 included in the certificate were not approved by the respondent as it was not duly signed by the respondent.

[22] Counsel further argued that the respondent has a counterclaim against the applicant of a penalty fee for the incomplete work by the applicant in the amount of N\$ 1746 600. Counsel further argued that the matter should have been referred to arbitration as per the arbitration clause. Counsel argued that the respondent has *bona fide* defences to the summary judgment and it must be dismissed.

Discussion

[23] As it was pointed out in *Air Liquide Namibia, supra*, summary judgment is an extraordinary remedy that, once upheld, it shuts the door to justice for the defendant. It must be granted in circumstances where it is clear that the defendant has no defense at all.

[24] In this regard, it has been said in *Kotze*⁵ v *Lemure* supra:

'The court must be *qui vive* and not grant summary judgment where the defendant has in the affidavit in opposition to summary judgment raised issue which are triable and to the possibility that some injustice may be visited on the defendant by the grant of summary judgment without a full trial.'

[25] In this matter the respondent in the opposing affidavit raised several issues that are triable. Firstly, that the respondent is entitled to retain a portion of the contract amount for purposes of being utilized by the respondent for rectification of any defects and insufficiencies in the works or materials delivered by the applicant and that to date there are defects on the buildings that have not been rectified by the applicant. The retention amount of N\$248 757.65 was erroneously included in the certificate by the architect and the quantity surveyor who thought that the defects were rectified when the certificate was issued. The architect and the quantity surveyor confirm that.

[26] Secondly, the respondent says it is entitled to deduct a penalty fee, for delay in completing the project on time, from any monies due to the applicant. The penalty fee according to the respondent is N\$1 746 600, which is more than what is allegedly owed by the respondent and is allegedly a liquidated amount. The architect in annexure "E" confirms the penalty fee. The respondent intends to institute a counterclaim for the penalty fee. Thirdly, the respondent states that the contract amount was unilaterally increased by architect and the applicant from N\$ 9 329 174.91 to N\$ 10 089391.73. Mr. Vaatz correctly submits that the architect was the agent of the respondent and therefore the respondent is bound by the action of the architect. That may be so, but the respondent says the architect acted *ultra vires* his power. That is clearly an issue which is triable.

[27] Fourthly, the respondent states that in terms of clause 26 of the building contract entered into between the parties the matter should have been referred to arbitration. Mr. Vaatz is of the different view and submits that it should have been the respondent who should have referred the dispute to arbitration as soon as the

⁵ NAHCMD 164(16 June 2017).

certificate was issued, the respondent disagrees with that interpretation. That again is an issue which is triable. In my respectful view, the respondent has raised issues which constitute bona fide defenses and should be tested at a full hearing. In my respectful view, some injustice may be visited on the respondent by the grant of summary judgment without a full trial.

For all those reasons, I make the following order:

[28] Order:

1. The application for summary judgment is refused.
2. Costs shall be costs in the main action.

G N NDAUENDAPO
Judge

APPEARANCES:

FOR THE PLAINTIFF/APPLICANT

Mr. A Vaatz,
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FOR THE DEFENDANT/RESPONDENT

Ms. N Shikongo,
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