

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

SUMMARY JUDGMENT RULING

Case no: HC-MD-CIV-ACT-CON-2020/01302

In the matter between:

WV CONSTRUCTION (PTY) LTD APPLICANT/PLAINTIFF

and

O'BRIAN ANTHONY DAVIDS

FIRST RESPONDENT/ DEFENDANT

STANDARD BANK NAMIBIA LIMITED

SECOND RESPONDENT/DEFENDANT

Neutral Citation: *WV Construction (Pty) Ltd v Davids* (HC-MD-CIV-ACT-CON-2020/01302) [2020] NAHCMD 593 (9 December 2020)

CORAM: SIBEYA J

Heard: 07 December 2020

Delivered: 09 December 2020

Flynote: Practice – Summary Judgment – Defendant opposing summary judgment application on grounds of breach of contract and misrepresentation – Clear dispute between the parties in respect of performance derived from the contract entered into between the parties – The Defendant can succeed to ward-off the application for summary judgment if he proves that he has a bona fide defence on the merits and an arguable case - Summary judgment application dismissed.

ORDER

- a) Summary judgment application is dismissed with costs.
 - b) The costs are subject to rule 32(11).
 - c) Matter is postponed to 26 January 2021 at 14h00 for Case Planning Conference.
 - d) Joint case plan must be filed on or before 21 January 2021.
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RULING

[1] The applicant instituted action against the first respondent for monies allegedly due to the applicant in terms of a construction project to be completed by the applicant at the special instance of the first respondent. No relief is sought against the second respondent which is cited merely for the interest that it may have in the outcome of the proceedings.

[2] On or about 05 November 2020, the applicant applied for summary judgment against the first respondent.

[3] Mr. M. Tjiteere appeared for the applicant while Ms. L. Shikongo appeared for the first respondent.

[4] The first respondent opposed the application for summary judgment and the following defences were raised:

- a) that the applicant breached the terms of the agreement by failing to finalise the construction of the house (the project) on the completion date agreed upon;
- b) poor workmanship; and
- c) that the applicant fraudulently misrepresented in its completion certificates to claim monies which it is not entitled to.

[5] The long and short of the applicant's arguments in support of its application for summary judgment are premised on the following:

- a) that first respondent failed to place primary and/or material facts before court to support his *bona fide* defence;
- b) that first respondent's allegations pertaining to "POC1" does not set out a defence good in law;
- c) that first respondent's opposing affidavit is not in compliance with rule 60(5) in that it does not set out the nature and grounds of the defence fully; and
- d) that applicant's "POC2" sets out a liquidated amount in money due and payable.

[6] The first respondent's primary reaction to the applicant's averments is that the applicant failed to address, in its averments, its breach of the agreement. Applicant breached the agreement by failing to complete the project within the agreed period of time and further failed to address the issue of fraudulent misrepresentation of its completion certificates and its liquid document, "POC2", so emphasised the first respondent. In essence, the first respondent formed the view that the applicant resorted

to “nit-picking” one of the first respondent’s defences as opposed to addressing all defences raised.

[7] On the contrary, the applicant avers that the first respondent placed no material facts to show that he has a bona fide defence and further failed to substantiate allegations of poor workmanship as alleged. The applicant also stated that the first respondent failed to fully disclose the nature and grounds for defence, in that the defences raised by the first respondent are skeletal in nature and as a result do not satisfy the requirements of a good and proper defence in law.

[8] The law on summary judgment applications is trite and plentiful and need not be repeated in this ruling. However, the general approach regarding summary judgments can be surmised as follows as set out by Corbett JA in *Maharaj v Barclays National Bank Ltd*:¹

‘Accordingly, one of the ways in which the defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

All that the Court enquires into is:

(a) whether the defendant has fully disclosed the nature and the 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 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),

¹ 1976 (1) SA 418 (A) at 426A.

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.'

[9] It has been said without number and put beyond dispute that summary judgment is a drastic civil procedure engaged by the creditor for the speedy recovery of what is due to it for a liquidated amount of money. The claim may be based on a liquidated document. The aforesaid drastic nature of this application cannot be overemphasized as it literally entails that once the application is granted the defendant is shut out of court so to speak. It is therefore critical that a court should carefully evaluate the application, the merit of the opposition and the defences raised in the quest to attain justice.

[10] Ms. Shikongo conceded in oral arguments, correctly so in my view, that the defence of poor workmanship raised falls short of a bona fide defence as it constituted a mere allegation without substantive evidence to that effect. Ms. Shikongo was however adamant in her compelling arguments that the applicant failed to complete the project within the agreed period of time and fraudulently misrepresented its completion certificates and resultantly made false claims. She concluded that the applicant claims the amount which is not due to it.

[11] Mr Tjiteere was not to be out-muscled and he persisted that all the defences raised by the first respondent are not bona fide proper defences in law to deny the applicant summary judgment.

[12] With the above, this court takes the view that it would not be proper at this stage to scientifically construe the all defenses raised by the first respondent. The first respondent was required to raise defenses, which, if proven during trial, could raise a proper defense against the plaintiff's claim. It is not for this court to decide the parties' case at the current stage of the proceedings.

[13] Suffice to state that it is common cause between the parties that the project was not completed. The applicant attributes such non-completion on being locked out of the site by the first respondent. The first respondent avers that he terminated the agreement due to the fact that the applicant failed to complete the project within the agreed period of time. To this end the applicant avers that there was no agreed time for the completion of the project. This averment, the first respondent dismisses as false. The existence or not of the completion date is material to the determination of this matter as it appears to underpin the termination of the agreement. This court holds the view that this aspect constitutes a bona fide defence which should be ventilated at trial for justice to be attained in this matter.

[14] Having found that the first respondent raised a bona fide defence, summary judgment ought to be refused but for what it is worth, the defence of fraudulent misrepresentation appears to be a bona fide defence as well worthy of consideration at trial. In the premises granting summary judgment now at this stage would be premature.

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

- a) Summary judgment application is dismissed with costs.
- b) The costs are subject to rule 32(11).
- c) Matter is postponed to 26 January 2021 at 14h00 for Case Planning Conference.
- d) Joint case plan must be filed on or before 21 January 2021.

O SIBEYA

Judge

APPEARANCES:

FOR THE APPLICANT:

M TJITEERE

Dr Weder, Kauta & Hoveka Inc.

Windhoek

FOR THE FIRST RESPONDENT:

L SHIKONGO

Metcalfe Beukes Attorneys

Windhoek