

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: SEPE'S GENERAL ENTERPRISES CC and KAVANGO EAST REGIONAL COUNCIL RUNDU TOWN COUNCIL MINISTER OF WORKS AND TRANSPORT MINISTER OF EDUCATION, ARTS AND CULTURE MINISTER OF FINANCE AND PUBLIC ENTERPRISES MINISTER OF URBAN AND RURAL DEVELOPMENT	PLAINTIFF 1 ST DEFENDANT 2 ND DEFENDANT 3 RD DEFENDANT 4 TH DEFENDANT 5 TH DEFENDANT 6 TH DEFENDANT	Case No: HC-MD-CIV-ACT-OTH-2023/03679 INT-HC-SUMJUD-2023/00364 Division of Court: Main Division Heard on: 17 November 2023
Heard before: Honourable Lady Justice Rakow	Reasons delivered on: 8 December 2023	
Neutral citation: <i>Sepe's General Enterprises CC v Kavango East Regional Council</i> (HC-MD-CIV-ACT-OTH-2023/03679) [2023] NAHCMD 807 (8 December 2023)		
Order:		
1. The plaintiff's application for summary judgment is dismissed.		

2. Costs to be costs in the cause
3. The matter is postponed to 23 January 2024 at 15:30 for additional Case Planning Conference.
4. The parties shall file a joint case plan on or before 18 January 2024.

Reasons for order:

RAKOW J :

Background

[1] For convenience sake, the parties are referred to as in the main action. The plaintiff issued a summons against the defendants for work done by the plaintiff. The plaintiff attended to the fixing of broken sewage lines which were overflowing as a result of a damaged and blocked sewage pipe in the area of Sauyemwa Combined School. The plaintiff was appointed as a contractor and began work on the site on 8 May 2023. The plaintiff was at all times monitored by inspectors on behalf of the defendants and the work was completed to their specifications. On 14 June 2023, the plaintiff issued an invoice to the first defendant in the amount of N\$2 024 335.15. The plaintiff has not been paid for the work done. The defendants entered appearance to defend, subsequently, the plaintiff on 18 September 2023, filed its application for summary judgment and the fourth defendant filed an answering affidavit on 20 September 2023 in opposition to the plaintiff's application.

Parties

[2] The plaintiff is Sepe's General Enterprises CC, a close corporation duly incorporated in terms of the Close Corporations Act 26 of 1988. The first defendant is the Kavango East Regional Council, duly established as a legal entity in terms of the Regional Councils Act 22 of 1992 as amended. The second defendant is the Rundu Town Council, duly established as a legal entity in terms of the Local Authorities Act 23 of 1992 as amended. The third defendant is the Minister of Works and Transport, duly appointed in terms of the Constitution of the Republic

of Namibia. The fourth defendant is the Minister of Education, Arts and Culture, duly appointed in terms of the Constitution of the Republic of Namibia. The fifth defendant is the Minister of Finance and Public Enterprises, duly appointed in terms of the Constitution of the Republic of Namibia. The sixth and last defendant is the Minister of Urban and Rural Development, duly appointed in terms of the Constitution of the Republic of Namibia.

Claim

[3] The plaintiff applies for summary judgment in the following terms:

- a) Payment in the amount of N\$ 2, 024, 335.15 by the First Defendant.
- b) Alternatively, payment of N\$ 2, 024, 335.15 by the Defendants, jointly and severally, the one paying the others to be absolved.
- c) Interest on the amount of N\$ 2, 024, 335.15 at the rate of 20% per annum from 08 September 2022 until date of final payment; and
- d) Costs of suit.

Arguments

Plaintiff

[4] Mr Walters for the plaintiff, argues that the so-called bona fide defence of the fourth defendant is no defence at all. It does not parry this application by merely relying on the first respondent's non-compliance with the law. Our law has developed to protect an innocent party such as the plaintiff. Mr Walters further submits that the averments relating to the over inflation of the invoice by the plaintiff is made by a deponent who does not have any expertise regarding the works done by the plaintiff and nor were such averments supported by someone who does. Mr Walters argues that the inspector, in the employ of the fourth defendant reported to be satisfied with the work of the plaintiff and recommended that payment be made.

[5] Mr Walters argues that the non-compliance with the law, therefore, does not raise a

triable issue as the parties are ad idem regarding the first defendant's non-compliance with legislation. This court is already perfectly positioned to make a determination on the result of such non-compliance, that is, he submits, by relaxation of the *pari delicto potior est conditio defendentis maxim.*

Defendants

[6] Mr Ncube on behalf of the defendants argue that the plaintiff and the first defendant in this matter did not follow the procedures and as a result, the contract that the parties entered into or the work that the plaintiff carried out are vitiated by an illegality. Mr Ncube takes it further to argue the defendants cannot pay for an illegal contract and will demonstrate to this court when they are to lead evidence in their defence to rebut the plaintiffs case that a party that does not follow procurement procedures cannot be compensated for the work it carried out.

[7] Mr Ncube submits that there was no purchase order and the invoices was overly inflated as a result. Mr Ncube states that the defendants will demonstrate that a job of that nature could not have cost that much, had procurement processes been undertaken and more competitors had tendered.

Legal considerations

[8] The law on summary judgment applications is trite, however, it is important to accentuate the basics for purposes of this judgment. Applications for summary judgment are governed by rule 60 of the Rules of this Honourable Court, which stipulates as follows:

'Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each claim in the summons, together with a claim for interest and costs, so long as the claim is –

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) delivery of a specified movable property; or

(d) for ejection.’

[9] In the case of *Namibia Airports Company Limited v Conradie*¹, Hoff J, as he then was, on pg 5-7 at para 8, states that:

[8] In *Gulf Street (Pty) Ltd v Rack – Rite Bop (Pty) Ltd and Another* 1998 (1) SA 679 (OPD) at 683 G – 684B the following appears:

“In the matter of *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793 C – D the learned judge quotes with approval:

“It will therefore be seen that summary judgment is an extra ordinary and drastic remedy. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must in my view strictly comply with the requirements of the Rule.”

In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a bona fide defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet namely a clear claim and pleadings, which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. (my emphasis) In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff’s claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence, which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if plaintiff’s claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court. (See also *Dowson & Debson Industrial Ltd vs Van der Werf and Others* 1981 (4) SA 417 (CPD) at 424 F – 427 A.)’

[10] In *First National Bank of Namibia Limited v Louw*², the court laid out seven golden rules of summary judgment, however for purposes of this judgment, reference will only be made to the rules relevant to this case:

¹ *Namibia Airports Company Limited v Conradie* 2007 (1) NR 375 (HC) para 22 pg 5-7 at para 8

² *First National Bank of Namibia Limited v Louw* (I 1467-2014) [2015] NAHCMD 139 (12 June 2015).

'(a) The resolution of summary judgment does not entail the resolution of the entire action i.e., the defendant is required to set out facts which if proved at trial would constitute a defence. The upshot of this is that the court is required to refuse summary judgment even though it might consider that the defence will probably fail at the trial.

(b) The adjudication of summary judgment does not include a decision on factual disputes. This means that the court should decide the matter from the assumption or premise that the defendant's allegations are correct. For that reason, summary judgment must be refused if the defendant discloses facts which, excepting the truth thereof, or if proved at trial, will constitute a defence.

(c) Because summary judgment is an extraordinary remedy, it should be granted only where there is no doubt that the plaintiff has an unanswerable case.

...

(e) The court is not bound by the manner in which the defendant presents its case. This is to mean that if the defendant files an opposing affidavit that discloses a triable issue, the defendant should, on that account, be granted leave to defend the action.

...

(g) Summary judgment must be refused in the face of any doubt arising as to whether or not to grant it. The basis for this rule is that an erroneous finding to enter summary judgment heralds more debilitating consequences for a defendant than a plaintiff. This is because any error committed in refusing summary judgment may be dealt with during the substantive trial. In this regard therefore, leave ought ordinarily to be granted unless the court is of the opinion that the defendant has a hopeless case.'

Discussion

[11] The defendants raised two defences, specifically, one being that the plaintiff and the first defendants in this matter did not follow the procedures and as a result, the contract that the parties entered into or the work that the plaintiff carried out are vitiated by an illegality and secondly, that there was no purchase order and the invoices was overly inflated as a result. The second defence in itself speaks to the fact that there is a dispute in respect of the claim amount prayed for by the plaintiff in its summary judgment application.

[12] If due consideration is given to the golden rules of summary judgment mentioned hereinabove, the court is of the view that the defendants do not have a hopeless case and the pleadings of the plaintiff are not immaculate and do not put this court at ease to shut the door on the defendants. The defendants have, by the mere mention of these two defences in the opposing affidavit, raised a triable issue and as such, the court has to allow them an opportunity to be heard.

[13] Insofar as the issue of costs is concerned, I am of the opinion that the general rule that costs follow the event must find application.

Order

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

1. The plaintiff's application for summary judgment is dismissed.
2. Costs to be costs in the cause.
3. The matter is postponed to 23 January 2024 at 15h30 for additional Case Planning Conference.
4. The parties shall file a joint case plan on or before 18 January 2024.

Judge's signature	Note to the parties:
RAKOW J Judge	Not applicable
Counsel:	
PLAINTIFF:	DEFENDANTS :
R Walters Of Adv. SS Makando Chambers, Windhoek.	J Ncube Of Government - Office of the Government Attorney, Windhoek.

