

SOUTH AFRICA / JUDGMENT

Dikopane Project Management v Empfuleni Local Municipality (67235/2019) [2020] ZAGPPHC 259 (4 June 2020)

[2020] ZAGPPHC 259**COURT**

North Gauteng High Court, Pretoria

BEFORE

P H Malungana

CASE / FILE NUMBER

67235/2019

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORI****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE

NO: 67235/2019

04/06/2020

In

the matter between:

DIKOPANE

PROJECT

MANAGEMENT

Plaintiff

and

EMPFULENI

LOCAL MUNICIPALITY

Defendant

JUDGMENT

MALUNGANA AJ

- [1] The applicant, to whom I shall refer for convenience as the plaintiff, sued the respondent, to whom I shall refer as the defendant, for the sum of R1, 618,983.92 plus interest and costs of action.
- [2] After the delivery of plea, the plaintiff applied for summary judgment on the ground that the defendant has no bona fide defence to the action. The defendant in turn filed a resisting affidavit raising in limine the contention that the court has no jurisdiction to adjudicate over the matter in that the parties have chosen 'that any dispute arising shall be referred to arbitration.'
- [3] The plaintiff's claim in the summons is founded on the written agreement ('the agreement') concluded between the parties, for the supply and delivery of fuel and lubricants by the plaintiff to the defendant. A copy thereof is attached to the particulars of claim as annexure 'POC1.'
- [4] The particulars of claim delineate the salient terms of the said agreement, and it is therefore not necessary for the purposes of this judgment to repeat them herein.
- [5] In terms of the letter of appointment attached to the agreement marked annexure "A", the agreement in question would endure for a period of thirty six months, from 24 October 2017 to the 23rd of September 2020. The rates payable in respect of the goods to be supplied are set out in the particulars of claim as follows:

"5.8.1 Diesel(0,005%) – Actual Price (including VAT) of R10.83;

5.8.2 Octane Petrol (95%) – Actual Price (Including VAT) of R11,00".

- [6] It is alleged by the plaintiff that it had performed its obligations under the agreement by supplying and delivering fuel products to the defendant. Subsequently the plaintiff rendered tax invoices to the defendant totalling R1 618 983,92 as shown in paragraph 7 of the particulars of claim.

- [7] I interpose to quote the relevant portion of the letter of demand addressed by Clientele on behalf of the plaintiff to the defendant on 11 December 2018. It reads:

"3. On or about 2 November 2017, you entered into an agreement with our client for the supply and delivery of fuel lubricants.

4. Our client has advised that despite having rendered services as agreed, you have failed and refused to render payment on our client's account.
5. We have been instructed by our client to demand from you, as we hereby do, payment of the amount outstanding of R1 618 983.02 within 60 days of receipt of this letter.

6. Should you fail to adhere to this letter, our client reserves the right to institute legal action against you.”

[8] Another letter which deserves attention is the one addressed by the plaintiff’s legal representatives on 23 May 2019. The relevant portion read as follows:

“We act on behalf of Dikopane Project Management CC(“our client”).

We refer to various previous correspondences and letters of demand addressed to the Municipality by our client in respect of monies due due to our client for goods (fuel and petroleum products) sold and delivered by our client to the Municipality in terms of a written agreement dated 1 November 2017.

We also refer to various undertakings made by officials on behalf of the Municipality to make payment to our client of all monies due to our client.

However, on the date of this letter our client has not received any payment of the monies due from the Municipality.

The Municipality is on date hereof indebted to our client in the amount of R1,618,983.92 (One million six hundred and eighteen thousand nine hundred and eighty three Rand and ninety two cents) for fuel and/or fuel products sold and delivered to the Municipality in terms of the agreement concluded

between the parties on 1 November 2017.”

[9] In the plea, the defendant has raised a special plea citing the lack of jurisdiction of this Court. The defendant also denies that the plaintiff performed its obligations under the agreement. According to the plaintiff the issue that falls to be determined is whether or not the defendant has a bona fide defence to the claim lodged by the plaintiff as per the summons.

[10] A good prima facie defence, as defined in *Rex v Rhodian Investments Trust (Pty) Ltd 1957 (4) SA 631* is when the defendant alleges facts which if established would entitle him to succeed in his defence at trial. Once there is a bona fide defence then the application for summary judgment ought to be dismissed. This point was properly propagated in the case of *Jena v Nechipote 1986 (1) ZLR 21* wherein GUBBAY JA (as he then was) stated that:

“All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is a mere possibility of his success, he has a plausible case, there is a triable issue or there is a reasonable possibility that an injustice may be done if summary judgment is granted.”

[11]In the present case the argument on the point in limine is turned upon the effect of the arbitration clause contained in Clause16 of the agreement. I now deal with each of the issues raised in defence in turn.

[12] Clause 16.1 of the agreement reads:

“The Parties agree that any dispute arising out of or in connection with the this Agreement or a Specific Project Agreement, the Parties may at any time by agreement refer the dispute for resolution by way of Arbitration which shall be presided over by an Arbitrator appointed by the

Arbitration Foundation of Southern Africa (“AFSA”).

[13] It is generally accepted that arbitration clauses are increasingly used in commercial agreements as a mechanism for resolving contractual disputes, and there are no summary jurisdiction in arbitrations. However, it is not sufficient to simply state that there is a dispute without setting out the terms of the dispute as Didcott J succinctly pointed out in *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 304E-G:

“Arbitration is a method for resolving disputes. That alone is its object, and its

jurisdiction. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a

dispute must exist before any dispute question of arbitration can arise. It includes re Carus-Wilson and Greene (1887) 18 QBD Z (CA); London and Lancashire Fires Assurance Co v Imperial Cold Storage and Supply Co Ltd

(1905) 15 CTR 673, King v Harris 1909 TS 292.”

[14] On the issue of jurisdiction counsel for the defendant in his written heads of argument, sought to argue that the parties have bound themselves to the provisions of the agreement when they signed it, and the plaintiff is not permitted to deviate therefrom. I am in agreement with this proposition insofar as it relates to compliance with the terms of the agreement. However, as the authorities have shown, that does not absolve the defendant from setting forth the nature of dispute that ousts the jurisdiction of this court.

[15] The discretionary powers to exclude arbitration is not usually available in the case of a statutory arbitration. See *Body Corporate of the Pinewood Park Scheme No 202 v Dells (Pty) Ltd*, [2012] All SA 377 (SCA) at paragraph

17. My finding, therefore, is that no dispute has been raised necessitating any issue in the instant case to be referred for arbitration. I align myself with the dictum in the matter of *PCL Consulting (Pty) Ltd t/a Phillips v Tresso Trading 119 (Pty) Ltd*, 2009 (4) SA 68 (SCA) (15 March 2007), also referred to by the plaintiff’s counsel which states in par. 19 that:

“No arbitrable dispute has been raised by the defendant justifying a stay in proceedings.”

- [16] In view of the above finding, I turn now to consider whether there is a bona fide defence in terms of rule 32(3)(b) of the Uniform Rules of Court. In terms of the said rule, the defendant must satisfy the court by affidavit that he has a bona fide defence to the action, such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant for his defence. See *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) 422. The defence must be judged with particular regard to the manner in which the cause of action has been set forth and a defendant may rely on the fact that by virtue of the baldness of the plaintiff's allegations that he might be unable to formulate an adequate reply. See *Guhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) 56; *Nichas & Son (Pty)Ltd v Papenfus* 1970 (2) SA 316 (O).
- [17] It is apparent ex facie the affidavit that the defendant denies that the plaintiff rendered any of the services it claims to have rendered in terms of the agreement. This flies against the allegations contained in the letters of demand and the invoices attached to the particulars of claim. In the letter dated the 23rd of May 2019, an allegation is made by the plaintiff to the effect that various officials in the employ of the defendant made undertakings on its behalf to pay the plaintiff monies owed to the plaintiff. The defendant did absolutely nothing to rebut or challenge the

correctness or otherwise of such material evidence in its resisting affidavit.

- [18] In *Sharon Pipeline Specialists CC v Vhembe District Municipality* (112/2016)[2016] ZALMPHC 2 (3 May 2016), Semenya AJ in dismissing the summary judgment application said in para.6 that: 'In an application of this nature, the court should determine whether the defendant's defence is good in law and whether it is bona fide. The court has a discretion to decide in the defendant's favour even if the defence is neither bona fide nor good in law. However, the discretion has to be exercised judiciously -*Mnweba v Maharaj* [2001] All SA 265 (C). There can be, no doubt, in my view that the defendant was aware of the seriousness of the allegations contained in the letter dated 23 May 2019, and it boggles my mind that no attempt whatsoever, has been made to deal with the content thereof. I need not emphasise that the purpose of Rule 32 is to prevent a defendant who has no defence to a claim from delaying the matter unnecessarily by abusing the court process, and to enable it to grant a final judgment without a trial despite the fact that a defendant has entered appearance to defend. The particularity of an affidavit is evidence, and the a bald, vague or laconic affidavit is indicative of the fact that the defendant wishes to avoid the dangers inherent in the presentation of a fuller or clearer exposition of his evidence. See *Soil Fumigation Services Lowveld CC v Chemifit Technical Products (Pty) Ltd* [2004] 2 All SA 366 (SCA), 2004 (6) SA 29 (SCA); *Standard Bank of South Africa Ltd v Friedman* [1999] 1 All SA 142 (C) 148, 1999 (2) SA 456 (C). The inescapable conclusion which I have reached in this case, is that the defendant's affidavit falls short of the standard requirements of the affidavit expected under rule 32(3)(b) of the Uniform Rules of Court.

- [19] In the circumstances the order I make is as follows:

1. The defendant is ordered to pay the plaintiff the sum of R1, 618, 983.92;
2. Interest on the aforesaid amount at the rate of 10.25% a tempore morae;
3. Costs of action

P H Malungana

Acting Judge of the High Court

Gauteng Division, Pretoria

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