

SOUTH AFRICA / JUDGMENT

Gedeelte 19 Van 1 Plaas Waterval CC t/a Kudusrus Game Lodge (2024/2019) [2021] ZANWHC 71 (15 September 2021) [2021] ZANWHC 71

COURT

North West High Court, Mafikeng

BEFORE

M Kgabi

CASE / FILE NUMBER

2024/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

Case No: 2024/2019

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:

GEDEELTE 19 VAN 1

PLAAS WATERVAL

CC

t/a KUDUSRUS GAME LODGE

PLAINTIFF/APPLICANT

And

BAPHIRING

TRADITIONAL COUNCIL

DEFENDANT/ RESPONDENT

Heard:

19 August 2021

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 15 September 2021.

ORDER

The

following orders are made: [i] The Plaintiff's Application for summary judgement is refused.
[ii] Defendant is granted leave to defend.
[iii] The costs to be costs of the suit.

JUDGEMENT

KGABI AJ

INTRODUCTION

- [1] For the sake of convenience, the parties are referred to as 'Applicant' and 'Respondent' respectively.
- [2] This is an Application for Summary Judgement for an amount of R2 500 000.00, arising out of an action brought by the Applicant against the Respondent.
- [3] The Applicant claims the above amount alleging that the Respondent failed to compensate the expenses incurred by Applicant during the cancellation of a joint venture contract that they entered into regarding Kudusrus Game Lodge and Predator Park.
- [4] The Applicant allege in his Particulars of Claim, that the Respondent is liable in terms of the partial tacit and partial written contract marked Annexure "POC 1".

BACKGROUND:

- [5] The Parties entered into the following agreement:

During or about April 2018 the Plaintiff, represented by F Greef, and the Defendant, represented by Kgosi EM Mabelane, entered into a partly written and partly oral, alternatively tacit agreement with the following relevant terms:

The oral part being:

5.1 The parties agreed that the contract regarding the Kudusrus Gamelodge and Predator Park was cancelled;

5.2 The Defendant will pay to the plaintiff an amount of R2'500'000.00 as a compensation for expenses incurred by the plaintiff in and regarding the above mentioned contract;

5.3 The amount of R2'500'000.00 will be paid by the Defendant to the Plaintiff as a lump-sum within a reasonable time.

A copy of the written part of the agreement is annexed to the summons marked Annexure "POC1" acknowledging indebtedness of R2'500'000.00 regarding Kudusrus and Predator Park.

[6] The Applicant issued summons on 21 June 2019, against the Respondent. The summons is supported by Annexures "POC 1.

[7] The Respondent filed a Notice of Intention to Defend the matter on 15 August 2019, after a Notice of Bar was filed.

[8] On 20 September 2020 the Respondent filed an Exception in terms of Rule 23 of the Uniform Rules of Court. The exception was taken by the Respondent against the Applicant's Particulars of Claim on two points:

8.1 That they are vague and embarrassing, and

8.2 Lack of necessary averments necessary to sustain a cause of action.

On 5 August 2020, after finding that in terms of Rule 23, the excipient ought to have given the Applicant a notice to correct the pleadings if they were vague and embarrassing allegations, and Annexure "POC 1" was sufficient to form a cause of action, the Application for Exception was dismissed with costs by Gura J.

[9] On 28 September 2020, the Respondent filed the Defendant's Plea, which denies that the letter marked "POC 1" has a nexus between the contract regarding the Kudusrus Game Lodge and Predator Park and the Applicant's claim.

[10] On 14 October 2020, the Applicant filed a Summary Judgement Application based on the fact that the Plea does not raise any issue for trial, and attached thereto is a Schedule of costs incurred by the Applicant regarding a certain Baphiring Game Lodge marked "FOU 1" signed by both parties and amount being R2 705 671.94. Further to this there is a WhatsApp message that is purported to have come from the Respondent's representative, with a promise that the Respondent is waiting for R12 M government allocation and will pay in April 2018.

[11] On 19 October 2020, the Respondent filed a Notice of Intention to Oppose.

[12] On 4 November 2020, the Respondent filed an Affidavit Opposing Summary Judgement and the Condonation for late filing was granted thereafter on 5 November 2020. The Opposing Affidavit raises the following facts:

12.1 awkward sup flows averments,

12.2 That there are issues that are triable,

12.3 That the Respondent does not know as to which case to answer to,

12.4 That “FOU 1” relates to review of expenses incurred by Respondent on external service provider,

12.5 That the joint venture was between the Respondent and Kudusrus Game Lodge, and not the Applicant.

12.6 Respondent deny making a tender to pay R2.5 M

12.7 That “POC 1” is a letter, not a contract.

[13] Following the Court’s Practice Directives, the Applicant filed their Practice Note and Heads of Argument on 29 January 2021. The matter was postponed on 2 (two) occasions with a cost order on 05 November 2020, and 26 February 2021 thereafter at the instance of the Respondent to allow them to file their Heads of Argument.

[14] Application for Summary Judgement came before this court now on 19 August 2021. Respondent requested another postponement to file their Heads of Arguments and they indicated that they were considering approaching Applicant for settlement of the matter out of court. They concede that the matter was postponed on several occasions at their instance. They offered to pay the costs. The court refused the postponement, thereafter Respondent requested that they be heard on papers already filed. Court granted indulgence to hear Respondent on Opposing Affidavit and Defendants Plea, even if there were no Heads of Arguments from Respondent. It must be clearly stated that the attitude of the Respondent in lack of adherence to the Court’s Practice Directives is concerning, and should be addressed for future purposes as they are not doing any justice for their clients.

UNIFORM RULE 32

[17] In terms of the Uniform Rule 32, after the Respondent delivered a Plea. The Plaintiff is now required to verify in the Founding Affidavit the following:

17.1 The cause of action and the amount claimed,

17.2 Identify any point of law relied upon and the facts upon which Plaintiff’s claim is based

17.3 Explain briefly why the defense as pleaded does not raise any issue for trial.

[18] According to Erasmus, on Superior Court Practice, Rule 32 Summary Judgement was introduced in England to assist Plaintiff, where the Defendant cannot set up a bona fide defense or raise against the Plaintiff’s case an issue which ought to be tried. The rule is designed to prevent plaintiff’s claim, based on certain causes of action to be delayed by what amounts to abuse of process of court

- [19] The summons states that the cause of action, is the cancellation of the contract which led to the drafting of the “POC 1”, which is in content a letter purported to be an Acknowledgement of Debt. The “POC1”, states that the settlement figure is R2.5M. The document “POC 1” is a letter on the Letterhead of Baphiring Traditional Administration, but it does not bear any addressee. This letter refers to Kudusrus Game lodge and Predator Park contracts.
- [20] Further details of how the amount of R2.5 M was reached, were stated in detail in the Annexure to the Founding Affidavit supporting the Application for the Summary Judgement, where the Applicant gave court details of the costs that they incurred when they upgraded the infrastructure in the premises of the Respondent while the joint venture was still active.
- [21] The court still has to determine whether “POC 1” can be regarded as a valid agreement, and the nexus between the documents supporting the claim should also still be established through further evidence.

LIQUID DOCUMENT

- [22] At this juncture, we need to determine whether the amount claimed is clear. The Applicant states in his founding affidavit that he relies on a liquidated amount of money.
- [23] A liquidated amount is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment or put differently, where the ascertainment of the amount in issue is a matter of mere calculation. See *Botha v W. Swanson and Co. (Pty) Ltd.*
- [24] In this instance, the parties agreed upon payment in lump-sum of the amount of R2.5 M. The agreement, and the written confirmation are therefore what makes the amount to be liquidated according to the Applicant. The documentation provided as proof of debt, i.e. “POC 1”, “POC 2” and “FOU 1” should strengthen and affirm the debt payable, and therefore making the claim a liquidated one.
- [25] I will therefore deal with each of these supporting documents below.
- “POC 1” refer to Kudusrus and Predator Park, and as previously mentioned, it is indeed from Baphiring Traditional Administration,
- but cannot affirm on the face of it, as to whom was it addressed to.
- “POC 2” is a letter of demand from the Applicant’s attorneys to the Respondent. The letter of demand refers to Baphiring Game Lodge, and there is no reference to Kudusrus and Predator Park.
 - “FOU 1” is a detailed schedule of expenses that were incurred regarding Baphiring Game lodge, and the total amount is R2’705’671.94.
- [26] There are definitely issues that needs to be ventilated or clarified regarding the three documents above relied upon, as they state different amounts, and the issues were not cleared through affidavits.

BONA FIDE DEFENCE

[27] The test still remains what it always was namely: Has a defendant disclosed a bona-fide defense? In Tumileng Trading CC V National Security and Fire (Pty) LTD [2020] ZAWCHC 52, Binns –Ward J, held that:

“However, our procedure, by contrast, even in its amended form, remains true to that in which summary judgement was originally introduced in the English civil procedure in the mid-19th century. Rule 32(3) which regulates what is required from the Defendant in its opposing

affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed”.

[28] We also have to explain briefly why the defense as pleaded does not raise any issue for trial.

[29] There is indeed a dispute as to whether the agreement concerned Kudusrus or both Kudusrus and Predator Park? On the other side there is an issue as to whether this contract is relating to Kudusrus or Baphiring Game Lodge? The above issue was raised in the Defendant’s Plea when disputing the joint venture. This is a concern, as the different documents relied upon refer to different names.

[30] In Maharaj and Breitenbach v Fiat SA (edms) Bpk 1976 (2) SA 226 (T), it was held that what is expected of the defendant seeking to successfully oppose an application for summary judgement therefore

remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and the defence is genuine or bona fide, summary judgement must be refused. The defendant’s prospects of success are irrelevant.

CONCLUSION

[31] Having considered all the above issues raised by the Defendant, it is clear that the Defendant is raising issues that are triable.

[32] In the court’s view, the Respondents disputes a joint venture agreement, and therefore the Respondent is not required to show that its defence is likely to prevail. The Respondent can show that it has a legally cognisable defence on the face of it.

[33] In Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009(5) SA 1 (SCA), the Supreme Court of Appeal held that:

“The rationale for summary judgement proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defense of her/his day in court. After almost a century of successful application in our courts, summary

judgement

proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[34] As the position has changed now, after the amendment of Rule 32 and the Defendant has to deliver their plea, the bona fide defence can now be ascertained from the Plea. The court is satisfied that the threshold of a bona fide defence has been crossed, and therefore The court is bound to refuse the summary judgment, and allow the Defendant leave to defend. See *Maharaj and Breitenbach v Fiat SA (edms) Bpk 1976 (2) SA 226 (T)*.

[35] The court must always be reluctant to deprive the Respondent of his normal right to defend, in instances where it is clear that there are triable issues. The Respondent's issues raised needs to be ventilated, and the normal court process will assist to resolve this matter fairly.

[36] In *Shepstone v Shepstone* 1974 (2) SA 462 Miller J said:

"The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that... "a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial".

[37] I am convinced that there are triable issues in this matter, and therefore it will be proper to refer the matter to trial, in order to ventilate all the issues that are raised.

The following orders are made:

M KGABI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAFIKENG

Date of Hearing

: 19 August 2021

Judgement

Delivered

: 15 September 2021

Appearances for the Applicant : Mr Esterhuyse

Appearance for the Respondent : Adv Seboko

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