

SOUTH AFRICA / JUDGMENT

Norland Construction (Pty) Ltd v Chris Hani District Municipality (1998/2016)

[2016] ZAECHGHC 110 (26 October 2016)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe

CASE / FILE NUMBER

1998/2016

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IN THE HIGH

COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: 1998/2016

In

the matter between:

NORLAND

CONSTRUCTION (PTY) LTD

Plaintiff

And

CHRIS

HANI DISTRICT MUNICIPALITY

Defendant

JUDGMENT

BESHE J:

- [1] Plaintiff issued summons against the defendant on the 26 April 2016 for payment of the sum of R2 162 442.03, interest thereon and costs of suit.
- [2] This was met by the entering of an intention to defend by the defendant.
- [3] Plaintiff is now seeking summary judgment against the defendant which is in turn opposed by the defendant.

- [4] The plaintiff is a company with limited capacity which is duly registered in accordance with the company laws of the Republic of South Africa as a civil engineering concern. The defendant is a local authority of Queenstown, duly established as a company C Municipality in terms of the provisions of Chapter 1 of the Local Government (Municipal Structure Act No. 117 of 1998).
- [5] It is common cause that a contract relating to water purification was awarded to the plaintiff by the defendant in May of 2012. In June 2014 the plaintiff submitted the claim which is the subject of this litigation – claim number 21 in relation to electrical / mechanical works. The said claim reads thus:
- “Therefore in accordance with clause 4.2, 4.9, 5.12, 6.3 and 10.1 of the General Conditions of the Contract. The contractor hereby requests an extension of time for completion of works to 15 July 2014 as reflected in its claim programme, together with preliminary and general costs amounting to R2 162 442.03.”*
- [6] It transpires that defendant was not amenable to paying this amount. This resulted in the dispute regarding the claim being referred to an adjudicator, one Mr Gurry. The adjudicator ruled that the plaintiff was to be awarded its claim in full as set out above.
- [7] It is common cause that the defendant has not implemented the adjudicator’s award, hence this action against it.
- [8] In its resistance of the summary judgment application, defendant contends that it has a bona fide defence to plaintiff’s claim. To substantiate this assertion, defendant contends that its engineers ruled against the plaintiff thereby rejecting claim number 21. This, it would appear, was on the basis that plaintiff was not entitled to claim twice for delays more especially that an extension had already been granted in respect of the completion date. Defendant further avers that Mr Gurry’s adjudication is fatally flawed and stands to be set aside on the basis that in making the award he was biased, acted irrationally and unreasonably and without any due regard to the true facts pertaining to the dispute. That there was no basis for Mr Gurry to approve / uphold the claim. This, so contends the defendant, is evidenced by an email which was erroneously or inadvertently provided together with other documents by plaintiff’s representatives to the defendant – subsequent to the adjudication. The email that is annexed to defendant’s papers as “MAM3” reads as follows:

Hi Warren

Cant advise Sam at this stage until dust has settled.

Can you please tell him that he must submit a certificate this month and include the following

Claim 21

Interest for late payment prime plus 3% which is 12% pa at moment.

50% of my fee – will have final Invoice to him by end of week

I believe that you have a claim for change in scope exceeding 15% and this claim will far exceed R1.0m

If Sam decides to go ahead the clam he should write something like the following to the client.

Further to our notice of a potential Claim and now that we know the total Contract value we confirm that we will submit a formal claim, in accordance with Clause 6.11 of GCC 2010, within 28 days from the date of this notice

Kind Regards

Neville Gurry

Bsc(Hons), MSc, PrEng, CEng, FSAICE, MICE, PrPCM

Specialist Construction Consultant

Multi-Disciplinary Mediator and Adjudicator

- [9] According to the defendant, the “Warren” to whom the email is addressed is a senior member of the plaintiff whilst the “Sam” referred to in the email is a director in the plaintiff’s company – Mr Sam Hobson. The supporting affidavit in respect of the summary judgment application is deposed to by Mr Samuel Bonnin Hobson.
- [10] Defendant further contends that it intends instituting a counter-claim seeking an order that the Gurry’s adjudication report be set aside as being void and of no force and effect. To this end, it is contended on behalf of the defendant that a notice has been served on the plaintiff and delivered by hand, in which they declare that defendant disputes the validity and / or correctness of Gurry’s decision. A letter to this effect is attached to defendant’s papers at “MAM6”.
- [11] It is trite that in order to successfully resist an application for summary judgment, the defendant must establish by means of an affidavit that he has a bona fide defence to the action or rely on a counter-claim.[1] Whilst a defendant is not required to prove that his allegations are true, he must however swear to a defence or fully disclose the nature and grounds of his defence which will satisfy the court that he has a defence that is bona fide and good in law.[2]
- [12] In my view, should the defendant succeed in proving the facts he alleges constitute a bona fide defence during the trial, such will constitute a defence to plaintiff’s claim. In my view, this is an appropriate case in which the defendant should be granted leave to defend the action.
- [13] Accordingly the application for summary judgment is dismissed.

Defendant is granted leave to defend plaintiff’s claim.

The costs of this application are costs in the cause.

N G BESHE

JUDGE OF THE HIGH COURT

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Date Heard : 7 June 2016

Date Reserved : 7 June 2016

Date Delivered : 26 October 2016

[1] Rule 32 (3) (b) of the Uniform Rules of Court.

[2] See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 A, *Joob Joob Investments v Stocks Mavundla Zek* JV2009 (5) SA 1 (SCA) at 12.

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