



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

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|------------------------------|--------|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: **4112/2020**

In the matter between:

PINASE AND ASSOCIATES CC

Applicant

and

DEPARTMENT OF HEALTH FREE STATE

1ST Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
HEALTH, FREE STATE**

2ND Respondent

**BE PART OF IT CONSULTING ENGINEERING
(PTY) LTD**

3RD Respondent

MAROGELA CONSULTING ENGINEERS (PTY) LTD

4TH Respondent

JUDGMENT BY:

REINDERS J

HEARD ON:

18 MAY 2023

DELIVERED ON:

This judgment was handed down in open court on 18 AUGUST 2023 at 09h30 and thereafter circulated to the parties' representatives by electronic mail communication.

- [1] In October 2020 the applicant (as plaintiff) issued summons against the first and second respondents (as first and second defendants - hereafter only “the defendants”). Reference to the parties will be as in the main action. After the defendants filed its plea, the plaintiff belatedly applied for summary judgment. The defendant opposed the condonation application as well as the application for summary judgment.
- [2] At the commencement of the court proceedings I condoned the late filing of this application and directed the parties to proceed with the merits of the application. It is not the principles applicable to an application for summary judgment that are in dispute between the parties, but rather the application thereof to the facts of this matter. The factual matrix creating the backdrop to the application emanates from a tender awarded to the plaintiff by the defendants in an amount of R 3 269 520.00 for the provision of professional engineering services in respect of minor refurbishments at the provincial Pelonomi Hospital in Bloemfontein, and further averred “affirmations” (the “extended agreement”) concluded between the parties.
- [3] The plaintiff moves for summary judgment against the defendants in the amount of R 73 047 462,60, interest thereon and cost of suit. The defendant resisted the application for summary judgment on several grounds, including a lack of authority by the deponent to depose to the verifying affidavit, prescription, a counterclaim for overpayment, non-conclusion of the alleged extended scope of work, a lack of authority to conclude the latter and non-compliance with statutorily mandated procurement processes.
- [4] The deponent on behalf of the plaintiff in the founding affidavit to the application for summary judgment avers that the defendants have failed to provide a bona fide defence to the plaintiff’s claim. In heads of argument filed on behalf of plaintiff and in oral submission it was submitted that plaintiff’s claim is based “on a liquid document or for a liquidated amount”. I am not convinced that such a submission is correct. The summons contains allegations to the effect that plaintiff cancelled its agreement with the defendants and claims “damages”. Rule 32(1) allows a party to apply to

court for summary judgment only based on a liquid document, for a liquidated amount in money, for delivery of specified moveable property or for ejectment. The present claim is not based on a liquid document (nor is a liquid document annexed as prescribed by Rule 32(2)(c)), nor is it a claim for delivery of moveable property or ejectment. The plaintiff's claim is for damages which do not constitute a liquidated amount in money. Summary judgment may only be applied for in respect of a claim falling within the four categories mentioned in Rule 32(1).¹ Summary judgment cannot be applied for in respect of an unliquidated amount.

- [5] But assuming that I am wrong in my views that the claim is not for a liquidated amount, a succinct summary of the test to be applied by a court in deciding whether to grant summary judgment or not, was set out recently by the Supreme Court of Appeal in the unreported unanimous judgment of **Cohen NO & Others v D[...]**.² Nicholls JA held in para [31] as follows:

“The high court failed to consider the test to be applied in deciding whether to grant summary judgment. This was, and remains, whether the facts put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court.³ The defendants must fully disclose the nature and grounds of their defence and the material facts on which it is founded. All a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim.⁴” (numbering of footnotes adjusted)

- [6] With reference to the difference between the amended rule 32 or rule 32 prior to the 2019 amendment, the Supreme Court of Appeal held that the position remains that a defendant has to disclose a bona fide defence to successfully oppose an application for summary judgement.⁵ The defence must be genuine, as opposed to ‘a sham’ defence.⁶ It was held that the prospects of success are irrelevant, and as long as the defence is legally cognisable in the

¹ *Nichas and Son (Pty) Ltd v Papenfus* 1970 (2) SA 316 (O); s.1985(1) SA 540 (C).

² (Case no 368/2022) [2023] ZASCA 56 (2023).

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Joint Venture Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA); [2009] 3 All SA 407 (SCA) para 32.

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 418H-419A.

⁵ At para 28.

⁶ At para 28.

sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail.⁷

[7] The defendants' main gripe seems, as I understood it, to be the judgment amount which is an increase from R3.2 million for minor refurbishments to the hospital to more than R86 million for alleged major refurbishments. The defendants aver that the alleged R86 million contract was not preceded by any process in compliance with the precepts of s217 of the Constitution of South Africa⁸ or, for that matter, with any of the related legislative procurement requirements. The defendants accuse the plaintiff of seeking an order from court which ratifies its circumvention of a competitive bidding process in terms of s217 of the Constitution.

[8] If I apply the principles as set out in *Cohen supra*, I have to conclude that defendants have set up allegations which constitute triable issues and which can only finally be adjudicated upon by a court having had the advantage of evidence placed before it. Having so concluded I cannot grant summary judgment.

[9] A cost order in respect of the condonation application still has to be made. It was the plaintiff who moved for the indulgence and who should bear the costs thereof as will be reflected in the order hereunder. Notwithstanding my reservations in respect of whether the plaintiff's claim falls within the ambit of

⁷ At para 29.

⁸ S217 reads:

217 Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001 (wef 26 April 2002).]

the provisions of Rule 32(1), I intend to make the usual cost order that I deem appropriate in applications like these.

[10] I make the following order:

10.1 The plaintiff is ordered to pay the costs of the application for condonation.

10.2 The application for summary judgment is refused.

10.3 Leave is granted to the defendants to defend the action.

10.4 Costs to be in the cause.

C REINDERS, J

On behalf of the Plaintiff:

Adv T. Masuku SC

Adv M. Simelane

Adv N. Nyathi

Instructed by:

A.T. Shabangu Inc Attorneys

c/o Mohlokonya Attorneys

BLOEMFONTEIN

On behalf of 1st and 2nd Defendants:

Adv N. Cassim SC

Adv I. Macakati

Instructed by:

C.E. Cawood

State Attorney

BLOEMFONTEIN