IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPORTABLE:	**NO**
OF INTEREST TO OTHER JUDGES:	**YES**
REVISED:	**NO**

Date: 20/12/2021

Signature:

CASE NO: 2020/32427

In the matter between:

JOVAN PROJECTS (PTY) LTD Applicant

and

ICB PROPERTY INVESTMENTS (PTY) LTD Respondent

Coram: **MACHABA AJ**

Heard on: **23 AUGUST 2021**

Delivered: **20 DECEMBER 2021**

Summary:

Summary Judgment*: Application for summary judgment under the amended rules based on liquidated documents. Is a construction Certified Certificate of Final Completion issued by a Principal Agent on behalf of the owner of the construction works, a liquidated document? Respondent has previously paid ten progress invoices after the Principal Agent had evaluated them and sent to the Respondent for payment.*

Respondent disputes that the Final Certificate of Completion verified by its Principal Agent is a liquidated document and asserts that same can be adjusted.

Practice*: Rule 32(1) and (2) as amended requiring the defendant to provide the Court with a defence that is bona fide and not a sham. Inter alia, the Applicant sues for payment on the basis of two certified progress certificates one of which is a Certificate of Final Completion in terms of a written JBCC Principal Building Agreement. Respondent paid ten (10) previous invoices issued and certified by its Principal Agent using the same format as the one Applicant contends for viz. the JBCC Principal Building Agreement.*

Applicant avers that: it has completed the works; the Principal Agent has evaluated the works; the Agent has evaluated and the two invoices in issue herein, the Agent has deducted late penalties due to the Respondent; the Agent has certified those invoices for payment by the Respondent in terms of the JBCC PBA format; and the Agent has sent those invoices to the Respondent for payment. The Applicant avers those certified invoices are akin to Acknowledge of Debts and therefore, are liquid documents, each entitling it to launch this application.

Respondent denies ever concluding the JBCC PBA, and that the works were completed to its satisfaction. It contends that it had concluded an oral construction agreement. It also denies that the certified invoices are liquid documents and argues that the Final Completion susceptible to adjustment. Respondent filed counterclaim for payment of penalties in terms of the oral construction agreement, and damages in the loss of income.

Held*: In view of all the facts of this case, the Court is not satisfied that the Respondent's opposing affidavit is bona fide or that it has met the requirements of the amended rule 32(2) to ward off an application for summary judgment and that its defence is valid.*

***Held**: The substance and nature of the Respondent's defence is actually a complaint against its own Principal Agent who it alleges has failed to conduct itself in accordance with the parties' contract. On the other hand, the Principal Agent filed confirmatory affidavit agreeing with the Applicant's contentions and this fact alone militates against the Respondent's case.*

***Held**: It is common cause that the Respondent has previously paid ten (10) progress invoices prepared for it by its Principal Agent in accordance with the same JBCC PBA that it denies. That on the totality of evidence, the facts favour the Applicant and Principal Agent's versions of events.*

ORDER

---

1. Summary judgment is entered in favour of the Applicant for payment of R809,478.94 to the Applicant/Plaintiff;
2. Payment of 6% default interest compounded monthly from 23 September 2020 to date of final payment thereof;
3. The Respondent is ordered to pay the costs of this action.

JUDGMENT

MACHABA AJ

"*[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs."*[1]

INTRODUCTION

[1] In this application, the Applicant is the plaintiff in an action it instituted against the Respondent/defendant for payment of an amount of R809,478.94 arising from one (1) progress certificate No. 11, and one (1) Final Completion Certificate No. 12. These certificates arise from the civil construction work undertaken by the Applicant to the Respondent's property pursuant to a tender to do so as submitted by the Applicant and accepted by the Respondent.

[2] The crux of the dispute leading to the non-payment of the above invoices is the nature of the building/construction agreement concluded by the parties. The Applicant, supported by Respondent's Principal Agent – Spencer Associated Architects, allege that the parties including the Respondent represented by Spencer, concluded a JBCC Edition 2014 Principal Building Agreement. The Respondent has put the Applicant's version into question. It denies concluding that JBCC PBA agreement, or signing certain contract documentation. It does not deny that it accepted the Applicant's tender, it just denies that it concluded the kind of an agreement that the Applicant and the Respondent's Principal Agent say the Respondent concluded with the Applicant.

[3] It thus behoves the Court to narrate the factual background of this matter.

FACTUAL BACKGROUND

[1] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18.

[4] From the particulars of claim, the Applicant alleges that on 29 June 2018 it responded to a tender issued by the Spencer Associated Architects on behalf of the Respondent who was, in turn, represented by one Ivo Dos Santos Branco for the construction of a creche known as Branco Creche. The tender was for R13,025,286.57.

[5] In issuing that tender, the Respondent was represented by its very own Project Engineer being the Principal Agent while the Applicant was represented by Mr JB Van den Linde. Applicant submits that its tender was successful and accepted on 18 July 2018 and annexed a letter to that effect from the Respondent's Principal Agent.

[6] This letter is important in that it seems to suggest two different things to the two persons herein. It first states that the contract concluded is subject to the terms and conditions of JBCC, Edition 6.1 of March 2014 Principal Building Agreement (JBCC PBA) which terms shall be applicable and relied upon for the execution of the said tender. Secondly, it promises a completion of contract documentation which must be signed once the Principal Agent has prepared them and presented same to the parties. The said letter of acceptance plays some role towards this judgment and it is thus necessary to quote its contents herein.

[7] It reads as follows:

"duly instructed by the Employer Mr Branco of 16 Loper Avenue, Spartan Extension, and acting on their behalf, we confirm the intention to appoint you as the principal contractor for the abovementioned contract as soon as all relevant contract documentation has been finalised for signing on the following conditions.

1. *The contract sum shall be R13,025,268.57*
2. *….*

9. You are formally to sign the JBCC Principal Building Agreement Edition 6.1, March 2014 as soon as you have complied with the items listed above.

All the previous correspondence of any sort that has taken place in connection with the contract works shall be deemed to be null and void and of no force and effect and replaced by the terms and conditions of this letter which red together with the JBCC Principal Builder Agreement Edition 6.1, March 2014, constitutes

the only terms and conditions which will be recognised in connection with the contract works.

Immediately upon receipt of this letter, you are to proceed with the execution of the works, pending finalisation of the contract documentation.

We confirm that the site is available and as soon as the contract documentation requested above has been provided, we will arrange for a formal site handover meeting on or about 23 July 2018…"

[8] Pursuant to the said letter of acceptance and despite all that it stated, and on 25 July 2018, a site handover meeting was held and attended by the Applicant and the Principal Agent who acted on behalf of the Respondent. The minutes thereof are extensive and exceed four (4) pages.

[9] The Applicant states that over a month later after the handover, and specifically on 18 September 2018, the Respondent accepted its tender and there was then a partly written and partly oral agreement. The Respondent's Principal Agent prepared contract documentation for signature. It is the Applicant's contention that it signed the contract but the Respondent has, to date, not signed same.

[10] The said agreement and its terms and conditions are also extensive. However, there are certain clauses that are immediately important. Those are:

10.1. The employer and the contractors are defined as the Respondent and Plaintiff respectively.

10.2. *"Payment certificate",* being *"a certificate issued at regular intervals [CD] by the principal agent to the parties certifying the amount due and payable in terms of the JBCC Payment certificate format.*

10.3. *"Final Payment Certificate"* being *"the certificate issued by the principal agent after the issue of the certificate of final completion after the final account has been agreed, or deemed to have been agreed."*

10.4. Clause 3.2 states that *"the agreement shall come into force on the date of acceptance by the employer (the contract date)*

10.5. Clause 5.1 states that *"the parties shall sign the original contract documents and shall each be issued with a copy thereof. The original signed documents shall be held by the principal, agent [DC]."*

10.6. Clause 6.1. states that *"the employer warrants that the principal agent has full authority and obligation to act and to bind the employer in terms of this agreement. The principal agent has no authority to amend this agreement.*

10.7 Clause 6.6 states that *"the employer shall not interfere with or prevent the principal agent or an agent from exercising fair and reasonable judgment when performing obligations in terms of this agreement."*

10.8 Clause 21.12 states that *"a certificate of final completion shall be conclusive as to the sufficiency of the works and that the contractor's obligations [12.2.7] have been fulfilled other than for latent defects."*

10.9. Clause 25.6 states that *"the principal agent shall certify one hundred percent (100%) of the amount of final account including the adjustments [26.0; 27.0] in the final payment certificate."*

10.10. Clause 25.7 states that *"the employer shall pay the contractor the amount certified in an issued payment certificate within fourteen (14) calendar days of the date for issue of the payment certificate [CD] including default and/or compensatory interest;"*

[11] The Applicant contends that on 5 February 2020, the Principal Agent concluded the preparation of contract documentation and presented same for the Applicant to sign which it did. A copy thereof was handed back to the Principal Agent for the Respondent's signature. The said agreement has still not been signed by the Respondent.[2]

[12] Applicant contends that pursuant to the contract and the provisions thereof, it commenced with the works and brought same to completion. It then along the way issued and was paid progress invoices No.1 to No. 10.

[2] It seems to me that even after February 2020, the Applicant continued to render works for which it must have been paid. This is because, completion certificate was issued in September 2020.

[13] On 2 September 2020, the Principal Agent issued a final completion certificate. Before this final completion, the parties are agreed that the Applicant issued ten (10) progress invoices all of which were paid by the Respondent. The process of compiling, submitting and certifying same followed the JBCC component of the agreement which lends credence to the Applicant and Principal Agent's versions.

[14] It was only right at the end, when progress invoice number 11 in the amount of R478, 251,15 and Final Invoice No. 12 in the amount of R331,127.79 which were certified by the Principal Agent for payment were issued, that the Respondent refused to pay same and a dispute arose.

[15] The Applicant now sues the Respondent for payment of an amount of R809,478.94, plus 6% default interest compounded monthly from 23 September 2020 to date of final payment thereof in terms of the said certified certificates.

[16] In its plea, the Respondent raised a special plea that deals with the internal dispute resolution mechanism in the event that there is a disagreement between the parties.

[17] The Respondent avers that in terms of the said clause 30.1, of the very same agreement which it denies, the parties agreed that should a disagreement arise, they shall attempt to resolve same within ten (10) days and record the resolution thereof. If the disagreement is not resolved, then same shall constitute a dispute which shall be referred to adjudication which must be resolved in ten (10) days from the expiry of the first 10-day period. The issue is that the Applicant has not followed this route.

[18] The Respondent also contended that the so-called letter of acceptance of the agreement was, in fact, an intention to appoint the Applicant as the contractor for its project. It contends that the said letter had numerous conditions which the Applicant failed to meet.

[19] It is noteworthy that the said letter of appointment does not state whether the conditions included therein were suspensive (i.e. conditions precedent) or resolutive (i.e. conditions subsequent).[3] A mention of anyone of the two would have been helpful in determining the matter. However and despite the conditions contained in the said letter, it appears that the building works proceeded till completion stage, or to a substantive completion stage hence the parties are now

[3] See Christie, The Law of Contract in South Africa, 5th Edition, LexisNexis Butterworths, page 139.

fighting over certificates number 11 and 12. There was indeed work done despite all the terms of that letter.

[20] The difference between the two types of contractual conditions are: *"[A] condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event…"*[4]

[21] The learned author of Christie goes further and states that: *"[W]hether a condition is precedent or resolutive is a matter of construction, the words "subject to" being the normal way of indicating a suspensive condition…"*[5]

[22] Absent that averment and/or evidence suggesting same, the Court is entitled to assume that the conditions were resolutive i.e. not depended on a prior happening of a future uncertain event unless of course the congruent and contemporary conduct of the parties point to that direction. In fact, the conduct of these parties indicated a resolutive contract. More of this latter.

[23] The Respondent contended further that the parties concluded an agreement which does not or did not encapsulate the JBCC. According to it, it concluded an oral agreement for the construction of the Branco Creche. In accordance with the terms of the oral agreement:

23.1. the Applicant was to construct the creche at the costs of R13,025,268.00 on the designs and drawings supplied by the Spencer Associated Architects (the Principal Agent).

23.2. The said Spencer Associated Architects were to project manage the agreement. Were there to be delays and the contract proceed beyond January 2019, the Applicant was to pay an amount of R7,500.00 per day for the said delay until the date of completion.

23.3. The works were to proceed to completion to the Respondent's satisfaction and provide the Respondent with numerous certificates of installations.

[24] The Respondent denies that it was ever given a written contract to sign, or that there was any contract signed by the parties. In a view that this Court takes, this

---

[4] Christie, op. cit.
[5] Ibid.

defence is a real issue which must be looked at on the totality of the matter as to whether or not it is *bona fide*, and/or raises triable issues.

[25] The Respondent admits that the Applicant was appointed to execute the contract. It also admits to having paid all the Applicant's invoices save the last two. Naturally, some work was done to warrant those ten progressive payments. It is of the view that it is entitled to withhold payments thereof given the fact that there is a breach of the oral agreement by the Applicant.

[26] The Respondent avers that the Applicant breached the verbal agreement in that it did not complete the building works by January 2019. It argues that the Applicant, instead, prepared a recovery plan in which it undertook to complete the works by April 2019, and later shifted the completion date to August 2019. It alleges that on those two dates, the Applicant failed to complete the said works. It only finalised the works in December 2019.

[27] Applicant was provided with a snag list on 19 October 2019 which were finalised in July 2020. A perusal of the said snag list does not indicate anything that reference this project/agreement. One does not see, for example, from whom it comes, to whom it is directed, the name or identify of the agreement etc. This becomes difficult for this Court, especially where there is a Principal Agent, on the other hand who swears under oath that the Applicant had brought the agreement to a practical completion.

[28] The Respondent averred that the Applicant has never reached a stage of practical completion given the fact that there appeared to exist some persistent damp problem. Again, the Court is faced with the Principal Agent's contrary evidence which is sworn under oath.

[29] If this matter were to be referred to the trial Court, that Court would have to consider the two issues and determine which of the two versions would prevail. Would it be the Applicant's, supported by the Principal Agent, with their partly unsigned written JBCC PB Agreement, or the Respondent's oral agreement which of course does not exist except in the Respondent's mind, and denied by the Applicant and the Principal Agent.

[30] From where this Court is sitting and by looking at the above two versions, it appears incomprehensible that parties could conclude an oral agreement for a building contract worth over R13 million. This is not only irresponsible, but dangerous given the ever-present conflicts in construction industry in relation to

buildings and building projects. Such a dispute, should it arise, would easily threaten the very same project and there would be no references to resolve same.

[31] This is the reason that the probabilities would immediately favour the Applicant and the Principal Agent's version of events. Furthermore, the Applicant's version seems plausible particularly given the invoices that were regularly certified, and issued for payment by the Principal Agent all of which were in the JBCC format and the payments that followed. This is exactly what the two persons explained, demonstrated, and supported with their evidence in Court.

[32] Despite admitting to paying the invoices as set out in the Particulars of Claim, the Respondent denies that the Spencer Associated Architects had provided it with certified invoices.

[33] In light of the admission that the Respondent had paid the Applicant's invoices 1 to 10 and its above version that the Principal Agent has not provided the Respondent with these invoices, it is strange to fathom how could the Applicant have been paid. These invoices appear, on the face thereof, to have been signed by the Respondent's Principal Agent's Mr F D Spencer. They were then paid by the Respondent.

[34] Furthermore, there is nowhere on the papers filed of record where the Respondent complains that it had never accepted the JBCC PBA as its contract. It alleges later in the affidavit, that it was not aware of the existence of the JBCC Agreement.

[35] There is also no apparent complaint by the Respondent to the Principal Agent when it received any one of the previous invoices with JBCC PBA format, on the use of JBCC format. Instead, the Respondent paid all those invoices in accordance with how the Principal Agent had prepared them (i.e. JBCC format).

[36] The Respondent further contends that the Applicant did not complete the building works in time or as per its own recovery plan and that that justified its conduct in withholding payment from the Applicant. It also denies that it was in breach of the agreement and alleges instead, that it was the Applicant who failed to perform in terms of the oral agreement; and/or alternatively, the two parties were to perform simultaneously. Again, the Respondent contends that it was thus entitled to withhold its performance pending the said simultaneous performance by the Applicant.

[37] The Respondent then included a counter-claim in its defence and pleaded that when it and the Applicant concluded the oral contract as they did, the parties contemplated that any delay in completing the works would cost the Respondent money. It also averred that there was a severe damp problem with the works. It thus claims an amount of R900,000.00 for delays calculated at an amount of R7,500.00 per day and an amount of R3,3 million for the operational costs occasioned by the delay.

[38] The Respondent sought that the action be dismissed with costs, alternatively, that claim stand over pending the finalisation of its counterclaim.

[39] It is immediately relevant, noteworthy and worrisome that the Respondent has failed, alternatively, neglected or further alternatively refused to annex any evidence to support the claim it made against the Applicant. There is not even an email directed to the Applicant detailing the amounts claimed herein and the bases thereof. The only document so crafted was a letter from the Respondent's lawyers disputing the Applicant's claim for payment of the amount owing to it.

[40] After the plea, the Applicant took advantage of the new rules relating to summary judgment applications and applied for same.

[41] In addition to the averments in its particulars of claim the Applicant stated that it verifies the "causes" of action and the "grounds" upon which the claims arising from the liquid documents were based. It submitted that the Notice of Intention to defend and the Plea filed do not disclose any defence and were merely filed to delay the finalisation of its claim.

[42] The Applicant submitted that the two outstanding certified certificates were like acknowledgement of debt which entitled it to rely thereon as "causes" of its action.

[43] The Applicant contended further that the Respondent misunderstood its claim which is a claim for payment based on two liquid documents. It contended that the issues raised by the Respondent were not relevant to its claim. It contends that in any event, and in terms of the contract, there are avenues that exist in terms of the JBCC PB Agreement, to pursue if the Respondent had any complaints or disputes against it. It made reference to clause 30.1 of the Agreement which regulates the parties' dispute resolution.

[44] The Applicant stated that the Respondent has however never raised any disagreement with it in terms of clause 30.1 of the Agreement. Instead of following

the provisions of this JBCC Agreement, the Respondent elected not to pay the Applicant the amounts certified in the above two invoices.

[45] The Applicant denies the Respondent's assertion that the parties did not conclude any written contract. The Applicant asserts that its official met with Mr Branco on 23 July 2018 where Mr Branco orally informed the Applicant that the Applicant had been appointed as a contractor for the works. The rest of the terms of the agreement were in accordance with the JBCC PBA terms and conditions as per the tender issued by the Principal Agent dated 8 June 2018.

[46] The Applicant further asserts that the Respondent authorised its Principal Agent to hand over the site to it on or about 25 July 2018; authorised the Principal Agent to manage the contract; and to certify and deliver to invoices for payment. Accordingly, the Applicant contends, that the Respondent's conduct demonstrated that it accepted the Applicant's tender/offer and the JBCC PBA's terms and conditions which came into effect in accordance with the terms of the said contract.[6]

[47] The Applicant rejected the Respondent's denial of the Principal Agent's preparation of the contract documentation for its signature. It contends that the Respondent has in any event, indemnified the Applicant against the acts/omissions of the Respondent and/or its agents. This is confirmed by the Principal Agent.

[48] The Applicant further contends that the Respondent's so-called terms of the oral contract unlawfully altered the written agreement concluded between the parties. In particular, the Applicant denies that the contract works had to be done to the Respondent's satisfaction and contended that the Respondent's Principal Agent had regularly inspected the works for the Respondent, including requests for extensions of time and found those to be reasonable and acceptable.

[49] The Applicant further denies the Respondent's averment of a penalty rate of R7,500.00 per day and asserts that the written JBCC PBA contract provided for R1,000.00 per day until practical completion. It argues that the Principal Agent applied the agreed daily rate, evaluated the penalty that the Applicant was liable for, and deducted same from the Applicant's interim invoice No. 11. Unfortunately for the Respondent, the Principal Agent confirms this submission.

---

[6] These were referred to above.

[50] The Applicant further denies that the works were not completed and asserts that the Principal Agent agreed that the works had reached completion stage. It contends that the issue of dampness, if same is an issue, should have been dealt with in terms of the Agreement as part of the 5-year latent defect correction. Furthermore, the Applicant asserts that even in that event, the Respondent would not be excused from making the required payments certified by the Principal Agent which invoices were sent under cover of a letter that showed that same were sent to the Respondent.

[51] The Applicant contends that the Respondent seemed to be raising numerous issues that had nothing to do with it, or alternatively, that it sought to raise issues that fall to be resolved in terms of the dispute resolution process of the JBCC PBA.

[52] It is evident, as I noted, that there is no evidence in terms of which the Respondent raised its issues directly with the Applicant. Many of the email correspondences filed of record, are directed by the Respondent's Mr Branco, to the Principal Agent (its agent on site).[7]

[53] The Applicant asserts further that the Respondent indemnified the Applicant from its acts and omissions or that of the Principal Agent. It also asserts that the Respondent is precluded by the JBCC PBA from interfering with the functions of the Principal Agent. He contends that despite all these issues, the Respondent has not changed its Principal Agent. Again, the Principal Agent confirmed this point.

[54] Finally, the Applicant laments the bare denials that littered the Respondent's plea.

[55] In denying the counterclaim, especially the penalties for alleged late completion of the works, the Applicant asserted that the Principal Agent compiled a comprehensive calculation of the penalties and deducted an amount of R39,000.00 from its progressive invoice No. 11.

[56] It asserts further that the Respondent has, to date, not given any notice of disagreement in respect of these lost time penalties. Indeed, what is further

[7] In fact, in paragraph 29.1, of the opposing affidavit, the Respondent states that "I annex hereto as ARSJ1 a chain of emails between myself and the principal agent where, on 5 June 2019, I wrote to the principal agent and on the following day he replied. In my email, I stated that the buildings were supposed to have been finished by January [2019]and that we were now in June 2019 and as such delay in completing the building has caused serios losses of income. In the principal agent's response, he concluded by saying that they assured me that they were committed to completing the project in the shortest time possible". Annexure ARSJ2 is another email to the principal Agent from the Respondent dated 5 October 2019 complaining of the same issue.

noteworthy is that the indirect and above-mentioned allegation by the Respondent that its own Principal Agent had failed to calculate and deduct the proper penalties from the Applicant's invoice(s), is in fact a fight that the Respondent ought to take with its Principal Agent, and not the Applicant. In this case, there is no such a dispute between these two and it boggles the mind why the Applicant who is an innocent party in these calculations and deductions should be dragged into what is essentially a dispute between the Respondent and the Principal Agent.

[57] In the event that the Respondent's version is indeed correct and that the Principal Agent failed to calculate and deduct correct amounts of late penalties, then the Respondent would in law be entitled to look to the Principal Agent for its losses.

[58] This issue of delays in completion of the works is further complicated by the fact that the email correspondence between the Respondent and the Principal Agent pointed to a serious disagreement and blaming each other as to the real cause of the resultant delays. Each party has different reasons why there were delays in the construction of the works. There is nowhere where the Applicant is fingered as the cause of the material delays that have unfortunately resulted in the Branco Creche. Nonetheless, even if there were such delays caused by the Applicant, this Court accepts that the Principal Agent calculated what he determined to be reasonable deductions thereof and deducted what was due to the Respondent. The Principal Agent used at a rate of R1,000.00 per day contained in the written JBCC PB Agreement and not what the Respondent seeks this Court to accept (viz. the R7,500.00 per day from his oral agreement).

[59] The Applicant further contends that instead of paying its invoices, the Respondent launched the above counterclaim with *mala fide* intentions of delaying the resolution of its claim.

[60] It argued that even if the Respondent raised disputes or disagreements with the Applicant in terms of the JBCC Agreement, such would not absolve the Respondent from paying the two invoices on which the Applicant's claims relied. It asserted that these claims were like acknowledgment of debts which gave rise to new causes of action, which entitle it to a provisional sentence order. These submissions are, once again, confirmed by the Respondent's very own Principal Agent.

[61] The Applicant further argued that the Respondent's rate for the daily penalties and the amount claimed in respect of the said inflated rate of R7,500.00 per day are

not provided for in the Agreement, and are in contravention of the Conventional Penalties Act, Act No. 15 of 1962.

[62] Furthermore, the Applicant denies that the Respondent or the agreement entitles the Respondent to claim damages in the amount of R3,3million which would also be contrary to the above Penalties Act. The Court was referred to section 2 of the said Act which reads as follows:

"2. (1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, of both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of recovery or the penalty,"

[63] There is nowhere where the Respondent could point to Court for its entitlement, in lieu of its version of the contract where it was entitled to sue for both penalties and damages. Accordingly, this accusation by the Applicant seems to have merit.

[64] The Applicant contends finally that the Respondent's plea and counterclaim do not raise any triable issues. It persisted with its claim.

OPPOSING AFFIDAVIT

Preliminary Objections

[65] In opposing the summary judgment application, the Respondent raised a number of preliminary objections which it did not raise in its Plea. This is very strange in that in bringing this application after having to wait for the Respondent's Plea, the Applicant ought to have been afforded an opportunity to address those points of law in its application for summary judgment.

[66] Under the amended rules for summary judgment, a plaintiff is obliged to wait until after the defendant has filed his or her plea before the plaintiff can launch summary judgment application. In his/her or its affidavit, the plaintiff is required to explain why the defence pleaded by the defendant is not bona fide and does not raise any issue for trial. As a matter of logic, the plaintiff can only comply with this

requirement when he or she knows what the defendant has as his or her defence outlined in the plea.[8]

[67] It follows practice logic that the defendant may not, in his or her affidavit resisting the plaintiff's summary judgment application, raise defences that have not been pleaded safe for those that appear normally in this application. In the words of Van Loggerenberg:[9]

> *the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. In this regard the plea should comply with the provisions of rules 18(4) and 22(2). (Sic)*

[68] This is trite legal proposition that precludes a party to litigation from ambushing the other party with selective pleading at every turn. The defendant has an obligation to set out his or her case fully and with clarity. The defendant is therefore called upon to file a plea that sets out its defence and, in the summary judgment application, to amplify the defence on an affidavit to illustrate a *bona fide* defence to the action. In setting out the defence on his or her affidavit, the defendant will not be restricted to the *facta probanda* of the case but will be entitled and **expected** to set out relevant *facta probantia*.[10]

[69] A defendant is required to set out a defence with reasonable clarity ***and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea it cannot in the absence of an explanation for the inconsistency be said to be bona fide***.[11] [Emphasis added]

[70] This Court finds that the Respondent has deprived the Applicant an opportunity to deal with these preliminary grounds in its founding affidavit, especially given the fact that there is no right of reply in these proceedings. It is thus unfair to the Applicant. This Court could have easily elected to reject them out of hand and deal only with the one that appears in the plea, however, in the interest of justice, they will be individually dealt with.

---

[8] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) paragraph 22; Van Loggerenberg, Erasmus: Superior Court Practice, RS15, 2020, D1-416. See also Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters 2020 (1) SA 623 (GJ).

[9] Van Loggerenberg, Erasmus: Superior Court Practice, RS15, 2020, D1-416 to 416A.

[10] See McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 23; Abrahamse and Sons v SA Railways and Harbours 1933 CPD 626 637; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) 838 – 839; Moaki v Reckitt & Colman (Africa) Ltd 1968 (3) SA 98 (A) 102B; Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC) paragraphs 50-53.

[11] Cf Breytenbach v Fiat SA (Edms) Beperk 1976 (2) SA 226 (T).

INDIVIDUAL GROUNDS OF PRELIMINARY OBJECTION

[71] The first ground of objection is exception to the above observation in that it is usually raised in summary judgment applications against affidavits in support of summary judgment applications. The gist of this objection is that the Applicant's affidavit in support of the summary affidavit swears positively to the "*grounds"* and "*causes*" of action. The Respondent takes issue with the plural "causes of action" as opposed to "a cause of action" and "grounds of claims" as opposed to "a ground of claims" which the Respondent asserts are mutually destructive on the facts.

[72] It is noteworthy that the Respondent has not clarified which versions are mutually destructive of one another.

[73] Furthermore, there are tools available for the Court to resolve disputes where there are mutually exclusive versions. Usually, a Court has to be assisted with evidence and legal argument to arrive at a conclusion regarding the existence or otherwise of mutually destructive versions and to apply trite legal principles in determining which version to accept and why.

[74] It appears as if the Respondent raises an issue that there are mutually destructive clauses on:

"whether or not the letter to appoint the Applicant to execute the works, read with the JBCC PBA terms constituted or could constitute a part oral or part written agreement where there is a non-variation clause."

[75] This Court did not follow this argument and finds no merit in it. The Respondent has failed to demonstrate to Court which versions were mutually destructive. The fact that the Applicant confirmed the "cause**s** of action," instead of "a cause of action" is in the greater scheme of things an issue that should not detain this Court's time. From the Applicant's claim, it is evident that the Applicant sues on the basis of two certified certificates of payment *viz*. Inv. No. 11 and Inv. No. 12. It is in reference to these documents, which it regards as liquid documents, that it confirms those two causes of action and grounds leading to the said claims.

[76] This Court is unable to find that this is an issue that should be referred to trial Court for determination when it is in fact peripheral to the actual dispute between

the parties namely, whether or not the Applicant has made out a case for summary judgment by proving *inter alia*, that the Respondent is liable to pay the Applicant the amounts claimed and that the latter has no *bona fide* defence thereto.

[77] The second ground of objection is that the Agreement relied upon by the Applicant is null and void in the absence of an assertion, by the Applicant, that all the *'suspensive'* conditions had been met.

[78] This is not a point of law and ought not to have been raised at this point.

[79] From the papers, it is only the Respondent who labels the conditions contained in its letter of appointment as being subject to the *suspensive* conditions. The Respondent's Principal Agent did not think of those as such. In fact, the Respondent itself also did not consider those to be suspensive. This Court has noted herein above that the Respondent's conduct of allowing the Applicant to proceed with contract works and to pay ten (10) progress invoices, negated any reliance, if there was any, on the so-called suspensive conditions.

[80] If it is a dispute, then it is a factual dispute that should not have raised as a preliminary objection. It is a matter of contractual interpretation wherein some kind evidence has to be advanced to support the Respondent's contention. In this case, there is no evidence to support the above argument. In fact, the conduct of the relevant parties herein, including the Respondent in paying the first ten (10) progress invoices, must suggest to this Court that the parties did not regard these conditions as suspensive in nature.

[81] Furthermore, the Respondent's above contention flies in the face of the entire period of the contract (whether written as alleged by the Applicant and the Principal Agent, or oral one by the Respondent). It is beyond dispute that the Applicant has rendered substantial amount of work in the project and has been paid over 90% i.e. R11 million of R13 million contract value. This suggests to this Court that the Respondent accepted the Applicant's services and works and authorised payment therefor. It did so without so much as to question the validity of the JBCC PBA and/or the suspensive conditions of the Applicant's appointment.

[82] Furthermore, that the conditions mentioned in the Letter to Appoint constituted *suspensive* conditions, is something that this Court hears from the Respondent. The said document does not couch itself as such and the conduct of the parties (including the very same Respondent) does not support this argument.

[83] It is for the above reasons that this Court is inclined to reject this second point of objection on the basis that the parties themselves have never treated these conditions as suspensive in the manner understood in law. The Applicant was handed over the site, commenced its works and was paid for the works done. It is therefore a little too late to seek to revert back to the conclusion of the agreement when same is at an end.

[84] Accordingly, this Court is not moved to accept this objection.

[85] The third ground of objection, according to the Respondent, is that the Applicant's claim in so far as it relies on the final certificate, it is not based on a liquid document. This Court will deal with this issue below.

[86] The fourth ground of objection is also not a preliminary objection but a substantive defence. The Respondent contends therein that to the extent that the final certificate issued is a liquid document, then same was issued in *iustus error*. In essence, this defence must be reliant on the facts to assist a Court to come to a conclusion that a contract concluded or the issuing of the final invoice, was a result of a reasonable mistake which if found to exist, would cancel the entire contract or set aside the said certificate. It is not a legal point that should be raised as a preliminary objection. In this case, the contention by the Respondent is that the issuing of the final certificate alone was as a result of *iustus error.*

[87] Just like ground four above, grounds five and six are also not preliminary points of law. It is not apparent why the Respondent resorts to this kind of pleading where legal points are not differentiated from facts grounding a defence.

[88] However, because the Respondent does not deal further with the above points of complaint, it is difficult for the Court to do so on its own.

[89] The issue herein is mainly whether or not the Applicant has made out a case for the grant of a summary judgment and has demonstrated that the Defendant's defence is not *bona fide* and does not raise any triable issues. This issue, the Applicant dealt with in its Particulars of Claim and the founding affidavit herein.

[90] The Respondent did not plead, in its plea, that these two agreements signed by the Applicant, prejudiced it, or that it could not plead thereto. In fact, it denied the averments by the Applicant and proffered a version that it concluded an oral agreement with the Applicant. It even dealt with the terms and conditions thereof.

[91] The Respondent then raised a further issue relating to the correct date of concluding the said agreement. In light of the fact that the parties carried

themselves in accordance with the terms of a written contract, it does not matter which date was the correct one. It may have been signed after or during the currency of the JBCC PB Agreement, this Court finds that such does not, in the greater scheme of things, matter. It is thus not inclined to accede to this objection.

[92] The other objection is that the Certificate of Final Completion is not a liquid document **and can be adjusted**. If this Court accepts the Applicant's case, this contention will also have no merit given the fact that the Respondent agreed to hand-over all authority to the Principal Agent and agreed not to interfere with the latter's management of the contract. Most importantly, it agreed to a clause in the JBCC PB Agreement which confirms that the said progress certificate, once certified by the Principal Agent whose conduct binds the Respondent, shall constitute a complete and sufficient proof of the work done. The invoice would constitute a liquid document as defined in law.[12] It thus cannot be that the Respondent can bind itself to pay a certified invoice and when it has to pay, then raise certain points that contradict its own conduct. The Respondent cannot blow hot or cold.

[93] It is not open to the Respondent to second guess its Principal Agent when the latter had determined that the Applicant had reached a stage of completion and has certified its invoices to that effect.

[94] If this Court accepts the Respondent's case that there is an oral agreement, then this Court must mentally eliminate or reduce the role of the Principal Agent in this oral agreement and look at whether there is evidence where the parties may have agreed to this above clause. In this case, the Respondent has not pointed to any. In fact, it is common cause that it has paid all previous ten (10) progressive invoices that were presented to it by the Principal Agent. This lack of contemporaneous evidence other than the late debate when payment was being claimed also militates against the Respondent's issue of the illiquid nature of the final certificate. It has not even pointed to any instrument where such a contentious point is grounded.

[95] At all material times of this relationship, the Principal Agent, who acted as a conduit through which the Respondent paid the Applicant's first ten (10)

[12] It is defined within the context of a provisional sentence where it may only be granted on a liquid document which is **a document wherein a debtor acknowledges over his signature**, or that of his duly authorised agent, or is in law regarded as having acknowledged without his signature actually having been affixed thereto, his indebtedness in a fixed and determinate ...

progressive invoices, and whose version aligns with that of the Applicant, facilitated these payments by certifying[13] the Applicant's certificates for and on behalf of the Respondent who paid all ten of them. The Agent contends that these certificates constituted liquid documents. The Respondent is in no position to deny that.

[96] It appears to this Court that on the balance of the probabilities, the parties regarded these certificates as liquid documents. Accordingly, this Court does not accept the Respondent's objection.

[97] Aligned to this objection is the contention that if the final completion certificate/invoice was issued as a liquid document, then it was issued in *iustus error*.

[98] This is very strange argument in that it seeks to impute an error on a person who does not accept to have made any error.[14] The error must have been made and owned by the Principal Agent. This is not the case herein.

[99] The Principal Agent who was, at all material times, the eyes and the ears of the Respondent in this Branco Creche project does not accept what the Respondent says, and in fact aligns itself with the Applicant's case.

[100] Again, it is noteworthy that the Principal Agent was never called by the Respondent, who alleges that there was an error in the characterisation of these certificates, to account to the Respondent in that regard, nor was the Agent sued for negligent management of this agreement.

[101] Accordingly, this Court is hard pressed to agree with the Respondent herein. It accordingly finds that this point also has no merit.

[102] Fourthly, the Respondent took issue with the fact that the Applicant does not say when it reached practical completion stage.

[103] This Court does not accept that this objection, if it can properly be referred to as a preliminary objection.

[104] If this Court accepts the Applicant's case, then in terms of the JBCC Agreement, the Principal Agent's conduct in certifying that the works were brought to a stage of practical completion is unassailable.

[105] The fact of the matter in this case is that the Principal Agent has already accepted and certified that the contract works have reached practical completion.

---

[13] That is by checking, evaluating, disputing and correcting errors or inconsistencies therein.
[14] See paragraph 37 of the opposing affidavit.

[106] However, if the Respondent raises a *bona fide* and triable defence, then this Court ought to have been provided with evidence that demonstrate (even at a superficial level) that there had been prior engagements and/or disagreements between the Respondent and the Applicant regarding whether or not the Applicant had reached a stage of practical completion. Again, we need to temporarily reduce the Principal Agent's role because, on its own, it agrees with the Applicant on this point. One has to look for a direct, contemporaneous confrontation between the Applicant and Respondent on this issue. Unfortunately, the Court does not have this evidence. What exists is a list of email correspondence between the Respondent and the Principal Agent relating to numerous issues that delayed the completion of the above project.[15]

[107] Accordingly, it is difficult to involve the Applicant in this debate between the Respondent and its agent. The Respondent correctly directed its gripe to its Agent on the ground.

[108] The Respondent then raised a further point, this time alleging that there is a pre-existing relationship between the Applicant and its Principal Agent. This argument suggests that these two persons connived to defraud and prejudice and/or to oppress the Respondent in the execution of this agreement. In fact, in paragraph 30 of the opposing affidavit, the Respondent attacks its own Principal Agent for condoning the Applicant's non-compliance with the contract or contract documentation.

[109] The arguments in the said email correspondence evidence the Respondent's frustration with the delays on the completion of the works. The Respondent even alleged that it suffered loss of income in the amount of R150,000.00 per month. This Court still holds that if the said claim was *bona fide*, the Respondent should have long done something about its Principal Agent. It appears as if the latter may not have been as diligent as the Respondent would have liked it to be.[16]

[110] However, it is still noteworthy that the Respondent has not, to date, called upon the Principal Agent to account for its lack of diligence in managing the contract, or been sued for financial loss that arose as a result of its lack of diligence in managing the said contract.

---

[15] See paragraphs 29 and 30 of the Opposing Affidavit.

[16] Similarly, the Principal Agent denies that it has not evaluated, measured and calculated the delays that were due to the Respondent. It confirms the Applicant's case that those were comprehensively compiled and deducted from invoice No. 11.

[111] What is abundantly clear is that the Principal Agent confirmed, in its confirmatory affidavit, that it was still the Respondent's Principal Agent. It also confirmed averments in favour of the Applicant.

[112] It is on this bases that this Court finds that this attempt and preliminary objection is also frivolous and falls to be rejected.

[113] Similarly, the Respondent's complaint that there was no compliance with the terms of conditions of the JBCC PBA Agreement in that the Applicant failed to provide it with a building guarantee. I find this too to be without merit. The simple fact is that the Applicant was allowed to render services in terms of this agreement despite all these conditions that the Respondent seeks to belatedly characterise as *suspensive*. The very same terms and conditions, suspensive or not, did not trouble the Respondent's mind when the Applicant commenced with the contract, and when it paid all but two of the progress invoices issued by the Applicant certified by its Project Agent.

[114] Accordingly, it is not open for the Respondent to raise this (suspensive conditioning of the agreement) as a preliminary objection.

RESPONSE TO FOUNDING AFFIDAVIT SUPPORTING THE SUMMARY JUDGMENT

[115] Besides the above preliminary points, the Respondent submitted that it plans to amend its plea consequent to the summary judgment being dismissed. The question is who said that this application would fail? The Respondent's contention is presumptuous. The second question is, what and who stopped the Respondent from amending its plea before this application was set down?

[116] The Respondent ought to have known that there is recent authority to the effect that a defendant is not precluded from amending its plea after an application for summary judgment is brought. The correct procedure then is for the application to amend the plea to be finalised first, and if the amendment were granted for the plaintiff to bring a fresh application for summary judgment in respect of the revised plea if so advised.[17] This is with respect correct. Henney J pointed out that there is nothing in Rule 28 that precludes a defendant from giving notice of an amendment and then either filing amending pages if there is no opposition, or to bring an application for leave to amend if the amendment is opposed.[18]

[17] Belrex 95 CC v Barday [2020] JOL 48872 (WCC) paragraph 33.
[18] Rule 28(1) to (5).

[117] In this case, the Respondent elected to take a chance and plead its case as it has done. Should that election fail, it would have no one but itself to blame.

[118] The Respondent continued with its dissatisfaction of how the Principal Agent (and not the Applicant) has managed this contract. Amongst others, it accused the said Agent of failing to insist on the performance guarantee required from the Applicant; the failure to correctly and timeously deduct the late penalties; and to issue a certificate of practical completion when the Applicant had not provided them with various certificates that are normally issued on completion of the contract.

[119] As an example, in paragraph 47.2 of the opposing affidavit where it dealt with the signing of the contract in 2020, the Respondent charges that:

> *"In fact so disingenuous and mala fide was the conduct of the principal agent that the Plaintiff, that the JBCC PBA was signed by the Plaintiff ex post facto on 5 February 2020, more than a year after the agreed to date of practical completion of January 2019, and indeed final completion of February 2019 as supported by the correspondence I have already dealt with."* (Sic.)

[120] Once again, it appears to this Court that the fight is substantively between the Respondent and its Principal Agent. The Respondent has deliberately not availed itself options, and/or avenues of recovering its alleged loss from its agent who represented it in the Branco Creche contract. It now seeks to have the Applicant's claim be stimmed for the '*failures*' (if there are any) of the Principal Agent.

[121] The Respondent submits that it never raised any complaint, dispute or disagreement with the Applicant because it never knew that the said Agreement was subject to the JBCC PBA. From the facts of this case, this argument does not hold water. First, as stated herein above, the Principal Agent repeatedly and on no more than ten occasions, presented to the Respondent certified progress invoices from the Applicant, on a JBCC letter head and format, for payment. Not once, and especially early in those days of the first invoice, did the Respondent question the JBCC format of the said invoices and the application of JBCC PBA in its agreement.

[122] Secondly, and to date, there is no evidence, in this matter, of where the Respondent takes the Principal Agent to task about the applicability of the JBCC PBA. In fact, the disputes are largely about delays, and penalties for such delays.

[123] Furthermore, of the three parties, the Respondent is the only one that alleges that the ruling contract was not subject to the JBCC PBA. The Principal Agent, who has never been fired from its office or sued, confirms what the Applicant says which contradicts the Respondent's version.

[124] It is on that basis and on the probabilities of the facts of this case that this Court too aligns itself with the Applicant's evidence and does not accept the Respondent's version/defence.

[125] In its plea, the Respondent asserts that the penalty rate of R7,500.00 per day is provided for in its version of the contract. This contention is not supported by any evidence. The only evidence that exists of a written instance where these amounts were referred to was when the Respondent complained to the Principal Agent, and in a response to the Applicant's letter of demand.[19] There is no evidence that prior to the conclusion of the said oral agreement, all three role players herein knew that the penalty for late completion of the works was R7,500.00 per day. The Court has found that on the contrary, the only existing contemporaneous evidence, supported by the Applicant and Principal Agent, is the JBCC PB Agreement which records R1000,00 per day as a rate of payment for late completion of the contract.

[126] Secondly, the Respondent contended that damages it claims in its counterclaim are not subject to section 2(1) of the Conventional Penalty's Act. It asserts that those are damages that it can claim over and above the late payment deductions. This Court has referred to the provisions of the Conventional Penalties Act, and does not agree with the Respondent's reading thereof. The reading of the said provision actually supports the Applicant's understanding of the Act.

[127] First, the nub of the Respondent's dispute, even though it does not wish to admit same, is against its Principal Agent for 'mismanaging' the Branco Creche contract and consequently causing it the 'loss' it has now 'suffered', be it the incorrect penalties or the consequential loss arising therefrom.

---

[19] When confronted with a letter of demand from the Applicant's attorneys, for the first time of direct interaction between these two parties, the Respondent sets out all its disputes against its own Principal Agent as an answer against the Applicant's letter of demand. As stated, there is no prior evidence of such communications between these parties. It is thus curious why the Principal Agent's failures are attributed to the Applicant.

[128] The Court is faced with the usual threats of counterclaims with a view to ward off a summary judgment application when in fact, such a claim appears to be misdirected. It seems clear that this Court should simply adopt a robust approach in dealing with this matter.

[129] This Court finds that the counterclaim does not disclose any *bona fide* cause of action as against the Applicant.

[130] Finally, the Respondent attacked the Principal Agent's affidavit for the latter's failure to deal with the delays in signing of the agreement and the suspensive conditions of the said agreement. The Respondent further complain that the Agent has also failed to produce the alleged certificate of completion.

[131] As stated herein, the Principal Agent aligns itself with the Applicant. It is difficult for the Court to consider favourably the conduct of the Respondent when it has on its own failed to take action against the person it alleges mismanaged the said contract with the result that the Respondent has suffered over R4 million worth of damages.

[132] This complaint is not congruent with the facts of this case either before and/or during the currency of the said agreement.

ISSUES ARISING

[133] In this case, the Applicant has to make out a case for the grant of a summary judgment. In doing so, the Court now has, as a result of an important amendment to the rules pertaining to summary judgment applications, to consider the pleading and evidence that the parties rely on for their respective cases. The Court, at this stage, only has to consider whether the defence raised by the Defendant is *bona* fide and whether the defendant raises triable issues that can be referred to trial Court. A brief look of the applicable law is thus apposite.

APPLICABLE LEGAL PRINCIPLES

[134] It is trite that the purpose of summary judgment is to afford the plaintiff a speedy judgment of his claim in instances where the defendant seeks to delay the finalisation of its claim by filing a plea which discloses no *bona fide* defence.

[135] Summary judgment is regulated in terms of rule 32 of the Uniform Rules of Court. Where relevant it reads as follows:

"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-
(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment;
together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a). verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may-
(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or
(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.

[Emphasis added]

[136] For the plaintiff to be successful in its application, he has to satisfy the requirements set out in Rule 32(1) of the Uniform Rules of Court.

[137] A defendant wishing to oppose summary judgment has to invoke the procedure set out in Rule 32(3) which provides it with the following steps to follow, namely; that:

(a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given[20] or

(b) he may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence) that he has a *bona fide* defence to the claim on which summary judgment is sought or he has a *bona fide* counterclaim against the plaintiff.[21]

[138] The opposing affidavit must disclose the nature of defence and the material facts relied upon.[22] The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to determine whether the affidavit discloses *a bona fide* defence or not.

[139] I have stated that "*[A] defendant is required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea it cannot in the absence of an explanation for the inconsistency be said to be bona fide*."[23]

[140] Binns-Ward J in the case of ***Tumileng Trading CC v National Security and Fire (Pty) Ltd and E & D Security Systems CC v National Security and Fire (Pty)***

---

[20] Rule 32(3)(a).
[21] Rule 32(3)(b).
[22] Oos Rande Bantoesakke Adminstrasie Raad v Santam Versekeringsmaatskappy Bpk en andere 1978 (1) SA 164 (W); Slabert v Volkskas Bpk 1985 (1) SA 141 (T).
[23] Cf Breytenbach v Fiat SA (Edms) Beperk 1976 (2) SA 226 (T).

Ltd[24] dealt with the amended summary judgment procedure. The learned Judge unpacked the effectiveness thereof and what each party's responsibilities entail.

[141] What the amended rule seems to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a *bona fide* defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of **something more** than a 'formulaic' supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely for the purposes of delay.[25]

[142] At para [21] Binns-Ward J stated that *"[I] consider that the amended rule 32(2)(b) makes sense only if the word 'genuinely' is read in before the word 'raise' so that the pertinent phrase reads 'explain briefly why the defence as pleaded does not genuinely raise any issue for trial'. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham."*

[143] This is because a Court seized with a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence *is genuinely advanced*, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case,[26] unless the defendant's versions are so far fetched that they ought to be rejected. I do not understand that the Court would be forced to simply ignore meritless defence pass by simply because it is precluded, so it is suggested, from pronouncing on the *bona fides* of the defence. It is to be recalled that by *bona fide*, it is meant a genuine defence that raises triable issues at trial.

[144] The Court in ***Tumeling***'s case had an occasion to comment on the test and requirement for a successful ward off of an application for summary judgment. Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure.

---

[24] Supra.
[25] Para [22].
[26] Para [23].

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. The classical formulations in ***Maharaj***[27] and ***Breitenbach v Fiat SA***[28] as to what is expected of a defendant seeking to successfully oppose an application for summary judgment 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 that the defence is genuine or *bona fide*, summary judgment must be refused. The defendant's prospects of success are irrelevant.[29]

[145] As has always been the position, the opposing affidavit must *'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'*. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant 'has a *bona fide* defence to the action'. *There is thus no substantive change in the nature of the 'burden',20 if that is what it is, placed on a defendant in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b) will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence*.[30]

[146] The Court correctly held in my view:

"[25] The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which 'the nature and grounds of the defence and the material facts relied upon therefor' have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words not bona fide. And the amended subrule 32(3)(b) implies that it should continue to be the indicated method. (If a case gives rise to a

[27] Maharaj supra, at p.426A-E.
[28] 17 Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T), at 228B-H.
[29] Tumileng's case, para [13].
[30] Ibid, para [24].

defendant being able to cogently rely on 'technical points',21 it was, and remains, entitled to do so.)" [footnotes omitted]

[147] The Court further held that:

"[26] The traditional import of the requirement that the facts relied on by a defendant be 'fully' disclosed was mentioned earlier in this judgment.22 It may be, now that the opposing affidavit falls to be made after the defendant's plea has been delivered, that more is required of the defendant in terms of the amended rules than was previously demanded. After all, the qualification by Corbett JA in Maharaj supra, loc. cit.,23 that 'the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading' sounds incongruous when the court adjudicating the summary judgment already has the plea before it."[31] [footnotes omitted]

[148] After referring to what appeared to be the defendant's defence, in the overall dispute between the parties, the Court asked a pertinent question:

"[40]. However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly 'no'! The reason for the negative answer is that the enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, ***it is whether the ostensible defence that has been pleaded is bona fide or not****. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule 32(2)(b) (viz. showing that 'the defence as pleaded does not raise any issue for trial') with what is demanded of a defendant in terms of subrule 32(3)(b) (viz. showing that its defence to the action is bona fide; i.e. that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of 'issue for trial' in subrule 32(2)(b) as*

[31] https://frenchside.co.za/what-is-a-sworn-translator-south-africa/

denoting something different from a 'bona fide defence' within the meaning of subrule 32(3)(b)."

[149] In para [44], the Court held that: *"[T]he averments in the defendant's opposing affidavit fall far short of what is required of it in terms of rule 32(3)(b) if it is to avoid summary judgment; see in this regard what has been described as 'the classic formulation' by Colman J in* ***Breitenbach v Fiat SA***.[32] *Where are the material facts it relies on for its defence? None are given."*

[150] Just as in this case where the Respondent/defendant threatens an amendment the Court held that: *"[47] It is difficult to conceive that if the defendant really had a counterclaim against the plaintiff arising out of the expense incurred in undertaking remedial work, it would not be in a position, nearly two and a half years after the effective termination of the agency agreement, to formulate the claim, or at least furnish reasons for its inability to have done so. It did neither."*

[151] This Court has already expressed a concern about why the Applicant's proposed amendment had not been made until the parties get to this stage – where the Court has to pronounce on this application (on the papers filed of record). This Court finds that where it is not satisfied, it should not be cornered to grant leave to defend where there is mere threat of a possible amendment, or of a counterclaim for that matter.

LIQUIDATED AMOUNT IN MONEY

[152] The thrust of the Applicant's claim is that the two certified invoices it relies upon constitute liquid documents for purposes of this application. It relies on the JBCC PBA and the provisions thereof, once certified by the Principal Agent, as to the completeness and sufficiency of the state of the works. It also relies on the fact that the Respondent, through its Principal Agent, has already certified its last two invoice which in terms of the JBCC PBA, and complied with the correct past procedure to be followed before payments were made. This Court has dealt with this issue above.

[153] The Respondent further persists with the contention that it has concluded a verbal agreement with the Applicant. However, there are no facts pleaded in the plea or

[32] 25 Breitenbach v Fiat SA supra, loc. cit.

submissions regarding the parties' agreement on this aspect i.e. whether or not certified progress invoices could constitute liquid documents.

[154] Further, the Respondent denied that the two documents were liquid documents and contended that they could be adjusted. It is thus necessary to understand what documents are we dealing with herein.

[155] Rule 32 further provides that where an applicant relies on a liquid document for the purpose of summary judgment, he or she should attach such document to his or her application. This was done herein.

[156] It is a trite principle of our law that the term "*liquid document*" for purposes of summary judgment proceedings (Rule 32) has the same meaning as a "liquid document" for purposes-of provisional sentence proceedings (Rule 8) (***Van Wyngaardt, N.O. v Knox*** 1977 (2) SA 636 (T). In ***Rich & Others v Lagerwey*** 1974 (4) SA 748 (AD) at 754H, the court said that if a document in question, upon a proper construction thereof, evidences by its term and without resort to evidence extrinsic thereto, an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.

[157] In ***Union Share Agency and Investment Ltd v Spain*** 1928 AD 74 at 79, Solomon, CJ, said:

> *"It is of the essence of the doctrine of provisional sentence that the acknowledgment of debt or the undertaking to pay should be clear and certain on the face of the document itself and that no-extrinsic evidence should be required to establish the indebtedness."*

[158] As stated above, the Principal Agent has confirmed that it received the Applicant's progress invoices, certified them, and presented them for payment to the Respondent. It had deducted from invoice No. 11, the late penalties that were due to the Respondent and submitted what was payable to the Applicant to the Respondent for payment thereof as it did with the Applicant's past ten progress invoices. It is further evident that it did so in accordance with the JBCC format as provided for in the JBCC PBA.

[159] The Respondent accepted these past progress invoices from the Principal Agent and paid them. It accordingly acknowledged the authority of the Principal Agent to

bind it with the latter's certified invoices and it considered itself bound to an extent of paying same. How that must now change is a mystery.

[160] The documents relied upon by the Applicant for this claim meet the requirements of liquid documents given the fact that the documents evince (i) the amount (ii) owed to the Applicant (iii) by the Respondent and/or its authorised agent. There is no need for any extrinsic evidence to prove any of those three elements.

[161] Again, this Court must decide whether the above defence is *bona fide* and/or raises a triable issue or is a sham. The facts of this case reveal that the Respondent's defence cannot be genuine or *bona fide*.

[162] The JBCC Agreement through which the Respondent had been paying the Applicant for the latter's progressive certificates provides that the Principal Agent shall certify each progress invoice from the Applicant and that such certified invoice shall be complete and sufficient as to the work done.

[163] In the event that the Respondent's contention is to prevail, who then must attend to the adjustment of the said invoices. Surely, it cannot be the Respondent given the fact that it has never engaged the Applicant directly when it comes to invoices. It has always acted through the Principal Agent. It also cannot be the Principal Agent who has confirmed that he has already certified and adjusted these progress invoices. The Principal Agent has also and most importantly, already confirmed that it was still on the Respondent's pay roll.

[164] It thus beggars the question who in the tripartite has to adjust the said invoices. There being no one, this Court finds that the Respondent's contention is not *bona fide* but far-fetched.

DAMAGES CLAIMED ON THE COUNTERCLAIM

[165] In ***Leymac Distributors Ltd v Hoosen and Another***[33] the Court concluded that the quantum of damages claimed necessarily has to be assessed by a Court on the basis of what the Court itself considers to be reasonable, fair and just. The Court went on further to say "*the court cannot assess the quantum of damages in a vaccum. It has to hear evidence…*".

[33] 1974 (4) SA 524 (D) at 527 F-G.

[166] In this case, the Court has found that much of the Respondent's complaint is against the Principal Agent's so-called mismanagement of the contract with the resultant 'loss of income'.

[167] To the extent that the Applicant was penalised for those by payment of agreed penalty rate, this Court finds that this is the end of the matter. However, the Applicant further referred the Court to a clause in the JBCC Agreement where the Respondent has indemnified the Applicant against any loss or harm that may arise from this Agreement. This is confirmed by the Principal Agent.

[168] From the facts before this Court, there appears to be no direct evidence that ties the Applicant to this loss nor is there a suggestion that the Respondent and Applicant agreed to the payment of loss of income which is a special kind of damages. If anything, the Principal Agent might have answers to the Respondent's complaints.

[169] Accordingly, this Court finds that the counterclaim is misguided.

THE COURT'S DISCRETION

[170] The Court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the Court has a doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The Court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met.[34] Referring to the extraordinary and drastic nature of the summary judgment remedy in ***Maharaj v Barclays National Bank Limited***,[35] Corbett JA reasoned as follows:

"The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law".[36]

[34] Mahomed Essop (Pty) Ltd v Sekhukhulu and sons 1967 (3) SA 728 D.First National Bank of South West AfricaLtd v Graap 1990 NR 9 (HC).
[35] 1976 (1) SA 418 (A).
[36] 1976 (1) SA 418 (A) at 423G.

[171] The test is whether on the set of facts before it, the Court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by this Court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment.

CONCLUSION

[172] As may be gleaned from the above authorities, Courts are extremely loath to grant summary judgment unless satisfied that the pplaintiff has an unanswerable case. This is because summary judgment is an extra ordinary and very stringent remedy in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant.[37] It is only when there is no doubt that the plaintiff has an unanswerable case that it should be granted.[38] In such cases then the court can revisit its leniency and grant summary judgment.[39] In ***Shepstone v Shepstone***,[40] 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".

[173] In this case, this Court has no reason to deviate from the above well-established legal principles. Instead, it has a duty to follow the principles as they are binding on it.

[174] The above does not, however, in my view fetter the overriding discretion of this court to refuse or grant summary judgment if it considers it an appropriate order. It may be a matter for consideration when dealing with the issue of the costs.

---

[37] See Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd SA 662 OPD at 666A. In this case the court quoted Marais J in Mowschenson v Mercantile Acceptance Corporation of SA Ltd **1959 (3) SA 362** (W) at 366 regarding the proper approach to be adopted in dealing with similar matters.
[38] Vide Breitenbrach v Fiat S.A. (EDMS) Bpk 1976 (2) SA 226 AT 229.
[39] Per Cobertt J in Arend & another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304F – 305.
[40] 1974 (2) SA 462 E-H.

[175] After consideration of all the facts before me, this Court finds that the Respondent's defence is far-fetched and falls to be rejected.

THE COSTS

[176] In this case, this Court could not find any reason to depart from the norm in terms of the costs. Accordingly, the costs must follow the result of this order.

ORDER

[177] I therefore make an order in the following terms.

1. Summary judgment is entered in favour of the Applicant for payment of R809,478.94 to the Applicant/Plaintiff;
2. Payment of 6% default interest compounded monthly from 23 September 2020 to date of final payment thereof;
3. The Respondent is ordered to pay the costs of this action.

It is so Ordered.

_____

T J MACHABA

Acting Judge

Gauteng Local Division

Delivered: This judgment was handed down electronically by circulation to the parties and or their legal representatives via email and uploaded to Caseline and released to

SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 December 2021.

HEARD ON:	23 AUGUST 2021
DATE OF JUDGMENT:	20 DECEMBER 2021
FOR THE APLICANT:	H M BOTHA
INSTRUCTED BY:	GOODES & SEEDAT INC. (011 656 1452 george@goodesco.co.za or liz@goodesco.co.za)
FOR THE RESPONDENT:	H P Van NIEUWENHUIZEN
INSTRUCTED BY:	DAVID KOTZEN ATTORNEYS (011 453 1458/9 dkotzen@mweb.co.za)