REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 27017/18

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

21/09/2018
DATE

SIGNATURE

In the matter between:

TUDOR ENGINEERING AND DRAUGHTING CC **PLAINTIFF**

and

FORTITUDE TECHNOLOGY GROUP (PTY) Ltd **1ST DEFENDANT**

JAQUAR EQUIPMENT SERVICES (PTY) Ltd **2ND DEFENDANT**

JUDGEMENT

MOSOPA AJ:

[1] This is an application in terms of Rule 32(2) of the Uniform rules of Court. The Plaintiff seeks relief in the following terms;

1.1. Payment in the amount of R766,014,63.

1.2. Interest at a rate of 2% per month from date of service of summons to date of final payment; and

1.3. Costs of suit,

[2] The application is opposed by the Second Defendant.

BACKGROUND

[3] On 8 September 2016 and on 15 September 2016, at or near Benoni, the Plaintiff and the First and Second Defendants, the Plaintiff duly represented by Braam Beukes and Matthew Barber, the Defendant duly represented by Darrell Smith, held the meetings with the aim of discussing and negotiating the manufacturing and assembling by the Plaintiff, of a Belt Filter Flocculent make-up Posing Plant ("Plant") for the Second Defendant.

[4] On 20 September the First and Second Defendants duly represented by Darrell Smith entered into a verbal agreement with Plaintiff duly represented by Braam Beukes and Matthew Barber whereby the Plaintiff was to manufacture and assemble the Plant.

[5] The salient terms of the agreement were as follows;

5.1 The Defendant urgently required the Plaintiff to manufacture and assemble the Plant;

5.2 The Plaintiff by virtue of the urgency of the matter would not be required to submit a provisional tender prior to rendering the services;

5.3 The services rendered by the Plaintiff would be rendered based on the rates set out in a previous written tender, of the Plaintiff, which

had been accepted by the Defendant and according to which services had been rendered.

5.4 The tender conditions applicable to the services to be rendered by the Plaintiff would be the same as the tender conditions applicable to the abovementioned tender;

5.5 Extra items to the agreement would be separately priced on a unit basis;

5.6 The Plaintiff would invoice the First Defendant in respect of the services rendered by it, and,

5.7 The Plaintiff's invoice would be payable upon presentation and interest would be payable on overdue amounts.

[6] The Plaintiff completed the manufacturing and assembling of the Plaintiff in terms of the verbal agreement by the end of October 2016. On 2 November 2016, Plaintiff presented invoices number 2913 to the First Defendant for the service rendered. On the 8 May 2017 a letter of demand was sent by the Plaintiff's attorneys to the First Defendant seeking payment of the amount of R547,876,29.

[7] On 19 May 2017 by way of email the managing director of the First Defendant, apologised for not replying timeously to the Plaintiff's letter of demand and promising to settle the full outstanding amount no later than the end of July.

[8] The Defendant further alleges that on or about September 2017, the Plaintiff represented by Mr Beukes and Mr Berber and the First Defendant represented by Mr Darrell Smith and Mr Justin Marc Smith reached an oral agreement that the pilot plant will be sold and the Plaintiff will receive payments of its reasonable costs, once the costs had

been satisfactorily established as a first charge against the sale proceeds of the pilot plant. It was understood and agreed that until such time that the proposed sale had been successfully finalised and the Plaintiff's claim properly quantified, no amount was due and payable to the Plaintiff. The parties have not currently succeeded in selling the pilot plant. The Plaintiff denies all this allegations.

LEGAL PRINCIPLE

[9] Rule 32(3) of the Uniform Rules of Court provides;

"32 (3) Upon hearing of an application for summary judgement the Defendant may-

(a) Give security to the Plaintiff to the satisfactory of the Registrar for any judgement including cost which may be given, or

(b) Satisfy the Court by affidavit (which shall be delivered before noon on the Court day but one preceding the day on which the application is to be heard) or with the leave of the Court by oral evidence of himself or of any other person who can swear positively to the fact that he 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 therefore."

[10] From the above it is clear that the Defendant faced with this kind of application may avoid summary judgement made against him/ her by;

10.1 Giving security to the Applicant to the satisfaction of the Register; and;

10.2 By satisfying the Court by affidavit that he has a *bona fide* defence to the action and shall disclose the nature and grounds of the defence and the material facts relied upon therefor.

The Defendant elected to satisfy the Court by affidavit stating material facts relying upon.

[11] In ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)*** the following was stated; "Accordingly, one of the ways in which a Defendant may successfully oppose a claim for summary judgement is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts in the sense that material facts are alleged by the Plaintiff in his summons, or combined summons, are disputed, or new facts are alleged constituting a defence the Court does not attempted to decide these issues, or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All the Court enquires into is:

(a) Whether the Defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded and;

(b) Whether on the facts so disclosed the Defendant appear to have as to either the whole or part of claim a defence which is *bona fide* in law. If satisfied on these matters the Court must refuse summary judgement, either wholly or in part as the case may be while the Defendant need not deal exhaustively with facts and the material facts upon which it is based with sufficient particularly and completeness to enable Court to decide whether the affidavit disclose *bona fide* defence."

[12] The procedure in terms of this rule is not intended to shut out a Defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before Court. (see ***Majola v Nitro Securitisation (Pty) 2012 (1) SA 226 (SCA) at 323 F-G)***. In ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venter 2009(5) SA 1(SCA) at 11 G-12D*** Navsa JA Stated, "The rationale for summary judgement proceedings is impeccable. The procedure is not intended to deprive a Defendant with a traible issue or sustainable defence or her/his day in Court. After almost a century of successful applications in other Courts summary judgement proceedings can hardly continue to be described as extraordinary. Our Courts, both of first instance to appeal level, have during that time rightfully been trusted to ensure that a Defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a Defendant of the nature and ground of his defence and the facts upon which it is founded. The Second consideration is that the defence so disclosed must be both *bona fide* and good in law. A Court which is satisfied that this threshold has been crossed is then bound to refuse summary judgement. Corbett JA also warned against requiring a Defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to creditors. Having regard to its purpose and its proper application, summary judgement proceedings only hold terrors and are" drastic" for a Defendant who has no defence. Perhaps the time had come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425g-426e."

[13] It is trite that the Court in this type of applications cannot deal with the precession it is required when the Court is hearing a similar matter in a trial proceedings. All the Court is expected to do under this subrule is to investigate(a) whether the Defendant has disclosed the nature and grounds of his defence and (b) whether on the facts so disclosed the Defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide* and good in law.

DISCUSSION

[14] The parties in *casu,* concluded a verbal agreement. The Defendant agrees that it send a letter to the Plaintiff, a letter dated 19 May 2017 that it intends to make a payment towards the outstanding amount in July, however denies that such, amounts to acknowledgment of indebtedness. Defendant further state that the parties subsequent to such letter in September 2017, reached an oral agreement in terms of which the pilot plant would be sold, and the Plaintiff will receive payments of its reasonable costs once these costs has been satisfactorily established, as a first charge against the sale proceeds of the pilot plant. It was further agreed that until such time that the proposed sale has been successfully finalised and the Plaintiff's claim properly quantified, no amount is due and payable to the Plaintiff. Further that the parties have not succeeded in successfully selling the pilot plant.

[15] In view of the number of affidavits allowed in such kind of these applications, the Plaintiff did not get an opportunity of responding to the Defendant's averments. However it was contended orally on behalf of the Plaintiff that no such oral agreement took place. This in itself creates a factual dispute which cannot be determined on the papers. If what the

Defendant is alleging is correct then it means that, that constitute a *bona fide* defence. This means that this become a triable issue and the door cannot be shut on the Defendant by granting the Plaintiff summary judgement.

[16] I am alive to the fact that such agreement was concluded after the Defendant promised to pay Plaintiff the outstanding amount by the end of July 2017. It is not clear as to what happened between the end of July 2017 and when the alleged oral agreement was reached in September 2017.

[17] The Defendant showed that it has a *bona fide* defence which is good in law and it is for that reason that summary judgement ought to be refused. JC Sonnekus in the law of Esteppel in South Africa page 31 stated; "The question that has to be asked, is whether or not the party who is trying to resile from the contract he has led the other party, as a reasonable man, to believe this was binding himself (see ***George v Fairmead 1958(2) SA 465 (A) 471 B-C)***.

[18] In ***Pillay and Another v Shaik and others 2009(4) SA 74 (SCA) at 845,*** Farlam JA stated; "This raised the question as to whether the doctrine of *quasi-mutual* assent can be applied in circumstance where acceptance does not take place in accordance with a prescribed mode but the conduct of it is such as to induce a reasonable belief on the part of the offer has been duly accepted according to prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the consideration underlying the application of the reliance theory apply as strongly in such a case such as of present as they do in case where no mode of acceptance is prescribed and the

misrepresentation by the offence relates solely to the fact that there is consensus."

ORDER

[19] Having regard to the above, I make the following order;

(1) The Defendant is granted leave to defend the Plaintiff's claim

(2) Costs to be costs in the cause.

M.J. MOSOPA

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant	: Adv. P.P Ferreira
Instructed by	: Christo Bekker Inc.
For the Defendant	: Adv. E.Van As
Instructed by	: Karla Strydom Attorneys.
Date of hearing	: 31 July 2018
Date of Judgement:	21/09/2018