

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

Case No.: 1670/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

C SQUARED CONSUMER CONNECTEDNESS (PTY) LTD

Applicant

and

**THE HOD: DEPARTMENT OF SPORTS, ARTS,
CULTURE AND RECREATION: FREE STATE
PROVINCIAL GOVERNMENT**

1st Respondent

**THE MEC: DEPARTMENT OF SPORTS, ARTS,
CULTURE AND RECREATION: FREE STATE
PROVINCIAL GOVERNMENT**

2nd Respondent

CORAM: VAN RHYN, J

HEARD ON: 18 MAY 2023

DELIVERED ON: 31 MAY 2023

[1] The plaintiff, C Squared Consumer Connectedness (Pty) Ltd, issued a Provisional Sentence Summons against the first and second defendants (the HOD and the MEC for the Department of Sports, Arts, Culture and Recreation of the Free State Provincial Government, respectively) for payment of the amount of R3 344 335.84 which it alleges is owed to it in terms of a payment remittance advice electronically issued by the defendants' duly authorized representative being the

Accounting Officer on 17 November 2022. A copy of the remittance advice is appended to the provisional sentence summons marked "Annexure A"

[2] The defendants entered an appearance to defend and filed an affidavit, proffering the defence that the remittance advice was erroneously issued by the defendants to the plaintiff. The background facts relevant to the defence are as follows: The plaintiff was awarded a tender on 25 August 2022 to provide event management services at the Macufe Festival to be held at Bloemfontein from 25 September 2022 until 9 October 2022.

[3] Subsequent to the commencement of the Macufe Festival, on 3 October 2022 DS Consortium, a joint venture consisting of Dots Design Group (Pty) Ltd and SANAQUA Event and Promotion CC, launched an urgent application seeking the review of the tender awarded to the plaintiff on the basis that the awarding of the tender to the plaintiff was tainted by administrative irregularities in that it deviated from the tender specifications.

[4] The urgent application was opposed by the plaintiff and the second defendant. Their opposition was unsuccessful and on 3 October 2023 Loubser J held that the decision by the Department of Sports, Arts, Culture and Recreation: Free State Government, to award the tender to the plaintiff, was as a result of a tender process that was not fair, equitable and competitive. As a result, the tender was reviewed and declared unlawful. The service level agreement concluded between the first and second defendants and the Plaintiff relating to the impugned decision was struck down in accordance with the provisions of Section B of the Promotion of Administrative Justice Act¹.

[5] Due to the fact that the Macufe Festival had by then already commenced and was in full swing, Loubser J, found that it would not be in the public interest to cause the festival to end. The effect of the order granted by Loubser J was that the plaintiff proceeded to render services during the Macufe Festival until its completion. No

¹ Act 3 of 2000.

ruling was made relating to payment to the plaintiff for the services it continued to render despite the order that the service level agreement was struck down.

[6] Subsequent to the granting of the order by Loubser J, the plaintiff and the respondents launched an application for leave to appeal which application was refused. Leave to appeal was then sought from the Supreme Court of Appeal. This application is pending.

[7] The defendants contend that prior to launching the application for leave to appeal, the remittance advice was erroneously issued to the plaintiff for payment. In their affidavit in terms of the provisions of Rule 8(5) of the Uniform Rules of Court, the respondents contend that even though they are of the view that the plaintiff is entitled to compensation for the services rendered during the Macufe Festival, payment cannot be effected due to the fact that the service level agreement has been declared unlawful. Therefore, pending finalization of the appeal, alternatively an order granted by this court, the respondents' hands are tied and as a result the promise to pay in the form of the remittance advice was cancelled.

[8] The primary element of provisional sentence is that it is only available to a plaintiff who is armed with a liquid document.² The procedure for obtaining this form of remedy in the High Court is governed by Rule 8 of the Uniform Rules of Court. The issue whether a particular document can be described as "liquid" for purposes of provisional sentence has given rise to much debate in litigation. A document is liquid if upon a proper construction thereof, evidences by its terms and without resort to evidence extrinsic thereto, is an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor.³

[9] The justification traditionally advanced for the institution of provisional sentence is that a liquid document gives rise to a rebuttable presumption of indebtedness. The plaintiff must therefore allege in his or her summons that the document (a copy of which is required by Rule 8(3) to be annexed to the summons) is genuine and that, on the face of the document, the amount claimed is owing. If the

² Harrowsmith v Ceres Flats (Pty) Ltd 1979 (2) SA 722 (T) at 727G - 728D.

³ Rich v Lagerwey 1974 (4) SA 748 (A) at 754H.

defendant disputes these allegations, the onus is on the plaintiff to prove that they are true. That includes, for example, the authenticity of the defendant's signature, the authority of the defendant's agent, or the fulfilment of a "simple condition".⁴

[10] The respondents do not dispute the issuing of the remittance advice nor the liquidity thereof. The plaintiff rendered goods and services on the instance and request by the respondents towards continuation of the Macufe Festival subsequent to the court order on 3 October 2023. The respondents undertook and promised to pay the plaintiff and issued the remittance advice in terms whereof payment was due on 22 November 2022. I agree with the submission on behalf of the plaintiff that the "promise to pay", in the form of the remittance advice, was not issued on condition that the plaintiff would have to wait the outcome of the pending appeal.

[11] Provisional sentence is a summary and interlocutory remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment. Provisional sentence precludes a defendant with no valid defence from 'playing for time'. Apart from the fact that provisional sentence is only available to a plaintiff who is armed with a liquid document, two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. The one is that it only leads to a provisional or interlocutory order. Final judgment is still to be considered in the principal case. In the final instance, the claim against the defendant can still be dismissed. The other is that, while on the one hand it entitles the plaintiff to payment of the judgment immediately, that is, before entering into the principal case, on the other hand it affords the defendant to insist on security for repayment pending the final outcome.

[12] While the plaintiff must, at the provisional stage, discharge its onus on a preponderance of probabilities⁵ the defendant need only satisfy the court that, having regard to the incidence of onus in the principal case, the probabilities of success in the principal case are against the plaintiff.⁶ I am of the view that the plaintiff has established, on a balance of probabilities, that the defendants have unconditionally

⁴ Harrowsmith at 73 IB.

⁵ Rich v Lagervey 1974 (4) SA 748 (A) at 760F-H.

⁶ Barclays National Bank Ltd v HJ de Vos Boerdery Ondememings (Edms) Bpk 1980 (4) SA 475 (A) at 484D-E.

acknowledged liability for the amount claimed. The Defendants failed to produce sufficient proof of its defence to satisfy the court that the probability of success in the principal case is against the plaintiff.

[13] On a clear and purposive reading of the remittance advice, the respondents' reasons for cancelling payment and the probabilities of success in the principal case being in favour of the plaintiff, it follows that the plaintiff is entitled to provisional sentence in the amount claimed.

Order:

[14] In the circumstances the following order is made against the first and second defendants jointly and severally, the one paying the other to be absolved:

1. Provisional Sentence is granted against the first and second defendants in the amount of R3 344 335.84
2. The first and second defendants are ordered to pay interest on the amount of R3 344 335.84, a *tempora morae* calculated from 22 November 2022 to date of payment.
3. The first and second defendants are ordered to pay the plaintiff's costs of the action.

VAN RHYN J

On behalf of the Plaintiff: Adv. M J Merabe
Adv. K Nhlapo- Merabe

Instructed by: Peyper Attorneys
BLOEMFONTEIN

On behalf of the Defendants: Adv. J A Motsepe SC
Adv. TM Ngubeni

Instructed by:

State Attorneys
BLOEMFONTEIN