

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

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

Case number: 3680/2023

In the matter between:

SHER CON SURFACING (PTY) LTD

(Registration Number: 20[....]07)

APPLICANT

And

MANGAUNG METROPOLITAN MUNICIPALITY

1ST RESPONDENT

NOLWANDLE ME TRADING ENTERPRISES

(Registration 20[....]23)

2ND RESPONDENT

HEARD ON: 14 SEPTEMBER 2023

JUDGMENT BY: VELE,AJ

DELIVERED ON: 1 DECEMBER 2023

[1] Sher Con Surfacing (Pty) LTD ("the Applicant"), approached this court on the urgent basis for the granting of the Rule nisi against Mangaung Metropolitan Municipality ("First Respondent") and Nolwandle ME Trading Enterprises CC ("Second Respondent"), on a notice of motion that was divided into Part A and Part B for the granting of the following orders against the First and Second Respondents:

[2] In Part A, it sought the following:

2.1 That the non - adherence to this Court's rules relating to form, time periods and service be condoned, and the application be heard as an urgent application in terms of Rule 6 (12) of the Uniform Rules of Court;

2.2 That the non - compliance with the provisions of section 35 of the General Law Amendment Act 62 of 1955 be condoned.

[3] That a rule nisi be issued; calling upon the Respondents to show cause, if any, on 17 August 2023 at 9h30 as to why the following order should not be made final:

3.1 The First Respondent be interdicted from making payment in the amount of R 585 149 - 27 (Five Hundred and Eighty - Five Thousand One hundred and Forty Nine Rand and Twenty Seven Cents), or any part thereof to the Second Respondent pending the finalisation of the relief sought in Part B of the notice of motion;

3.2 The First Respondent ordered to preserve and keep the amount of R585 149- 27 or any lesser amount maximum to limit of R585 149 - 27, held by the First Respondent pending the finalization of Part B of the Notice of motion under the same case number.

[4] The orders in paragraphs 3.1 and 3.2 supra serve as an interim interdict with immediate effect pending the finalisation of the application.

[5] That the Second Respondent be ordered to pay the costs of this application on an attorney client scale.

[6] First Respondent be ordered to pay the costs of the application, only if application is opposed by the First Respondent.

[7] Further and/or alternative relief.

[8] PART B; the Applicant sought an order in the following terms:

8.1 The Second Respondent pay the Applicant an amount of R585 149. 27 (Five Hundred and Eighty - Five Thousand One hundred and Forty Nine Rand and Twenty- Seven Cents) and tempora morae interest until date of full and final settlement.

8.2 The second Respondent being ordered to the Applicant, as set out above, the First Respondent be authorised and ordered to pay the amount of R585 149. 27(Five Hundred and Eighty - Five Thousand One hundred and Forty Nine Rand and Twenty Seven Cents), or any part thereof, directly to the Applicant.

8.3 Second Respondent pay the costs of the application on an attorney and client scale.

8.4 First Respondent to be ordered to pay the costs of the application, if First Respondent it opposes.

8.5 Further and or alternative relief.

[9] The background of the matter is the rule nisi was granted against the First and Second Respondent on 18th of July 2023, and with the return date on 17 August 2023. On the return date, the rule nisi under Part A was further extended to 14 September 2023, as the Second Respondent filed opposing papers. Second Respondent opposed Part B as well, which postponed to the same date. Applicant was ordered to file its replying affidavit on or before 31 August 2023. The Second Respondent, filed a counter - application to be simultaneously heard with Part B.

[10] Mangaung Metropolitan Municipality (hereinafter called the "First Respondent"), entered into an agreement for the construction of tarring roads and surfacing of certain areas within its metropolitan area with Nolwandle Me Trading Enterprises CC (hereinafter called "the Second Respondent"), following an open tendering process. The Second Respondent then sub - contracted Sher Con Surfacing (PTY) LTD

(hereinafter referred to as "the Applicant"). There is no contract between the applicant and the First Respondent. Applicant is seeking to interdict the First Respondent from effecting the final payment to the Second Respondent in respect of certain projects completed within the Municipality, as an amount of R585 149 - 27 was due to it, for services rendered. The application was separated into Part "A" and Part "B". In Part A, the applicant sought to interdict the First Respondent from effecting payment to the Second Respondent, pending the finalization of the application in Part 8.

[11] Part A was brought on an urgent basis and a Rule nisi was granted on 18 August 2023 by Van Rhyn, J with the return date being 17 August 2023, that was further extended to 14 September 2023 by Chesiwe, J; when both Parts A and B were to be heard along - side the Second Respondent's counter application. Part A was brought on an ex parte basis, as the Respondents were not served prior to the granting of the Rule nisi. Though the order was obtained in an urgent basis it was only served on the second Respondent on the 1 August 2023, by way of e - mail. The Second Respondent also filed the counter- application to be heard simultaneously with Applicant's application. Second respondent's application prayed for the following orders:

- 11.1 That the applicant's application be stayed pending the finalization of the second respondent's counter - application;
- 11.2 An order be made for the parties to subject themselves to a measurement of the area covered by the applicant;
- 11.3 After the measurement the applicant be abated taking into consideration all payments made by the Second Respondent;
- 11.4 That after the abatement, the party found to be liable to the other, be ordered to make payment to the other of such amount of liability;
- 11.5 Further or alternative relief;
- 11.6 Costs

[12] The First Respondent did not file any opposing papers and elected to abide by the ruling of the court. The Second respondent argued that there was no basis for Part B was not supposed to have been brought on the urgent basis, as the applicant

was aware that the amount was disputed and still to be confirmed as the Second Respondent has raised a number of issues that the Applicant was to rectify. The issue of the measurement of the surface covered and the supply of a liquid substance known as "tack", used to apply asphalt to the surface is disputed, as incorrectly invoiced. The terms of the agreement, provide for the Applicant to merely apply the tack and asphalt on the surface, not to supply them. The Applicant has invoiced for tack, without producing any proof of purchase.

[13] Second Respondent disputed the applicant's invoices, and the Applicant was aware of this disputed fact. There are some discrepancies surrounding invoice 49, which is the back - bone of the application. Invoice 49 dated 22 June 2022, which reflects an amount of R355 250 - 89, annexed in support of the simple summons issued on 12 August 2022 out of the Bloemfontein Regional Court, marked "A". The Applicant is relying on the acknowledgement of debt concluded on 15 September 2021 for amount of R435 149. 27 and a further amount of R100 000, with no supporting document, to compute the sum of R585 149. 27, claimed in Part B of the current application. Second Respondent referred to "MAR 2", tax invoice no 149 dated 3 August 2021, reflect an amount of R369 307. 26 as the outstanding balance. This is just over a month prior to Banda signing the acknowledgment of debt, with no further invoices generated.

[14] Applicant invoiced for supply of tack in Certificate 4 dated 2 August 2021 attached in support to tax invoice 149 "MAR 2". Second Responded disputes this, as it is in contrast to the parties' agreement; that the Second Respondent was to supply tack. Applicant though aware of this dispute, failed to produce proof of supplying tack. Second Respondent attached proof of payment to Tosas, for the supply of tack in February, March, April, May and June 2021. "MAR 5.1" dated 2 February 2021 is for R36 374. 50, "MAR 5.2" dated 11 February 2021 is for R47 000, "MAR 5.3" dated 18 March 2021 is for R90 130. 33, issued to DNA Land Use Consultant, an associate of the Second Respondent, "MAR 5.4" dated 4 May 2021 is for R12 000, "MAR 5.5" dated 7 May 2021 is for R59 938 and "MAR 5.6" dated 10 June 2021 for R40 000.

[15] Advocate Buys, on behalf of the applicant, submitted that rule nisi should be confirmed and an order for payment of R585 149. 27, as set out in Part B. He

pointed out that, the Applicant was relying on the acknowledgment of debt signed on 15 September 2021. This submission is incorrect, as the acknowledgment is for the sum of R435 149. 27; not amount claimed. The Applicant alleging, that it is entitled to an amount of R585 149. 27. In that regard, it bears the onus to prove.

[16] Mere perusal of the papers reflects that there is a dispute of fact. The Second Respondent from the onset has raised number of points in limine:

16.1 The Second Respondent took a point that the Notice of Motion was defective, as was issued on 17 July 2023 as per date stamp, pre - dating the supporting affidavits of Mr Isaacs and Ms York; deposed of on 18 of July 2023, a day after. The affidavit of one, Ralegae Bonolo Mayeng, the Registrar, who issued the Notice of Motion, addressing the stamp discrepancy was filed and cleared this aspect, which was not pursued further.

16.2 A further point taken was the one of *lis alibi pendens* before the Bloemfontein Regional Court under case number (771/2022), wherein Applicant has issued a simple summons and never took a step beyond the intention to defend.

16.3 The Applicant relied on the word of one Mr Andries Radebe, an employee of Much Asphalt, one of the second Respondent's suppliers, heard on 17 July 2023. It then approached the court on the urgent basis, for an order interdicting the First Respondent from making the final payment under current contract to the Second Respondent on the evening of 18 July 2023, the very date that Mr Isaacs and Ms York's affidavits were deposed. Mr Radebe did not depose of a confirmatory affidavit, though his word was the reason for urgency of Part A. Applicant did not advance any reason for not filing Mr Radebe's confirmatory why his confirmatory affidavit.

16.4 The amount as reflected in invoice no 49 dated 22 June 2022 is for the total sum of R355 250 - 89, whilst Applicant is claiming the total sum of R585 149- 27.

[17] In opposition to Part 8, the Second Respondent is raising the fact that, there is *lis alibi pendens* at the Bloemfontein Regional Court under case number 771/2022 for payment of the sum of R355 250. 89 for goods sold and delivered during 2020/2021. The Second defendant filed the intention to defend, but the applicant failed to file its declaration within the prescribed period and failed to pursue the matter further. The Second Respondent argued that its point in limine regarding the *lis pendens* at the Regional court was a good point; that Mr Isaacs did not really bother to deal with satisfactorily, other than to say the defendant was different from the current Second Respondent. Mr Isaacs was being disingenuous, as a mere perusal of the supporting documents relied on in both matters are the same, it is clear that his accessions are not supported by any document. The Applicant want to benefit from its wrong citation of the Second Respondent in the summons. By mere perusal of the acknowledgment of debt; Annexure "FA1", Statement 049 (annexure "A" to the simple summons) and Invoice 149 (annexure "MAR 2") the following is glaring. Same VAT No 4380289225, which is the VAT number of the Second Respondent, is display on both "FA1" and "Annexure A" to the simple summons issued in the Bloemfontein Regional court, under the above case number. Invoice "149 MAR 2" reflects an amount of R369 30. 26 as the total outstanding balance and no further invoices produced.

[18] In addressing Part B, the Second Respondent has raised a dispute of fact, that in my view was sufficiently established and raised the matter that was pending before the Bloemfontein Regional Court, as an aspect that the Applicant failed to deal with in a sufficient manner. It is clear that though the Applicant's cause of action was set out in the summons as one for goods sold and delivered, perusal of the invoices attached in support thereof point in one direction, that of services rendered; in that the invoices refer to the overlaying of asphalt not the supply thereof. The very same invoices are the basis of the Applicant's application for interdicting the First Respondent from making payment pending the finalisation of Part B.

[19] The Applicant is relying on the acknowledgment of debt signed by Mr Banda, who was the newly appointed General Manager, at the time of signing and not fully acquainted with the dealings of the Applicant and the Second Respondent and outstanding issues at the time. The Applicant was opportunistic in this respect, as it

was aware that Second Respondent has requested the recalculation of the amounts. Mr Banda's diligent work unearthed a number of discrepancies in the Applicant's invoices. He discovered that they were charging for tack, despite the fact that the Second Respondent was supplying it and invoices of purchase thereof provided annexures "MAR 5.1 to 5.6". The Applicant was fully aware of the fact the measurements of the resurfaced areas was disputed. The measurement of the areas remained unresolved due to the unavailability of the Applicant's employees, as the appointments were not honoured.

[20] The Applicant did not ventilate what made it so urgent, for Part B to be on an ex parte basis, as it was aware of the pending action in the Regional Court, that it has not taken beyond issue of summons; despite being aware of the Second Respondent's intention to defend it. Applicant failed to file a declaration resulting in the stalemate position. The action proceedings were appropriate in the circumstances and the matter settled by hearing of oral evidence. The Applicant was not honest with the court when bringing Part B of the current application, as it was fully aware of the disputed facts; unable to be settled by way of affidavits, but required some oral evidence. In *Buffalo Freight Systems (Pty) Ltd v. Crestleigh Trading (Pty) Ltd*¹ the court warned against deciding application proceeding, when there are disputed facts solely on the affidavits. The legal position is that, where a party should have foreseen, that a serious dispute of fact, that cannot be resolved by way of affidavits, but proceed on the application, runs a risk of the dismissal of the application².

(21] The principle as set out in the *Plascon - Evans v Van Riebeeck Paints*³, will not be applicable; as Part B of the application cannot be, refer for oral evidence, as there is, a pending matter based on the same facts that has not been disposed. The Applicant's claim cannot be finalised by way of affidavits, if one takes into account the nature of the dispute, without hearing of the oral evidence. In *Transnet Ltd t/a Metrorail v Rail Commuters Action Group*⁴, the court reiterated the fact that, where

¹ 2011(1) SA 8 (SCA) at 14D- F

² *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

³ 1984 (3) SA 623 (A) at 634H - 635C

⁴ 2003 (6) SA 349 (A) at 368C - D and G - H

there is a dispute of fact on the papers and the applicant fails to make out a case for the relief sought, the court ought to dismiss the application.

[22] Based on fact that there is action that is a pending action and the dispute around amount due to the Applicant, which it should have foreseen, the Applicant's application under Part B, cannot succeed and dismissed.

[23] I now turn to the Second Respondent's counter - application. It is clear that in as far this is concerned, there is very little in dispute. It is common cause between the Applicant and the Second Respondent; that the Applicant did render services; laying asphalt in certain roads and/or premises within the First Respondent's Municipality, at the instance of the Second Respondent, in line with tender awarded by the First Respondent.

[24] What is in dispute; is the number of square meters that were covered and, or supply of the any materials by the Applicant. The Applicant is aware of the dispute surrounding the supply of "tack". The Second Respondent provided invoices as proof of purchase of tack in bulk. The Applicant in its "Certificate final 4", annexure "MAR 4" dated End of August 2021, has a line item called: "Tack coat of 30% stable - grade emulsion" amounting to R122 755. 68.

[25] The Second Respondent, is merely seeking an order to allow the parties an opportunity to revisit the Applicant's invoices and verify if there is any amount due by it, or if there was an over payment, so that Second Respondent can be reimbursed of the difference. The orders sought are in the interest of justice, and granted as prayed.

[26] WHEREFORE, THE FOLLOWING ORDER IS MADE:-

1. Part A of the application.

- 1.1 The First Respondent is interdicted from making payment of the amount of R355 250. 89, or any part thereof;" to the Second Respondent pending the

finalisation of the Second Applicant's relief sought in the counter - application under case number 3680/2023.

1.2 The First Respondent is to preserve and keep safe the amount referred to in order 1.1 supra, or any lesser amount thereof to the maximum of R355 250. 89, held by the First Respondent pending the finalisation of the Second Applicant's relief sought in the counter - application under case number 3680/2023.

2. Part B of the application.

2.1 Applicant's relief under Part B of the Notice of Motion; is dismissed.

3. Second Applicant's counter - application.

3.1 The parties are ordered to subject themselves to measurements of the area covered by the Applicant;

3.2 After such measurements, the statements of the Applicant be abated taking into consideration all payments made by the 2nd Respondent;

3.3 After such abatement, the party found liable to the other, is ordered to make payment to the other of such amount of liability;

3.4 Applicant to pay the Second Respondent's Costs on a party and party scale.

S.O VELE, AJ

APPEARANCES:

Counsel on behalf of the Applicant:

Adv. J J Buys

Instructed by:

York Attorneys

BLOEMFONTEIN

Counsel on behalf of the Second Respondent:

Instructed by:

Honeydew

Adv. J J Hayes

Rodrigues Blignaut Attorneys

Honeydew

C/o Symington De Kok

BLOEMFONTEIN