

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

CASE NO: 4253/2022

IN THE MATTER BETWEEN:

INATHI-MBAKO JV

PLAINTIFF

AND

MANGAUNG METRO MUNICIPALITY

DEFENDANT

JUDGMENT BY: **MPAMA, AJ**

DATE HEARD: **27 OCTOBER 2022**

DELIVERED ON: **07 NOVEMBER 2022**

[1] As early as 2009, Nugent JA in **SAPO v DE LACY 2009 (5) SA 1 SCA** shared the following sentiments:

“Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency”.

[2] This is an application for provisional sentence brought in terms of Rule 8 of the Uniform Rules of Court concerning an award of a tender by the defendant to the plaintiff.

[3] On 05 September 2022 the plaintiff instituted a provisional sentence summons against the defendant wherein it claims payment of an amount of R5 713 489.23 including VAT together with interest thereon at the rate of 7.25 % per annum as from 16 May 2022 as per certificate no.2 issued by the duly appointed consulting engineers of the defendant, Tsela Tsweu Consulting Engineers.

[4] The defendant is opposed to the application. On its opposing affidavit, the defendant first, denies that it is indebted to the plaintiff in the amount of R5 713 489.23. Second, the defendant denies that their agent was duly authorised to certify the monies claimed by the plaintiff due and payable.

[5] The background facts can be summarised as follows: The defendant advertised a tender with contract number: C685 under the description "Tender: bid 593: 2020/2021: Botshabelo Section R- installation of internal water reticulation".

[6] The defendant appointed, Tsela Tsweu Consulting Engineers (Pty) (Ltd) (hereinafter referred as defendant's agent) to act as their consultants and agents for this contract.

[7] The plaintiff submitted its bid and on 21 October 2021 it was awarded the tender. The defendant's agent handed over the site to the plaintiff on 14 January 2022.

[8] One of the bidders was Down Touch Investments (Pty) (Ltd) and being one of the unsuccessful bidders on 28 January 2022 it launched an urgent application in this court against the defendant and the plaintiff (cited in the application as first and second respondent respectively).

[9] On 10 February 2022 this court granted the following order in favour of Down Touch Investments (Pty) (Ltd):

"18.2. Pending the final adjudication of a review application to be instituted within five (05) days of the granting of this order, the respondents are interdicted and restrained from in any way further implementing or acting upon the decision of the first respondent to award the public tender number:

MMN/593:2020/2021 styled “Botshabelo Section R- installation of internal water reticulation “to the second and third respondents.

18.3. The order in 18.2 above shall serve as an interim order with immediate effect”

[10] On 15 February 2022 the defendant’s agent addressed a letter to the plaintiff advising them of the interdict, instructing the plaintiff to suspend all works immediately until further notice and further ordering the plaintiff to remain on site. In addition, the plaintiff was instructed to wait on the defendant for a way forward, as the defendant promised to revert back to the plaintiff within 72 hours regards de-establishment of the site.

[11] On 07 March 2022, the plaintiff submitted in writing a Notice of Intention to claim for extension of time and standing time cost. This notice was served on the defendant and its agent. A further notice was issued by the plaintiff on 25 March 2022. There were further engagements between the plaintiff and the defendant’s agent in trying to resolve certain issues concerning this tender.

[12] On 16 May 2022 the defendant’s agent, despite the court order granted on 10 February 2022 addressed the following correspondence to the plaintiff:

**“MMM/ BID 593: 2020/2012: BOTSHABELO SECTION R –
INSTALLATION OF INTERNAL WATER RETICULATION: PAYMENT
CERTIFICATE NO.2**

We hereby certify that the work is correct and complete in accordance with the specifications and contract document and certify the payment to an amount of R 5 713 489.23 including VAT to Inathi- Mbako JV for the above-mentioned project.”

[13] The plaintiff armed with the aforesaid document dated 16 May 2022, received from the defendant’s agent instituted provisional sentence summons on 05 September 2022 against the defendant.

[14] The purpose of provisional sentence is to enable a plaintiff who sues on a liquid document to obtain prompt payment by means of a provisional judgment without having to wait for the final determination of the dispute between the parties.

[15] The learned authors, **HERBESTEIN & VAN WINSEN, THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA FIFTH ED, VOL 2** at page 1313 on provisional sentence say the following:

“A mode of procedure provided for in the rules of court, but it existed even in Roman – Dutch law, under the appellation ‘namptissement’ or ‘handvulling’. The essence of the procedure then and now is that it provides a creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of money due without his having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action. The procedural method of provisional sentence is no magic wand to be used to disarm prospective defendants or dispel all opposition, but is a well- recognised, long standing and often- used mode of obtaining speedy relief where the plaintiff is armed with a liquid document. The purpose of provisional sentence proceedings is thus to enable the plaintiff to obtain an enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties”.

[16] At page 1315 the aforesaid authors define a liquid document as follows:

“a document in which the debtor acknowledges, over his signature or that of a duly authorised agent, or is in law regarded as having acknowledged without his signature being actually affixed to the document, his indebtedness in a fixed and determinate sum of money. Examples of documents to which the debtor or his agent has affixed a signature are cheques, promissory notes, mortgage bonds, acknowledgments of debt and deeds of sale”.

[17] Joffe et al on High Court Motion Procedure: A practical Guide say the following on onus in applications for provisional sentence:

“The plaintiff bears an onus of proving on a balance of probability:

- (a) the authenticity of the defendant’s signature or the defendant’s agent signature on the document
- (b) in the case of an agent, the authority of the defendant’s agent
- (c) the fulfilment of any condition the entitlement of the plaintiff to the claim evidenced by the liquid document
- (d) all other facts necessary to sustain a cause of action on the document concerned.

[18] Once the plaintiff has proved (on a balance of probabilities) the signature of the defendant or its agent, and the fulfilment of any simple condition giving rise to the obligation, the court will grant provisional sentence unless the defendant produces counterproof which satisfies the court that the probability of success is against the plaintiff.

[19] The defendant may rely on defences that go behind the liquid document. The onus is on the defendant to show that if evidence is heard the probabilities are that he would succeed. See **ALLIED HOLDINGS LTD v MYERSON 1948(2) SA 961 at 967.**

[20] The applicant on its head of arguments contended that the court order relied upon by the defendant as a defence does not relieve the defendant of its obligations in terms of the contract entered into with the plaintiff and that the plaintiff has every right to enforce its rights despite the interdict. It was further argued that the plaintiff remained on site as instructed by the defendant’s agent, consequently is entitled to this payment and the defendant’s agent was authorised to issue the payment certificate which qualifies as a liquid document. The plaintiff, in addition argued that the defendant paid the plaintiff accordingly with regard to the first certificate despite the existence of an interdict and by relying on their agent’s unlawful act, the defendant was now being disingenuous.

[21] It was argued, first, by the defendant that the agent was not authorised to bind the defendant by issuing the certificate acknowledging debt when the awarding of a

tender by the defendant to the plaintiff was still a subject of litigation before this court. Second, the defendant argued that the defendant's agent by ignoring the court order and acting on this tender acted contemptuously and unlawfully and therefore it cannot be said it was duly authorised to issue the certificate and acknowledge the defendant's liability.

[22] The document in possession of the plaintiff is an engineer's payment certificate. The defence that is being raised by the defendant on this document goes behind the document. The defendant therefore bears an onus to prove that the defendant's agent was not authorised to issue the payment certificate, that there is a story of a transaction behind it, and that an investigation into that story may show that the defendant is not liable in terms of the liquid document. See *Allied Holdings Ltd* 's case at 968.

[23] In **TWEE JONGE GEZELLEN (PTY) LTD & ANOTHER V LAND & AGRICULTURAL DEVELOPMENT BANK OF SA & ANOTHER 2011 (3) SA SA1 CC** Brand AJ said:

“But a defendant who relies on a defence which goes beyond the liquid document is required to produce sufficient proof of that defence to satisfy the court that the probability of success in the principal case is against the plaintiff before provisional sentence can be refused. If there is no balance of probabilities either way with regard to the principal case, the court will grant provisional sentence. It follows that if there is a balance in favour of the plaintiff, provisional sentence will be granted. There is no closed list of defences on which the defendant can rely. Examples in practice of defences going behind the liquid document are numerous. They include the defence: that the plaintiff never advanced the amount claimed, that the liquid document was tainted with illegality; or that the document had been obtained by fraud”.

[24] The onus is on the defendant to show that the liquid document is tainted with illegality. The mere allegation of illegality is not sufficient to discharge the onus. See **JOSEPH V HEIN 1975 (3) SA 175 at 176.**

[25] In **LESOTHO DIAMOND WORKS (1973) (PTY) LTD V LURIE 1975(2) SA 142**

it was held that:

“To attempt in provisional sentence actions the formulation of hard and fast rules relating to defences which might be raised or the enumeration of an exhaustive list of such defences is to court serious and unnecessary trouble. Each case must of necessity be decided largely upon its own particular facts. Defences other than those based upon a challenge either to the validity of the instrument in question or to the larger transaction of which such instrument forms a part may therefore validly be raised to claims for provisional sentence”.

[26] It is not in dispute that the plaintiff and the defendant were interdicted and restrained by this court from in any way further implementing or acting upon the decision of the defendant to award the tender to the plaintiff. The plaintiff, defendant and defendant’s agent are fully conversant of the court order.

[27] The facts, as presented by the defendant disclose a valid defence in law to plaintiff’s claim. The effect of the judgment granted by this court (in favour of Down Touch Investments) was that the operation of a contract between the plaintiff and the defendant is being suspended. If one were to go behind the document presented by the plaintiff, and investigate the story presented by the defendant regarding the authority of its agent to sign the certificate, the probabilities might be against the plaintiff. It is very difficult to escape a thought that the certificate in possession of the plaintiff might be tainted with illegality.

[28] The defendant on its head of arguments argued that the non-compliance with the court orders threatens a rule of law and undermines public confidence in our legal system. I agree with these sentiments. The actions of the defendant’s agent tend to suggest a wilful disobedience and a clear disregard of the court’s order.

[29] The defendant has managed to discharge an onus by disclosing a defence that goes behind the liquid document presented by the plaintiff.

[30] Therefore the request for a provisional sentence must fail.

[31] In the circumstances, I make the following order:

31.1 Provisional sentence is hereby refused.

31.2 The defendant is hereby directed to file a plea within 10 days from the date of this order.

31.3 Thereafter the normal Rules of Court as regards pleadings and further conduct of action trials shall apply.

31.4 The costs of the provisional sentence application are reserved for determination by the trial court.

L. MPAMA, AJ

On behalf of the plaintiff:

Instructed by:

Adv JC Coetzer

Lovius Block Inc.

Bloemfontein

On behalf of the defendant:

Instructed by:

Adv. DR Thompson

Raynard & Associates Inc

Bloemfontein