

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO: 2778/15

In the matter between:

MHB CONSTRUCTION CC

Plaintiff

and

ALVOPOINT CC

Defendant

JUDGMENT

MBENENGE J:

[1] On 13 July 2015 the defendant acknowledged (in writing) being indebted to the plaintiff in the capital sum of R441 452.30, together with interest thereon, at the plaintiff's bank's prime overdraft interest rate calculated from September until date of full and final payment.

[2] The defendant undertook, in terms of clause 4 of the acknowledgment of debt, to pay the capital sum, together with interest thereon, in six monthly instalments with effect from 31 July 2015. The only amount paid by the defendant to the plaintiff pursuant to its undertaking was the sum of R76 978.24, on or about 3 August 2015. Demand notwithstanding, the defendant failed to pay the remaining instalments to the

plaintiff, rendering the full balance of the debt, including interest, in terms of clause 9 of the acknowledgement of debt, becoming due and payable.

[3] The instant provisional sentence proceedings wherein the plaintiff seeks judgment against the defendant in the sum of R367 867.92, together with interest thereon as aforesaid, were thereupon resorted to.

[4] Pursuant to Rule 8(5) of the Uniform Rules of Court the defendant delivered an opposing affidavit wherein it points, firstly, to the existence of a counter-claim against the plaintiff in the sum of R1 232 590.80 arising from a business relationship between the parties relating to remedial construction work the plaintiff allegedly did during the year 2014 and which gave rise to a dispute that in turn culminated in the launch of previous pending provisional sentence proceedings, before this court, against the defendant under case number 1219/2015.¹

[5] In executing the acknowledgment of debt and the relevant memorandum of agreement, so the defendant's case goes, the true and proper intention of the defendant was merely to delimit the extent of its liabilities on the plaintiff's claim instituted against it under case number 1219/2015, and it was not the true and proper intention of the defendant to abandon or waive the counterclaim it has against the plaintiff amounting to R1 232 590.80. The defendant also threatens to bring proceedings for the appropriate rectification of the acknowledgment of debt so as to reflect the true common intention of the contracting parties.

[6] In the second place, because case no 1219/2015 is still pending, having not been disposed of, the provisional sentence proceedings are hit by *lis alibi pendens*.

[7] At the hearing of this matter the defence founded on *lis alibi pendens* was not persisted in. It therefore remains for this court to consider whether the defence grounded on the existence of the alleged counter-claim against the plaintiff passes muster.

¹ In the pending proceedings the plaintiff claims an amount of R1 045 710.70 based on certain engineer certificates

[8] Much as it is permissible for a defendant to raise a liquid or illiquid counterclaim as a defence,² it is only in exceptional circumstances, and where a defendant raising a counter-claim has established, on the affidavits filed in the provisional sentence proceedings, that the probabilities of success are substantially in its favour, will a court postpone provisional sentence proceedings pending the outcome of the defendant's counterclaim.

[9] In the *Pretorius* case,³ Henochsberg J put it thus:

“...provisional sentence may be granted notwithstanding the fact that the defendant has a counterclaim exceeding the amount of plaintiff's claim, before the latter is decided and that the question as to whether provisional sentence will or will not be granted depends upon the answer to the question as to whether the probabilities of success on the counterclaim favour the defendant or not.”

[10] Let me now turn to consider whether the defendant has provided any factual foundation regarding the basis of the alleged counter-claim or its proposed prospects of success.

[11] The defendant has contented itself with merely saying:

“The summons and the defendant's opposing affidavit under Case No. 1219/2015 are both voluminous and **I crave leave to have them admitted also in these proceedings by way of this reference thereto**; they are relevant also in this matter and the parties respective stances in this matter are largely articulated those pleadings. The court file in the matter will be made available to this court at the hearing of the instant proceedings and the plaintiff has those pleadings. **I reiterate and draw particular attention to the contents of the defendant's opposing affidavit delivered under Case No 1219/2015 where the defendant contests the capital amount aimed by alleging payments made amounting “to not less than R564 680,87” and claims the existence of a counterclaim available to the defendant amounting to some R1 232 590, 80.”** (Emphasis added.)

[12] In the light of the excerpt quoted above, I was urged to consider the papers in case no 1219/2015 with which I was provided and find that the counterclaim enjoys prospects of success. In my view, that approach has no legal basis.

² *Pretorius v Weedon* 1961 (3) SA 702 (N) at 711; *BOttico Maccantca Italian v Photogrammetric Engineering (Pty) Ltd* 1965 (2) SA 276 (D); *Durlop South Africa Ltd v Orkaz (Pty) Ltd* 1975 (1) SA 912 (W); *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* 1975 (2) SA 142 (O) at 145H; *Kanderssen (Pty) Ltd v Medical Property Holdings Ltd* 1977 (3) SA 445 (W); *Mao-Theia v Neto* 1981 (3) SA 829 (C); *Reichenberg v Rontgen* 1983 (3) SA 745 (W) at 750H; *HVD Investments (Pty) Ltd v Neffke* 1984 (2) SA 368 (W) at 372A.

³ *Supra*.

[13] In effect the defendant expects the Court to draw inferences or conclusions from facts set out in a matter that is not serving before me. Not even an annexure to an affidavit is an integral part of the affidavit.⁴

[14] It was incumbent on the defendant to pertinently make out a case for the counter-claim contended for in the instant matter so as to afford its adversary the opportunity to refute the allegations in reply.

[15] The following remarks by Joffe J in *Swissborough Diamond Mines v Government of the RSA*⁵ setting out the law relating to the content of affidavits generally, are apposite:

“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavits documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.”⁶

[16] The above quoted remarks were made in the context of affidavits in motion proceedings. There is no reason why the principle should not be applied to provisional sentence proceedings, in so far as parties to such proceedings do depose to and deliver affidavits.

[17] By merely referring to papers in related proceedings and craving leave “*to have them admitted also in these proceedings by way of this reference thereto*” the defendant failed to discharge the evidentiary burden resting on it to establish the existence of a counter-claim that enjoys prospects of success.

[18] In the result, the following order is made:

- (a) Provisional sentence in the sum of R367 867.92, together with interest thereon at the plaintiff’s bank’s prime overdraft interest rate, calculated from 1 September 2015 to date of full and final payment, is entered in favour of the plaintiff.

⁴ *Port Nolloth Municipality v Xhalisa & Others* 1991 (3) SA (CPD) at 111.

⁵ 1999 (2) SA 279 (T).

⁶ *Ibid* at 324 F-G.

(b) The defendant shall pay costs of the action incurred to date.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Date heard : 24 March 2016

Judgement delivered : 12 April 2016