

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE No. 11741/2012

6/2/2013

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
6/2/13 DATE
keer SIGNATURE

In the matter of:-

and

PHUMI TRADING JV MOSALLO ZWANE CONSTRUCTION

Plaintiff

and

LEKWA MUNICIPALITY

Defendant

JUDGMENT

Van der Byl AJ:-

[1] In this matter the Plaintiff seeks provisional sentence against the Defendant in an amount of R2 430 000, together with interest thereon at the rate of 15,5 per cent as from the date of service of the provisional service summons.

.../...

[2] As is apparent from the summons the amount claimed is for an "additional amount awarded under the contract MIG/MP033/ST/08/09 to the contract price of R5 400 000,38 for the upgrading of gravel roads to paved roads in Lekwa Municipality, which amount was retained by the Plaintiff as per the agreement between the parties under contract number, MIG/MP033/ST/08/09 which amount is now due, owing and payable as certified by the Defendant's agent, being Mashi Molo Civil Engineers and Agriculturists (Pty) Ltd as per Annexure A ...".

[3] Annexure A to the summons with heading "CERTIFICATE OF FINAL COMPLETION" ("the Certificate") -

- (a) refers to a contract numbered MIG/MP033/ST/08/09, describes the scope of the work;
- (b) indicates that the total contract amounts to R5 400 000,38;
- (c) purports that an additional amount of R2 430 000 was awarded; and
- (d) seems to certify that the project (referred to as Project A & B) was completed on 24 August 2011.

[4] The Certificate also contains a note which reads as follows:

"In accordance with Clause 521 of the General Conditions of Contracts for Construction Works 1st Edition 2004, we hereby certify that the

.../...

contract works as specified above are deemed to be complete in conformity with the provision of the contract. All defects have been confirmed as corrected in accordance with the contract and the contractor's remaining 50% retention in accordance with the defect liability period should be released."

- [5] The matter is vehemently opposed by the Defendant.
- [6] In its opposing affidavit filed in terms of Rule 8(5) it is contended -
- (a) *in limine*, that the proceedings are fatally defective because of the Plaintiff's failure to adhere to the peremptory provisions of Rule 8(3) by failing to have annexed the contract known as MIG/MP033/ST/08/09 to the summons;
- (b) on the merits, as set out in a letter on behalf of the Defendant addressed to the Plaintiff's attorneys of record on 2 December 2011 in response to demands by the Plaintiff's attorneys for payment (ie. 10 months before the provisional sentence summons was issued) -
- (i) that it denied that it owed or was indebted to the Plaintiff for R2 430 000;
- (ii) that the entire amount of the approved budget allocated to the project in question was fully utilized and fully paid to the Plaintiff;
- (iii) that at some stage the Plaintiff had a view that the budget ought to be increased by an amount of R2 000 000 or R2 430 000, but the Municipal Management declined to do so;

.../...

(iv) that, after the Plaintiff had abandoned the site consequent upon a dispute in respect of phase 2 of the project, the Municipal Council resolved to that legal action be instituted for a breach of contract;

(v) that the Plaintiff then returned to the site on its own and it was agreed that an arbitration process be pursued so as to resolve the phase 2 dispute.

[7] Furthermore, as is apparent from the Defendant's affidavit, it appears -

(a) that it is conceded that the Defendant made an offer to the Plaintiff for appointment as an "*independent contractor*" for the project for a fixed amount of R5 400 000,38 with an explicit indication that that amount should not be exceeded;

(b) that upon or about 20 July 2010 the Plaintiff accepted the offer in writing;

(c) that towards the end of 2010 or the beginning of 2011 it came to the Defendant's attention that the allocated funds were almost exhausted, but that not much or sufficient construction work had been done;

(d) that on an investigation instituted into this state of affairs, it was established that the Plaintiff over-billed its certificate for the 2nd phase of the project;

.../...

- (e) that, on being made aware of these findings, the Plaintiff suggested that the Defendant should avail an additional funding of between R2 000 000 and R2 430 000;
- (f) that the Defendant, through its management, suggested to the Plaintiff that the parties should have regard *"to the underlying written contractual agreement which inter alia provided that in an event of a dispute an arbitration procedure to be undertaken"*;
- (g) that the Plaintiff then abandoned the construction site thereby having committed a breach of the underlying contract;
- (h) that, as already indicated, the Municipal Council on 24 June 2011 passed a resolution to the effect that legal proceedings be instituted against the Plaintiff for termination of the contract concluded between the Defendant and the Plaintiff;
- (i) that, as also already indicated, the Defendant then out of its own accord returned to the site;
- (j) that it never approved any additional funding towards the project which would have, had it been done, been done by resolution of the Municipal Council and communicated to the Plaintiff in writing.

.../...

[8] In my opinion the Plaintiff has for various reasons failed to make out a proper case for the granting of provisional sentence.

[9] As I have already indicated, the Plaintiff -

(a) claims payment of a sum of R2 430 000, being "*.... an additional amount awarded under the contract MIG/MP033/ST/08/09 to the contract price of R5 400 000,38 which amount was retained by the Plaintiff as per the agreement between the parties under contract number, MIG/MP033/ST/08/09 which amount is now due, owing and payable as certified by the Defendant's agent, being Mashi Molo Civil Engineers and Agriculturists (Pty) Ltd as per Annexure A ...*"; and

(b) relies, in support of that claim solely on the Certificate.

[10] The contract referred to in the summons is not annexed to the papers.

[11] It was submitted on behalf of the Plaintiff that the Plaintiff was not in law required to annex the contract referred to in the summons to the summons and, as submitted at the hearing of this matter, that, in any event, there is no indication in the Defendant's opposing papers that the contract referred to is a written contract.

[12] I am unpersuaded that I should accept that the contract referred to in the summons is not a written contract or that the Defendant should have proved that it is

.../...

such a contract. As a matter of fact in the written communications between the parties reference is made to an underlying written contractual agreement.

[13] Rule 8(3) does not enjoin that only liquid documents be annexed to the summons.

[14] In determining whether or not a document is one upon which a plaintiff's claim is founded, the following test, as held in **Longtill Construction Ltd v Lirhobern (Pty) Ltd 1978 (2) SA 240 (W) at 244C**, is to be applied:

"Whether it is necessary to determine the defendant's liability; or material to the plaintiff's cause of action; or whether the action is so dependent on it that it cannot proceed without a consideration of it; or whether it forms a vitally important part of the plaintiff's claims against the defendant."

[15] Upon a proper scrutiny of the Certificate it refers to an underlying contract, contract number MIG/MP033/ST/08/09.

[16] If regard is had to the Certificate alone, taking into consideration, particularly, the disputes between the parties as is apparent from the Defendant's opposing affidavit and the Annexures thereto, it is impossible to determine without regard being had to the underlying contract who is liable to pay what amounts and when such amounts are due and payable.

[17] The contract is, therefore, in my view material to the Plaintiff's cause of action and that it cannot proceed without a consideration of the contract.

.../...

[18] The Plaintiff was accordingly bound, if the contract was a written contract, to annex the contract to the summons and, if it was not in writing, to have made that averment in the summons.

[19] In my view it is, bearing in mind, *inter alia*, that the contract was awarded by way of tender (see: **Annexures ZM6 and ZM7** and the note contained at the end of the Certificate), on the probabilities highly unlikely that the contract could not have been concluded in writing.

[20] Apart from the question whether or not the Plaintiff should have annexed the contract to the summons the Defendant is not debarred from raising a defence arising from the contract in question.

[21] In ***Wustrow v Wustrow 1980 (2) SA 308 (W)*** Coetzee J held in this regard at **311G** as follows:

"... the proper ground for refusal in such cases is not that the liquidity of the document is destroyed, but that it affects purely the defence which the defendant is entitled to raise against a claim made against him on such a document which is based on a clearly defined causa debiti. He is indeed entitled to raise a defence to the payment of the money which he undertook to pay in terms of such a document on the basis that that cause of action does not exist, either because that particular debt, for instance, has been paid, or there is some defect in that particular cause of action which entitles him to refuse payment.

It is defendant's task, if he is to avoid provisional sentence against him, to show on a balance of probabilities that the debt described, in an otherwise liquid document, is not due or payable by him."

[22] The Certificate clearly refers to another transaction as its *cause debiti*, namely,

.../...

an "additional amount awarded under the contract MIG/MP033/ST/08/09 to the contract price of R5 400 000,38".

[23] The question is, therefore, not whether the Certificate is a liquid document, but rather whether, if regard is had to the contract, the additional amount is owing.

[24] If regard is had to **Annexure ZM 6 (record p. 27)**, it is apparent from the Plaintiff's appointment that it was subject to the condition, *inter alia*, that "*the tendered price of R5 400 000 (VAT INCLUDED) be accepted and that the project budget of R5 400 000... shall not be exceeded*".

[25] In its letter of acceptance, **Annexure ZM 7 (record p. 29)** the Plaintiff explicitly recorded its acceptance of the contract value of R5 400 000 and no more, being an amount that was admittedly paid to the Plaintiff.

[26] In all the circumstances I am unpersuaded that the Plaintiff is entitled to provisional sentence.

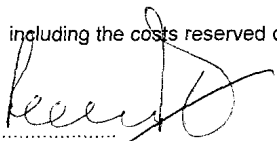
[27] As far as costs are concerned I was urged on behalf of the Plaintiff that in the event of me dismissing the Plaintiff's claim, costs be reserved for determination at the trial. I am disinclined to adhere to this request. It is quite clear from the papers that the Plaintiff was, at least 10 months before summons was issued, well aware of the fact that its claim was disputed by the Defendant and the grounds on which it was disputed.

.../...

[28] It appears that the matter was postponed on 5 November 2012 because, according to the presiding Judge at that stage, the matter was not ripe for hearing since heads of argument were not filed in time. On this issue conflicting affidavits were filed by the respective attorneys. The parties were in the circumstances in agreement that the wasted costs of that day be costs in the cause.

[29] In the premises the following order is made:-

1. **THAT** the application for provisional sentence be refused.
2. **THAT** the Defendant be ordered to file its plea within 20 days as from date of this order.
3. **THAT** the Plaintiff be ordered to pay the Defendant's costs of this application, including the costs reserved on 5 November 2012.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

On the instructions of

ADV A J VENTER

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DATE OF HEARING

28 January 2013

JUDGMENT DELIVERED ON

6 February 2013