



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 2022-22946

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
REVISED:

In the matter between:

RANGEL LOGISTICS (PTY) LTD

PLAINTIFF

And

UNHU ALUMINIUM (PTY) LTD

DEFENDANT

(Registration Number: 2017/463152/07)

Coram: Lucas van Tonder AJ

Heard: 15 November 2023

Delivered: 31 May 2024

Summary:

Summary judgment – Delay caused by procedures to be complied with prior to obtaining hearing date.

Agreement to “*pay now fight later*” – enforceable absent challenge.

Right to payment contractually fixed, even if disputed – similar to provision of security pending resolution in due course.

LUCAS J VAN TONDER AJ:

Introduction:

- [1] The procedural history of this summary judgment application illustrates the potential ineffective nature of summary judgment procedures, if not partly due to the delays resulting from Practice Directives and Rules applicable it, amongst other, in this Division.
- [2] It would appear that the scope for a party opposing summary judgment to cause delay in relation thereto with impunity, removes the small if any advantage above rather proceeding to trial in claims that would have qualified for summary judgment.
- [3] The summary judgment relates to claims for payment in respect of an undisputed written and signed contract, in respect of which both parties performed over a long period of time.

Procedural background:

- [4] The Plaintiff instituted action on 6 July 2022 against the Defendant for payment of an amount of R655,016.29 and interest thereon, allegedly due owing and payable for breach of contract and services rendered in terms of a written agreement.
- [5] The Plaintiff then applied for summary judgment on 31 August 2022.
- [6] The Defendant filed its opposition only on 10 October 2022.
- [7] The Plaintiff then delivered heads of argument in support of summary judgment on 13 November 2022.
- [8] This was followed by the Plaintiff's application on 15 February 2023 to compel delivery of the Defendant's heads, which application was set down on 22 March 2023.
- [9] The Defendant delivered its heads only on 14 March 2023, almost 10 months after summons had been issued.
- [10] Practice Notes followed from 16 March 2023 onwards.

- [11] On 13 June 2023 the Plaintiff requested a date for set down of the summary judgment application.
- [12] On 20 September 2023 the Plaintiff refreshed its request for a set down, which was granted on the same day (indicating that it ought to have been possible much earlier) for an eventual set down on 13 November 2023.
- [13] The Plaintiff submitted updated heads of argument on 29 October 2023. On the same day the parties submitted a further joint Practice Note.
- [14] The matter was ultimately argued during the week of 13 November 2023. Due to personal constraints and professional obligations overlapping with the acting judge appointment, judgement has been delayed beyond what would be expected, for which an apology is offered to the parties.
- [15] The fundamental flaw in procedures that require the co-operation of both parties lies in the litigious fact that one party, normally the defendant, has no urgency or incentive to for conclusion. The procedures then require the plaintiff or applicant to seek orders to compel, which in turn requires application for allocation, hearing and judgment or directive. The procedural- and practice rules should have stronger default provisions that allows a plaintiff/applicant to benefit from such default in order to accelerate towards finality.
- [16] Having regard to the procedural history, the label “*summary judgement procedure*” is a patent misnomer. Unless there is factual or statistical substantiation that most plaintiffs are *mala fide* or opportunistic, it would appear that the legal system may have become overwhelmingly engineered to protect those against plaintiffs which have *bona fide* claims. An example is the “*summary judgement procedure*” in this matter, evident from the manner in which the court system allowed it to be delayed, thus defeating the objective.
- [17] Economic growth, commercial affluence, industrial integrity, if not the general wellbeing of a capitalistic society depends on the efficiency with which rights and obligations, voluntarily committed to, are being honoured and, if not, enforced through

the judiciary. The legal system, in particular the procedural leg of it, should not facilitate those who seek to undermine the aforesaid objective. There would be a justifiable sentiment amongst law abiding entities, that those who act unlawfully or seek to avoid justice are afforded more protection than those who seek to rely on lawfulness or enforcement of justice, if only through justice being delayed for the benefit of lawlessness. Numerous jurisprudential principles support the notion that the legal system should cost-efficiently protect and enhance the moral fibre of commercial reality, time-related efficiency being a critical element.

[18] In another matter on the roll during the same week as this matter it was necessary to respond to the procedural delays, some of which should appropriately be repeated below.

[19] In the Constitutional Court, Brand AJ (as he then was in that forum) said in *Twee Jonge Gezellen (Pty) Ltd v Land & Agricultural Dev Bank of SA t/a The Land Bank*:¹

“We all know that the pace at which the wheels of civil justice are turning is unacceptably slow.”

[20] In a country where citizens complain that almost every sphere of government appears to fall apart, the judicial mainstay of the *trias politica* would be well served to be reminded of the oft quoted extra-judicial statement by Lord Goff of Chieveley in “Commercial Contracts and the Commercial Court” (1984) LMCLQ 382 at 391:

“[The judiciary is] there to help [litigants], not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.”

¹ 2011 (3) SA 1 (CC) (2011 (5) BCLR 505; [2011] ZACC 2).

[21] Albeit that parties are often not innocent when it comes to procedural delay, the absence of similar mandatory time frames for the period after the close of pleadings until the hearing date perhaps deserves some attention.²

[22] With borrowed inspiration from the New Zealand research,³ it is fair to ask why advanced “civilization”, or at least with the benefit of vastly improved technology, the customers of the justice system could still justifiably pronounce the cynicism of Charles Dickens in Bleak House (1853) some 170 year later:

‘This is the Court... which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give – who does not often give – the warning, “Suffer any wrong that can be done you rather than come here!”’

[23] Roscoe Pound (1906) in “*The Causes of Popular Dissatisfaction with the Administration of Justice*” wrote:

“Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.”

[24] Academic writing on the two main objectives of any civilized justice system refers to the first objective as the desire of each individual to correct a wrong through dispute resolution as fast as possible, to avoid having to obtain it through force or violence.

² Compare research in New Zealand by Toy-Cronin, B., Irvine, B., Stewart, K., & Henaghan, M. (2017). *The Wheels of Justice: Understanding the Pace of Civil High Court Cases (Project Report)*. The benefit of judicial intervention through Rule 37A has been emphasised by the full bench of the Mpumalanga High Court in *Hlatshwayo and Another v Road Accident Fund* (324/2019) ZAMPMBHC 2 (24 January 2023). However, a moratorium has been placed in this division since 29 November 2023 on the right to apply under Rule 37A(1)(b) for application of this rule (subject to certain exceptions).

³ *Ibid.*

This must be juxtaposed to the prevailing cynicism in respect of the second theoretical objective of any civilized justice system, namely:

*“Together, these functions [of the judiciary] of private dispute resolution, rule creation, ordering of the capitalist economy, and providing a check on government, are a public good that goes beyond the interests of the individual who calls upon the system.”*⁴

- [25] It would be helpful if procedural efforts were to be made to allow summary judgment to become true to its name.

Factual background:

- [26] Albeit that the present matter commenced under the rubric of “*summary judgement procedure*”, this court has been entangled in extensive papers over a long period of time involving lengthy heads of argument and counter argument which had to be trawled through in an attempt to dissect the pith of what should ultimately determine justice between the parties. Once the full extent of arguments on wide-ranging issues had been wrestled through, the essential answer was eventually revealed and formulated with a level of simplicity⁵. Anecdotally, the short answer was more laborious to formulate than the longer one.

- [27] The conduct detailed above creates an overwhelming sentiment on behalf of the Defendant in this matter, namely “*catch me if you can*”.

⁴ *Toy-Cronin et al supra*, p2.

⁵ There is benefit in often referring to the sentiments expressed in *Schietekat v S* [1999] 1 SA 131 (C) by Slomowitz AJ:

“I marvel at the flood of learning in which one must sink or swim in order to adjudicate what were once taken to be relatively straightforward matters...

It is sufficiently taxing, I find, to have to come to grips with the facts of a case and the principles of our common law to be applied to them. The time has perhaps arrived seriously to question the value of jurisprudential inebriation caused by having to imbibe vast quantities of what are more often than not merely particular instances of general principle. Consequently I begin with an apology for being impelled by circumstance to add to the mountain of authority. I will, I hope, be brief and seek to get to the pith of the problem by burdening my remarks with as little reference to the books as possible.”

[28] In the present matter, it may well be that the Plaintiff ultimately ends up being paid for amounts that are in dispute or which it might even not be entitled to, albeit almost two years after issuing summons and, anomalously, following summary judgment proceedings.

[29] The ultimate justice appears to hinge on paragraph 5.18 of the particulars of claim, where the Plaintiff pleaded reliance on clause 45 of the undisputed agreement between the parties, which reads as follows:

“45 DISPUTES

45.1 Should there be any dispute of any nature whatsoever between the parties in regard to any aspect, matter or thing relating to these trading terms and conditions and whether or not the company has executed its obligations in terms of any agreement it has with the customer, then and in such event the customer shall nevertheless be obliged to perform its obligations in terms of any such agreement as though [sic] the company had performed properly and to the customer's satisfaction.

45.2. The customer's remedy, having performed its obligations as provided in clause 45.1, shall be limited to an action against the company for repayment of either the whole or portion of the amount which the customer alleges, constitutes an overpayment.

45.3. Without affecting the generality of clauses 45.1 and 45.2 the customer shall not be entitled to withhold payment of any amounts, by reason of any dispute with the company, whether in relation to the company's performance in terms of any agreement, or lack of performance or otherwise, after which payment the customer's rights of action against the company in terms of this clause can be enforced. Until such payment is made, any rights that the customer may have, shall be deemed not yet to have arisen and it is only the payment to the company which releases such rights and makes them available to the customer in respect of any claim that he may have against the company.

45.4. In any dispute between the company and the customer the company shall be deemed to have performed its obligations in a proper and workmanlike manner and strictly in accordance with any agreement between it and the customer, until such time as the customer proves the contrary.”

- [30] The Defendant did not dispute the applicability of the clause nor did it seek to challenge it on the basis that it is *contra bonos mores* or adverse to constitutional principles. The tried and tested principles of *caveat subscriptor* followed by *pacta sunt servanda* allows terms such as clause 45, however draconian it might be, to be enforceable.⁶ At worst the clause delays justice, but in this instance by express agreement, as opposed to unjustifiably slumbering in the cosy protection of a court process rendered lethargic through the conduct or opportunism of a defendant.
- [31] In short, clause 45 is a “*pay now fight later*” provision, freely agreed to, without prior challenge for an extended executory phase of the contract.
- [32] Once clause 45 is undisputed, it casts serious doubt on the *bona fide* nature of any technical defence to challenge authority, knowledge of the facts, or even whether compliance with the credit regulations should bar enforcement of such contractual provisions.
- [33] The history of debits and credits over a long period of time has afforded the Defendant ample opportunity to demand statement and debatement, if not the prompt determination of its alleged counter-entitlement as provided for in clause 45.
- [34] The Defendant’s counsel has valiantly been at pains to emphasise “*the eye of the needle*” precautions aimed at preventing success in summary judgement, and the harsh consequences if not imposed.
- [35] Ironically, the Rule 32 provides a protective remedy very much along the lines of what clause 45 has bound the parties to, namely, the right to provide security to the plaintiff to the satisfaction of the court pending determination of the indebtedness.
- [36] This appears from sub-rule 32(3) and (8). Sub-rule (8), it would appear, mandates the court to grant leave to defend “*subject to such terms as to security...as the court deems*

⁶ See *Capitec Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) par 63 to 66; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) par 80.

fit". In the same manner, interim compliance with or enforcement of clause 45 does not deprive the defendant of its contractual right to repayment in due course.

- [37] Reliance on clause 45 overcomes the defences raised in a manner that justifies summary judgment.

Costs:

- [38] In *Johannesburg City Council v Television & Electrical Distribution (Pty) Ltd*,⁷ the court held that "*. . . in appropriate circumstances the conduct of a litigant may be adjudged "vexatious" within the extended meaning that has been placed on this term in a number of decisions, that is, when such conduct has resulted in "unnecessary trouble and expense which the other side ought not to bear"*". See also *In re: Alluvial Creek Ltd* 1929 CPC 532 at 535, *Phase Electrical Co Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 918H – 919B, and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101G – 102D.

- [39] The conduct of the Defendant aimed at delaying enrollment of the summary judgment application and its failure to actively dispute the meticulously worded agreed interim liability pursuant to clause 45 of the agreement, justifies an order of costs, despite the nature of the alternative order detailed below.

Order:

- [40] In the circumstances, the following order is made:

- (a) The Defendant is ordered to pay the Plaintiff the sum of R655,016.29;
- (b) Interest on the aforesaid amount at the rate of 9% per annum from date of summons until date of payment;
- (c) In the alternative to (a) and (b), the Defendant is ordered to provide security, by investing in the trust account of the Plaintiff's attorneys of record the sum of

⁷ 1997 (1) SA 157 (A) at 177 C – F.

R655,016.29 plus interest on the aforesaid amount at the rate of 9% per annum from date of summons until deposit of such security;

- (d) Payment of the Plaintiff's costs in respect of the summary judgment application on party to party scale.



LUCAS J VAN TONDER AJ