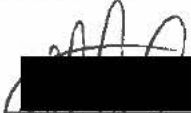




**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)**

Case No. 3550/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
23 May 2025	
DATE	SIGNATURE

TUNICA TRADING 104

Plaintiff

and

CITY OF MBOMBELA

Defendant

JUDGMENT

MONTSHO-MOLOISANE AJ

- [1.] This is an application for Summary judgment brought in terms of Uniform Rule 32 of this Court. The Applicant in this application is the Plaintiff in the action instituted against the Defendant for payment of an amount of R 5 754 244.06, which is alleged to be outstanding in respect of work done on the construction of the Nkululeko Circuit road in Mbombela.

- [2.] The Defendant entered appearance to defend the action, subsequent to which the Plea was filed.
- [3.] The Respondent opposes the application, and the basis for such opposition is set out in its Answering affidavit.
- [4.] The parties will herein be referred to as in the main action.

Background facts

- [5.] The cause of action, as set out in the Particulars of claim, is based on what is averred to be a Cession agreement concluded by the Plaintiff, the Defendant and MJ Mthombeni Construction (Pty) Ltd ("MJ Mthombeni"), in terms of which it was agreed that the Defendant would pay invoices for work done, directly to the Plaintiff, as the sub-contractor, and not to MJ Mthombeni Construction as the main contractor. A document titled "DIRECT PAYMENT AGREEMENT", was drafted and signed by representatives of the Plaintiff, the Defendant and MJ Mthombeni Construction on 06 April 2023, reflecting the terms of the agreement. The amount quoted and agreed upon by the parties was stated as an amount not exceeding R 9 373 658.36, payable once the Engineer has certified such progress payment to be properly due to the contractor.
- [6.] It is averred that in terms of the Direct Payment Agreement:

- 6.1. the Defendant paid the Plaintiff, an amount of R 788 649.30 on 25 July 2023; R 1 434 167.72 on 07 September 2023; and R 396 586.31 on 15 November 2023;
- 6.2. MJ Mthombeni paid the Plaintiff a total amount of R 1 503 851.44 being R 531 645.00 on 06 March 2023 and R 972 206.44 on 24 March 2023;
- 6.3. the Plaintiff alleges that the Defendant and MJ Mthombeni paid a total amount of R 5 123 254.77, leaving a shortfall of R 5 754 244.06.

[7.] In its Amended Plea, the Defendant pleaded that:

- 7.1. the contract for the construction of the Nkululeko Construction Circuit road, was entered into between the Defendant and MJ Mthombeni Construction, subsequent to its appointment under BID number 306/2021, to construct the Nkululeko Circuit road for the tendered amount of R 18 653 251.62 (eighteen million six hundred and fifty three thousand two hundred and fifty one rand and sixty two cents). The appointment was governed by the General Conditions of Contract for Construction Works, 3rd Edition, 2015;
- 7.2. the contract on Bid 306/2021 was not concluded with the Plaintiff, and the Defendant was not a party to the contract entered into between the Plaintiff and MJ Mthombeni Construction;
- 7.3. the Defendant was approached by the representatives of MJ Mthombeni Construction and the Plaintiff, due to lack of transparency between them and payments which were not forthcoming from MJ

Mthombeni to the Plaintiff. As a result the Defendant drew up the said document titled "DIRECT PAYMENT AGREEMENT" to quell any and all infights between them, and avoid the impact thereon on service delivery;

- 7.4. the amount of R 9 373 658.36 was an estimate that was subject to certification by an Engineer for actual work done, the value of which is subject to the original tendered rates submitted by MJ Mthombeni Construction before the Bid was awarded, and not the rates stated by the Plaintiff in its Bill of Quantities rates agreed to between MJ Mthombeni Construction and the Plaintiff;
- 7.5. that in terms of the said DIRECT PAYMENT AGREEMENT, it is the Defendant's Engineer, and not MJ Mthombeni Construction, who certifies completion of works; and
- 7.6. the Defendant denies that the agreement signed is a Cession.

The Summary Judgment application

The Founding affidavit

[8.] In its application for Summary judgment, the Plaintiff refers to the Defendant's Plea to the Particulars of Claim, and contends that:

- 8.1. the Defendant paid the Plaintiff monies due to the main contractor, but in its Plea denies that there was a valid Cession agreement of the contract;

8.2. the Defendant's Plea that it was MJ Mthombeni Construction which was appointed and not the Plaintiff, is vitiated by two Acknowledgement Letters, issued on the letterheads of the Defendant, titled "*Municipal Public Accounts Committee*" ("MPAC"), each signed by a Councillor in Ward 14, bearing the City of Mbombela stamp marked AX1 and AX 2 to the Founding affidavit. Annexure AX1, reads as follows:

"This letter serves to acknowledge that the Municipal Public Accounts Committee has received the request to intervene in the issue of Tunica Trading 104, the committee will address the issue with relevant department to pay the Tunica Trading 104 before 30 October 2024. This matter has been outstanding for a while due to unforeseen reasons within the structure. We hereby confirm that all work was completed and finalised. The two projects in this regard are Mountainview Road Upgrade and Nkululeko Circuit road. The values is as per cession agreement and attached outstanding invoices as follows: (sic)

Project 1: R 6 670 000.00

Project 2: R 9 393 658.00

This matter will be resolved and settled

Working together in building better communities in a City of excellence for an ultimate destination.

Yours in Ward 14

Mr B. Matsebula

MPAC Researcher and Investigator".

8.3. Annexure AX2 reads as follows:

"This letter serves to acknowledge that the Municipal Public Accounts Committee has received the request to intervene in the issue of Tunica Trading 104, the committee will address the issue with relevant department to pay the Tunica Trading 104, before the 30 October 2024. This matter has been outstanding for a while due to unforeseen reasons within the structure. We hereby confirm that all work was completed and finalised. The two projects in this regard are Mountainview Road Upgrade and Nkululeko Circuit road. The values is as per Cession agreement and attached outstanding invoices. (sic)

Please assist the bearer in accordance with the Council's relevant policy...

Yours in Ward 14

Councillor M...

01/09/2024"

[9.] The Plaintiff further contends that:

9.1. the Cession referred to was entered into in the amount of R 9 373 658.36 and the Defendant cannot avoid liability in light of the Direct Payment Agreement/Cession that it entered into with the Plaintiff and MJ Mthombeni Construction, and also that it paid some

money to the Plaintiff pursuant thereto, between 25 July 2023 and 15 November 2023.

- 9.2. that a contractual right may be ceded by the cedent to the cessionary, without informing the debtor, if the main contract between the parties is not altered or amended, and moreover, if the debtor carries on dealing with the original creditor, the cedent, in good faith, the cessionary, which is the new creditor, is bound by the contract, and the debtor cannot avoid liability.

[10.] The Plaintiff further avers that at the time of completion of the work by the Plaintiff, the Defendant had underpaid the Plaintiff with the amount of R 5 754 244.06.

[11.] In the premises, it was contended, the Defendant is indebted to the Plaintiff in the amount of R 5 754 244.06 which was underpayment for the work completed by the Plaintiff, and in respect of the Direct Payment Agreement.

The Answering affidavit

[12.] In the Answering affidavit opposing Summary judgment, deposed to by the General Manager: Corporate Services of the Defendant, it is contended that:

- 12.1. the Plaintiff was never awarded Bid number 306/2021 subsequent to which the Defendant entered into a contract for the construction of the Nkululeko Circuit road;

- 12.2. the rates payable to Mthombeni Construction were subject to the rates tendered in the Bid submitted by MJ Mthombeni and not as set out in the Bill of Quantities submitted by the Plaintiff;
- 12.3. the Defendant disputes the authenticity of the two Acknowledgement Letters, AX1 and AX2, allegedly issued by the Municipal Public Accounts Committee, indicating that it had received a request to intervene in the issue with the Plaintiff, and undertaking to address the issue with the relevant department to pay the Plaintiff before 30 October 2024;
- 12.4. that the role of the said Committee is one of oversight, and that its appointment is in accordance with Section 79A of the Local Government: Municipal Structures Act, no 117 of 1998 ("the Structures Act"). The Court to the Confirmatory affidavit deposed to Mr Kenneth Mkhonto the Councillor in Ward 14, disputes that Annexure AX2 was written by him, and states that it is not his signature appearing thereon.
- 12.5. that it is only a Municipal Manager who has the authority and is responsible for the financial affairs of the Municipality in terms of Section 60 of the Local Government: Municipal Finance Management Act, no 56 of 2003 ("the Municipal Finance Management Act").

[13.] It is contended that the Plaintiff's claim should be dismissed as Rule 32(1) requires that the claim be on a liquid document, or for a liquidated amount, which has not been established in *casu*.

The Replying affidavit

[14.] In the Plaintiff's Replying affidavit, deposed to by its director, Mr Louis Wessels, the historical background regarding the advertised Bid 306/2021 and ultimate award thereof is outlined.

[15.] The Replying affidavit further sets out the circumstances that culminated with the agreement between the MJ Mthombeni Construction and the Plaintiff, and later on between the Plaintiff, MJ Mthombeni and the Defendant, which is a Cession agreement. He contends that:

15.1. the Defendant made several payments directly to the Plaintiff, as a result of the Cession agreement, accompanied by the completed Bill of Quantities;

15.2. the Defendant was aware that the total amount due, at the time of the signing of the Cession agreement, was R 9 373 658.36, in accordance with Table A attached to the agreement, reflecting such amount, which was signed on behalf of the COM, an acronym for City of Mbombela, the Defendant herein;

15.3. Councillor Mkhonto, who deposed to the Defendant's Confirmatory affidavit disputing the authenticity of Annexure AX2, cannot be trusted as he is conflicted and that he might have deposed to the affidavit under duress, in order to secure his employment. The deponent further questions the absence of an affidavit from Mr B Matsebula, who is referred to as a neutral person, as he is not an employee of the Defendant;

15.4. the main contractor confirmed that the work was completed; and

15.5. on the totality of the evidence, the Defendant does not have a valid defence.

Issues for determination

[16.] The issues for determination are, the following:

16.1. whether the Plaintiff's claim for Summary judgment is based on a liquid claim or liquidated amount in money; and.

16.2. whether the Defendant has disclosed a *bona fide* defence in its Answering affidavit.

Evaluation

[17.] The following facts are common cause as pleaded in the affidavits before Court:

17.1. The Plaintiff and MJ Mthombeni Construction had a subcontracting agreement in terms of the Nkululeko Circuit road, which extended to the payment that was to be made to the Plaintiff for work done;

17.2. the representatives of the Defendant and those of the Plaintiff got together with MJ Mthombeni, of MJ Mthombeni Construction, and concluded the Direct Payment Agreement for payment to be made directly to the Plaintiff in respect of work or services completed, to which Table A, that specified the amount of the said construction project as not exceeding the total of R 9 373 658.36, was attached;

17.3. the only party who signed Table A, is a representative of the Defendant, as that signature appears where the phrase- "*On behalf of COM*" appears COM is an acronym for the City of Mbombela.

17.4. no date appears on Table A;

[18.] Table A has no probative value, as it was not signed by all three parties.

[19.] In any event, even if this Court were to consider the Direct Payment Agreement as being a Cession agreement, without having to have regard to the probative value of Table A, I am of the view that Clause 4.2 of the agreement is crucial for the purpose of determining whether the Plaintiff has satisfied the requirements set out in Rule 32(1). Clause 4.2 provides:

" 4.2 COM will only be obliged to effect payment to engaged Tunica Trading in accordance to Table A, and to the amount not exceeding R 9 373 658.36 (nine million three hundred and seventy three thousand, six hundred and fifty eight rand and thirty six cents), once the Engineer has certified such progress payment to be properly due to the contractor".

[20.] Clause 4.2 is therefore peremptory, as it accords with the General Conditions of Contract for Construction Works, 3rd Edition 2015.

[21.] It is important to state that in paragraph 6.3 of the Replying affidavit, the deponent, who is the director of the Plaintiff, refers to Annexure "COC1" to the Summons where he avers the following:

"6.3 The main contractor has confirmed that the work was done to completion".

[22.] It is appropriate to mention that Annexure "COC1" to the Particulars of Claim, which is relied on by the Plaintiff in this application, is a letter issued on the letterheads of MJ Mthombeni Construction, and is titled "Final Approval Certificate". The letter is signed on behalf of MJ Mthombeni Construction, and Tunica Trading 104 (Pty) Ltd. The date 13 September 2023 is reflected next to each signature. The letter states the Final Approval date as 01 September 2023, and states as follows:

"It is hereby confirmed that the site and the works stated in the contract above have been duly inspected by MJ Mthombeni Construction (Pty) Ltd and deemed complete and without any defects. A Final Approval Certificate is hereby issued in accordance with Clause 5.16.1 of the General Conditions of Contract 2015. (Expiration of Defects Liability Period)."

[23.] I also take note that there is no reference in the Founding and Replying affidavits, that an Engineer certified such progress payment to be properly due to the contractor, as contemplated in Clause 4.2 of the Direct Payment Agreement, so as to justify the granting of summary judgment prayed for.

[24.] Another important issue that needs to be addressed, is the authenticity of the two Acknowledgement letters, referred to as Annexure AX1 and AX2, which were issued by the Ward 14 Councillors. The deponent to the Defendant's Confirmatory affidavit, Kenneth Mkhonto, disputes that he wrote the document, and states that it is not his signature appearing thereon.

- [25.] The veracity of the contents of the Confirmatory affidavit is however disputed by the director of the Plaintiff, Louis Wessels, basing his contention on the fact that Mr Mkhonto is still in the employ of the Defendant and would therefore secure his employment. This is no doubt speculative.
- [26.] In my view, whether the two Councillors were authorised to make the kind of financial commitments appearing in Annexures AX1 and AX2, can only be established by having regard to the statutory powers they have.
- [27.] Section 79 A(1) of the Municipal Structures Act, which was referred to by the Defendant's Counsel, provides for the establishment of the Municipal Public Accounts Committee, whose functions, as stipulated in subsection(3) thereof, are *inter alia*, to review the Auditor-General's reports and comments, and make recommendations to the Municipal Council based thereon; to initiate and develop oversight report on annual reports, and investigate reports on any matter affecting the Municipality.
- [28.] In terms of Section 60 of the Municipal Finance Management Act, and as correctly contended on behalf of the Defendant, it is only the Municipal Manager, as the accounting officer, who is authorised to make financial decisions on behalf of the Defendant, and not the Municipal Public Accounts Committee or Councillors.
- [29.] In my view, the contention by Plaintiff's Counsel that the two Councillors made an assurance to the Plaintiff that the payment was approved by the Municipal Public Accounts Committee, is binding on the Defendant, is not sustainable,

based on the fact that they are not authorised to make financial decisions in terms of the provisions of the Municipal Finance Management Act.

- [30.] Plaintiff's Counsel further referred this Court to the case of *Hippo Quarrine (Tvl) (Pty) Ltd v Eardley*¹, where a Cession agreement was described as "an essential link in the Plaintiff's case" and to the case of *Johnson v Incorporated General Insurance Ltd*², where the Court held that:

"Cession, in our modern law, can be seen as an act of transfer to enable the transfer of a right to claim... to take place".

- [31.] In this regard, I am of the view that whether the tripartite agreement entered into by the parties on 06 April 2023 constitutes a Cession agreement or not, *ex facie* the document, the inquiry should be limited to whether the Defendant has entered appearance to defend the Plaintiff's claim, solely for the purpose of delay.

- [32.] It is undoubtedly so that Summary judgment enables a Plaintiff to obtain judgment against a Defendant without resorting to trial when a Defendant has no defence to a claim based on a liquid document, or for a liquidated amount of money.

- [33.] The Defendant's Counsel, in my view, correctly so, referred this Court to the judgment in the case of *Majola v Nitro Securitisation 1 (Pty) Ltd*³, where it was held that:

¹ *Hippo Quarrine (Tvl) (Pty) Ltd v Eardley*, 1992(1) SA 867 (A) at 873 D

² *Johnson Incorporated General Insurance Ltd* 1983 (1) SA 318 (A)

³ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA)

*"The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole, from laying his defence before the Court"*⁴.

Applicable Law

[34.] Rule 32(1) entitles the Plaintiff to apply to Court for Summary judgment on each of such claims in the summons as is only-

- "(a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property;
- (d) for ejectment"

[35.] In the case of *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (formerly First Rand Bank of South Africa Ltd*⁵, the Court defined a liquidated amount of money as *"an amount which is either agreed upon or which is capable of speedy and prompt ascertainment"*.

[36.] The landmark judgment of Corbett JA in the case of *Maharaj v Barclays National Bank Ltd*⁶, outlines the principles and requirements for opposing Summary judgment. It specifically explains what a Defendant has to demonstrate to successfully resist a Summary judgment application, requiring him/her to show a bona fide defence to the claim.

⁴ At 232 F-G

⁵ *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (formerly First Rand Bank of South Africa Ltd* 2010 (6) SA 439 (SCA)

⁶ *Maharaj v Barclays National Ltd* 1976 (1) SA 418 (A)

[37.] In essence, the Maharaj judgment sets the standard for how a Defendant can effectively oppose a Summary judgment application by presenting a credible and legally sound defence.

[38.] The rationale and requirements for the grant or refusal of Summary judgment are trite and were summarised by the Supreme Court of Appeal, relying on the Maharaj judgment *supra* in the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁷, to which the Defendant's Counsel correctly referred this Court to, as follows:

"Our Courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G- 426 E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A Court which is satisfied that this threshold has been crossed is then bound to refuse Summary judgment".

Findings

[39.] It has been contended on the Plaintiff's behalf, that the cause of action against the Defendant is based on the Direct Payment Agreement, which is a Cession agreement.

⁷ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

- [40.] As I have already evaluated this submission, it does not absolve the Defendant from the obligation of satisfying this Court that the claim is based on a liquid document, or is for a liquidated amount of money.
- [41.] I have also expressed my view regarding the Plaintiff's reliance on Annexures AX1 and AX2, which, it was contended, was an assurance of indebtedness signed by the two Councillors in Ward 14 of the municipality. This does not accord with the provisions of the Municipal Finance Management Act.
- [42.] Lastly, there has not been any compliance with Clause 4.2 of the Direct Payment Agreement, in that there is no Certificate submitted by an Engineer certifying such progress payment to be properly due to the Plaintiff. Instead, the Plaintiff relies on the Final approval certificate, sent by MJ Mthombeni Construction which, according to the Defendant is insufficient to warrant payment.
- [43.] It is trite that where the defence is based upon facts which dispute the material facts alleged by the Plaintiff in the Summons, the Court cannot decide those issues or determine whether or not there is a balance of probabilities in favour of one of the parties. The Court, in those circumstances, is obliged to enquire firstly, whether the Defendant has fully disclosed the nature and grounds of his/her defence, and the material facts on which it is founded; and secondly, whether on the facts so disclosed, the Defendant appears to have a defence which is *bona fide* and legally sound.
- [44.] I am therefore of the view that the Defendant should successfully resist Summary judgment prayed for by the Plaintiff on the basis that there is a

reasonable possibility that the defence advanced by the Defendant, as set out in the Answering affidavit, may succeed on trial.

[45.] In the light of the disputes raised by the Defendant and the *bona fide* defence disclosed, I am of the view that the Plaintiff's claim is not liquidated, nor is it based on a liquid document. In the circumstances the Plaintiff has not met the threshold set in Rule 32(1) for Summary judgment to be granted.

[46.] Having regard to the afore-stated legal principles, I am satisfied that the Summary judgment application should be dismissed.

[47.] The Defendant has prayed for an order for costs to be awarded on a punitive scale. I am however not persuaded that there is any factual and legal basis that justifies the award of costs against the Plaintiff on a punitive scale, in the absence of any facts pleaded by the Defendant to that effect, in its Answering affidavit.

ORDER

[48.] In the result, this Court makes the following Order:

48.1. The application for Summary judgment is dismissed with costs;

48.2. Costs of suit to be paid by the Plaintiff on a party and party scale.



L.M. MONTSHO-MOLOISANE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Date heard : 07 March 2025

Judgment delivered :

electronically by circulation to all parties : 23 May 2025

Appearances

Counsel for the Plaintiff : Adv A.A. Milazi

Instructed by : Milazi AA Incorporated
Mbombela

Counsel for the Defendant : Ms Xolile Ngwenya

Instructed by : Xolile Ngwenya Attorneys
Mbombela