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

Not Reportable

Case no: 2193/2025

In the matter between:

SEQHOBONG CONSTRUCTION CC	**APPLICANT**
(reg no: 2002/091165/23)	
and	
MANGAUNG METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
THE MUNICIPAL MANAGER: MANGAUNG METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**

Neutral citation: *Seqhobong Construction CC v Mangaung Metropolitan Municipality and Another* (2193/2025) [2025] ZAFSHC 371 (25 November 2025)

Coram: DE LA REY AJ

Heard: 11 September 2025

Delivered: This judgment was handed down electronically by circulating to the parties legal representatives and release to SAFLII. The date and time for the hand-down is deemed to be 12h00 on 25 November 2025.

Summary: Application for payment – whilst action still pending – defence of *lis pendens* established – abuse of process.

ORDER

1 Condonation is granted for the late filing of respondents answering affidavit and the applicant's replying affidavit.

2 Condonation is granted and the applicant's additional affidavit is accepted.

3 The applicant's application is dismissed with costs payable on an attorney and client scale.

JUDGMENT

De la Rey AJ

Introduction

[1] The applicant approaches court by way of a mandamus application for an order in the following terms:

'1.1 an order to compel the first and second respondents to pay invoices 166; 168; 171; 176; 191; 192; 193; 195 and 198 totalling the amount of R3 362 536-75 within seven days from the date of the order directly into the applicant's Nedbank current account held under account number: . . .'

[2] In the alternative, the applicant sought the following relief:

'3.2.1 an order to compel the first and second respondents to process within thirty (30) calendar days from the date of order invoices 166; 168; 171; 176; 191; 192; 193; 195 and 198.

3.2.2 An order to compel the first and second respondents to pay invoices 166; 168; 171; 176; 191; 192; 193; 195 and 198 totalling the amount of R3 362 536-75 within seven days from the lapsing of the thirty (30) calendar days as per prayer 1.2.1 *supra*, directly into the applicant's Nedbank bank account held under account number . . .'

The applicant furthermore sought cost order on an attorney and own client scale.

[3] The applicant's application for payment of the abovementioned amount is founded on s 65(2)*(e)* of the Municipal Finance Management Act 56 of 2003. Although framed as an application to compel, it is evident from the application that the applicant simply seeks payment of the outstanding invoices as mentioned hereinbefore.

[4] In opposing the application, the respondents, besides answering to the specific averments, took various points *in limine* arguing that the *mandamus* relief sought was inappropriate on the facts, stating that the applicant has failed to meet the requirements of an interdict and stating that there are material disputes of facts and alleging prescription of the applicant's claims. For reasons that appear hereafter, it is only necessary to deal with a single aspect in the respondents' opposition to the application and that is the allegation that the payment sought on the relevant invoices by the applicant has prescribed.

[5] In this regard, the applicant, in its replying affidavit, in answer to the respondents' averment of prescription stated as follows:

'7.2 Prescription is not applicable in this event. The applicant has instituted action proceedings in this Honourable Court during 2022 thus the applicant has not allowed for the claims to have prescribed, and I thus reiterate that the purpose of this application is to compel the respondents to adhere to their statutory duty to duly process invoices and affect payment thereon within a period of thirty (30) days should there be no disputes.'

[6] The applicant's averment relating to the action already instituted in 2022 did not appear in its founding affidavit and the applicant sought and was granted leave to file an additional affidavit dealing specifically with the points *in limine* raised by respondents and more specifically to the response relating to the allegation of prescription. Attached to the additional affidavit is an amended particulars of claim filed under case number 5216/2022 in terms of which the applicant, as plaintiff in the action, also sought payment in the amount of R7 338 360.96 from the first respondent, as defendant in the action. Part of this amount, as is evident in the annexures to the amended particulars of claim, relates to tax invoices 166; 168; 171; 176; 191; 192; 193; 195 and 198. It is thus clear that the applicant has, prior to launching the application, instituted an action for the payment of the balances due on the exact same invoices that forms the subject matter of this application.

[7] It must be mentioned that, on the face of it, it appears as though the particulars of claim in the action was amended to eventually include the invoices that form the subject-matter of the current application and it might not have formed part of the initial action. Based on the aforesaid, counsel for the respondents, in his heads of argument and in

court, took the point that there is a current action pending between the same parties based on the same factual averments i.e., payment of the abovementioned disputed invoices and that the application, irrespective of all the other points taken, clearly cannot succeed based on the defence of *lis pendens*.

[8] Counsel for the applicant was queried on why the application should not be regarded as an abuse of process and, more specifically, why the existence of a current action between the same parties relating to the same invoices was not mentioned at all by the applicant in its founding papers. Counsel for the applicant conceded that it should have been stated in the founding affidavit but denied that the application amounted to an abuse of process. The relief in seeking payment was abandoned during argument and the applicant simply sought an order in terms of which the respondents had to process the necessary invoices within a period of 30 days.

[9] In *Maughan v Zuma and Others*,[1] it was held that:

'Our courts have not attempted to have an all-encompassing definition of what is meant by an abuse of process. Over the years there have been a number of instances in which the courts have deemed it appropriate to intervene and arrest an abuse of process which include those instances where proceedings have been instituted for an ulterior and/or improper purpose and for an improper and/or ulterior motive.'

[10] Given that there is an unresolved action pending between the parties relating to payment of, inter alia, the same invoices the respondents, as defendants in the action, would in any event have already considered payment of the invoices and for whatever reason have decided that the payment thereof was not due and payable, hence the pending unresolved action.

[11] An amended order as sought by the applicant simply makes no sense. It is quite clear that the applicant in this matter, irrespective of the pending action between the parties, decided, to approach this Court under a different case number on application to try and hasten and force payment of the apparent disputed invoices.

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[1] *Maughan v Zuma and Others* [2023] ZAKZPHC 59; [2023] 3 All SA 484 (KZP); 2023 (5) SA 467 (KZP); 2023 (2) SACR 435 (KZP) para 70.

[12] It is unthinkable that a party, knowing that it is involved in an unresolved action would simply disregard the action, fail to tell the court about the pending action in its founding affidavit and then effectively seek payment of a disputed debt and thereby sidestepping the pending action procedure.

[13] Counsel for the applicant was adamant that the process followed was not an abuse of process in that they are in terms of the Act entitled to the relief sought. Whilst this submission simply reiterates the administrative actions to be that respondents had to perform in terms of the Act, the issue in this matter is not whether the applicant has got the right to seek the relief as per the notice of motion, the problem lies in the fact that the applicant, having been forced to divulge to court the pending action only after being forced to deal with the possible prescription, failed in its founding affidavit to be frank and honest with the court relating to the true current scenario relating to the disputes between the parties.

[14] The issue of abuse of process thus lies with the failure by the applicant to play open cards with the Court. Had the respondents not pleaded prescription in its opposing affidavit which the applicant of necessity had to deal with in reply, this Court would have been none the wiser about the existing action pending between the parties. The conclusion is inescapable that that the application was brought for an ulterior and/or improper purpose and constitutes an abuse of process.

[15] In *Nestle (South Africa) (Pty) Ltd v Mars Inc*,[2] Nugent AJA stated:

'The defence of *lis alibi* pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

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[2] *Nestle (South Africa) Pty Ltd v Mars Incorporated* [2001] ZASCA 76; [2001] 4 All SA 315 (A); 2001 (4) SA 542 (SCA); 2001 BIP 130 (SCA) para 16.

[16] The existence of the pending action between the same parties, relating to payment of the same invoices clearly establishes the defence of *lis pendens* and the application stands to be dismissed. It should be mentioned that even if the additional affidavit by applicant is disregarded, on applicants own case, that is that the claims have not prescribed because of the action instituted in 2022, the defence of *lis pendens* is established. The doctrine of *lis pendens* requires that the pending action be finalised in the forum in which it is pending. The argument that there is no *lis pendens* because applicant in the application also seeks an order that respondents 'process' the invoices is contrived. Prior to abandoning it during argument, applicant clearly sought payment of the relevant invoices both in terms of its main relief as well as its alternative relief sought. Furthermore, and, in any event, it is hard to imagine how the applicant could ever have argued that it does not have an effective alternative remedy whilst presenting the existing pending action as answer to a defence of prescription.

[17] The defence of *lis pendens* is established and the application cannot succeed.

Costs

[18] Considering the applicant's abuse of process this court will grant a punitive cost order in favour of the respondents as is evident in the order.

Order

[19] In the result, the following order is granted:

1 Condonation is granted for the late filing of respondents answering affidavit and the applicant's replying affidavit.

2 Condonation is granted and the applicant's additional affidavit is accepted.

3 The applicant's application is dismissed with costs, payable on an attorney and client scale.

[redacted]

H E De la Rey

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant: J Ferreira

Instructed by: Willie J Botha Incorporated, Bloemfontein

For the respondents: L B J Moeng

Instructed by: Matlho Attorneys, Bloemfontein.