Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **680/2024**

In the matter between:

MACP CONSTRUCTION (PTY) LTD Plaintiff

and

JOE MOROLONG LOCAL MUNICIPALITY Defendant

Neutral Citation: ***MACP Construction (Pty) Limited v Joe Morolong Local Municipality (680/2024)***
Heard on: **5 June 2026**
Delivered on: **26 June 2026**
Coram: **Olivier AJ**
Summary: **Civil Procedure – Provisional Sentence – Legal position confirmed. plaintiff's claim based on liquid document – defendant unable to show an inability to satisfy the judgment debt, or an even balance of success in the main case, or reasonable prospect that oral evidence may tip the balance of success in the defendant's favour. Provisional sentence justified.**

ORDER

In the result, the following order is made:

1. Provisional sentence is granted in favour of the plaintiff against the defendant for:

    1.1 Payment in the amount of **R734 000.54 (Seven Hundred and Thirty-Four Thousand Rand and Fifty-Four Cents)**;

1.2 Interest on the amount of R734 000.54 (Seven Hundred and Thirty-Four Thousand Rand and Fifty-Four Cents) a *tempore morae*, calculated from 28 July 2023 to date of final payment; and

1.3 Costs of suit on Scale "B" as referred to in Rule 69(7), read with Rule 67A(3) of the Uniform Rules of Court.

JUDGMENT

OLIVIER AJ

1. The plaintiff approaches this Court for provisional sentence in the total amount of R734 000.54 (Seven Hundred and Thirty-Four Thousand Rand and Fifty-Four Cents) (***"the claim amount"***), plus interest and costs based on the alleged non-payment by the defendant of an interim payment certificate and invoice issued by the plaintiff in the said amount.

2. The matter is opposed and the parties have duly filed their answering as well as replying affidavits.

3. The relevant undisputed facts in this matter are as follows:

   3.1 That the plaintiff and the defendant entered into an agreement during September 2022 in terms whereof the plaintiff was supposed to attend to the building of a road (***"the project"***) and that the agreement incorporated the General Conditions of Contract for Construction, Third Edition, 2015 (***"the GCC"***);

   3.2 That the defendant appointed BMH Africa Engineers (Pty) Ltd (***"BMH"***) as its agent and specifically as the engineers on the project with full authority to act in accordance with the terms of the above agreement and the GCC which would include the authority to bind the defendant to make payment of all amounts certified by BMH in terms of interim and final payment certificates;

3.3 That, in terms of the GCC, the defendant is obliged to make payment of the amount due to the plaintiff within 28 (twenty-eight) days from receipt of the payment certificate(s) referred to in the previous paragraph subject to the plaintiff issuing a tax invoice to the defendant in the amount due;

3.4 That BMH issued an interim payment certificate (herein after referred to as "***the initial payment certificate***") for the claim amount on or about 17 October 2023 (initially on 30 June 2023) and that the plaintiff issued an invoice, addressed to the defendant, in the same amount and on the same day; and

3.5 That the claim amount has not been paid by the defendant.

4. The plaintiff issued a provisional sentence summons against the defendant on 14 March 2024 whereupon the defendant filed its answering affidavit on or about 24 July 2024.

The plaintiff's replying affidavit was filed on or about 31 July 2024.

5. It should be mentioned that the question as to whether the plaintiff complied with the formal requirements of Rule 8 of the Uniform Rules of Court ("***the Rules***") was never in issue and upon a proper consideration of the papers in the matter, I am satisfied that the plaintiff did in fact comply with the said formal requirements and I will therefore not spend any further time on this issue.

6. It is trite that provisional sentence is available to a plaintiff who is armed with a liquid document and it is common cause that in the present matter the plaintiff relies on the initial payment certificate issued by BMH on behalf of the defendant, in its claim against the defendant.

7. It is further trite and needs no further discussion, that payment certificates such as the one relied on by the plaintiff, are deemed to be liquid documents.[1]

8. Seemingly in keeping with the above legal position, the defendant, neither in its answering affidavit, nor in its unsigned heads of argument, disputed the question whether the initial payment certificate relied upon by the plaintiff is a liquid document and that the plaintiff's claim is in fact based on a liquid document.

9. Surprisingly however, it was argued on behalf of the defendant that the initial payment certificate relied upon by the plaintiff is not a liquid document and that the plaintiff has consequently failed to make out a case for the provisional sentence sought.

10. Mr. Mongala, who appeared for the defendant based his above argument on a letter from the defendant and addressed to the plaintiff dated 21 September 2022 in terms whereof the plaintiff's tender for the project was accepted and specifically to a paragraph in said letter that reads as follows:

> *"The Works will be executed in terms of Contract No. B196/2019. The above project description and Contract number must be quoted in all correspondence."*

---

[1] ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** [2009] 3 All SA 407 (SCA), par 27

11. With reference to the initial payment certificate relied upon by the plaintiff and with reference specifically to the covering letter that accompanied the initial payment certificate, Mr. Mongala argued that the initial payment certificate is rendered illiquid by the fact that the contract number is not mentioned in said covering letter.

12. I find this argument to be artificial and bordering on the desperate, seeing that the contract number appears very clearly on the opening page of the initial payment certificate itself.

13. I can therefore find no merit in this argument on behalf of the defendant and I therefore find that the plaintiff's claim is in fact based on a liquid document.

14. It has been held that the theory behind provisional sentence is that it is granted because the Court is provisionally satisfied that the plaintiff will be successful in the principal action, based on the presumption of the genuineness and the legal validity of the documents placed before Court.[2]

15. It is also trite that once a plaintiff has shown that his claim is based on a valid liquid document, that the said document was presented for payment and that payment was not made, the plaintiff would ordinarily be entitled to provisional sentence[3] and that the onus then shifts to the defendant to admit or deny his liability and, if liability is denied, set out the grounds upon which the denial is based.[4]

16. In the present matter, the only defence raised by the defendant in its answering affidavit is that BMH issued a revised payment certificate (herein

---

2 ***Harrowsmith v Ceres Flats (Pty) Ltd*** 1979 (2) SA 722 (T) at 728
3 ***Froman v Robertson*** 1971 (1) SA 115 (AD) at 120
4 See ***Rule 8(5)*** of the rules

after referred to as ***"the amended payment certificate"***) in the amount of R481 097.28 (Four Hundred and Eighty-One Thousand And Ninety-Seven Rand and Twenty-Eight Cents) (***"the amended amount"***) and that the defendant is indebted towards the plaintiff only in the amended amount.

17. In ***Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another***[5] the apex Court dealt with the constitutionality of the provisional sentence procedure and held that the provisional sentence procedure does constitute a limitation to the right to a fair trial[6] but that the limitation might be justified where courts are afforded a discretion to refuse provisional sentence in the following circumstances:

 17.1 Where there is an inability on the part of the defendant to satisfy the judgment debt;

 17.2 Where the defendant can show, on the papers, an even balance of success in the main case; and

 17.3 Where the defendant can show a reasonable prospect that oral evidence may tip the balance of success in the favour of the defendant.[7]

18. In the present matter the defendant did not allege an inability to pay the amount of the judgement debt (the claim amount) although Mr. Mongala, again outside the scope of his papers and heads of argument, intimated as much during his argument.

---

5 2011 (3) SA 1 (CC)
6 ***Twee Jonge Gezellen***, *supra*, par 70(a)
7 ***Twee Jonge Gezellen***, *supra*, par 70(b)

The above intimation as well as the submission made in the heads of argument for the defendant to the effect that oral evidence might tip the balance of success in the favour of the defendant, are made without any substance or support and cannot be sustained.

19. The only question, in my view, to be answered is whether the defence raised by the defendant, namely that the initial payment certificate was amended to a payment certificate in a lower amount, affords the defendant an even balance of success in the main case.

20. The parties are *ad idem*, as was already mentioned, that the agreement between them would incorporate the terms of the GCC.

21. Clause 6.10.4 of the GCC states as follows:

> "*The Employer's Agent*[8] *shall deliver to the Employer and the Contractor the payment certificate referred to in Clause 6.10.1 within 7 days of the receipt by the Employer's Agent of the Contractor's said statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of Clause 10.2. The Employer shall pay the amount due to the Contractor within 28 days of receipt by the Employer of the payment certificate ...*" (my omissions)

Suffice it to say that clause 6.10.1 of the GCC refers to interim payment certificates.

22. Clause 10.2.1 affords the plaintiff and the defendant the right to deliver a written dissatisfaction claim to BMH in respect of any matter arising out of or in connection with the agreement between the parties whilst clause 10.2.2 of the GCC states as follows:

> "*If, in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or*

8 In this case BMH

the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter."

23. It should be stated, for the sake of completeness, that clause 10.1 of the GCC deals with the applicable provisions where the contractor claims for an extension of time for the completion of the project and suffice it to say that the provisions of clause 10.1 are not applicable in the present matter.

24. It is not in dispute that the defendant has not raise any dissatisfaction claim after delivery of the initial payment certificate and it is also not in dispute that the amended payment certificate was delivered after the provisional sentence summons was served on the defendant nor was it in contention that the agreement between the plaintiff and the defendant was cancelled on 1 November 2023 in other words before the issuing of the provisional sentence summons and the delivery of the amended payment certificate.

25. It is apposite to also mention the provisions of clause 9.3.2 of the GCC which deals with the termination of the agreement and which provides that upon such termination all of the provisions of the GCC shall continue to apply for purposes of resolving any dispute and for purposes of determining the amounts payable by either the plaintiff or the defendant to the other of them.

26. I am of the view that, simply based on the provisions of the GCC, the defendant has not managed to make out a case for a finding that the defendant has an even balance of success in the main case.

27. I say the above based thereon that by the time that the agreement between the parties was cancelled, the time for the defendant to invoke the contractual dissatisfaction mechanism in respect of the initial payment~~s~~ certificate had come and gone without it being used.

28. The initial payment certificate was therefore, by operation of the parties' own agreed upon dispute machinery, binding on the defendant which constitutes the very basis upon which the plaintiff is entitled to insist on payment and upon which non-payment constitutes a breach of the agreement which justifies cancelation and the institution of a civil claim.

29. I would be remiss if I did not refer to ***Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd***[9] where the Court dealt with a very similar provision in respect of dissatisfaction claims in the Standard FIDIC Conditions of Contract ("***the SFCC***").

30. In terms of the dispute resolution procedures contained in the SFCC, a dispute between parties to the agreement is to be referred to a dispute resolution board and in the event of any party being dissatisfied with the decision of the dispute resolution board, such party may, within 28 (twenty-eight) days give notice of its dissatisfaction.

The Court held, with reference to further relevant provisions of the SFCC that if notice of dissatisfaction is not given, the decision by the dispute resolution board becomes final and binding.[10]

31. I can find no reason why the above cannot find application to the present matter specifically in view of the fact that the defendant agreed, in clause 10.2.2 of the GCC, that if it did not submit a dissatisfaction claim in respect of the initial payment certificate within 28 (twenty-eight) days, it shall have no further right to raise any dissatisfaction on the said initial payment certificate.

---

9 2014 (1) SA 244 (GSJ)

10 ***Tubular Holdings***, *supra* at 246 to 247

32. I consequently hold the view that the initial payment certificate had become contractually binding after 28 (twenty-eight) days and in any event before the cancellation of the agreement.

33. In view of all of the above, I am of the view that provisional sentence should be granted and I can see no reason why the costs should not follow the result.

Mr. Basson, who appeared for the plaintiff, argued that costs on Scale "B" should be appropriate and, in view of the fact that this matter is relatively uncomplicated, I agree with his contention.

<u>ORDER</u>:

34. In light of the afore-mentioned, I make the following order:

1. **PROVISIONAL SENTENCE IS GRANTED IN FAVOUR OF THE PLAINTIFF AGAINST THE DEFENDANT FOR:**

   1.1 **PAYMENT IN THE AMOUNT OF R734 000.54 (SEVEN HUNDRED AND THIRTY-FOUR THOUSAND RAND AND FIFTY-FOUR CENTS);**

   1.2 **INTEREST ON THE AMOUNT OF R734 000.54 (SEVEN HUNDRED AND THIRTY-FOUR THOUSAND RAND AND FIFTY-FOUR CENTS) A *TEMPORE MORAE*, CALCULATED FROM 28 JULY 2023 TO DATE OF FINAL PAYMENT; AND**

1.3 **COSTS OF SUIT ON SCALE "B" AS REFERRED TO IN RULE 69(7), READ WITH RULE 67A(3) OF THE UNIFORM RULES OF COURT.**

[redacted]

A.D. OLIVIER
ACTING JUDGE
NORTHERN CAPE DIVISION
KIMBERLEY

APPEARANCES:

For the Plaintiff: *On instructions of:*	**ADV AA BASSON** **Thomas Swanepoel Inc.** Tzaneen c/o **Duncan & Rothman Inc.** Kimberley
For the Defendant: *On instructions of:*	**MR J MONGALA** **Morwaagae Attorneys Inc.** Kimberley