

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/032179

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

[1]

4/10/2023

[2]

DATE

SIGNATURE

In the matter between:

**STEFANUTTI STOCKS HOUSING (A DIVISION OF
STEFANUTTI STOCKS (PTY) LTD**

Plaintiff

And

INSTRATIN PROPERTIES (PTY) LTD

Defendant

Case Number: 2022/032192

**STEFANUTTI STOCKS HOUSING (A DIVISION OF
STEFANUTTI STOCKS (PTY) LTD**

Plaintiff

And

INSTRATIN PROPERTIES (PTY) LTD

Defendant

JUDGMENT

MUDAU, J:

- [1] This matter comes before me on summons for provisional sentence pursuant to Rule 8 of the Uniform Rules of Court. The plaintiff issued two provisional sentence summonses for payment of the sums of R 37 998 151.44 and R 44 850 000.00, respectively arising out of two acknowledgements of debt, together with interest thereon and costs. The first, under Case No. 2022/032179 had allegedly been provided pursuant to and under the so-called Devland Principal Building Agreement, being a Joint Building Construction Committee (JBCC) contract for the construction of certain houses (the Devland summons).
- [2] The second, under Case No. 2022/032192, is based upon an acknowledgement of debt that had allegedly been provided pursuant to and under the so-called Carnival Principal Building Agreement, being a JBCC contract for the construction of certain houses (the Carnival summons). The parties are the same and the causes of action are also substantially the same. Pursuant to an Order of this Court (per Dosio J) on 1 December 2022, the matters were consolidated.
- [3] Uniform Rule 8 entitles a plaintiff to proceed by way of provisional sentence when the plaintiff is armed with a liquid document. It is trite that a liquid document is a written instrument, signed by the defendant or its agent, evidencing an acknowledgement of indebtedness which is unconditional or for a fixed amount of money.¹ It is also trite law that provisional sentence is, although provisional in nature, an extraordinary remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment without resorting to the more expensive and dilatory machinery of an illiquid action.²

¹ See generally *Twee Jonge Gezellen (Pty) Ltd & Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank & Another* (CCT 68/10) [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC) at para 15.

² See *Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H quoting the authors Nathan, Barnett and Brink *Uniform Rules of Court* 2nd ed at 66.

Background

- [4] The matter has as its genesis the following background. The Social Housing Regulatory Authority (SHRA) was established in 2010 pursuant to the Social Housing Act³ to supply social housing. It is a public entity in terms of Schedule 3A of the Public Finance Management Act⁴ (the PFMA). Social housing is state-subsidised rental housing targeted at low to medium income groups earning between R 1 850.00 - R 22 000.00 per month.
- [5] The defendant was incorporated in 2013 to execute, as employer, contracts for the construction of social housing projects offered by SHRA in and around the Greater Gauteng area. The process of securing contracts for the SHRA projects involved the submissions of tenders administered under JBCC construction contracts and required the joint submission by an employer, principal agent, and contractor (as defined in the JBCC contract) for the carrying out of the work.
- [6] Pursuant to the JBCC agreements signed between Instratin and Stefanutti Stocks (Stefanutti) and/or Stefanutti BMH Construction JV, the following developments were undertaken by the latter: - Matlosana Gardens (Matlosana), Devland Gardens (Devland), and Carnival Gardens (Carnival). Save for Matlosana, the dispute pertains to the Devland and Carnival projects, which were not completed.

Interlocutory application

- [7] There is an interlocutory issue relating to the defendant's request to file a further affidavit. The plaintiff opposed the application and has filed an answering affidavit. It is trite that this Court may, in the exercise of its discretion, allow additional affidavits in appropriate circumstances.⁵ Significantly in this regard, a further set of affidavits may be allowed where considerations of justice and fairness require it and where it is shown that the affected party will

³ 16 of 2008.

⁴ 1 of 1999.

⁵ See *Stein Brothers Ltd v Dawood* 1980 (3) SA 275 (W) at 281; see also *Sadler v Nebraska (Pty) Ltd* 1980 (4) SA 718 (W) at 720–1.

not suffer any prejudice that could not be remedied by an appropriate order for costs.⁶

- [8] In *casu*, the main reason for requesting the filing of a further affidavit was the defendant's need to correct what it is alleged to be a misrepresentation that might have been created in paragraph 60 of the replying affidavit of Mr. Howard Schwegmann in omitting certain portions of an e-mail trail between the parties. The defendant alleges that the email ("RA27") and its contents were used to advance the proposition that the accounts had been finalised on the Carnival Gardens project, when this is in fact not so.
- [9] On the plaintiff's version, paragraphs 60 of the replying affidavit relied upon, is a direct response to paragraphs 100 and 101 of the opposing affidavit and traverse the defendant's alleged failure to annexe the entirety of the final account engagement. It alleges that the importance of RA27 is not the emails but rather, the spreadsheet annexed thereto, which for the reasons traversed in the replying affidavit, allegedly supports the plaintiff's claim. It is further alleged that there was no suggestion by the plaintiff that the final account had been finalised.
- [10] According to the plaintiff, Mr Schwegmann, in paragraphs 60 of the replying affidavit, objects to an impression being created that the final account value set out in "TM17" of the opposing affidavit, reflecting the value of R 222 092,513.93 was the full conspectus of the plaintiff's entitlement. The plaintiff goes on to say that "not only has the final account not been finalised but, also, the defendant's indebtedness secured by the instruments relied upon the plaintiff, has not, not in fact, been discharged".
- [11] After a proper consideration of the application, it seems that the affidavit that the defendant seeks to file ensures that all relevant evidence is considered and that the court has a complete understanding of the matter. It does not prejudice the plaintiff in any material way. In the interest of justice, leave is granted for the defendant to file the affidavit of Tsepiso Mote. Similarly, leave is granted for the plaintiff to file its answering affidavit as it did.

⁶ *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at 993E–G.

Provisional sentence

[12] The issue to be decided is whether the plaintiff has made out a case for a provisional sentence judgment, which will be so if the defendants have no valid defence to the claim. In the matter of *Twee Jonge Gezellen v Land and Agriculture Development Bank*⁷ it was stated that “the purpose of provisional sentence has always been to enable a creditor who has a liquid proof of his or her claim, to obtain a speedy remedy without recourse to the expensive, time-consuming and often dilatory processes that accompany action proceedings following upon an illiquid summons”.⁸ It was further stated that it precludes a defendant who does not have a valid defence from “playing for time”.⁹ Significantly, there is no closed category of defences that can be raised against claims for provisional sentence.¹⁰

[13] It is trite that to succeed, a plaintiff is limited in the provisional sentence case to the evidence which emerges *ex facie* the document. A plaintiff cannot rely upon extrinsic evidence.¹¹ In this matter the provisional sentence summonses were issued based on two written acknowledgements of debt signed by the defendant’s CEO (Mr. Netshitangani), who acknowledged the amounts owed by the defendant to the plaintiff. The defendant allegedly owes the plaintiff money from two construction contracts related to low-cost housing projects known as “the Devland project” and the “Carnival project”. These projects were concluded in 2016 and 2018, respectively. The contracts for both projects were based on the standard JBCC contract.

[14] According to the acknowledgements of debt, the plaintiff admitted claims against the defendant under the JBCC contracts. On the Carnival project, the plaintiff claims outstanding invoices from December 2019 to July 2020 totalling R 16 100 000.00 as well as P&G escalation claims from 1 March 2020 to 1 March 2022. For the Devland project, the plaintiff claims outstanding invoices for February, March and April 2020, as well as P&G escalation claims from 1 March 2020 to 21 February 2022.

⁷ *Twee Jonge* above n 1.

⁸ *Id* at para 18.

⁹ *Id*.

¹⁰ *Id* at para 21.

¹¹ See *Colee Investments (Pty) Ltd v Papageorge* 1985 (3) SA 305 (W) at 308I.

- [15] After concluding the acknowledgements, the Contractor continued working on the remaining tasks for both the Carnival project, with the defendant as the Employer, and the Devland project, with the defendant's rights and obligations transferred to Devland Gardens RF (Pty) Ltd.
- [16] Apart from the acknowledgment of indebtedness mentioned earlier, the defendant also committed to paying the outstanding amounts according to a payment schedule attached thereto. The defendant, while denying liability based on the acknowledgment of debt for the Devland project, contends that the liability has been transferred to Devland Gardens RF through a cession agreement.
- [17] The defendant filed an affidavit setting out the circumstances which it alleges disentitled the plaintiff to claim provisional sentence on the acknowledgments of debt. The defendant opposes the entering of provisional sentence on both claims firstly on the basis that Mr. Netshitangani, its CEO, director and signatory to the acknowledgments of debts did not have the authority to conclude such acknowledgments. On the defendant's version, the conclusion of the acknowledgments of debt constituted an act outside of the ordinary course of the business of the company and would have required approval of 90% of the shareholders of the company. Secondly, that the matter is subject to an arbitration clause and that the court does not have jurisdiction. Thirdly, that the defendant has an arbitrable counterclaim against the plaintiff.
- [18] In respect of the Devland contract the defendant contends that the amount owing and payable for the work that was done by the plaintiff has been determined under the Devland JBCC contract in the amount of R 5 600 000.00 only, subject to the arbitrable counterclaim. In respect of the Carnival contract, the defendant contends that the amount owing and payable has not been determined by a meeting of the parties as required under the Carnival JBCC contract and that the defendant has paid the plaintiff more than the value of the of the work carried out by the plaintiff, subject further to the arbitrable counterclaim.

[19] It is common cause between the parties that Mr. Netshitangani, a board member and the CEO of the defendant concluded the acknowledgements of debt. The JBCC agreements, from which the underlying indebtedness arose were concluded between the parties. Further, the Devland contract was ceded to Devland Gardens RF.

Authority

[20] Both provisional sentence summonses as indicated, assert that Mr. Netshitangani represented the defendant when executing the acknowledgment of debt documents. However, the defendant denies Mr. Netshitangani's authority to act on their behalf in concluding these agreements. The defendant maintains that Mr. Netshitangani was not authorised by them to finalise the acknowledgements of debt or to assume the obligations outlined therein.

[21] The plaintiff contends that Mr Netshitangani was impliedly authorised to have concluded the acknowledgements of debt, which ordinarily falls within the usual scope of the office of a CEO carrying on the business of the defendant. This is allegedly borne out by the fact inter alia that, Mr Netshitangani is a director and the CEO of the defendant, and that the defendant holds him out as such. Counsel for the plaintiff submitted, based on the Supreme Court of Appeal decisions such as *South African Broadcasting Corporation v Coop and Others*¹² and *NBS Bank Ltd v Cape Produce Co Pty Ltd and Others*¹³ that if a principal has conferred the necessary authority either expressly or impliedly upon an agent, then that agent is taken to have actual authority.

[22] Reference was made to the leading of *Hely-Hutchinson CA*¹⁴ Lord Denning MR explained the concepts of actual and apparent authority as follows:

“[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when

¹² (178/08) [2009] ZASCA 30; 2006 (2) SA 217 (SCA).

¹³ (281/99) [2001] ZASCA 107; 2002 (1) SA 396 (SCA).

¹⁴ *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA) at 583A-G adopted and approved in *Makate v Vodacom Ltd* (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 48 and following.

the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.

Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation". (Own emphasis)

[23] Tebogo Lucas Modishane, the deponent to the opposing affidavit, is one of the directors who was specifically authorised to handle matters related to the JBCC contracts. According to the defendant, the company had resolved that: -

"Mr. Tebogo Lucas Modishane acting in his capacity as the duly authorised agent of the Company, be and is hereby authorized and empowered to firstly negotiate the final terms and conditions of the JBCC Agreement referred to in the preceding resolution; and secondly sign the said JBCC Agreement and all other deeds and documents, including the annexures which may be necessary for the implementation of the abovementioned Agreement; and thirdly, generally do everything that may be necessary for the implementation of the abovementioned JBCC Agreement, and fourthly any agreement, deeds or documents signed by the said Tebogo Lucas Modishane acting under authority of this and the preceding resolution shall conclusively be deemed to be the agreement, deed(s) and document(s) authorized by this and the preceding resolution on behalf of the Company".

The defendant contends that the plaintiff as a party to the JBCC contract had knowledge of this fact as it was Annexure “C” to the JBCC, in particular that the defendant's authorised representative was Modishane.

[24] Section 66(1) of the Companies Act¹⁵ (“the Act”) provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the Memorandum of Incorporation (“MOI”) of the company provides otherwise. This section places a positive obligation on the board of directors, collectively, to manage and control the company's affairs. However, such authority is not without limit as the Act limits, restricts and qualifies the authority of the board in various sections. In addition, the Act also provides that the MOI can further limit the authority of the board to perform acts on behalf of a company. The MOI of the defendant for purposes of the present matter have not been limited or restricted. (Emphasis added)

[25] Section 20(7) of the Act codifies the common law Turquand rule. This rule provides that a person dealing with a company in good faith, other than a director, prescribed officer or shareholder of such company, is entitled to presume that a company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements. These requirements are considering the Act, the company's MOI and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company (represented by the board) to comply with any such requirement. The application of this provision must always be read in line with the common law position.

[26] A significant factor in terms of this section is the fact that the third party must be dealing with the company in good faith. This means that any person who would have reasonably known that the board did not have authority to act on behalf of a company in a transaction, would not succeed if attempting to enforce or uphold such reserved matter against the company.

¹⁵ 71 of 2008.

[27] Section 66 of the Act as pointed out requires the business and affairs of the company to be managed by or under the direction of its board which has the authority to exercise all the powers and perform any of the functions of the company. Since a company's board usually has full authority to conduct its affairs and because the shareholders generally leave the conduct of the company's affairs to the board and thus hold the board out as the company's representative.

[28] There is no denying that the plaintiff knew about the express delegation of authority that the company had given. The plaintiff, accordingly, ought to have been alive to the necessity of obtaining due authorisation. The absence of a board resolution under the circumstances is fatal to the plaintiff's claims, rendering them untenable.

[29] I am thus not convinced that the signing of these acknowledgments of debt for those specific amounts of money is a routine occurrence in the ordinary course of business for a company in general. The plaintiff has not proved on a balance of probability, on the affidavits in both cases, that Mr Netshitangani had actual authority to conclude the disputed transactions. At the very least, his actual authority is bona fide disputed on reasonable grounds. I conclude that provisional sentence should be refused. I do not deem it necessary to address the other issues raised, as this can be dealt with by the trial court in due course. In the exercise of my discretion, I reserve the question of costs for decision at the trial of the principal case.

Order

[30] I accordingly make the following order: -

- a. Provisional sentence in Case Number 2022/032179 and Case Number 2022/032192 is refused.
- b. The Defendant is directed in both matters to file its plea within 20 days from the date of this order.
- c. The costs are reserved for decision by the trial court.

