HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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BALOYI – MBEMBELE AJ DATE: 23 FEBRUARY2023

CASE NO: 22632/22

In the matter between:

KHAVHAKONE CONSTRUCTION GROUP(PTY) LTD Applicant

and

HOUSING DEVELOPMENT AGENCY First Respondent

THE MINISTER OF HUMAN SETTLEMEN Second Respondent

JUDGEMENT

BALOYI-MBEMBELE AJ

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 23 FEBRUARY 2023.

INTRODUCTION

[1] The applicant brought an application for payment against the first respondent based on two interim payment certificates ("IPC") in the amount of R887 785.06 ("IPC25") and R359 026.47 ("IPC26") with interest from 27 and 28 December 2021 until date of payment.

BACKGROUND

[2] The amount claimed is based on the work done by the applicant arising from a Service Level Agreement in terms of the General Conditions of Contract (2nd Edition 2010) ("GCC"). The applicant submitted an invoice for the work done in the amounts of R887 785.06 and R359 026.47.

[3] It is common cause that the engineer issued two interim payment certificates IPC 25 on 29 November 2021 and IPC26 on 1 December 2021. The applicant demanded payment from the first respondent without success which resulted in this application.

[4] The first respondent disputes the validity of the IPC on the ground that they were rejected by the engineer, and therefore subject to a dissatisfaction claim dispute.

[5] The first respondent raises the following points *in limine*:

(a) there is a dispute of fact regarding the payment certificates and, the matter should be referred for oral evidence, or the parties should be directed to arbitration.
(b) the application be stayed pending the adjudication of the dispute in arbitration.

[6] The applicant argues that there is no dispute of fact as the cause of action is based on liquid documents. Accordingly, the Court should decide the application based on the ICP as conclusive proof of the claim. The applicant submitted that clause 10.10.1 of the GCC makes provision to institute Court proceedings for the payment of IPC and states:

"10.10.1 Nothing herein contained shall deprive the contractor of the right to institute immediate Court proceedings of failure by the Employer to pay the amount of a payment certificate on its due date, or to pay any amount of retention money on its due date for payment."

LEGAL FRAMEWORK

[7] It is trite that motion proceedings are decided on papers filed by the parties and, in case there is a factual dispute which can only be resolved by oral evidence, it is appropriate that actual proceedings should be used unless the factual dispute is not real and genuine.[1]

[8] In *National Director of Public Prosecutions v Zuma*[2] the Court said the following:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual disputes because they are not designed to determine probabilities…"

[9] The approach of the Court is that where a factual dispute is foreseeable and when it does actually arise, it would lead to a dismissal of the application.[3] The exception to this approach is that where a party had been obliged by statute to proceed by way of motion procedure, he cannot be penalised when a factual dispute arises.[4]

[10] In *Standard Bank of South Africa Ltd v Neugarten & Others*[5] Flemming J stated that the "Court's function, if there is factual dispute, is to select the most suitable method of employing *viva voce* evidence for the determination of the dispute." The learned Judge then proceeded in discussing whether oral evidence would be convenient, for example

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1 *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H to 635C.
2 2009 (2) SA 277 (SCA) at [26].
3 *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165
4 *Deputy Minister of Tribal Authorities and Another v Kekana* 1983 (3) SA 492 (B) at 497E -G.
5 1987 (3) SA 695 (WLD) AT 699C-D.

where the dispute is "comparatively simple". If not, a referral to trial would be more convenient.

[11] Parties correctly referred to *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[6] where the Court held that Rule 8 of the Uniform Rules of Court provides for provisional sentence where a claim is founded by upon a liquid document. The theory behind provisional sentence is that:

> "it is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the document must therefore be unconditional and liquid ('zuiwer en klaar of liquid'). If a document 'upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor' it is one upon which provisional sentence may properly be granted."

[12] The Court per Gorven AJ pointed out, with reference to *Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd*[7]*:*

> "…that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor…"

The learned judge held that similar reasoning applied to interim certificates:

> "The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract."

[6] 2009 (5) SA 1 (SCA) at [26].
[7] 1973 (4) SA 181 (D) at 183H-184H.

In these proceedings both parties admit that the IPC were issued, however, the first respondent disputes that they are subject to dissatisfaction claim.

[13] In the event there is a dispute of fact regarding the IPC, the Court is not bound to decide the matter. However, where a claim is based on liquid document or liquid amount, not disputed, the Court will grant an order.

[14] In *Tredoux vs Kellerman*[8] it was stated that:

> "A liquidated amount of money is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or, put differently, where ascertainment of the amount in issue is 'a mere matter of calculation'."

The Court granted summary judgment in the conceded amount and in respect of which no evidence of payment had been placed before Court.

[15] The Court in *Standard Bank*[9] ordered the matter be referred for oral evidence to determine the following:

> *"(a) whether Eagle did consent in terms of s.226(2) of the Companies Act, 1973 and to determine questions (b) and (c), which related to the certificate and the amount of Neugarten's liability. As proof of the alleged indebtedness the bank relied on a certificate issued in accordance with the provisions of the Vivaldi guarantee and the guarantee signed by the three respondents. In theirs answering affidavit, the respondents contended that the Vivaldi guarantee was invalid, and challenged the correctness of the certificate. The Court referred the matter for oral evidence to be heard to determine the validity of the certificate.*
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> " 1. Oral evidence be heard to determine the questions:

[8] 2010 (1) SA 160 (CPD) at [18].
[9] *Idem* n 5.

(a) whether S E Eagle did 'consent' as meant in s 226 (2) of the Companies Act 1973 to the 'provision of security' by means of annexure 'MRH 1' to the application;

(b) if so, what rate of interest was to apply to the liability of respondents as suretieis by virtue of annexures 'MRH I' and 'MRH 2' to the papers, with reference to the debts of Neugarten Fashions (Pty) Ltd;

(c) (i) what debits and credits on what dates were included in the amount of R2 755 242,31 to which the certificate of indebtness, annexure 'MRH 3', has reference if all debts of interest are excluded;

(ii) what would the amount of Neugarten's liability be if the rate of interest determined under (b) above is applied to the said debits and credits on the correct basis."

ANALYSIS OF EVIDENCE

[16] The first inquiry is whether there is a real dispute of fact? If yes, the second inquiry is whether the application should be decided on papers. It is the first respondent's case that the engineer rejected the certificate which give rise to dispute of fact. The letter states the following in respect of IPC25 "…*we have checked and therefore reject this claim on the grounds of the above-mentioned points".* The applicant as *dominis litis* was aware of the said letter and should have foreseen that a factual dispute may arise.

[17] The first respondent referred to a meeting held on 9 December 2021, for further discussion of the certificate. The applicant, however, disputes the record of the meeting. These then answers the first enquiry, that there is a real dispute of facts with regards to the IPC. The next inquiry, that follows are whether I can decide this application based on the papers? This would depend on whether the facts disputed are admitted by the applicant.[10]

[18] One cannot ignore that the issues raised by the engineer were not resolved and that both parties are not in agreement regarding the IPC. It is clear that the issues raised affects the application and the relief sought. I am satisfied that there is a real and genuine factual dispute and therefore I am not bound by the IPC.

[10] *Idem* n 1.

STAY IN PROCEEDINGS

[19] The first respondent submitted that in the event the Court does find that there is a dispute of fact, the matter be stayed pending the outcome of the arbitration. The first respondent have instituted a counterclaim in which they seek payment of R1 490 000.00 against the applicant as liable for penalties as well as a claim for the payment of a guarantee. It is common cause between the parties that the counterclaims are disputed. It is clear that the issues are interrelated with issues in this application and one should discourage parties in bringing multiple proceedings arising from the same cause of action in different forums. The correct procedure is to either dismiss the application or to refer the matter for trial alternatively, refer this matter to arbitration, depending the outcome. As already indicated above the Court's duty is to assist parties to resolve disputes where possible.

PUNITIVE COSTS

[20] The applicant submitted that the first respondent should pay punitive costs resulting from the application to compel. The applicant argues that the application was necessary as the first respondent failed to file it's heads of argument timeously in terms of the Practice Directives. The applicant delivered the heads of argument on 12 August 2022 and the first respondent was served with the application by email on 27 August 2022. The application to compel was served on the first respondent on 27 August 2022 at 11h33. The first respondent submitted that the delay was communicated to the applicant's attorney.

[21] The Constitutional Court in *Mkhatshwa and others v Mkhatshwa and others*[11] held that the purposes of punitive costs, being an extraordinarily rare reward, are to minimize the extent to which the successful litigant is out of pocket and to indicate the Court's extreme opprobrium and disapproval of a party's conduct. Although punitive costs are rarely awarded, the Constitutional Court affirmed that existing jurisprudence indicates that

[11] 2021 (5) SA 447 (CC) at [21]-[22], [26]-[27].

they are appropriate when it is clear that a party has conducted itself in an indubitably vexatious and reprehensible manner.

[22] The first respondent served heads of argument just a few hours before an application to compel was served on the first respondent. It was submitted that the applicant was made aware of the delay therefore I do not find any prejudice in this regard and cannot find that the first respondent's conduct is vexatious. I therefore do not find any basis for granting punitive costs.

ORDER

[23] I find that there is a dispute of facts which cannot be resolved on these papers and I make the following order:

1. The application is referred to trial.
2. The notice of motion shall be deemed to constitute a simple summons and the notice of opposition shall be deemed to constitute a notice of intention to defend.
3. The applicants are directed to deliver a declaration within 20 (twenty) days from date of this order where after the normal rules as applicable to pleadings, notices and discovery shall apply as for trial.
4. The costs of the application shall be reserved to be determines in the trial.

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M.C BALOYI-MBEMBELE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Applicant's Counsel:	Adv. BD Stevens
Instructed by:	Clyde & Co Inc
First Respondent's Counsel:	Adv M. Phalane
Instructed by:	MMMG Attorneys