

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 38844/11

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

11 April 2012

FHD VAN OOSTEN

In the matter between

**ESOR AFRICA (PTY) LTD /
FRANKL AFRICA (PTY) LTD JOINT VENTURE**

PLAINTIFF

and

BOMBELA CIVILS JOINT VENTURE (PTY) LTD

DEFENDANT

Provisional sentence – validity of claims not disputed - defence raised by way of counterclaim in excess of plaintiff's claim – whether a defence – counterclaim forming part of larger transaction between the same parties - discretion of court in refusing or suspending plaintiff's claim pending finalisation of counterclaim – factors affecting.

J U D G M E N T

VAN OOSTEN J:

[1] This is an action for provisional sentence. The action is based on two Engineers Progress Certificates, numbered 34 and 16, for the amounts of R868 090,32 and R278 338,16 respectively, pursuant to two agreements concluded between the parties in regard to the Gautrain Project: the first for the design and construction of piling earth retaining structures and construction of piling understructures, and the second, for the provision of Sandton station car park piling.

[2] The defendant does not dispute the validity of the two certificates the plaintiff relies upon but opposes the application by way of a counterclaim based on an Engineer's Progress Certificate issued pursuant to a third agreement concluded between the parties, reflecting a negative amount to be paid by the plaintiff in the sum of R1 577 244,96, which is in excess of the amounts claimed by the plaintiff. The plaintiff disputes the counterclaim and it is common cause that the dispute, in terms of the third agreement, must be referred to the Dispute Adjudication Board for adjudication, and thereafter, if either party is dissatisfied with its decision, for final determination to arbitration. The grounds for the dispute have not been disclosed in the papers before me.

[3] The sole issue for determination at this stage is whether the plaintiff's claims ought to be suspended pending the determination of the defendant's counterclaim. It is important to bear in mind that whilst the three agreements are entirely separate, they all regulate the contractual relationship between the parties regarding construction works in the same project. A defendant's entitlement to raise a counterclaim as a defence in provisional sentence proceedings has been recognised in a number of cases. The authorities however are not clear on the nature of the onus resting on the defendant (see *Reichenberg v Röntgen* 1983 (3) SA 745 (W) 750H; *HVD Investments (Pty) Ltd* 1984 (2) SA 368 (W) 372A). It is not necessary to consider the position concerning a counterclaim resting on a transaction extraneous to that to which the liquid document relates. In the present matter, as I have already alluded to, the counterclaim, like the plaintiff's claims, arise from the contractual relationship between the parties concerning this particular project. In *Mao-Cheia v Neto* 1981 (3) SA 829 (C), Tebbutt J held that the court was vested with a discretion to either refuse or postpone provisional sentence where the liquid document, upon which an action for provisional sentence is based,

forms part of a larger transaction between the parties and where the probabilities in the principal case favour the defendant or they are approximately evenly balanced. The constitutionality of provisional sentence proceedings came under scrutiny in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of SA t/a The Land Bank and Another* 2011 (3) SA 1 (CC), where the Constitutional Court held that the limited circumstances under which a court may refuse provisional sentence constituted an unjustified limitation on a defendant's rights of access to courts and in developing the common law concerning the court's discretion to refuse provisional sentence, enumerated the circumstances in which the court may refuse provisional sentence. In my view the *ratio* in the judgements I have referred to, remain good law and has not been affected by the Constitutional Court judgment.

[4] In the exercise of my discretion in the present matter, I take into account the contractual relationship between the parties, the fact that the plaintiff's claims are uncontested, and that the defendant's counterclaim, although disputed, *prima facie* appears bona fide. It would accordingly result in an injustice should provisional sentence be granted in the absence of the defendant's counterclaim. Counsel for the plaintiff made much of the different forum the parties are bound to for adjudication of the counterclaim but I do not think this in any way constitutes an obstacle in ensuring, in the manner I propose to do, that a final accounting is effected once all disputes have been determined.

[5] In the result I make the following order:

1. The action for provisional sentence is postponed pending finalisation of the proceedings before the Dispute Adjudication Board or Arbitration proceedings for the adjudication of the defendant's counterclaim.
2. The costs of the action for provisional sentence are reserved for determination by the trial court.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

ADV (MS) S LIEBENBERG

KNOWLES HUSEIN LINDSAY INC

COUNSEL FOR DEFENDANT

DEFENDANT'S ATTORNEYS

ADV PL CARSTENSEN

EDWARD NATHAN SONNENBERGS

DATE OF HEARING

DATE OF JUDGMENT

10 APRIL 2012

11 APRIL 2012