

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 45335/13

In the matter between

ESOFRANKI CIVILS (PTY)LTD

APPLICANT

And

EYETHU TRANSLODGE AND PLANT HIRE (PTY) LTD

RESPONDENT

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an application for summary judgment.

[2] The applicant and the respondent entered into a Sub Contract Agreement on 14 February 2012. The respondent was the contractor on behalf of the Madibeng Local Municipality for the construction of the Jericho road to Makgabetlwane Road Bus Route. The respondent appointed the applicant as its sub-contractor in

respect of the construction of a 60 m bridge on Jericho road. The contract price was R 6 558 488.36

[2] In terms of the contract progress payments would be made monthly in respect of work done or as agreed on the schedule of deviation. The amount of the progress payment would be calculated by reference to measurement of the work done. Tax invoices for progress payments were to be submitted within three days of the date of measurement and payment of work accepted as completed would be made within seven days of the date of the defendant being paid by the Madibeng Local Municipality or within 30 days of the date of the tax invoice if suitable discount was accepted by the defendant.

[3] The applicant alleged in its particulars of claim that it complied with its obligations in terms of the agreement and that it had submitted the tax invoices to the respondent. The respondent was therefore indebted to the applicant in an amount of R 3 730 113.68. The applicant further alleged that the respondent was duly paid for the work by the Madibeng Municipality but failed to make payment to the applicant.

[4] The applicant stated in par 10 of the particulars of claim that the respondent had made payments to the applicant by reason of the operation of set-off. The applicant attached a document to the summons reflecting the payments made by the respondent and the outstanding amount. The respondent is therefore indebted to the applicant in an amount of R 2 314 673.36.

[5] The respondent opposed the application for summary judgment. In the answering affidavit the respondent submitted the following:

- Par 8. During the period 25 October 2012 up to 20 July 2013 the respondent made various payments to the applicant amounting to R 2 087 422.32 for work done.
- Par 9. The respondent admits that it encountered financial difficulties during the course of the contract period resulting in non-payment of the other invoices due to the applicant.

- Par 11. During September 2012 the parties, in order to satisfy the outstanding invoices, agreed orally that the respondent leases its construction vehicles to the applicant on another project at Kusile Power Station.
- Par 12. The respondent submitted that the implied and/or tacit terms of the oral agreement were:
 - ❖ The respondent will issue invoices for the work done to the applicant as payment due.
 - ❖ The applicant will then deduct the amount against the principle debt owed.
 - ❖ The applicant's foreman on site would sign the time and the work sheets pertaining to the operation of the construction vehicles and would provide the respondent with the time sheets.
 - ❖ According to the respondent's calculations the time sheets completed by the applicant's foreman and the hours of work of the construction vehicles satisfied the debt due to the applicant.

[6] Counsel for respondent submitted that the amount claimed in the summons is not liquidated and the alleged debt is not based on a liquid document. A liquidated amount is an amount in which the monetary value has been ascertained or which is susceptible to prompt ascertainment. The annexure attached to the summons wherein the amounts owed to the applicant were set out, was never disputed by the respondent. The respondent agreed that there was a set-off agreement and stated in its opposing affidavit that the amount claimed had been extinguished by way of this set-off agreement. In these circumstances I find that the amount claimed is a matter of simple calculation. I am satisfied that the debt is a liquidated amount.

[7] Counsel for respondent also submitted that the applicant alleged a set-off in its particulars of claim but failed to set out the particulars of the agreement. It therefore does not comply with Rule 32 as the particulars of claim lack sufficient particularity to sustain the applicant's claim and are excipiable or irregular. It is common cause that there was a set off agreement between the parties. The set off agreement mentioned in the particulars of claim reduced the amount owed to the plaintiff. The applicant provided the dates on which these amounts were set-

off against the debt. It also provided a schedule reflecting the exact amounts that were deducted from the debt. I find that the summons disclosed a cause of action and is not excipiable.

[8] In an application for summary judgment the respondents must set out the nature and grounds of their defence to enable the Court to establish whether the defence or counterclaim is bona fide and good in law.

[9] In *Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A) on page 426 Corbett JA noted the following:

"It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence."

[10] In Erasmus "Superior Court Practise Service" Edition 39 on page B1-222 the learned author summarizes the position:

"While it is not incumbent upon the defendant in formulating his opposition to the summary judgement application to do so with the precision that would be required in a plea, none the less when he advances his contentions in resistance to the plaintiff's claim he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action."

[11] In *Breytenbach v Fiat SA (Edms) Bpk* 1976(2) SA 226 T at 228 Colman J found the following:

"What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides."

[12] The respondents must comply with the requirements of the sub-rule and set out the "nature" and the "grounds" of their defence. These two words are not synonyms or alternatives. Facts must be placed before the court to give effect to

the word "grounds" in the sub-rule. This must be done with sufficient particularity and completeness as to be able to hold that if these statements of facts are found at the trial to be correct, judgement should be given for the defendant. See *Shepstone v Shepstone* 1974 (2) SA 462 (N).

[13] It is trite that a debtor relying upon payment does not only carry the onus of proving payment but also that the payment relied upon extinguished the debt relied upon by the plaintiff. The debtor must accordingly prove that he paid the debt in question and not simply that a payment was made to the creditor. See *Brink v Oberholzer* 1966(2) PH F104.

[14] The respondent alleged that according to its calculations using the time sheets completed by the applicant's foreman and the hours of work of the construction vehicles, that the debt due to the applicant was satisfied. The respondents did not provide any details for the calculations, the time sheets or the hours of work of the construction vehicles even though the documents are in its possession. The allegations are extremely vague and sketchy

[15] Taken into consideration all these circumstances I am convinced that the respondent did not disclose a bona fide defence. I cannot exercise my discretion in favour of the respondent.

[16] In the result the following order is made:

1. Summary judgment is granted against respondent for an amount of R 2 314 673.36
2. Interest at 15,5% per annum from date of service of summons to date of payment.
3. Cost of the suit.

L. Windell

Judge of the South Gauteng High Court

Counsel for applicant	: Adv. A. Jacobs
Counsel for respondent	: Adv. S Kabelo
Date of hearing	: 20 February 2014
Date of judgment	: 26 February 2014