IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

24/3/2016

....
DATE SIGNATURE

Case number: 63004 /14

In the matter between:

EXXARO COAL MPUMALANGA PTY LTD **APPLICANT**

And

ELANDSFONTEIN COLLIERY (PTY) (LTD) **RESPONDENT**

JUDGMENT

NOWOSENTZ L

BACKGROUND

[1] The applicant brought this application by motion proceedings on 22 April 2014. The claim is against the respondent for payment of R15 499 877,44

together with interest and costs for coal sold and delivered pursuant to three written Coal Purchase Agreements entered into between the parties during February , March and April 2013. An application for amendment of the Notice of Motion was sought at the hearing in order to rectify these agreements by the insertion of the words per "per metric ton" after the price. It is common cause that the price of coal sold was per metric ton and the amendment was not opposed. The amendment is accordingly granted. The respondent made an unconditional payment in the sum of R4 241 528,64 to the applicant and the applicant has reduced its claim which was formulated in Draft Order handed in and marked **"X".**

[2] The application was opposed. After the filing of the applicant's replying affidavit, the respondent filed an application to strike out parts of the applicants replying affidavit and leave to file a supplementary affidavit. The supplementary affidavit introduced new material relating to the set off agreement. The Applicant filed a supplementary affidavit to deal with this new material. These affidavits are accepted. The respondent did not persist with the striking our application but contended the proceedings by the applicant were vexatious.

[3] Prior to this application, on 14 February 2014 the applicant commenced action against the Respondent in this Court under case 12833/14 based on the same claim. A notice of intention to defend the action was delivered by the respondent on 3 March 2014. The applicant filed an application for amendment to its Particulars of Claim which was opposed by the respondent and has not been resolved. The disputed part of the proposed amendment is

an allegation in paragraphs 6.4 and 6.5 that during the period August to early December 2013 the defendant during negotiations admitted liability for the Plaintiff's claim. No plea has been filed.

[4] The parties agreed to a meeting of a Special Committee as envisioned in Clause 21 of the Coal Purchase Agreements which provides a dispute resolution procedure. The first step consists of a meeting by a joint committee with two representatives of each party who "shall use its bona fide best efforts to resolve the dispute". Should the committee fail, the second step is that the dispute shall be referred to arbitration. A meeting of the Special Committee took place on 8 May 2014 and minutes were drawn up. Paragraph 6 of the minutes reflects *inter alia* that the respondent admitted indebtedness to the applicant and for the amount claimed. In regard to payment the respondent proposed that the amount due would not be paid until the applicant paid an alleged amount due to an associated company of the respondent alternatively that the alleged amount be set off against the applicant's claim against the respondent. The applicant did not agree to this proposal in a letter by its attorney dated 25 June 2014. Neither party relied on the second step ie arbitration.

RESPONDENT'S INDEBTEDNESS

[5] The applicant relies on clause 21 of the Coal Purchase Agreements in contending that the meeting achieved its purpose of resolving the dispute by the respondent's admission of liability. The respondent admits in paragraph 49 of its Answering Affidavit that the dispute in regard to its indebtedness to the applicant has been resolved and that it indebted to the plaintiff.

[6] The applicant contends further that motion proceeds are appropriate and the action is no longer necessary in view of the respondent's admission of indebtedness. Therefore it is argued that the balance of convenience and equity are in favour of the motion proceedings. It has filed a notice of withdrawal of the action conditional on being granted relief in this application.

[7] The respondent in its answering affidavit raised the defence of *lis alibi pendens* and prays that the application be dismissed with costs on an attorney and client scale. It denies the dispute was settled as the set off was not dealt with and the minutes should not be disclosed. It alleged an agreement was reached in an email from Ms M Steyn on behalf of the applicant to Mr JHJ Schoeman the MD of the respondent and deponent on 12 December 2013. It was contended that properly interpreted, the email provided that the applicant and Exarro Coal (Pty) Ltd, (Exarro) applicant's holding company would deduct from applicant's claim against the respondent, their use of the throughput entitlement of Golfview Mining(Pty) Ltd (Golfview) at Richards Bay Coal Terminal granted by South Dunes Coal Terminal (Pty) Ltd (SDCT) . Golfview and the respondent are both wholly owned subsidiaries of Anker Coal and Mineral Holdings (ACMH). The amount due after 30 November 2013 could not be quantified according to the deponent, until a determination was made of the reasonable price for the allocation per tonne utilised though Golfview's RBCT entitlement. Notwithstanding this, an undisclosed tender of payment was made in terms of Rule 34.

[8] In its replying affidavit the applicant categorically denied the existence of any set off agreement having been intended or reached. The email in question was in the context of an attempt to restructure the debt of ACMH to SDCT in which Exarro had a vested interest as shareholder and wished to minimise its risk. The contemplated measures included a proposed five year lease to Exarro of the use entitlement of ACMH which was subject to the release of an Investec guarantee by Anker BV the Dutch parent company of ACMH. The applicant emphasised that no agreement eventuated from the proposals in Ms Steyn's letter dated 12 December 2013.

[9] The next day, 13 December 2013, Ms Steyn received a letter from the attorney of ACMH and Golfview not only alleging that Exarro was unlawfully using ACMH and Golfview's throughout entitlement from SDCT but that ACMH and Golfview were not indebted to Exarro and that no set off is possible in the circumstances. Furthermore it was pointed out by the applicant that the set off claimed by the respondent is not a liquidated amount and should be between the same parties.

[10] The respondent justified its supplementary affidavit on the basis that Mr Schoeman restricted the documents containing the respondent's defence and to fully dispel the submission made by Ms Steyn that the respondent's defence is contrived and dishonest. To this end he submitted a series of correspondence prior to the applicant's alleged set off agreement dated 12 December 2013 and an unsigned entitlement lease agreement between Golfview and Exarro. It was submitted that cumulatively considered these documents show that a lease agreement, containing a set off was created,

recorded in an email from Exarro dated 26 September 2013. It was not however formalised.

[11] The deponent disclosed that a with prejudice tender was made by the respondent to the applicant in the sum of R4 241 528, 64 which it regards as representing the difference between the sum claimed and R11 258 548.80 which is granted in its favour in the motion proceedings.

[12] In the applicant's supplementary replying affidavit Ms Steyn pointed out that the attorney's letter dated 13 December 2013 was not dealt with by the Respondent at all. She also noted that the respondent s case had shifted in that it now introduced an agreement creating a set off dated 26 September 2013. The sequence of events was set out in detail and it was denied that any such agreement came into being. She showed how respondent's excerpts of her correspondence such as thanking Mr Schoeman for his "efforts in concluding this business" was not evidence of the conclusion of any agreement which still had to be negotiated and drafted, which eventuality never transpired.

[13] There is certainly nothing untoward in a plaintiff applying in motion proceedings for judgment in action where the defendant has clearly conceded liability. The fact that no formal settlement was reached does not diminish from the respondent's admission of liability of the applicant's claim both at the Special Committee meeting and on these papers. Despite the defence of set off by the respondent, the applicant submits that no real dispute of fact exists and the respondent has been less than honest. *Wightman t/a JW*

Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) was cited at paragraph [13] that a party is required to seriously and unambiguously grapple with the allegations by the other party.

> "There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to answer and engagement with facts which his client disputes and reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that a court takes a robust view of the matter".

[14] In *Standard Bank of South Africa v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ)* at paragraph [6] Sutherland J succinctly stated the requirements for establishing set- off as follows -

> "What attributes must each debt possess to qualify for set-off? The elements are:
> 1. Both debts must be due to and owed by the same pair of persons.
> 2. Both debts must be liquidated.
> 3. Both debts must be due and payable. "

[15] At paragraph [14] the learned judge stated further :

> "In *Frank v Premier Hangers CC 2008 (3) SA 594 (C)*, the predicament of a litigant who wishes to invoke set-off is addressed. The court, having reiterated that unliquidated damages can never be set off against a debt, went on to demonstrate that the remedy of such a party is to seek a stay of the claim and thereupon establish by legal proceedings the damages and its quantum. (See too: Western Cape Housing Development Board v Parker & Ano 2003 (3) SA 168 (C).) "

[16] In *Fattis Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 1 SA 736 (T)* Boshoff J (as he then was) stated at 737:

> "Our Courts have frequently been called upon to consider whether a claim was liquidated or not for the operation of set-off. Mutual liquidity of debts is an essential pre-requisite for set-off. A debt must be liquid in the sense that it is based on a liquid document or is admitted or its money value has been ascertained, or in the sense that it is capable of prompt ascertainment."

[17] The respondent has never made a demand for payment of its set off claim either before the issue of summons by the applicant or even after the Special Committee meeting. It does not allege when the set off amount became due and payable. It simply states that it is now due and payable. It has never formulated, computed or quantified its claim before these proceedings. Only in its supplementary affidavit it quantified its set off claim in the sum of R11 258 548.80. There is no counter-application. The set off is a separate cause of action which must be pleaded and proven by the respondent. It has failed to do this.

[18] It is indeed an extraordinary *volte face* in the respondent's case that the contractual basis of its set off shifted from 12 December 2013 in its answering affidavit to 26 September 2013 in its supplementary affidavit. All this information was in the peculiar knowledge of the Respondent and no good reason has been shown why it failed to deal with its claim comprehensively in its answering affidavit. The onus of proof rests on the respondent to raise the defence of set off and the applicant cannot be blamed for the respondent's failure to set out the facts on which its defence or counterclaim is based in a thorough and convincing way. The turgid and piecemeal manner in which the respondent has presented its case invites the considerations in *Wightman's* case. In essence the respondent attempts to create a contractual relationship with serious financial implications in a complex and structured business environment from a patchwork of emails and letters. It is most improbable when viewed against the voluminous and intricate contracts involving the parties or their holding

or filial companies, filed of record as background material that the parties contracted on such an informal basis.

[19] The most disingenuous part of the respondent's case and ultimately the tipping point against the argument by the respondent of a genuine dispute of fact is the denial by the attorney of ACMH and Golfview of a set off with Exarro and the egregious failure of the respondent to deal with this at all.

[20] In conclusion the respondent has not sufficiently established a contractual basis for a set off. The onus of proof rested entirely on the respondent. The amount of the set off claim appears for the first time in the respondent's supplementary affidavit. It is not clear when the debt became due. Again this offends the principles in *Wightman's* case in that the respondent could have succinctly and clearly stated the facts it relied upon for the set off in the answering affidavit. Nothing prevented the respondent from not just raising a dispute f fact as a defence but it could have filed a counterclaim thus putting its full weight behind its case. In conclusion there is no serious dispute on these papers and the respondent's indebtedness as claimed been established. There being no counterclaim, no absolution in regard to the alleged set off can be ordered and this judgment is no impediment to the respondent bringing any claim in the future against the applicant. The applicant is entitled to an order in terms of the Draft Order marked **"X"**.

LIS ALIBI PENDENS

[21] The principle of *lis alibi pendens* is an equitable and practical one. The applicant was justified in bringing motion proceedings after it had commences action proceedings in view of the admission of liability by the respondent at the Special Committee meeting on 8 May 2014. The failure of the parties to agree that there was a set off may not have created a settlement, however nor did it create a real dispute of fact which the applicant was aware of when it commenced motion proceedings. Indeed as has been pointed out the basis of the set off was only formulated and brought to applicant's attention in the answering and supplementary affidavits of the respondent for the first time. The applicant was entitled to invoke the more convenient and speedy remedy of motion proceedings and has successfully rebutted the *prima face* inference that the motion proceedings are vexatious. Indeed the applicant seeks punitive costs for what it submits is dishonest conduct and contradictory statements by the respondent. In my view normal costs should suffice.

ORDER

An order is made in terms of the draft order (as amended) marked **"X"**.

NOWOSENTZ L AJ

Appellants Representative

Counsel	:	NGD Maritz (SC)
Instructing Attorney	:	Mahlangu Incorporated

Respondents Representative

Counsel	:	F Terblanche (SC)
Instructing Attorney	:	Werkmans Attorneys

Date heard	:	20 /05/ 2015
Date delivered	:	_____

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **63004/2014**

BEFORE THE HIS LORDSHIP ~~NOWOSENETZ AJ~~ Ledwaba.

In the application between:-

EXXARO COAL MPUMALANGA (PTY) LIMITED Applicant

and

ELANDSFONTEIN COLLIERY (PTY) LIMITED Respondent

DRAFT ORDER

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1. The first agreement, annexure "A" to the application, is rectified by inserting the words "*per metric ton*" after the price "*ZAR 580 (R580.00)*" in paragraph 9 thereof;

2. The second agreement, annexure "B" to the application, is rectified by inserting of the words "*per metric ton*" after the price "*ZAR 600 (R600.00)*" in paragraph 9 thereof;

3. The third agreement, annexure "C" to the application, is rectified by inserting the words "*per metric ton*" after the price "*ZAR 595 (R595.00)*" in paragraph 9 thereof;

4. The respondent is ordered to pay to the applicant an amount calculated as follows:

4.1 A capital amount of R11 285 348.80;

Plus

4.2 Interest on the amount of R4 103 791.20 calculated at the rate of 11.5% per annum, compounded and capitalised monthly on the last day of each month, from 30 March 2013 to 27 March 2015;

Plus

4.3 Interest on the amount of R6 033 979.87 at the rate of 11.5% per annum, compounded and capitalised monthly on the last day of each month, from 13 April 2013 to 27 March 2015;

Plus

4.4 Interest on the amount of R5 896 242.43 at the rate of 11.5% per annum, compounded and capitalised monthly on the last day of each month, from 28 March 2015 to date of payment;

Plus

4.5 Interest on the amount of R18 917.71 at the rate of 11.5% per annum, compounded and capitalised monthly on the last day of each month, from 22 April 2013 to date of payment;

Plus

4.6 Interest on the amount of R5 343 188.66 at the rate of 11.5% per annum, compounded and capitalised monthly on the last day of each month, from 5 May 2013 to date of payment.

5. Cost of the application, inclusive of the costs of senior counsel.

BY THE COURT

REGISTRAR