IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~NO~~/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED. 21/01/2022

[redacted]

Case No: 4924/2020

PGN CIVILS (PTY) LTD **APPLICANT**

And

GREATER GIYANI MUNICIPALITY **RESPONDENT**

JUDGMENT

MG PHATUDI J:

Summary: **Civil procedure-provisional sentence summons-rule 8 (1) Uniform Rules of Court – Plaintiff required in provisional sentence summons to found its cause of action-impermissible to do so in replaying affidavit-mutually contradictory facts pleaded in summons put cause of action in disarray, and the change caused cannot be repaired replication-*In casu, the discrepancies in the summons render the claims unquantifiable to sustain a provisional sentence order-held, provisional sentence order refused, costs deferred.***

[1] This application is brought in terms of rule 8 (1) of the Uniform Rules of court (`the rules`). The defendant was served with a provisional sentence summons to first answer the claims against it. The claim is opposed.

[2] The plaintiff in the summons relies on two distinct claims. I consider it apposite to first lay a foundation upon which the two claims are based.

[3] The plaintiff's claim (claim 1) is that on or about the 14 July 2017 and at Giyani, the parties concluded a written agreement ("the agreement") which comprised of the letter of appointment dated 04 July 2017[1]) attached to the summons.

The amount of R20 143 128 .28 accepted, was as offered by the plaintiff in its bid document attached to the provisional sentence summons and marked as an annexure[2] (`A1`) enclosing the basic terms and conditions of the relevant tender. (contract No: G/G/M/015/018/2017) In support of the claim, the plaintiff also attached the letter of appointment to which reference was made, the acceptance letter, and the Tender document which was subject to the usual General Conditions of Contract (`GCC`).

[4] The plaintiff having performed its obligations in terms of the said agreement submitted to the defendant its tax invoice being for payment of the amount certified by the engineers pursuant to certificate no.5 duly annexed to the summons[3].

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[1] Paginated Index, annexure "A1, P8, Index 1.
[2] 'A3' those annexure is divided into 5 volumes of 100 pages and indexed in bundles.
[3] Index Bundle 4, pp 385-400.

[5] This annexure was issued and identified by the plaintiff's engineers as a "final progress payment certificate No.07" dated 26 November 2018, for the attention of the defendant's municipal manager.

[6] The certificate referred to included "**half of the Contractor's retention dated 27 November 2018"**, the latter's tax invoice for work executed as described. The amount claimed was in the tune of R2 855 283.00, VAT inclusive, (15%) payable to the plaintiff. (PGN Civils (Pty) Ltd).

[7] In paragraph 6 of the particulars of claim, the plaintiff, however, refers to a tax invoice in respect of the amount certified by the engineers for interim payment (certificate no.7) marked annexure "A6"to the summons[4].

[8] The latter annexure "A6" reflects an amount payable to the plaintiff in respect of claim 1 as the sum of R65 207-77. The relevant tax invoice in support of claim 1 is dated 14 December 2018.

[9] Quiet intriguing, is the fact that what the plaintiff pleaded as annexure "A5", being the certified amount of R65 207-77 patently differs from certificate No: 7 which reflects an amount of R2 856 283.00 VAT inclusive.

This alone is problematic to make a determination, regard being had to the general principles of pleading, in particular, to which I shall enlarge on shortly in this judgment.

[10] The aforegoing facts are as pleaded by plaintiff in support of claim 1.

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[4] Index Bundles 5, P.401.

[11] I turn now to consider Claim 11 which invariably is predicated on the facts pleaded in respect of claim1.

[12] The plaintiff, in claim 11 once again, relies on the agreement to which reference was made as read with the `GCC` and a certificate of completion issued by the engineers on 14 September 2018[5].

[13] It is significant to mention though *obiter,* that annexure 'A7', being a certificate of completion, was signed by the parties and their duly authorized agents.

[14] Subsequent thereto, and on 25 September 2019, the plaintiff submitted its tax invoice to the defendant for payment of the amount of R1 121 119.81, VAT inclusive[6].

[15] The plaintiff alleged in its particulars of claim that the defendant has failed to meet its obligations to settle payments due by it made in both claim 1 and 11. Both these claims are, however, disputed by the defendant in its answering affidavit. ("AA"). The defendant has in fact pleaded in its "AA" that it has *bona fide* defence in that it has paid to the plaintiff all its contractual liabilities, the retention money included.

[16] The defendant's case is that it has already paid a retention fee to the plaintiff in the sum of R2 014 312.83, with additional amount of R45 361.46. The total amount paid to the creditor according to the defendant, translates to R2 059 674.28. This amount was allegedly paid to POLOKWANE

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[5] Ibid. P402, annexure 'A7'.
[6] Ibid. PP403-406.

SURFACING (PTY) LTD at the instance of the plaintiff as evinced in annexures 'BB1'and 'BB2[7]' annexed to the answering affidavit.

[17] The transaction referred to above was on account of the Cession agreement the plaintiff ceded in favour of Polokwane Surfacing (Pty) Ltd (Surfacing) against the former's debt in the sum of R2 697 643.10. Notwithstanding the said discharge, so the argument went, the plaintiff continued to submit further claims which were honoured, until the contract value was milked dry.

[18] As I understand, the hard core of the dispute appears to me to be in the amount of retention owing, due and payable to as the plaintiff well as the payment of the ceded amount.

[19] In order to extricate itself from the impase, the defendant's contention was that it had successfully negotiated with Surfacing to settle the retention fee and an additional amount of R45 361.46, which according to the defendant, was accepted by Surfacing as a full discharge of the compromise. This much appears from annexures 'BB3' and 'BB4' respectively[8], which evinces acceptance by Surfacing of the amount of R2 059 674.28 offered.

[20] Based on the above considerations, it was contended on behalf of the defendant that the amount reflected in Claim 1 and 11, respectively, is not owing, due and payable by it to the plaintiff.

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[7] (Annex 'BB1) is an instruction issued by plaintiff to the defendant. Annex 'BB2'is proof of payment tendered by defendant to Polokwane Surfacing.

[8] Annex 'BB3'is offer to settle the retention fee due which was occasioned by the existing cession, annex 'BB4'constitutes acceptance by Polokwane Surfacing of the retention fee offered by the defendant.

[21] Furthermore, the defendant's submission was that even if, assuming for a moment, that claim 1 was due and payable, same would be due not to the plaintiff, but to Surfacing to liquidate the ceded amount. Additionally, so the argument went, any payment under the aegis of claim 1, would not only be unlawful, but would offend the "unauthorized, wasteful and fruitless expenditure" principles prohibited by law[9].

[22] In an attempt to counterveil the disputed facts and the defence put forward, the plaintiff in its replication impermissibly introduced new facts not pleaded in its particulars of claim in support of provisional sentence judgment.

[23] The above mentioned observation is replete in paragraph 3 (3.1 to 3.6.4) of the replying affidavit[10]) ("RA").

[24] Crucially, the allegations raised in paragraph 5 (5.1 to 5.10) of the `RA`, are in my view, an introduction of unpleaded facts in the particulars of claim, which the plaintiff now seeks to usher in through the back door. It is so that the plaintiff is bound by the facts it has pleaded in the main, and should not, therefore, weave a new case in reply. If this approach is permitted, it would without a doubt, certainly prejudice the defendant who after being served with a reply, its opportunity to respond further, would be shut.

[25] I may in sum, express the view that although the plaintiff might have attempted to straighten up its claim in reply, the facts belatedly alleged as structuring the basis of its claim, appears nowhere in the summons which is a

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[9] The phraseology appears in the Local Government: Municipal Finance Management Act 56 of 2003, and I cited it herein for the sake of completeness.
[10] Paginated Index 5, PP 423- 425.

precursor to launch a provisional sentence judgment. This the plaintiff did not do from inception.

LEGAL METRIX:

[26] It is axiomatic that provisional sentence judgment applications are governed by the provisions of rule 8 of the Uniform Rules of Court. ("the rules")

[27] The present claim is anchored in five (5) bundles to which several annexures can be found as attachments in support of the claim. This is what the plaintiff did in accordance with rule 8 (3) of the rules. But, the matter does not end there.

[28] That, notwithstanding, at the centre of resisting the application, the defendant raised forceful legal principles, correctly so, in my view, that in a matter such as the present, the plaintiff was required to found its cause of action in the summons, and may not do so in the replying affidavit.

[29] The aforegoing principle is well vested in our legal literature and case law.

[30] This principle initially received prominence as early as 1971 in the case of DE BRUYN V MUNRO[11]

[31] Ten (10) years later in 1981, the principle was cited with deference by the court in BARCLAYS NATIONAL BANK V SERFONTEIN[12] where Goldstone J stated that:-

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[11] 1971 (1) (4) S.A 624 (O) at 628 B-C.
[12] 1981 (3) SA 244 (W.L.D) at 249 B-C.

"It is clear that a plaintiff in provisional sentence proceedings is obliged to establish his cause of action in the summons, and may not do so in his replying affidavit."

[32] It Is generally accepted legal practice that provisional sentence is an abreached interlocutory remedy designed to come to a creditor`s assistance who has liquid proof of his/her action claim to secure a speedy relief without resorting to more expensive and dilatory exercise of an illiquid suit.

Put differently, if successfully prosecuted, it precludes a defendant with no *bona fide* defence from engaging in dilatory tactics.

[33] In the instant case, given the facts highlighted as mutually contradictory in paragraphs [5] to [9] above, the discrepancies, as pleaded in the summons, place the plaintiff's cause of action in disarray. It came as no surprise that the latter resorted to brew new facts in its replying affidavit, a procedure outlawed in the two guiding authorities to which reference was made. I may safely state that the reply, despite its attractiveness, does not take the matter further as the damage caused cannot be repaired in the replication.

[34] Importantly, the plaintiff in paragraph 9 of Claim 11 pleaded that, in terms of the agreement, as read with the `GCC`, a certificate of completion, was issued by the engineers and to that end, relied on annexure 'A7'. However, a reading of annexure 'A7' does not, in my view, quantify precisely the amounts said to be due and payable by the defendant. This `Completion Certificate` ('A') is no more than an informative document that would ordinarily require the aid of oral evidence in order to constitute a liquid document. This is apparent from paragraphs 9, 10 and 11 under Claim 11 of the summons.

[35] This approach has indeed infringed upon the principle enunciated in L.P SCHITZ and SCHWARTZ NNO V MARKOWITZ[13] where the court held that:-

"I am not prepared to accept this proposition. A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action, which might lurk therein, without identifying it. (Own underlying added).

[36] The above *dictum* stems from the general principle that a pleader must specify the contractual clauses on which he/she places reliance.

[37] That said, I am fortified in my view that, similarly, paragraph 6.4 of the 'RA' in which the plaintiff seeks to accentuate its claim, surfaces for the first time in the replication.

[38] Furthermore, paragraphs 6.5 and 6.6 of the "RA" emerge, one again, late after the "AA" was delivered that its claim is in fact for 50% of the said retention and, again specify clause 6.10.5 of the `GCC` as the contractual clauses in a replying affidavit.

[39] It was also contended on behalf of the defendant that the amount of the R65 207.77 due to plaintiff which ground Claim I, took into account the Cession amount of R2 616 658.92 payable to Surfacing. All what the plaintiff had done in reply paragraph 6.4, ('RA') merely reproduced in "RA" the figures in respect of Claim 1.[14]

[40] There is, therefore, a dispute of facts as to how much of the retention fee is owing, due and payable by the defendant. Accordingly, the view I take of the

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[13] 1976 (3) SA 772 (W) at 775

[14] Paginated page, 428, Index 5, "RA".

matter is that both claims cannot be easily calculable to support a provisional sentence judgment.

I also could not find any plausible explanation offered by the plaintiff for these apparent discrepancies in its claim even in reply.

[41] In the light of the above considerations, I am satisfied that the defendant has a *bona fide* defence, far from a technical one, which would ordinarily raise a triable issue in due course. Conversely, I find that for the material discrepancies alluded to, taking into account the facts of the claim in its totality, the plaintiff failed to frame out a clear cut claim to justify the granting of a provisional sentence order. To that end, the application is destined to fail.

[42] For that, I deem the following order appropriate.

ORDER:

(a) The provisional sentence is refused;

(b) The defendant is ordered to deliver a plea within 10 days after the granting of this order;

(c) The costs are deferred for future determination in due course.

[redacted]

MG PHATUDI

JUDGE OF THE HIGH COURT, LIMPOPO DIVISION

POLOKWANE

APPEARANCE

Counsel for the Plaintiff	:	**Adv Bosson**
Briefed by	:	**Thomas Swanepoel Inc, Tzaneen**
Counsel for the Defendant	:	**Adv W Lusenga**
Briefed by	:	**F.M Maluleke Inc**
		C/O Mudzuli Attorneys, Polokwane
Date Heard	:	**20 October 2021**

Judgment Delivered electronically by circulation to the partie's legal representatives by email and uploaded on website and released to SAFLii. The date and time for hand- down is deemed to be 10h.00 21 January 2022.