

SOUTH AFRICA / JUDGMENT

Bee J Electrical CC v Latitude Property Developments (Pty) Ltd (2290/2024)

[2024] ZAECQBHC 80 (10 December 2024)

[2024] ZAECQBHC 80**COURT**

Eastern Cape High Court, Gqeberha

BEFORE

T Rossi

CASE / FILE NUMBER

2290/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 2290/2024

Matter heard on: 14 November 2024

Judgment

delivered on: 10 December 2024

In the matter between: -

BEE J ELECTRICAL CC

Plaintiff

and

LATITUDE PROPERTY DEVELOPMENTS (PTY) LTD

Defendant

JUDGMENT

ROSSI AJ:

- [1] The plaintiff seeks judgment by way of provisional sentence summons against the defendant for the amount of R3 824 812.45 together with interest thereon at the rate of 11.75% per annum as from 14 June

2023. The plaintiff relies on an acknowledgment of debt agreement (the ‘agreement’) which was executed by defendant in favour of the plaintiff on 15 June 2023.

The plaintiff’s cause of action and defences raised

[2] The material averments sustaining the plaintiff’s cause of action are replicated below:

‘To the sheriff or his deputy:

INFORM

LATITUDE PROPERTY DEVELOPMENTS (PTY) LTD ... (hereinafter called the Defendant):

- (1) that Defendant is hereby called upon immediately to pay to BEE J ELECTRICAL CC, ... (hereinafter called the Plaintiff) the amount of R3 824 812.45 together with interest thereon at the rate of 11.75% per annum as from 14 June 2023 claimed by Plaintiff in terms of an acknowledgement of debt concluded between the Plaintiff and the Defendant on the 14th of June 2023, a copy of which document is annexed hereto as BJE 1;
- (2) Further annexed hereto as BJE 2 is a copy of a resolution adopted by the Directors of the Defendant on the 14th of June 2023 approving the Acknowledgment of debt entered into and annexed as BJE 1;
- (3) That failing such payment, Defendant is hereby called upon to appear before this Court personally or by an advocate or by an attorney ... in the High Court, at Gqeberha on the 13th day of AUGUST 2024 at 09:30 ... to admit or deny the Defendant’s liability for the said claim;
- (4) That if Defendant denies liability for the same, Defendant shall not later than noon on the 8th day of AUGUST 2024, file an affidavit with the Registrar of this court, and serve a copy thereof on Plaintiff’s attorney, which affidavit shall set forth the grounds [sic] Defendant’s defence to the said claim, and in particular state whether Defendant admits or denies the signatures to the said acknowledgment of debt and resolution (annexures BJE 1 and BJE 2) or whether Defendant admits or denies the signature or authority of Defendant’s agent...’

[3] It is convenient at this stage to detail the salient provisions of the agreement:[1]

‘1

BACKGROUND:

It is hereby recorded that:

1.1 The Company[2] was appointed per Contract as a nominated sub-contractor to WBHO CONSTRUCTION to effect certain works in the construction of the Kunjani Mall Concordia, Knysna (refer to Annexure A – letter of appointment);[3]

1.2 The Company hereby confirms that the amount of R3 824 812.45 incl. VAT ... (the ‘Debt Amount’) remains due to them and being unpaid by WBHO of [sic] 1 June 2023 (the ‘Effective Date’) (refer to Annexure B – Debt Amount calculation);[4]

1.3 Latitude now hereby agrees to act as guarantor for the Debt Amount and by virtue of this agreement transfers and takes full ownership and responsibility to settle the full amount as co-principal debtor;

1.4 The Company wishes to procure that Latitude acknowledges the amount of its indebtedness and binds itself to specific terms.

1.5 The Company will furnish a credit note to WBHO Construction for the full Debt Amount and will attach such note to this agreement in recognition of Latitude's indebtedness (refer to Annexure C – Credit Note to WBHO).[5]

1.6 The parties wish to regulate their relationship regarding the aforesaid acknowledgement of indebtedness.

2 ACKNOWLEDGMENT OF DEBT

2.1 Latitude hereby acknowledges its indebtedness to the Company of the Debt Amount, together with interests [sic] and costs calculated as set out in clause 3 below ("the indebtedness"), subject to the terms and conditions set out herein.

3 INTEREST

3.1 The balance of the Indebtedness outstanding from time to time shall attract interest at the prime lending rate per annum of the Company's bankers per annum. Interest on the indebtedness outstanding from time to time shall be calculated and capitalised monthly in arrears, the first such calculation to be done on the last day of the month

following the Effective Date and all further calculations to be done on the last day of each following calendar month.

4 REPAYMENT

4.1 Latitude shall repay the indebtedness to the Company by way of the following:

4.1.1 Cash payments within 6 calendar months from the Effective date; [in manuscript next to this clause appears '31 Aug 23' which is accompanied by two sets of initials]

4.1.2 Certified payments on further appointments on future projects to be developed by Latitude where the company will be allowed to add the Debt Amount to their appointment as Selected Sub-contractor to carry out certain works and draw the Debt amount as first construction payment of these following projects:

4.1.2.1 Hartenbos Seefront Refurbishment – Hartenbos – commencement of July 2023

4.1.3 Latitude by virtue of signing this agreement confirms that the sub-contractor's appointment for the projects listed under 4.1.2 will be done by way of negotiation between Latitude and the Company and that no formal tender procedures will be followed where the Company will be forced to submit a tender to be appointed.

4.2 All payments received by the Company shall firstly be allocated to the costs which are due and payable in terms of this agreement, thereafter to interest and finally to the Debt Amount of the specific project in progress.

4.3 The Company reserves the right to grant Latitude an extension of time, to make concessions or to enter into, any other agreements which, if, in his sole discretion, may deem advisable, without in any manner affecting or limiting Latitude's liabilities towards the Company provided that the Company notifies Latitude in writing of such extensions, concessions or arrangements.

5 ACCELERATION OF PAYMENT

In the event of:

5.1 Latitude failing to comply with any provision of this agreement and persisting in such failure for a period of 5 (five) days after receipt of a written notice demanding compliance; or

5.2 Latitude not paying any amount any amount which is due and payable in terms hereof and persisting in such non-payment for a period of 5 (five) days after receipt of a written notice demanding such payment; or ...

the full amount of the Indebtedness outstanding, including all accrued and unpaid interest and administrative charges shall forthwith, without any further notice by the Company be due and payable.

6 BREACH

Should any party (the defaulting party) breach any terms of this agreement, the other party (the innocent party) shall be obliged to notify the defaulting party in writing to remedy such breach, and should the defaulting party fail to do so within 7 (seven days of receipt of such notification [sic], the innocent party shall without prejudice and in addition to any other remedies it may have, be entitled to:

6.1 Cancel this agreement and to claim damages from the defaulting party; or

6.2 Claim specific performance of any or all of the terms and conditions of this agreement.

7 ...

8 GENERAL

8.1 ...

8.5 Continued enforceability

Any provision in this agreement which is or may become illegal, invalid or unenforceable in any jurisdiction affected by this agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as pro non scripto and severed from the balance of this agreement, without invalidating the remaining provisions of this agreement or affecting the validity or the enforceability of such provision in any other jurisdiction.'

- [4] The defendant filed an answering affidavit to the summons and the plaintiff, a reply.
- [5] The defendant does not deny the signature nor the authority of its agent. Its defence is premised on the following:
- (a) First point in limine: this court's lack of jurisdiction as the agreement was signed, and its obligations were to be fulfilled in Hartenbos.
 - (b) Second point in limine: the agreement is void for vagueness. The defendant with reference to clause 2.1 of the agreement (which stipulates that the acknowledgment of debt in subject to the terms and conditions set out therein), contends that the indebtedness was payable in two ways –
 - (i) by cash payments; and (ii) by certified payments in the Hartenbos Seefront Project. If cash payments were made, the amount and dates of these payments could only be determined after final indebtedness is established (the amount owing by WBHO) and after deduction of any certified payments.
 - (c) Furthermore, the agreement refers to two different dates for commencement of the cash payments, namely, the defined effective date (1 June 2023) and 31 August 2023, which is written in manuscript.[6] Ex facie the agreement, the amounts and dates of the cash payments were not agreed. This clause is unintelligible given its failure to refer to any amounts and its reference to two different and incompatible dates.
 - (d) Third point in limine: the agreement is not a liquid document. This aspect overlaps with the second point in limine. The defendant contends that the amount can only be unconditional and ascertainable if the final indebtedness of WBHO is determined and after deduction of any certified payments in respect of the Hartensbos Seefront Project. None of the annexures referred to in the agreement are attached to the summons and the agreement is silent on the amounts to be paid and the payment increments. The defendant also refers to the plaintiff's attorney's letter of demand which preceded the issuing of the provisional sentence summons, and which demand refers to cash payments commencing on 31 August 2023.[7]
 - (e) On the merits, the defendant contends that as the Hartenbos Seefront Project was meant to serve as a method of expunging the indebtedness[8] (although the plaintiff refused to accept the appointment), absent further allegations made in relation thereto, the indebtedness cannot be said to be a fixed or ascertainable amount.
 - (f) Lastly, the defendant raises a dilatory plea of non-compliance with the National Credit Act, 34 of 2005 contending that the plaintiff failed to allege whether the National Credit Act was applicable or not.
- [6] In reply the plaintiff address the above grounds of opposition as follows:

- (a) The plaintiff contests the first point in limine on two grounds. Firstly, on the basis that its principal place of business and registered address are within the jurisdiction of this court and secondly, on the basis of s 22(2) of the Electronic Communication and Transaction Act, 25 of 2002.[9] A more persuasive answer is found earlier in the replying affidavit, when dealing with the historical events leading up to the execution of the agreement, which agreement was drafted by the defendant. The plaintiff's deponent explains:

'26. I did notice that paragraph 4.1.1 thereof made provisions therefore that Defendant could repay its indebtedness to Plaintiff by cash payments within 6 calendar months from the effective date, being the 1st June 2023... When I pointed this out to Stumke he informed me that Defendant would receive its first payment on the Hartenbos Seefront Project by the end of August 2023. Stumke thereafter suggested that I change the date in paragraph 4.1.1 to 31 August 2023, which I did. I then initialled next to the amendment.

27. Accordingly, on the advice of the Defendant and by agreement between the Plaintiff and Defendant, the date of settlement of the Debt Amount was determined as the 31st August 2023.'

I shall return to the aspect of jurisdiction momentarily.

- (b) In response to second and third points in limine, which concerns the alleged vagueness of the agreement and its liquidity, the plaintiff refers to clauses 1.3 and 1.5 of the agreement[10] from which it is apparent that the full amount as defined was due and owing by the defendant (as guarantor). The plaintiff contends that it is disingenuous to suggest that the amount is still owed by WBHO.
- (c) The plaintiff explains further that it refused to sign the letter of appointment in respect of the Hartenbos Seefront Project as an electrical contractor had already been appointed and the appointment letter was a scam. The plaintiff thus denies that works performed in the Hartenbos Seefront Project were ever meant to be set off against the indebtedness.
- (d) As the agreement was drafted by the defendant, subject to the amendment referred to above by the plaintiff, any ambiguity should be resolved in favour of the plaintiff. Any offending provision can be severed from the agreement in terms of clause 8.5 thereof. In any event, with reference to clauses 1.2, 1.3, 1.5, 2.1 and 4.1[11] of the agreement it cannot be contended that the debt is illiquid. The amount having been determined, and agreed, before the execution of the agreement.
- (e) Specifically in regard to clauses 4.1 and 4.1.1 the deponent explains:

'50.2 There was no agreement between the parties that Defendant's debt to Plaintiff would be settled in instalments. If that was the case, the agreement would have made provision for such instalments, the amount thereof as well as the dates when the instalments become due.

50.3 It is clear from paragraph 4.1.1 of the agreement that payment was to be made on the 31st of August 2023. Furthermore, as is evident from the emails and letters attached hereto, Defendant continuously tried to extend these dates and eventually conjured up an elaborate scheme of a share transfer to try and settle the debt.

50.4 This Honourable Court is furthermore in this regard referred to paragraph 8.12 of the acknowledgment of debt which clearly makes provision for... extensions of time and/or other indulgences...'

- (f) As far as the plaintiff's attorney's letter of demand referenced payments commencing on 31 August 2023, this was a misunderstanding by the attorneys of the plaintiff's instructions.
- (g) The Plaintiff furthermore denies the application of the National Credit Act by virtue of the defendant's asset value and annual turnover exceeding the statutory threshold (sections 4(1)(a)(i) read with 7(1)(a) of the National Credit Act). >

Legal principles applicable to provisional sentence

- [7] Prior to dealing with the merits of the plaintiff's claim and defence, it is apposite to remind ourselves of the governing principles, which is the prism through which these proceedings are to be approached.
- [8] Provisional sentence has its origins in early French law, which was received in Holland during the 16th century, and later made its way to the Cape, and has remained a part of South African law ever since.[12] The procedure for obtaining this form of remedy is governed by rule
- 8. The rule has not altered the principles of our common law.[13]
- [9] Provisional sentence has been described as extraordinary in the sense that it is the only one of its kind.[14]
- [10] The primary element of provisional sentence is that it is only available to a plaintiff who is armed with a liquid document.[15] It is uncontentious that in principle an acknowledge of debt is a liquid document.[16] A document is said to be 'liquid' if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff.[17] If the document upon a proper construction and without recourse to extinctic evidence does not constitute such an acknowledgment, provisional sentence cannot be granted.[18]
- [11] Or put differently by the learned authors in the works of Eramus,[19] to qualify as a liquid document which will sustain a claim for provisional sentence, a document must contain the following essential

elements:

- ‘1. The document must reflect an acknowledgment of debt. A document in which the acknowledgement of indebtedness is given in consideration of an undertaking by the creditor to advance monies in the future is liquid provided an unconditional obligation to pay money is undertaken: a debt at once comes into existence, and the existence of the debt is not put in abeyance by reason of the fact that the consideration for which the undertaking was given is a promise by the other party to perform an act in the future.
2. The acknowledgment of indebtedness must be unconditional. If a document does no more than “evidence a potential liability, the existence of which is dependent upon the happening of some future state of affairs”, the document is not a liquid document and the simplicity or otherwise of the condition upon which liability will arise is irrelevant. If a document expresses payment of a debt to be subject to a simple event or condition, extrinsic proof of the happening of the event or compliance with the condition is permitted, provided the act or event is indeed simple in the sense that it is inherently capable of speedy proof by means of affidavit evidence. Examples of “simple” conditions are the delivery or transfer of scrip; the giving of notice; the failure to pay interest on due date; the consent of a building society to a cession. The court must in each case inquire into the nature of the performance upon which payment is conditional in order to determine whether or not the case falls within the ambit of the exception to the general rule.
3. The acknowledgment of indebtedness must be for an ascertained amount of money...An instrument which contains an acknowledgment of indebtedness, but not in a specific sum, is not a liquid document and a certificate specifying the amount of indebtedness cannot turn it into a liquid document.’[20]
- [12] There are two further inherent characteristics of provisional sentence. Firstly, it leads to a provisional or interlocutory order as final judgment is still to be considered in the principal case.[21] Secondly, while on the one hand it entitles the plaintiff to payment of the judgment before entering into the principal case, on the other hand, it affords the defendant the right to insist on security pending the final outcome.[22]
- [13] The plaintiff must therefore allege in his or her summons that the document is genuine, and, on the face of the document, the amount claimed is owing.[23] If a plaintiff alleges a *causa debiti*, he is confined thereto;[24] an aspect to which I shall return.
- [14] The essence of the procedure is that it affords a creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of money due without having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action.[25] It prevents a defendant with no valid defence from ‘playing for time’.[26]
- [15] A defendant who denies liability is required to set out the grounds for that denial in an answering affidavit, and the plaintiff, is afforded an opportunity to reply.[27]

- [16] The theoretical justification traditionally advanced for the institution of provisional sentence is that a liquid document gives rise to a rebuttable presumption of indebtedness. The debt disclosed in the document must therefore be unconditional and liquid.[28]

Discussion

- [17] The aspect of jurisdiction, or lack thereof, can be dealt summarily. It is uncontentious that the agreement, drafted by the defendant, was submitted to plaintiff for consideration and approval. If the plaintiff had then and there accepted the defendant's offer to contract, the conveyance of its acceptance, would have been received by the defendant, as offeror, in Hartenbos.[29] On this basis, the complaint of a lack of jurisdiction would be sound.
- [18] But we know that the defendant's offer was met by a counter-offer in respect of clause 4.1.1. This aspect is addressed above. A counter-offer incorporates a rejection and therefore destroys the original offer.[30] The plaintiff's counter-offer was received and accepted by the defendant in Hartenbos. The defendant's acceptance of the counter-offer however was received by plaintiff, as offeror, in Gqeberha, which in turn confers jurisdiction. Mr Cooper who appeared for the defendant argued that this was of no assistance to the plaintiff in as much as it was not the plaintiff's case on the papers. That is not so. The offer and counter-offer are explained by the plaintiff, albeit in the context of setting out the historical landscape, in the replying affidavit.[31] I cannot ignore it. Accordingly, I find this court to have jurisdiction.
- [19] In regard to the National Credit Act, I find the plea of non-compliance to be without merit given that the defendant's asset value and annual turnover exceeds the threshold determined by the Minster in terms of s 7(1)(a) of the said Act.
- [20] I now turn to the merits. Most of the argument centred around the wording of clause 4.1 and its import. The parties are not ad idem. Plaintiff contends that the full debt amount was payable on 31 August
2023. The defendant contends that the provision is void for vagueness. Furthermore, the defendant disputes the liquidity of the agreement. In approaching the impugned provision, I am guided by the trite principles of interpretation applied by our courts,[32] which principles were authoritatively articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*: [33]

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process

is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[21] To my mind, having regard to the language used, an objective and sensible reading of clauses 4.1 and 4.1.1, with its amendments, do not convey that payment of the debt amount was to be effected by 31 August 2023. The plaintiff's interpretation is irreconcilable with the plain language used, which reads:

'4.1 Latitude shall repay the indebtedness to the Company by way of the following:

4.1.1 Cash payments within 6 calendar months from the Effective date;'[34] [in manuscript next to this clause appears the following '31 Aug 23']

4.1.2.1 Hartenbos Seefront Refurbishment – Hartenbos –
commencement of July 2023

[22] The agreement envisages payments (formulated in plural not singular), which is suggestive of instalments. The words 'from the Effective date' presents further difficulty to the plaintiff's interpretation and is indicative of more than one payment being envisaged.

[23] The effective date is defined in clause 1.2 as 1 June 2023. The inclusion of the effective date in this clause is irreconcilable with the plaintiff's interpretation.

[24] Additionally, the wording in clause 4.1 - 'by way of the following' - which is followed by clauses 4.1.1 and 4.1.2 makes provision for two alternative forms of payment, and not one.

[25] Mr Cooper directed the court to the Witwatersrand decision of Leyland[35] which concerned an acknowledgment of debt which had no provision for the number of monthly instalments payable nor the period in which the debt had to be paid off.

[26] In Leyland the acknowledgment of debt contained an escalation clause,[36] similar to the present instance. The plaintiff alleged in its summons that the full balance become due and payable as a result of the defendant's failure to pay the instalment due on 30 August 1983.[37] In advancing its case for provisional sentence, the plaintiff relied strongly on the defendant's failure to deny its non-payment on 30 August 1983,[38] and that as a result of this non-payment, and the invocation of the escalation clause, the amount of the instalment due on the said date was irrelevant.[39]

[27] The court found the following:

'I cannot accept counsel's above solution to the problem in this case and would approach it from a different viewpoint. The acknowledgment is silent on the amount of monthly instalments and there are no provisions in its terms from which that amount or, indeed, the period in which the debt must be paid off, can be inferred. The position is thus that the acknowledgment of debt leaves it entirely to the defendant to decide what amount he wishes to pay every month...It was essential for the plaintiff's cause of action (in addition to averring liquid indebtedness under the acknowledgment of debt) to place reliance on the provision of the acknowledgment of debt governing payability and to allege facts establishing that the condition precedent to payability has occurred. This entailed reliance on the very provision rendering the acknowledgment of debt fatally void. The plaintiff's

summons could therefor not sustain provisional sentence without having been rectified.'

[28] In *Leyland*, the court found further that the failure by the defendant to deny the non-payment on 30 August 1983 in its answering affidavit was insufficient to cure this deficiency. [41]

[29] In the present instance, and with reference to the plaintiff's summons, the plaintiff does not rely on the escalation clause. The summons is also silent on the date of 31 August 2023, which is the date upon which the plaintiff contends payment of the debt amount should have been effected. The plaintiff also fails to plead severance of any clause of the agreement.

[30] Accordingly, the plaintiff's counter-argument in respect of escalation and severance stands to be rejected, as it is not the pleaded case. The plaintiff is confined to the *causa debiti*. The cause of action set out in the summons must accord with the document upon which it is based.[42] The fact that a plaintiff must comply with form C as prescribed by rule 8 does not nullify this requirement. The rule merely prescribes the procedure to be followed. It has not altered the law.[43] It is indeed so that the acceleration clause is relied upon in the plaintiff's letter of demand, but this is insufficient to cure the deficiency.[44] This would go beyond establishing that a simple condition has been met.[45]

[31] What we are left with is the agreement. I have already found that the agreement speaks to the debt amount being paid in more than one instalment. For that reason, I am persuaded to follow *Leyland*. The agreement is silent on the instalment increments and the amounts payable. The plaintiff's suggested due date of 31 August 2023 is not pleaded nor is such an interpretation consistent with the wording of the agreement. The payment mechanism set out in clause 4.1 is vague. Further difficulties are encountered with reference to some form of set off flowing from the Hartenbos Seefront Project. As the plaintiff has not alleged a severance, these provisions stand. Additionally, the plaintiff claims interest as from 14 June 2023, which on its own version is prior to the defendant being in mora and is furthermore inconsistent with clause 3.1.[46]

[32] *Ex facie* the agreement, I am not satisfied, even on a provisional basis, that the debt is unconditional or liquid.[47]

[33] Adopting the words of Margo J in Barclays:[48]

‘...provisional sentence is an extraordinary remedy; it has drastic effects on a defendant; he is required to pay in advance of the final judgment; it is based on a document which makes the position so clear to the court and to the defendant that there is little room for anxiety on the score that the defendant is being made to pay in advance of the final judgment. A plaintiff who approaches the court by way of provisional sentence ought, in principle, to have his papers in order.’

[34] Given the exceptional nature of provisional sentence, and the court’s reluctance to whittle away its basic principles in the absence of established practice or weighty authority,[49] I am unpersuaded that the contra proferentem[50] rule is capable of playing any role in the present instance. For the same reasons, cases suggestive of the court’s reluctance to interfere with agreements having been struck between parties, albeit imperfect ones, are distinguishable.[51] The plaintiff cannot complain of the defendant’s failure to file a notice of irregular step. It was the plaintiff that opted to come to court on a provisional sentence summons; it is thus bound by the unique principles which govern the process.

[35] The provisional sentence summons is accordingly dismissed.

[36] I can see no reason not to adopt the ordinary rule that costs should follow the result.[52] Costs on scale B are awarded.

[37] In the result, the following order is issued:

1. The provisional sentence summons is dismissed with costs on scale B.

T ROSSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:

Mr P Du Toit

Counsel for the plaintiff

Instructed by:

Van Zyl Rudd Inc. Attorneys

13 McLean Road

Mill Park

Gqeberha

Ref: Mr Henk Ungerer

For the defendant:

Mr G Cooper

Counsel for the defendant

Rubensteins Attorneys

1st Floor Hill House

43 Somerset Road, Green Point

Cape Town

Ref: B Aronoff

C/o Rushmere Noach Attorneys

Ref: Ms J Theron

- [1] Annexure BJE 1 to the provisional sentence summons.
- [2] Defined on the cover page of the agreement as the plaintiff.
- [3] Annexure A is not attached to the summons.
- [4] Annexure B is not attached to the summons but is attached to the plaintiff's replying affidavit (BJE 5).
- [5] Annexure C is not attached to the summons.
- [6] Clause 4.1.1 of BJE 1 which is replicated above.
- [7] The letter is dated 22 May 2024 and is annexure MHP 3 to the answering affidavit.
- [8] Clauses 4.1.2 and 4.1.2.1 of BJE 1 which is replicated above.
- [9] Which reads – 'an agreement concluded between the parties by means of data messages is concluded at the time when and the place where acceptance of the offer was received by the offerer.'
- [10] Which are replicated above.
- [11] Which are replicated above.
- [12] *Twee Jonge Gezellen v Land and Agricultural Bank* ('Twee Jonge Gezellen') 2011 (3) SA 1 (CC) para 14.
- [13] *Ibid* para 12.
- [14] *Ibid* para 14.
- [15] *Ibid* para 15.

- [16] Ibid.
- [17] Ibid.
- [18] African Lumber Co (Pvt) Ltd v Katz 1978 (4) SA (CPD) 436G.
- [19] DE Van Loggerenberg, Erasmus Superior Court Practice, 2ed, Volume 2, D1-101.
- [20] Footnotes omitted.
- [21] Ibid para 16.
- [22] Ibid.
- [23] Twee Jonge Gezellen supra para 20.
- [24] Wustrow v Wustrow 1980 (2) SA 308 (W) 311H-312B.
- [25] A Cilliers et al, Herbstein & Van Winsen The Practice of the High Courts and the Supreme Court of Appeal in South Africa, 5ed, Volume 2, 1313.
- [26] Twee Jonge Gezellen supra para 18.
- [27] Rule 8(5). A further affidavit, on good cause shown, can be allowed in terms of rule 27(3
- [28] Harrowsmith v Ceres Flats (Pty) Ltd 1979 (2) SA 722 (T) 728C.
- [29] In GB Bradfield, Christie's Law of Contract in South Africa, 8ed ('Christie's'), p 41 it is explained that '(A)nalysis into offer and acceptance is also usually the most satisfactory method of deciding...whether the court has jurisdiction...as a general proposition, agreement is reached when each party is aware that the other is in agreement, which will be when and where the offeror receives communication of the offeree's acceptance from him.'
- [30] Christie's supra p 67.
- [31] This is not a situation where the plaintiff is introducing a new case by way of reply. The plaintiff is expanding on what has already been revealed ex facie the agreement and, to an extent, in the defendant's answering affidavit. Court's are inclined to be more lenient in this regard – Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa 2013 (2) SA 204 (SCA) par 26 to 27.
- [32] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) at para 18; Bothma-Batho Transport v S Bothma en Seun Transport 2014
- (2) SA 494 (SCA); Centriq Insurance Company Limited v Oosthuizen and Another (237/2018)
- [2019] ZASCA 11 (14 March 2019) at paras 17 and 18; Annual Survey of South African Law 2014 Interpretation of Written Agreements - Basic Approach to Interpretation, at 502 to 505; Wilma Petru Kooij v Middleground Trading 251 CC & Another [2020] ZASCA 45 (23 April 2020) at [15] and [16]; Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd [2020] ZASCA 58 (3 June 2020) at [6] and [7]. Passenger Rail Agency of South Africa v Sbahle

Fire Services CC [2020] ZASCA 90 (4 August 2020) at [26] to [28]; Smythe v Investec Bank Ltd (2017) ZASCA 147 (26 October 2017) at [28] and [29] and Tshwane City v Blair Atholl Homeowners Association 2019

[3] SA 398 (SCA); University of Johannesburg v Auckland Park Theological Seminary and Another 2021

[6] SA 1 (CC).

[33] 2012

[4] SA 593 (SCA) at para 18 – footnotes omitted.

[34] My own emphasis.

[35] Leyland SA (Pty) Ltd v Booysen and Clark Motors (Pty) Ltd 1984 (3) SA 480 (WLD).

[36] Ibid 481G.

[37] Ibid 481I.

[38] Ibid 482B-C.

[39] Ibid 482E.

[40] Ibid 482G-483C.

[41] Ibid 483D-E.

[42] Barclays National Bank v Chaldon Investments Ltd 1974 (1) SA 131 (W) 132H-133A.

[43] Twee Jonge Gezellen supra para 16.

[44] Leyland supra 483D-E.

[45] The defects go to the root of the matter.

[46] Which clause is replicated above.

[47] Harrowsmith supra 728C.

[48] Barclays National Bank v Chaldon Investments Ltd 1974 (1) SA 131 (W) 133A

[49] African Lumber Co (Pvt) Ltd v Katz 1978 (4) SA 432 (CPD) 438C-D.

[50] Christie supra p 278 explains the rule as follows – ‘the rationale of the contra proferentem rule is simply that, if that wording is incurably ambiguous, its author should be the one to suffer because he had it in his power to make his meaning plain.’

[51] National Stadium South Africa (Pty) Ltd and others v Firststrand Bank Ltd 2011 (2) SA 157 (SCA) and Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A).

[52] In argument the defendant did not persist with the punitive cost order originally sought.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECQBHC/2024/80.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bee-j-electrical-cc-v-latitude-unknown-topic-aecqbhc-2024>

Prepared on 9 October 2026 · Esheria