

SOUTH AFRICA / JUDGMENT

Endecon Ubuntu (Pty) Ltd v Mopani District Municipality (14/2015)

[2023] ZALMPPHC 38 (14 June 2023)

[2023] ZALMPPHC 38

COURT
Limpopo High Court, Polokwane

BEFORE
K.L. Pillay

CASE / FILE NUMBER
14/2015

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO
DIVISION, POLOKWANE)
CASE
No: 14/2015
(1)
REPORTABLE: YES / NO
(2)
OF INTEREST TO OTHER JUDGES: YES / NO
(3)
REVISED.

DATE: 14/06/2023
In

the matter between: ENDECON
UBUNTU (PTY) LTD APPLICANT
V
MOPANI
DISTRICT MUNICIPALITY RESPONDENT

Heard: 2 March 2023

Delivered: 14 June 2023 by circulation to the parties' legal
representatives

Coram:PILLAY AJ

JUDGMENT**INTRODUCTION**

- [1] The Application before Court is a mandatory order sought to compel the Respondent to make payment in respect of an invoice for services rendered as per the attached statement. The Applicant indicated that the Respondent failed to react, respond and neglected to comply and make payment, resulting in the Respondent's conduct being an administrative act capable of review by the Court with the relevant authority, to order the Respondent to comply in terms of the Promotion of Administrative Justice Act[1]. The application is opposed by the Respondent on various grounds and the Respondent has also raised various points in limine.
- [2] Prior to proceeding the parties agreed that the Court condone the non compliance in respect of timeframes by both parties. This was condoned and both parties argued the points in limine and the merits of the application. The matter was postponed and both parties were requested to file supplementary heads of argument dealing specifically with the procedural issue of prescription which was raised as a defence. Thereafter Judgment would be handed down.

BRIEF**BACKGROUND**

- [3] The Applicant is a firm of professional engineers based at Suid Street Polokwane, who mandated Mr Mukwevho, to file an affidavit on their behalf concerning his involvement in respect of this matter. The Respondent is the Municipal Manager of Mopani Municipal Municipality, situated at Main road Giyani.
- [4] The Applicant alleges that it was appointed to render services to the Respondent in respect of a project to improve the Madjadji Water works situated at the Greater Letaba Local Municipality. This project commenced in 2007 and continued to 2009. The Respondent made payment in respect of seven of the eight invoices submitted to it and failed to make payment in respect of the amount of R 1114 137.40 which was the final account due to the Applicant in respect of services rendered dated the 28 October
2011. The Applicant issued a practical completion certificate on the 26 May 2010 and a final completion certificate on the 9 July 2010.

- [5] Mr Mukwevho indicated that he communicated with various officials of the Respondent concerning this outstanding amount and in his communications with Mr M Mandiwana an employee of the Respondent, he was informed to withdraw the invoice dated the 28 October 2011 and reissue a new one dated the 11 December 2012 for the same amount, as this new invoice would be paid, since it was part of the current financial year.
- [6] Mr Mukwevho highlighted that since February 2014, he has been in touch with Mr Maake an employee of the Respondent in respect of the new issued account, but to no avail, amidst the email communication from the Respondent, that a response would be forthcoming shortly. The amount due including interest was R 1 530 513.12 and according to the Applicant it was not disputed as being the exact amount owing to the Applicant.
- [7] The Applicant submitted that professional services were rendered to the Respondent and no reason was provided to the Applicant why payment for the service rendered was not made by the Respondent. The Respondent's conduct in neglecting to make payment, being an administrative act, is reviewable by Court and as such, the Applicant prays that the Court order the Respondent to comply and make payment.
- [8] The Respondent represented by Mr Nare opposed the application and raised the following points in limine;
- [8.1] Noncompliance with the provisions of Section 3 of the Instituting of Legal Proceedings against Certain Organs of State Act[2]
- [8.2] Prescription of the claim in terms of the Prescription Act[3]
- [8.3] Noncompliance with the provisions of S217(1) of the Constitution[4] and S 112 of the Municipal Management Act.[5]
- [8.4] Dispute in respect of the interest charged by the Applicant on the current amount resulting in the amount claimed being disputed and need for referral to trial.
- [8.5] Material dispute in respect of the discussions held with Mr Mandiwana and the several other unknown officials of the Respondent.
- [8.6] Dispute concerning the generalised allegation of professional services rendered without actual documentary proof of such specified services which were rendered and the dates of such services.
- [9] The Respondent in light of these material issues sought the Court to dismiss the Applicant's claim with costs in light of the fact that the Applicant should have foreseen the dispute, yet chose to proceed by way of application.
- [10] In reply the Applicant indicated that amidst the initial mention of the 9 July 2010 as being the date of completion, the project would only be finalised once the Final Payment Certificate and Bill of Quantities were completed. This is the final amount due to the Contractor and Applicant. This Bill of Quantities was signed by the Applicant on the 13 June

2014 and the Contractor on the 18 June 2014. The reason for the fouryear delay, had to do with finalising the Bill of Quantities and considering penalties for late completion. There arose a dispute with the Contractor concerning these penalties and after a meeting held with the Respondent on the 9 June 2014, this dispute was addressed and the Bill of Quantities was finally settled.

- [11] The Applicant in response to the issue of prescription contended that it only started to run from the 18 June 2014, which was the date on which the final Bill of Quantities and final Payment Certificate was finalised, therefore, the allegation of the claim having prescribed is without merit. The Applicant indicated that they could not have foreseen the Respondent raising prescription as a defence.

The parties agreed that these proceedings be stayed pending the finalisation of the point in limine raised in respect of Section

217(1) of the Constitution and S 112 the Municipal Management Act. This point raised by the Respondent was ultimately abandoned and the proceedings withdrawn by the Respondent. The parties then continued with the arguments of this matter before Court.

- [12] The following aspects appeared to be common cause between the parties:

[12.1] The parties as identified in the application and the authority of the witnesses to depose to the affidavits on behalf of the parties.

[12.2] That both parties contracted for services to be rendered to the Respondent in respect of the project to improve the Madjadji Water works situated at the Greater Letaba Local Municipality.

[12.3] The Respondent made payment for seven invoices issued by the Applicant in respect of services rendered to the Respondent flowing from this agreement.

- [13] The following was considered to be disputed issues,

[13.1] The period of the service rendered, and the amount of money due to be paid to the Applicant by the Respondent in respect of the final invoice or statement.

[13.3] The issue of whether the provisions of Section 3 of the Instituting of Legal Proceedings against Certain Organs of State Act was applicable.

[13.4] Whether prescription was applicable and from which date would it start running and whether there was any interruption in respect of same.

[13.5] The authority of Mr Mashudu Mandiwana pertaining to the submission of invoices to the Respondent for payment. The amount charged by the Applicant in respect of interest on the outstanding amount and whether same was warranted.

[13.6] The issue concerning the relevance if any of the final Bill of Quantities and final Payment Certificate.

[13.7] The question concerning what if any was the alleged professional services, which was claimed to have been rendered and for which period exactly.

[13.8] Whether the material dispute of fact should have been foreseen by the Applicant and whether it was necessary for the Respondent to have filed a further affidavit flowing from the Applicants reply which placed new aspects before the Court, concerning the issue of Prescription.

ANALYSIS

OF THE FACTS AND THE LAW

- [14] The Application is to enforce payment against the Respondent for services rendered and to seek the Court's authority as provided in PAJA, to order the Respondent to comply with the notice of motion and make payment in respect of that account.
- [15] The Respondent argues a material bonafide dispute of fact existed and that before the Court could attend to the material dispute, the points in limine needed ventilation. The Respondent indicated that since the Applicant chose Motion proceedings to litigate, and same, did not provide for evidence to be tested by way of cross examination, the application was doomed to be dismissed.
- [16] The Applicant in argument when addressing the point in limine concerning Prescription, indicated that there was no obligation on the Applicant, in its' pleadings, to prematurely raise or address the issue of Prescription and thus the allegation of new information as motivated by the Respondent in argument, is without merit, since the Respondent was in a position to file a supplementary affidavit, if the Respondent deemed it necessary, in response to the replying affidavit.
- [17] I accept that there is a material factual dispute between the parties. The dispute of fact is such that I am unable to determine this matter on the papers. The dispute of fact is substantial and has bearing on both the parties' versions. The question therefore is whether I should dismiss the application on that basis, as per the Respondent's argument, or whether it would in the interest of justice, to be prudent, to order that the matter proceed by way of trial.
- [18] In terms of Rule 6(5) (g)[6] of the Uniform Rules, a Court has a wide discretion with regard to referring matters to oral evidence where application proceedings

cannot be properly decided by way of affidavit. An application to refer a matter to evidence should be made at the outset and not after argument on the merits. However, in certain exceptional circumstances, the Court may decide that a matter should be referred

to oral evidence even where no application for such referral had been made. Regard was had to *Pahad Shipping CC v Commissioner, SARS*[7].

[19] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[8] at 1162 it was stated that it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory

affidavits as opposed to viva voce evidence. Moreover in *The National Director of Public Prosecutions v Zuma*[9] Harms, JP noted at paragraph 26 and 27 that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, the motion procedures, cannot be used to resolve factual disputed issues because they are not designed to determine probabilities.

[20] In *Golden Peanut and Tree Nut SA (Pty) Ltd v Vermeulen N.O and Others*[10] at paras 5 & 8, the Court noted that if an application was unable to be determined on paper, the Court could dismiss the matter, call for evidence to be led or refer the matter for trial. The Court must consider the interest of justice if ordering the matter to trial and consider an appropriate Cost order if necessary to repair the inconvenience caused in circumstances where the Applicant could have foreseen the said dispute and persisted by way of application.

[21] In light of all that was indicated above especially the disputed issues, it is appropriate that this application be referred to trial. The various issues can only be ventilated when the evidence is tested under cross examination. This is in the interest of justice and fairness to both the parties before Court.

COSTS

[22] The facts and the manner in which the application developed, in the various stages during the proceedings, obliges the Court to rule that costs must be adjudicated after trial and to follow the cause.

ORDER

1. Condonation is granted to both parties in respect of non compliance with the relevant timeframes applicable to the Application.
2. The Applicant's Application under the above case number is referred to Trial.
3. The Notice of Motion in the Application shall stand as the Applicant's Combined Summons.
4. The founding affidavit shall stand as the Applicant's particulars of claim.
5. The Respondent's answering affidavit shall stand as the Respondents' plea.
6. The Applicant's replying affidavit shall stand as the Applicant's replication.
7. The further exchange of pleadings and pretrial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of the Court in respect of action proceedings. Discovery of documents not forming part of the Application papers shall take place in accordance with the provisions of the Rules of Court.

8. The parties are granted leave to utilise Rule 28 in the event that either of the parties wishes to amend its papers.
9. Costs occasioned by the Application, including the costs relating to the opposed motion, are reserved for determination in the trial.

K.L. PILLAY

Acting Judge of the High Court

Limpopo Division, Polokwane

APPEARANCES:

HEARD ON: 2 March 2023

Supplementary HOA

received 22 March 2023

JUDGMENT

DELIVERED ON: 14 June 2023. This judgment was

handed down electronically by

circulation to the parties'

representatives by email. The date

and time for handdown of the judgment

is deemed to be 14 June 2023 at 10:00.

FOR THE APPLICANT: Adv.

G J Diamond

INSTRUCTED BY: Du

Toit Swanepoel Steyn & Spruyt

Attorneys

FOR THE RESPONDENT: Adv.

K Mokwena

INSTRUCTED BY: Maboku

Mangena Attorneys INC

[1] Act 3 of 2000

[2] Act 40 of 2002

[3] Act 68 of 1969

[4] Act 108 of 1996

[5] Act 56 of 2003

[6] "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise." [Substituted by GG 39715 of 19 February 2016 Regulation Gazette 10566, Vol 608.]

[6] "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[Substituted by GG 39715 of 19 February 2016 Regulation Gazette 10566, Vol 608.]

[7]

[2010] 2 Alf SA 246 (SCA) at para 20.

[8] 1949 (3) SA 1155 (T) at 1162

[9]

[2009] ZASCA 1; 2009 (2) SA 277 (SCA)

[10]

[2019] JOL 46046 (FB)

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