

SOUTH AFRICA / JUDGMENT

Teligent AB v Telsar Solutions (Pty) Ltd [2005] ZAGPHC 374; 40/05/01 (17 August 2005) [2005] ZAGPHC 374

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

5440/05

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 5440/05

DATE:2005-08-17

In the matter between

TELIGENT AB..... Applicant

and

TELSAR SOLUTIONS (PTY) LTD..... Respondent

JUDGMENT

WILLIS, J: The applicant applies for an order against the respondent for payment of the sum of Euro 105 000 together with interest and costs. The respondent admits that it is indebted to the applicant in the aforesaid amount but alleges that it is excused from making payment of the aforesaid amount to the applicant by virtue of the fact that it has a counterclaim against the applicant in the sum of R1 699 992,22. The parties have entered into an agreement in terms of which they have agreed that the respondent's counter-application be referred to trial and that the notice of the counter application is to stand as a simple summons and the respondent is to deliver its declaration within 20 days of the order being made.

The parties therefore have agreed that the only issue for determination in this application is whether the court should grant judgment in favour of the applicant against the respondent in the aforesaid sum of Euros 105 000 or the rand equivalent thereof as at date of payment together with interest at the prescribed rate namely 15,5 percent per annum from 8 April 2004 to date of payment or whether the court should stay judgment on the applicant's claim pending the outcome of the respondent's claim against the applicant.

The applicant is prepared to provide security de restituendo. It is true that certainly in the past there was a general rule that a claim and a counterclaim and an application and a counter-application should be adjudicated *pan passu* and that judgment should not be granted on the claim until the counter application has been adjudicated upon. I was referred to various authorities but it seems clear to me that there has been a subtle but nevertheless significant shift over the passing of the years. In the case of *Truter v Degenaar* 1990 (11 SA 206 {T} Van Dijkhorst J indicated that the exercise of a discretion by the court was not limited in cases such as this to those where the counterclaim or counter application was frivolous or vexatious or had been instituted merely to delay judgment on the claim.

Furthermore in the case of *Saaiman v DCU Holdings (Pty) Ltd & Others* 2000 (3) SA 202 (T) De Villiers J similarly exercised his discretion in favour of the applicant and the factor which seem to weigh with him was that the applicant as in this particular case, was prepared to offer security de restituendo. Counsel for the respondent agreed that it seems clear that the legal position currently is that I have a broad equitable discretion which nevertheless must be exercised in a judicial manner.

Having regard to the fact that it is clear and beyond contest that the respondent does indeed owe the sum of Euros 105 000, that there seems to be a real dispute as to whether there is any basis to the counterclaim, and the fact that the applicant is prepared to offer security de restituendo; I am of the view that the application should succeed subject, of course, to certain safeguards.

The following order is made:

1. The respondent is ordered to pay the applicant the sum of Euros 105 000 plus interest thereon at the rate of 15,5 percent per annum from 8 May 2004 to date of payment.
2. The respondent may, at its election, effect payment of the amount referred to in paragraph 1 above by paying to the applicant an amount in rand sufficient to purchase that sum on the date of payment.
3. Against payment of the aforesaid amount the applicant shall furnish the respondent with security de restituendo in the form of a guarantee issued by a bank or other registered financial institution and shall be obliged to maintain the security for so long as the respondent prosecutes its counterclaim in accordance with this order and the Rules of this Court; such guarantee to be irrevocable subject to the terms set out in this order.
4. The respondent is ordered to pay the costs of this application.

5. The respondent's counter application is referred to trial on the basis that:
- 5.1 The respondent's notice of counter-application will stand as a simple summons;
- 5.2 The respondent will deliver its declaration within 20 days of this order;
- 5.3 Further pleadings will be delivered in accordance with the Rules of Court which will apply generally to the further conduct of the respondent's counter-application;
- 5.4 The costs of the counter application are reserved for the trial court.

ON BEHALF OF APPLICANT: ADV G MYBURGH (SC)

ON BEHALF OF RESPONDENT: AD S P PINCUS

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