

SOUTH AFRICA / JUDGMENT

Wallace v Ballprop Ten (Pty) Ltd (1153/2005) [2007] ZAWCHC 91 (16 October 2007) [2007] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

1153/2005

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IN

**THE LABOUR COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL
DIVISION)CASE NO: 1153/2005****DATE: 16****OCTOBER 2007****In**

the matter between:

**BURGER
AND WALLACE Plaintiff
and
BALLPROP
TEN (PTY) LIMITED Defendant****JUDGMENT****BOZALEK, J**

This is an interlocutory application in terms of Rule 22(4) of the Uniform Rules of Court, in which plaintiff, the applicant in the application, seeks an early judgment in respect of an admitted claim in convention. The plaintiff sued defendant, respondent in the application for services rendered, which claim was eventually admitted by defendant in the amount of R461 335,25. Defendant however filed a counterclaim for unliquidated damages in the amount of R98million odd and pleaded that its indebtedness to plaintiff fell to be set off against the plaintiff's indebtedness to it. It prayed therefore that plaintiff's claim be postponed until the adjudication of its claim in reconvention.

In this application plaintiff asked for judgment in respect of its admitted claim, not to be postponed, but to be granted in its favour immediately, as well as the costs of the application. The application is opposed and has lead to a record, including annexures, of close to 400 pages. Many aspects of the defendant's counterclaim are dealt with in great and, in my view, unnecessary detail in these papers, hence their voluminousness.

Rule 22(4) permits a party in the position of defendant to request in its pleadings that judgment in respect of an admitted claim in convention be postponed. Judgment is then automatically postponed "unless the Court upon the application of any interested party otherwise orders ...". The learned authors of Erasmus, Superior Court Practice comment that;

"The purpose of the practice is to avoid a multiplicity of consecutive actions and cross-actions and of process in execution between the same parties and, where possible and just, to dispose of all issues, claims and counterclaims between the same litigants in one and the same trial in order that there should be an end to litigation."

That is at page B1-149.

Commenting further on the nature of the discretion to be exercised by the Court, which might "otherwise order" the authors state;

"This discretion must be judicially exercised in accordance with the tenets of justice, fairness and reasonableness and with reference to all the relevant facts and circumstances. It is not necessary for the Court to consider the merits or demerits of a counterclaim in weighing up its decision. Generally speaking the Court will lean in favour of granting a postponement, for it is desirable that in the absence of cogent reasons to the contrary the process of the Court should not issue until all claims and counterclaims between the parties not being manifestly unsubstantial have been determined."

That is at page B1-150,

One of the authorities quoted by the authors in this regard, and relied on by both parties in this application, is *Consol*

Limited t/a Consol Glass v Twee Jongezellen (Pty) Limited and Another 2002(3) SA at 580c. There Van Zyl J observed that the discretion;

"must be exercised judicially in accordance with the tenets of justice, fairness and reasonableness and with reference to all relevant facts and circumstances." At page 585c-d.

He disagreed with the proposition which I have quoted earlier from Erasmus, that there is a general rule that a Court will lean in favour of granting a postponement. He stated as follows, at page 585g-h of his judgment;

"There is no indication in Rule 22{4) that the discretion is limited or otherwise restricted. Provided it is judicially exercised, it is wide and unfettered. If the plaintiff shows good cause as to why a postponement should not be granted the Court will give due consideration to refusing a postponement."

Associating himself with the approach adopted in *Truter v Wieqenaar* 1990(1) SA 206T at page 211e-fp Van Zyl, J held that it was not necessary for the Court to consider the merits or demerits of the counterclaim in weighing up its decision. In this regard it goes without saying that any Court will have great difficulty in proceedings such as these in determining the merits of a counterclaim where it is faced with conflicting versions regarding the merits in the papers.

Apart from making the observation that it remains open to a Court to consider at least on a prima facie and provisional basis, the merits of a counterclaim I find myself in agreement with the approach enunciated in the *Consol* matter.

Turning to the facts of this matter the papers reveal that the plaintiff is a construction company which rendered certain civil services on land in the Muizenberg area at the behest of defendant, a property development company. The work was certified as completed by March 2003, but defendant failed to pay the full balance owing in terms of the certificates. In an affidavit deposing summary judgment, defendant's director initially claimed that it was not liable for the sum claimed by plaintiff since its indebtedness was offset by damages it had suffered as a result of delays on the part of plaintiff in installing the services. This defence was abandoned however, and the claim is admitted in full.

Defendant's counterclaim arises out of an alleged joint venture agreement concluded between it and plaintiff in early 2001. The terms thereof, broadly speaking, were that plaintiff would install services on certain land which would be rezoned and sub-divided by defendant. Defendant would, it alleged, as contractor construct numerous residential properties in the building. In turn it would be entitled to half of the profit generated by the sales of the property purchases and would be compensated, by whom It is not clear, for its building work. The counter claim specifies that defendant suffered R30miMion odd worth of damages in respect of its 50% share of the "land profit" and some R69million odd in respect of its "construction profit". The damages were allegedly incurred by reason of plaintiff's alleged breach of the joint venture agreement through its contracting with a third party to do the necessary building work and its failure to honour its commitment with regards to the division of profit from the sale of erven.

Plaintiff denies the existence of any joint venture agreement and devoted the bulk of both of the affidavits filed on its behalf in this application, and the argument delivered to this Court, to illustrating the allegedly specious nature of the counterclaim.

Amongst the points relied on by plaintiff was the almost complete written reference to the alleged joint venture agreement,

notwithstanding the large amount of correspondence and documentation which passed between the parties during and after the course of their commercial relationship.

It was also contended on behalf of plaintiff that defendant had advanced inconsistent versions in its pleadings and under oath in various interlocutory applications, as to when the agreement was concluded. Further criticisms relate to the vagueness of the circumstances in which the alleged agreement was completed as well as the existence of a letter from the defendant's director to the plaintiff, long after the conclusion of the alleged joint venture agreement, in which defendant advises that it had entered into a joint venture agreement with a completely separate entity, involving some of the property allegedly involved in the first alleged joint venture agreement. In that letter there is no mention of any earlier joint venture agreement between the parties, let alone a complaint regarding any breach thereof.

The plaintiff also relies on various alleged inconsistencies, omissions and falsehoods committed by the defendant's director, one Carse, in affidavits filed by him in one or more of the interlocutory applications in this matter.

There are indeed several disquieting features to the defendant's counterclaim, not least its apparent inflated nature and the sparseness of any contemporaneous reference to the alleged joint venture agreement. There is but one written reference to a possible joint venture agreement between the parties. This is contained in a memorandum from defendant to plaintiff's representatives dated 15 May 2001, drawn up in order to enable defendant to obtain finance for the purchase of certain property. The memorandum contains the bald statement under the heading "legal entity" that "this is a joint venture between Burger and Wallace and Ballprop Ten (Pty) Limited". No details or terms of the alleged agreement are recorded however.

Plaintiff admits that there was talk of a joint venture agreement. It states that the memorandum in question was however no more than a proposal to which it never responded and thus no joint venture agreement was ever concluded. It also appears from the papers that as at May 2001 defendant had purchased certain property, but lacked the necessary finance therefor and was casting about for partners in a proposed development scheme. Such finance was eventually forthcoming from a third party introduced to defendant by plaintiff, or its directors. Furthermore in due course plaintiff or its holding company acquired a substantial interest in the development, directly from that third party, a position which appears to obtain until the present day.

Given these objective facts which indicate the possibility of an oral joint venture agreement, and I can put it no higher than this,

notwithstanding the apparent improbabilities and inconsistencies relating to defendant's counterclaim, in my view it is not possible

to find at this stage that it is frivolous, vexatious or manifestly unsubstantial. This is not the end of the enquiry however, since the merits of the counterclaim is but one possible factor relevant to the determination of the question before the Court.

Plaintiff did not rely solely on the weakness of the defendant's counterclaim, but cited other factors in seeking to persuade the Court to exercise its discretion in its favour. Mr Newdigate SC, who appeared together with Mr Howie, for plaintiff, also relied on the fact that the subject matter of plaintiff's admitted claim was entirely separate to the subject

matter of the defendant's counterclaim. This is correct only in the strict sense that they arise out of different agreements or alleged agreements.

Seen in broader perspective, however, both claims relate to and arise out of, at least according to defendant's version, the commercial

relationship which existed between the parties for a number of years. Furthermore the provisions of Rule 22(4) are not available only to defendants whose counterclaim arises out of the same set of facts and circumstances as does the plaintiff's admitted claim. The plaintiff also relied on alleged instances of defendant and its director, Carse, having been dishonest in the course of deposing to various affidavits in the interlocutory proceedings, including the present application.

There is no need to cite the details of these various instances. None of them is in my view so clear as to permit a finding on papers that Carse was deliberately dishonest. Even if such a finding was to be made in relation to one or more of the instances in question, they relate to ancillary matters which do not go to the heart of the defendant's counterclaim, and as such would not be of great assistance to this Court in determining whether judgment on the plaintiff's admitted claim should be postponed or not.

As a final factor Mr Newdigate relied on considerations of delay in contending that were judgment on the admitted claim to be postponed until determination of the defendant's counterclaim the plaintiff would be unfairly kept out of its money. This consideration must enjoy closer attention. Plaintiff issued a summons against defendant only in early 2005, nearly three years after the last certificate of indebtedness on the part of defendant was issued. The evidence reveals that during the prior three year period defendant had made promises of payment and arguably strung the plaintiff along. It was however plaintiff's decision to only summons as a last resort and in these circumstances that period of any delay in plaintiff being kept out of its monies cannot be laid solely at the door of defendant.

Since February 2005 the matter has been litigated strenuously through this Court, there have been opposed applications for summary judgment and requiring defendant to furnish security for plaintiff's costs in relation to defendant's counterclaim. Earlier, default judgment was taken against defendant and rescinded. Finally the present application was launched, which, with the exchange of four affidavits and voluminous annexures, has also taken up not inconsiderable time. The matter has now been set down for trial in September 2008.

Notwithstanding all these legal skirmishes there is no serious suggestion from plaintiff that in the litigation itself defendant has been responsible for undue delay. It goes without saying that, subject to constraints relating to delaying tactics, vexatious and frivolous applications or

defences, any litigant is entitled to strenuously defend proceedings and interlocutory applications. There has been no question of the defendant seeking a postponement of the trial, or unduly prolonging interlocutory applications. Indeed, for what it is worth, defendant has through its director, stated under oath that it will play its full part in ensuring that the trial is heard timeously and expeditiously. It is not for this Court to go behind such assertions on a speculative basis, nor does it assist plaintiff to speculate that the trial may well be postponed should defendant not provide particulars which may be sought, or should it not make timeous discovery. Plaintiff has both time and the rules of court at its disposal to ensure that the trial commences in due course. The trial itself need not necessarily be a protracted one, since, as far as one can determine from this vantage point, the critical issue, the existence or not of the alleged joint venture agreement, is likely to be resolved after hearing the evidence of two or three witnesses.

It is so that pending the outcome of the trial plaintiff is kept out of its money. This is an unfortunate, but often necessary consequence of the general rule of practice, which is recognised and enshrined in the provisions of Rule 22(4). No case has been made out by plaintiff that it would suffer especial financial prejudice as a result of this consequence, for example that its financial viability will be threatened. As has been pointed out in similar cases, should judgment on the admitted claim not be postponed there could equally be a detrimental effect for defendant should its counterclaim eventually be upheld in a sum greater than the admitted claim in convention.

In broad terms the Court in *Van den Bergh and Partners Limited v Robinson* 1952(3) SALR 747 SR was confronted with a similar situation to that which this Court is faced in the present matter. There the Court found that there were suspicious features about the counterclaim, which was based on an agreement to which no reference could be found in contemporaneous correspondence. The counterclaim itself appeared to the Court to be inflated. Nonetheless Tredgold, CJ considered that he would not be justified in deciding at that stage that the counterclaim was without substance. He too found that were the plaintiff to act with expedition it would be possible to bring the issues to trial without undue delay.

In the present matter exercising the discretion which this Court enjoys, and taking into account all the relevant circumstances and having regard to the "tenets of justice, fairness and reasonableness" I am not persuaded that plaintiff is entitled to the relief sought in this application. In the result the APPLICATION FOR EARLY JUDGMENT IS REFUSED.

Mr Grobbelaar, who appeared on behalf of defendant, sought the costs of the application in the event that it was refused. In the circumstances of the present matter however I consider that plaintiff may well be done an injustice were I to order costs against it at this stage. Only time will tell whether defendant will succeed with its counterclaim, and if so, to what extent. Should that counterclaim evaporate at some time in the future under the pressure of further litigation, or when it comes under a judicial microscope, plaintiff could well consider himself hard done by had it nevertheless to bear the costs of this application.

There are sufficient question marks in my mind concerning the validity of defendant's counterclaim to justify deferring any order of costs for later determination. This too was the course followed by the Court in Van den Bergh's case. In the result the following order is made:

The PLAINTIFF'S APPLICATION IN TERMS OF RULE 24(4) IS REFUSED;

The COSTS OF THIS APPLICATION WILL STAND OVER FOR LATER DETERMINATION.

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