



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

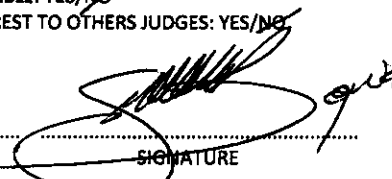
DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO ☒ YES

(2) OF INTEREST TO OTHERS JUDGES: YES/NO ☒ YES

(3) REVISED

28/3/16
DATE


SIGNATURE

CASE NO: 23859/2014

24/3/2016

In the matter between:

LOAD'EM SAND & STONE CC

Plaintiff

and

ROSHCOM (PTY) LTD

Defendant

JUDGMENT

Baqwa J

- [1] The plaintiff is a closed corporation trading under the name and style of Load'em Sand & Stone CC and the defendant is a company trading as Roshcon (Pty) Limited.

- [2] On 24 March 2014 the plaintiff issued summons claiming the sum of R1 002 457.54 against the defendant being an amount owed in respect of river sand sold and delivered by it to the defendant at the latter's special instance, during the period 18 October 2010 to 31 March 2011.
- [3] The plaintiff subsequently applied for summary judgment but this application was later withdrawn and the defendant was granted leave to defend.
- [4] The defendant filed a plea to the defendants' claim and at the same time filed a special plea in which it also relies on set-off as a defence to the plaintiff's claim.
- [5] In the present application the defendant seeks an order in terms of which the proceedings are stayed pending the final resolution by way of arbitration.

The Law

- [6] The special plea is based on the provisions of Section 6 of the Arbitration Act 42 of 1965 (*"The Arbitration Act"*) in which the following is stated:

"(1) If any party to an arbitration agreement commences any legal proceedings in any Court (including any inferior Court) against any other party to the agreement, in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that Court for a stay of such proceedings."

(2) *If on any such application the Court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the Court may make an order staying such proceedings subject to such terms and conditions as it may consider just."*

[7] There are two contracts in question in the present application and for ease of reference I propose to refer to them as the River Sand Contract and the G7 Material Contract. The River Sand Contract as already stated is the one that gives rise to the plaintiff's claim whereas the G7 contract is the one in regard to which the defendant claims to have overpaid the plaintiff which results in the set-off special plea.

[8] The defendant does not deny the contract and unequivocally admits the plaintiff's claim in its plea as follows:

"12. The defendant admits portions of this order not paid were as a result of offsetting same against payments made on disputed deliveries of material at Komati"

[9] It is trite law that arbitration is a mechanism for resolving disputes and that no purpose can be served by arbitration of a claim that is not disputed. This much is clear from the judgment of Didcott J (as he then was) in the case of **Parekh v Shah Jehan Cinemas (Pty) Ltd and Others** 1980 (1) SA 301 (D) at 304 E – G where he stated as follows at Marginal letter E *"A disputed claim is sent to arbitration so that the dispute which it involves may be determined."*

[10] The question that arises therefore is if the plaintiff's claim is not disputed, why should it be sent for arbitration.

- [11] This view is endorsed further by Plewman JA in **Telecall (Pty) Ltd v Logan** 2000 (2) SA 782 (SCA) at para 12 when he states:

"[12] I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word "dispute". If for example the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon."

- [12] In the special plea the defendant makes reference to the arbitration clause and then states *"A dispute concerning the liability of the defendant has arisen."*

It then contends that the plaintiff should submit the dispute to arbitration without setting out the terms of the dispute in the special plea. This does not accord with the law as set out in the case of **PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd** 2009 (4) SA 68 (SCA) at para 7 where Cloete JA stated as follows:

"In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set out the terms of the dispute."

- [13] It would therefore appear that the defendant merely alleges a dispute but omits to formulate same thus failing to make out a case for a referral as such referral would be *in vacuo*.

[14] The issue of set-off is pleaded as follows with reference to the G7 contract:

14.1 The Komati contract of June 2010 related to G7 material.

14.2 The order was for 77m² (should read m³) of G7 material.

14.3 The plaintiff allegedly delivered only 71m² (should read m³) of G7 material.

14.4 The defendant overpaid the plaintiff by an amount of R1 002 457.54 being the amount claimed from the defendant.

14.5 The plaintiff invoiced the defendant for the deliveries of G7 material at Komati.

14.6 The defendant disputed the quantities of G7 material delivered relative to the invoices submitted.

14.7 The plaintiff breached the agreement by delivering only 71m² of the quantities and not 77m² as ordered.

[15] The defendant states that its indebtedness to the plaintiff, which is admitted, is extinguished by setting off the unpaid River Sand invoices against the overpayment of the G7 material.

[16] The essentials for set off are set out in Amler's Precedents of Pleadings (eighth edition) P344 as follows:

16.1 The indebtedness of the plaintiff to the defendant

Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester Pty Ltd
2000 (4) SA 598 (C)

16.2 That the plaintiff's debt to the defendant is due and legally payable;

Mohamed v Nagdee [1952] 2 All SA 121 (A), 1952 (1) SA 410 (A)
Schnehage v Bezuidenhout [1977] 1 All SA 408 (O), 1977 (1) SA
362 (O)

16.3 That both debts are liquidated (a debt is liquidated) if:

16.3.1) it is based on a liquid document

16.3.2) it is admitted

16.3.3) its money value has been ascertained; or

16.3.4) it is capable of prompt ascertainment;

Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty)
Ltd [1962] 1 All SA 578 (T), 1962

16.3.5) The parties are indebted to each other in the same
capacity.

Road Accident Fund v Myhill NO 2013 (5) SA 426 SCA
Capricorn Beach Home Owners Association v HES
Potgieter t/a Nilands and Another [2013] ZASCA 116,
2014 (1) SA 46 (SCA)

[17] As is evident from the requirements of a set-off, it is necessary for the two parties to be mutually indebted to each other and that both debts are liquidated and fully due.

- [18] **In casu** the defendant has not set out a liquidated claim. Further, it is not clear from the defendant's narration of its set-off how the amount of the debt is calculated. No figures in support of such a calculation are provided. It is also not clear what the status of the short deliveries alleged is **inter partes**. In light of these omissions it cannot be said that the debt alleged by the defendant is a liquidated debt and whether it is due.
- [19] **In casu**, the debt will only come into existence once it is found (by a court or by agreement) as a fact that the quantities delivered are at variance with the amounts paid. The debt cannot be said to be in existence before this determination is made. The claim can therefore not be said to be liquidated or easily ascertainable.
- [20] The defendant's counsel sought to distinguish the application of the Shah Jehan Judgment by Didcott J (as he then was) (**supra**) from the present case by submitting that that case dealt with a counter claim involving a claim for damages which was therefore an illiquid claim. I have found that similarly in this application the G7 contract remains unresolved regarding short deliveries and to that extent therefore it remains illiquid and can therefore not be brought to bear on an admitted liquid claim simply by pulling in the arbitration clause to block the claim.
- [21] It is trite that in matters such as the present application a party stands or falls on the basis of the papers presented before the court and that a party must make out a case for the relief sought. The defendant has failed to define the dispute that it makes reference to and it seeks to set off a debt that is not liquidated. The arbitration clause with regard to which the defendant seeks to stay the present proceedings is simply not applicable.

[22] On a conspectus of all the facts and the submissions by counsel, I am not satisfied that the applicant has succeeded in making out a case for the relief sought.

[23] In the result, I make the following order:

The special plea is dismissed with costs.

A handwritten signature in black ink, appearing to read 'S. A. M. Baqwa', is written over a horizontal line.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:
Delivered on:

23 March 2016
24 March 2016

For the Plaintiff:
Instructed by:

Advocate E. P. van Rensburg
Van Zyl Le Roux Inc.

For the Defendant:
Instructed by:

Advocate M. Chauke
Bowman Gilfillan Inc.