

IN THE HIGH COURT OF SOUTH AFRICA
(TRANVAALSE PROVISIONAL DIVISION)

Case number: 30737/2004

Date: 24/08/2006

UNREPORTABLE

In the matter between:

BRIDGELINK (PTY) LTD

Plaintiff

and

ERASMUS BEYL INCORPORATED

Respondent

Attorneys & Conveyancers

JUDGEMENT

PRETORIUS J

The plaintiff is suing the defendant for provisional sentence in the amount of R570 000-00 together with interest and costs.

The claim arises from a contract dated 18 August 2003 issued by the defendant to pay to the plaintiff the sum of R570 000-00 on registration of the transfer of the property, Holding 123 North Riding, into the name of Zotos Projects (Pty) Ltd.

The matter is opposed. On 26 August 2005 the matter was postponed, after the applicant argued against the filing of a supplementary affidavit by the defendant.

The order on that date reads as follows:

- “1. That the matter is postponed to 29 November 2005, to the opposed motion roll;*
- 2. That the defendant is to pay the cost occasioned by the postponement.”*

The supplementary affidavit by defendant was filed on 23 August 2005.

Thereafter the defendant instructed a different attorney, namely Mr Mike Leinberger, of Savage, Jooste and Adams. Due to the complexity of the matter the attorney for the defendant requested a further postponement on 29 November 2005 to enable him to read the papers and evaluate the defendant's position. The matter was postponed *sine die* by agreement.

The plaintiff was of the opinion that this court should not read the supplementary affidavit before deciding whether it should be allowed.

I am of the opinion that the contents of the supplementary affidavit must be read when a court has to decide whether it has the discretion to allow the supplementary affidavit, as the contents of the supplementary affidavit will have a bearing on the court's decision.

On 26 July 2006 the plaintiff filed an affidavit opposing the defendants request to file a supplementary affidavit, contending that the supplementary affidavit does not disclose new facts and therefore there exists no reason for such a supplementary affidavit to be allowed. It is clear from the transcript of the proceedings before Poswa J that no further application for condonation would be necessary by the defendant to file the supplementary affidavit.

The court has a discretion to allow further affidavits in provisional sentence proceedings. Rule 8(5) is clear, the defendant may file an opposing affidavit, no further affidavits may be filed.

The defendant may file further affidavits only with the leave of the court in terms of rule 27(3). The court exercises a discretion when deciding whether further affidavits may be filed. This discretion will only be exercised in appropriate circumstances and on good cause shown. These circumstances will have to be special circumstances or exceptional circumstances and will depend on the facts of each case. The court will also decide on the fairness of allowing further affidavits in such an application.

In **Hirschowitz v van der Merwe and Another 1981(1) 806** on 809 B-D Preiss J, when referring to **Dickinson v South African General Electric Co (Pty) Ltd 1973(2) SA 620 (A)** said:

“It seems to me that this statement by the learned Judge, which was confirmed by the four other Judges on appeal, seems to suggest a somewhat wider discretion than is emphasized in Western Bank v Packery (supra). As far as I can ascertain from the judgment, decision in Dickinson’s case was not brought to the knowledge of the learned Judge.”

and on p 810

“I stress that this matter amounts virtually to the high-water mark of the exercise of a Court’s discretion in favour of a defendant.”

This court now has to decide whether exceptional circumstances that warrant the allowing of the supplementary affidavit exist in this matter.

The defendant alleges in the supplementary affidavit that the contract that the plaintiff relies on dated 14 October 2003 had been cancelled and that a second agreement was concluded on 12 March 2004. The undertaking on which plaintiff relies is dated 18 August 2003; the so-called first agreement.. There is thus a potential defence, which if it is proven to be true, Potgieter for the defendant

contents will be a total defence and the end to the application for provisional sentence.

The defendant has set out the reasons why he did not set out his defence as it is set out in the supplementary affidavit. He sets out his defence regarding the second agreement which replaced the first agreement. The court is of the opinion that the plaintiff did not convince the court that it will suffer prejudice should the supplementary affidavit be allowed.

In this instance, where the defendant sets out the reasons for the need of filing a further affidavit and his defence is set out in the supplementary affidavit which may dispose of the application for provisional sentence, I am of the opinion that there are special circumstances which entitles the court to use its discretion and allow the supplementary affidavit. This will enable the court hearing the application for provisional sentence to make a finding on all the relevant facts and deciding which agreement pertains to the matter.

Counsel for the plaintiff, Mr Klopper argued that the defendant is seeking an indulgence and should therefore pay the costs of the application for allowing the supplementary affidavit. Mr Potgieter, for the defendant is of the opinion that the contents of the supplementary affidavit is of such a nature that the plaintiff will not be able to proceed with the application for provisional sentence and therefore costs should be reserved.

In the circumstances where plaintiff may decide not to file an answering affidavit to defendant's supplementary affidavit and provisional sentence may not be granted, costs will be reserved.

I make the following order:

1. The defendant is allowed to file the supplementary affidavit;
2. Costs are reserved

Judge Pretorius

Case number	:	30737/2004
Heard on	:	11 August 2006
For the Applicant / Plaintiff	:	Adv H Klopper
Instructed by	:	Haupt & Earle
For the Respondent / Defendant	:	Adv TALL Potgieter
Instructed by	:	Savage Jooste & Adams
Date of Judgment	:	24 August 2006