

SOUTH AFRICA / JUDGMENT

Alugraph (Pty) Ltd v Goqwana (2419/2017) [2017] ZAECMHC 25 (18 July 2017) [2017] ZAECMHC 25

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

2419/2017

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION, MTHATHA)

CASE

NO: 2419/2017

In

the matter between:

ALUGRAPH
(PTY)
LTD
Applicant
and
BEVAN
GOQWANA
Respondent

JUDGMENT

MBENENGE ADJP:

- [1] The relief being sought in these proceedings is in the form of a mandament van spolie whereby the respondent has been called upon to show cause, if any, why an order in the following terms should not be made final:

“2.1 That the respondent is forthwith directed to restore and return possession of the premises to the applicant.

2.2 That the respondent be and is hereby interdicted and restrained from his continued from his continued occupation of the premises known as Block [...], No. [...] N. M. D., Mthatha (“the premises”) be and is hereby declared unlawful.

2.3 That the respondent be and is hereby forthwith interdicted and restrained from his continued lockout of the premises of the applicant’s directors, shareholders, patients and employees.

2.4 That the respondent be and is hereby forthwith interdicted and restrained from his continued interference with the operations and conduct of the applicant’s business from the premises.

2.5 That the respondent be and is hereby forthwith interdicted and restrained from coming within a distance of 50 (fifty metres) of the premises (Block [...], No. [...] N. M. D., Mthatha).

2.6 That the sheriff of this Court, duly assisted by members of the South African Police Services from Madeira and Mthatha Central Police Stations, shall be responsible for the immediate execution of this order.

2.7 The respondent is directed to pay costs of the application.”

- [2] When the application was moved on 1 June 2017 the applicant obtained the rule nisi it sought, the terms whereof are set out in paragraph 1 above. Paragraphs 2.1 to 2.7 of the rule nisi were made to operate as interim relief.

- [3] In the course of time after the respondent had entered the fray of the contest, it was, inter alia, agreed between the parties that the applicant would stay the execution of the interim order granted in its favour and that the parties shall co-exist in the subject premises as they did prior to 31 May 2017 until the finalisation of these proceedings.

- [4] Regard being had to the nature of the proceedings, all that the applicant had to allege and prove is that it was in peaceful and undisturbed possession of the property [1] whilst, on the part of the respondent, there are no defences available that do not amount to a denial of the applicant’s

allegations.[2]

- [5] In pursuit of the application it is alleged, by the deponent to the affidavit filed in support of the relief sought (Ms Zanele Siko), that as director, employee and shareholder of the applicant, she has been authorised by other shareholders and directors of the applicant to initiate and prosecute the instant proceedings, in support whereof she relies on confirmatory affidavits deposed to by other alleged directors, employees and shareholders of the applicant[3] and a resolution signed by herself and the aforementioned witnesses (referred to in the resolution as “SHAREHOLDERS & DIRECTORS PRESENT”).
- [6] The applicant is allegedly rendering services of kidney dialysis to patients from Mthatha and other surrounding arrears. According to Ms Siko the applicant was founded by herself, Nomvuselelo Mntonga, Liziwe Mkutyukelwa and Namhla Nolitha Mjindi; the respondent was approached and joined as a director during or about July 2016; the applicant concluded a lease agreement with Khumalo 1229 Projects (Pty) (Ltd) for the occupation of Block [...], No. [...] N. M. D., Mthatha, whence the applicant operates.
- [7] The current employee compliment of the applicant, after Nolitha Mjindi resigned, is said to comprise 6 employees.[4]
- [8] The complaint central to the application is that the respondent installed a key block to the main door of the premises, thus locking out Ms Siko and other nursing staff from being at the clinic and performing their duties. When concern for this action was raised the respondent removed the key block paving way for Ms Siko to perform her nursing duties on that particular day, but at the same time with the respondent mentioning that Ms Siko was being seen there for the last time. When formal steps were taken to challenge the stance of the respondent, he made it known that he had taken over and “should never see anyone of ... other owners and employees of the applicant.” In effect, the respondent, according to Ms Siko, took over possession of the premises, locking out “all the applicant’s directors, shareholders, patients and employees,” hence restoration of the premises is being sought.
- [9] The respondent’s version is a far-cry from that presented in the affidavit deposed to by Ms Siko. According to the respondent, the applicant is not involved in running the renal clinic; he joined the applicant when he was still a member of parliament and not practicing as a medical doctor; at that point no financial institution was prepared to grant assistance to the applicant; the respondent applied for finance. The respondent also claims to be providing the finances and to be processing the medical aid claims and payments, with all the finances being conducted through his private bank account; he, and not the applicant, obtained the necessary licence to run the renal clinic; he also entered into contracts in relation to the necessary machines or equipment; he pays the applicant’s member’s salaries.
- [10] Whilst there is convergence of versions among the parties in relation to the formation and shareholding of the applicant, there is a divergence of views regarding what precisely happened after the applicant has been formed. At another level, and in so far as the applicant must establish possession of the property of which it was allegedly unlawfully dispossessed, reliance has been placed on an undated document, there being no allegation

pointing to payment of rental by the applicant. For his part, the respondent relies on a lease agreement dated 20 October 2016 making no reference whatsoever to the applicant.

- [11] What has been said thus far points to a massive dispute of fact, irresoluble on the papers, especially in relation to whether the business of the renal clinic can in any way be ascribed to the applicant.
- [12] It was contended on behalf of the respondent when the matter was being heard that the applicant had not even established locus standi, in as much as, inter alia, nothing has been said about the requirements of a quorum or majority of the board of directors or how the alleged meeting was called and whether the respondent had been given notice of the meeting. Section 73 of the Companies Act 71 of 2008 is of significance in this regard.[5] Whilst the contention raised by the respondent seems attractive, an invocation of rule 7 of the Uniform Rules of Court could have been a more effective remedy.[6]
- [13] The respondent also denies that prior to the launch of this application he locked Ms Siko and others out of the subject premises.

Upon being concerned that there was foul play – too much stock of medication ordered but not tallying with the number of patients at the clinic and depletion of stock – the respondent called for a meeting, which Ms Siko and her cohorts did not attend. The only time he put a key block, but never changed locks, was when he sought to draw their attention, requiring them to attend a meeting, which act was short – lived and lasted for about 10 minutes. In this way, the respondent denies that there was even any dispossession.

- [14] As pointed out by Mr Paterson, Counsel for the respondent, there appears to be a deep rooted dispute as to the relationship between the parties which cannot be resolved on paper. Whether or not the dispute as it relates to the relief being sought ought to have been foreseen is another matter, which I find myself unable to resolve on the papers.
- [15] For all these reasons, the matter falls to be referred for the hearing of oral evidence on the very issues that will help determine

the precise relationship between the parties. I am indebted to Mr Paterson for the astute way in which he has identified the troubling relevant issues, including even the question of locus standi.

- [16] It is accordingly ordered that -

- (a) Oral evidence shall be heard to determine-
- (i) whether the business of the renal clinic subject to this application can in any way be ascribed to the applicant;
- (ii) whether the lessee to the premises on which the business is run is the applicant or the respondent;
- (iii) whether the nurses of the clinic are employed by the applicant or the respondent;

- (iv) whether the contracts relating to the machinery used in the clinic are in any way connected to the applicant;
- (v) whether any of the claims to medical aid and relative payments have anything to do with the applicant; and
- (vi) in the event of the business being found to be the applicant's, how all the finances are accounted for by the applicant.
- (b) The persons who have already filed affidavits are entitled to give testimony at the hearing, provided that any party shall be entitled to call as witnesses any other person (or person)s who have not hitherto delivered affidavits, upon delivering an affidavit of the proposed witness or witnesses embodying a summary of the proposed evidence at least 21 days before the hearing.
- (c) The provisions of rules 35, 36 and 37 of the Uniform Rules of Court shall henceforth apply to these proceedings.
- (d) The rule nisi granted by this Court on 01 June 2017 is extended to 12 December 2017.
- (e) The costs of this application shall stand over for determination by the court hearing the oral evidence.

S M MBENENGE

ACTING DEPUTY JUDGE PRESIDENT

HIGH COURT, MTHATHA

Counsel for the applicant: A M Bodlani

Instructed by:

Ximbi Ncolo

MTHATHA

Counsel for the respondent: T J M Paterson SC

Instructed by:

Dayimani Sakhela Inc

Heard on:

29 June 2017

Delivered on:

18 July 2017

- [1] Kgosana v Otto 1991
- (2) SA 113 (W)
- [2] Willowvale Estates CC v Bryanmore Estates Ltd 1990
- (3) SA 954 (W); Engling v Bosielo 1994
- (2) SA 388 (B)
- [3] Mesdames Nomvuselelo Mntonga and Liziwe Mkutyukelwa
- [4] Mesdames Siko, Mntonga, and Mkutyukelwa, as nurses; Lwandle Siko, as an administrative clerk; Asanda Mtonga, as a healthcare worker and Bongiwe Hanise, as a cleaner.
- [5] For instance, section 73 (4) provides: “(4) The board of a company may determine the form for giving notice of its meetings, but – (a)...; and (b) no meeting of a board may be convened without notice to all of the directors...”
- [5] For instance, section 73 (4) provides:
- “(4) The board of a company may determine the form for giving notice of its meetings, but –*
- (a)...; and
- (b) no meeting of a board may be convened without notice to all of the directors...”
- [6] Ganes & Another v Telecom Namibia Ltd 2004
- (3) SA 615 (SCA)
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Prepared on 23 October 2026 · Esheria