

SOUTH AFRICA / JUDGMENT

Balobi Trading (Pty) Ltd and Others v Siyaphambili Fishing Primary Co-Op Ltd and Others (2480/2022) [2022] ZAECKMKHC 100 (2 November 2022) [2022] ZAECKMKHC 100

COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe

CASE / FILE NUMBER

2480/2022

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case

No: 2480/2022

In

the matter between:

BALOB
TRADING (PTY)
LTD
First Applicant
Reg.
Nr. 2004/023388/07
BALOB
PROCESSORS (PTY)
LTD
Second Applicant
Reg.
Nr. 2000/006993/07
BALOB
FISHING ENTERPRISES (PTY)
LTD
Third Applicant
Reg.
Nr. 1993/003234/07
And
SIYAPHAMBILI
FISHING PRIMARY CO-OP LTD

First Respondent
Reg.
Nr. 2018/009765/07
THE
DDG OF FORESTRY, FISHERIES & AND THE
ENVIRONMENT
Second Respondent
LE
TAP
CC
Third Respondent
Reg.
Nr. 1992/015962/23
BLUE
SEAS PRODUCTS (PTY) LTD
Fourth Respondent
Reg.
Nr. 2005/005434/07

JUDGMENT

BESHE J:

[1] Applicants approached this court for an order in the following terms:

“PART A: INTERIM INTERDICT

1. Entertaining this Application as a matter of urgency and dispensing with the necessity for Applicant to adhere strictly to the rules of this Honourable Court in regard to form, notice, service, time periods and condoning Applicant’s failure to adhere to such rules of the above Honourable Court.
2. That pending the final determination of the relief sought in Part B hereof:
 - 2.1 Second Respondent be interdicted and restrained from issuing any of the forty-five squid catching permits applied for, or to be applied for, by First Respondent in terms of section 13 of the Marine Living Resources Act 18 of 1998 (as amended) (“the permits”) for the 2022/23 fishing season to the vessels of any party or otherwise; and
 - 2.2 First, Third and Fourth Respondents be interdicted and restrained from fishing or otherwise dealing with any of the aforesaid permits which may have already been issued to First Respondent by Second Respondent.
3. That the costs of the application for interim relief be determined in the proceedings brought in Part B of this Notice of Motion.
4. That Applicant be granted leave to supplement its founding affidavit if necessary for purposes of determination of Part B.

5. Further and/or alternative relief.”

For completeness, in Part B the applicants will essentially be seeking that first and second respondents allocate the squid catching permits issued to the first respondent for the 2022 / 2023 fishing season to vessels nominated by the applicants.

[2] First to third applicants are companies that are duly registered in accordance with the laws of this country. First applicant conducts business as buyer and marketers of fish world-wide. Second applicant conducts business as a fish products manufacturing facility. Third applicant manages several fishing vessels that are employed in the catching of various fish species.

[3] First respondent is also a company that is registered in accordance with the laws of the Republic of South Africa. It appears to be common cause or at least not in dispute that first respondent is a co-operative consisting of small scale fishing communities from historically disadvantaged communities. The granting of fishing rights to small scale fishing

communities is a culmination of department’s Small Scale Sector Policy whose objective as I understand it, is to recognise the rights of indigenous fishers and coastal communities, safeguard the said rights and provide security for same, which has taken many years to formulate and adopt.

[4] Second respondent is the Deputy Director General: Fisheries Management of the fisheries branch of Department of Forestry, Fisheries and the Environment (DFFE). It is common cause that fishing permits relevant to this application are issued from second respondent’s office.

[5] Third respondent is a close corporation whose business is that of a general fishing enterprise.

[6] Fourth respondent is also a company duly registered in accordance with the laws of this country. It also conducts business as a general fishing enterprise.

[7] The nature of the relief sought is succinctly outlined by the applicants in the founding affidavit deposed to by Mr Rowe as follows:

“10. First respondent has been granted certain long term fishing rights by the Department in terms of authority delegated by the Minister of Environment, Forestry and Fisheries. Applicants have concluded binding agreements with first respondent relating thereto. Pursuant thereto, the Department issued forty-five permits in respect of the 2021/2022 squid fishing season to first respondent. In terms of these permits, these fishing permits were allocated to applicants’ fishing vessels.

11. First respondent, in breach of its contractual obligations, is in the process of, or has just concluded agreements with third and fourth respondents relating to those same fishing rights.

12. The Department is due to allocate forty-five permits in respect of the 2022/2023 squid fishing season to first respondent. Applicant

seeks an interdict ordering first respondent and the Department to allocate these permits to applicants' fishing vessels. In the alternative, applicants seek an interdict preventing the respondents from dealing with the said permits for the 2022/2023 squid fishing season, pending the outcome of urgent arbitration proceedings to be launched by applicants. The season has already commenced on 1 July 2022."

- [8] The deponent to the founding affidavit describes himself as the Chief Executive Officer of first applicant and a director of first and second applicant companies. I propose to deal only with salient aspects of the founding affidavit in so far as they relate to the relief sought. The following emerges from the founding affidavit:

The Department of Forestry, Fisheries and the Environment (DFFE) has been in the process of implementing the Small-Scale Sector Policy which makes provision for the granting of community based subsistence fishing rights since about 2012.

- [9] It became obvious to the commercial fishing sector that viability of all vessels in the sector would be affected by this policy. This in view of the fact that each vessel in the would have a reduced allocation of squid permits. The group, I take it of commercial operators, though its trading arm in the form of first applicant started negotiating with Small-Scale Co-operatives who had applied for the allocation of small scale fishing rights.

- [10] An agreement was concluded with first respondent on 14 January 2020 in terms of the applicants were granted the "unequivocal right of first refusal to catch, process and market any fish caught from their fishing rights". In this regard, court is referred to Annexure MRFA1. Similar agreements were concluded with other various small-scale co-operatives.

- [11] On 24 June 2020 first applicant concluded a Joint Venture (JV) agreement with first respondent. The applicant(s)

undertook to catch, process and market the fish caught pursuant to utilising the rights of the first respondent. During 2021 first

respondent having been allocated 45 permits by the department, such permits were duly allocated to vessels that were nominated by the applicants. It is apposite to have regard to the two agreements marked MRFA 1 and 2 respectively. The former is entitled Agreement to Co-operate with respect to harvesting, processing and marketing. It is between first respondent and the applicants. The relevant part thereof reads thus:

"Now therefore the parties agree as follows

A. The Co-op understands and agrees that DEFF has awarded them fishing rights to be fished by their own members and mainly for their own use and for food security.

B. In addition the Co-op may have been awarded squid right that could be fished commercially and therefore the Co-op agrees to exclusively engage the Harvester to utilise such fishing rights on behalf of the Co-op.

C. The parties to this agreement understand and agree that DEFF will clarify how such squid rights may be utilised and that when such details are confirmed the parties will enter into a more specific agreement detailing the terms and conditions whereby the Co-op will allow the Harvester to catch and the Processor to process and the Marketer to market any fish caught.

D. Notwithstanding any of the foregoing the Co-op hereby agrees to give the Harvester and the Processor and the Marketer the unequivocal right of first refusal to catch, process and market any fish caught from their fishing rights”

[12] The relevant parts of MRFA 2 on the other hand reads thus:

The heading being: Small Scale Fishing Rights JOINT VENTURE Agreement between first respondent and first applicant being the co-op and facilitator respectively.

“1.

2.

3. DEFF must still clarify how these squids and other rights may be utilised; and

4.

5.

6. The Facilitator will be responsible for arranging the catching, processing and buying of any fish while utilizing the fishing rights awarded to the Co-op and the Facilitator confirms to accommodate a 25 man crew compliment for the Co-op, or such quantum of crew as may be granted to the Co-op by DEFF; and

7.

8.

9.

10.

11.

12.”

Now therefore the parties agree as follows:

“A. The Co-op understands and agrees that DEFF has awarded them fishing rights to be fished by their own members and mainly for their own use and for food security.

B. In addition the Co-op has been awarded squid fishing right that can be fished commercially and therefore the Co-op agrees to exclusively engage the Facilitator or such entity that may be appointed as nominee by the Facilitator from time to time, to catch the squid and to utilise such fishing rights on behalf of the Co-op.

C.

D.

E.

F. In the second or third year, the parties may agree to a different arrangement for e.g. a monthly payment or percentage of beach price value for fish landed or by also sharing in the fishing operation profits by acquiring a shareholding in a vessel.

G. Therefore the opportunity will also be available to the Co-op to further invest and participate in the fishing industry by purchasing

a share in a squid vessel or squid vessel owning company, which the Facilitator will manage on behalf of the Co-op. This will also

provide the Co-op an opportunity to gain experience and exposure to commercial fishing and contribute to the upliftment of the community.

H. In regard to rights issued to the Co-op, other than squid rights, the parties agree that the Facilitator will assist with the utilization and marketing of these other rights.

I. The parties hereby agree to sign all such further documentation or agreements that may be necessary from time to time to give effect to the terms of the agreement.

J. The Co-op undertake to appoint a representative committee of three persons with which will have a mandate to act on behalf of the Co-op in all matters and in all discussion with the Facilitator on business related matters.

K. The parties agree that the effective date of this agreement will be from the date of signature of this Agreement by the last of the signatories hereto and will be valid for the full duration that the Co-op holds squid and other fishing rights.”

The agreement also provides for arbitration. Clause 16.1 states that this agreement constitutes the sole record of the agreement between the parties with regard to the subject matter hereof.

[13] The permits that had been allocated to vessels were due to be re-allocated for the following fishing season being 2022 / 2023. First respondent was required, in terms of the Joint Venture agreement, to approach the department to facilitate the placement of permits. The parties also engaged in discussions regarding remuneration terms for the next season as well as other

terms. It would seem that the first respondent was not happy with what the applicants offered in this regard. It further would appear that the facilitation of placement of permits by the first respondent hinged on the outcome of this negotiations. This led the applicants to make first respondent a compromise, which according to the Mr Rowe, was accepted by first respondent. Representatives of the first respondent never got round to signing the document signifying its acceptance of the terms agreed upon. According to Mr Rowe, in contravention of clear rights applicants have in terms of the Joint Venture agreement, it was intimated on behalf of first respondent that it intended giving 15 out of the 45 permits allocated to them to a third party. It later came to light that first

respondent intended to allocate 15 permits each to third and fourth respondents respectively.

[14] Applicants assert that they have a clear right alternatively prima facie right to first respondent's permits in terms of the Joint Venture agreement. As far as injury committed or reasonably apprehended, it is asserted that it is evident that first respondent intends concluding agreements with third and fourth respondents and thus unlawfully repudiate the Joint Venture agreement. Further that applicants have no satisfactory alternative remedy but to approach this court and thereafter refer the matter to arbitration. That accepting the repudiation will cause irreparable harm not only to the applicants but to employees who would be left without an income. A damages claim is not viable because first respondent is not possessed of asserts which would be sufficient to meet a substantial claim for damages. It is furthermore asserted that as far as the balance of convenience is concerned, the applicant has strong prospects of success in establishing the validity of the Joint Venture agreement.

[15] Based on the following reasons, it is alleged that the matter is extremely urgent:

First, third and fourth respondents have shown no regard for applicants' rights in terms of Joint Venture agreement. First respondent has indicated that it will approach the department for fishing permits to be allocated to third and fourth respondents' vessels. This is due to occur imminently. Unless the interdict sought is granted, applicants' arbitration proceedings will be rendered nugatory.

[16] The application is opposed by all the respondents. All four respondents impugn the urgency of the matter and therefore the need to haul the parties to court on two days' notice. And without an explanation of the delay in launching the application. The respondents assert that if there is any urgency regarding the matter, it is self-created by the applicants. I have already alluded to applicants' version of what in their view makes the matter extremely urgent [my emphasis]. This is contained in the last paragraph of 74 of the founding affidavit. Needless to say, no explanation is provided why it took over a month to launch the application. The respondents point out that as far back as June 2022, the applicants were threatening to launch an urgent application to force the respondents in particular the first respondent to perform in terms of the agreement purportedly concluded with the first respondent. And had therefore been aware in June already that first respondent was not

willing to come to the party and perform according to the purported agreement. Applicants were also aware that there was

a sense of uncertainty and misunderstanding among the co-ops pertaining to the terms, inter alia, of the Joint Venture agreement with first applicant.

[17] On the 11 July 2022 applicants once again threatened the first respondent with urgent application. Once again in a letter addressed to the third respondent on 20 July 2022 the application for relief on an urgent basis is mentioned. The application for urgent relief was finally issued on 3 August 2022. I am inclined to agree with the respondents that urgency is self-created by the applicants.

[18] Lack of urgency is not the only point / objection raised by the respondents. They also impugn the locus standi of the applicants. This on the basis that the first agreement relied upon albeit signed by all three of the applicants or their

representatives it is not a binding contract (MRFA 1). The Joint Venture Agreement (MRFA 2) is only signed by first applicant but the enforceability thereof is assailed. Whilst this objection sounds meritorious, it can be appropriately determined by a consideration of the merits, namely whether there exists a binding agreement concluded between any of the applicants and the first respondent. It is also on the same basis that the respondents impugn Mr Rowe's authority by the respective juristic person to bring these proceedings. Together with their reply, the applicants have now filed

a resolution authorising Mr Rowe to bring this application.

Merits

[19] As can be gleaned from the points in limine taken by the respondents, the enforceability of the purported agreements is assailed. The respondents assert that the agreements

are invalid by reason of lack of compliance with statutory regulations. As regards the first agreement, first respondent asserts

that it is only an agreement to agree. That much is clearly spelt in in Clause C of MRFA 1. As far as the Joint Venture Agreement, first respondent contends that there was no meeting of minds. They were pressured to sign the agreement even though they had asked that they be given an opportunity to run it past their lawyers. And that in any event, it is unlawful as it seeks to bind the first respondent to the applicants for life. Something that would be contrary to the

Marine Living Resources Act (MLRA), the Regulations, the Small Scale Fishing Policy and the conditions under which the fishing rights were awarded. And is a ploy by the applicants to capture the small scale fishery co-operatives. That MRFA 1 has been superseded because the signing thereof on 14 January 2020 predates the award of permits to the first respondent on 16 November 2021.

[20] Second respondent also points out that applicants have not shown the existence of exceptional circumstances which warrant the restraining of second respondent's power to exercise its statutory powers. Second respondent also re-iterates

that the purported fifteen-year Joint Venture Agreement concerned is in conflict with the department's objectives as per its policies, the MLRA. The letter advising first respondent of the allocation of the rights concerned states in no uncertain terms that such rights may not be transferred or assigned to any entity. Further that there is no relationship between the applicants and the second respondent and applicants have no right to protect vis-à-vis second respondent by interdicting the second respondent from issuing out permits to the first respondent. Especially in light of

the fact that second respondent was not privy to the existence of the Joint Venture Agreement in question prior to the issuance of the fishing rights to the first respondent. Third respondent also disavows any agreement having been entered into between it and first respondent.

[21] In adding its voice to the opposition, in addition to the defences raised by first to third respondents, fourth respondent also points out that the Joint Venture Agreement is inchoate as it does not contain the actual price to be paid by the applicants and only amounts to an agreement to agree. Further that, in any event in terms of Section 19 (2) of the Act "No small scale fishing right or permit shall be transferable except with the approval of and subject to the condition determined by the Minister". Fourth respondent goes so far as asserting that the agreements in question are contra bonos mores. All the respondents make the point essentially that what the applicants envisage is to front with the co-ops and reduce them to mere paper rights holders. Especially that applicants contend they have signed agreements with other co-ops besides the first respondent. And that this smacks of bullying on the part of the applicants.

[22] In reply, applicants deny that the Joint Venture is an alienation of first respondent's fishing rights. But is aimed at building / creating some form of partnership with the first respondent.

[23] All the respondents assert that the applicants have not met the four requirements for the granting of an interim interdict.

[24] The application stumbles on the very first hurdle to be met in order for an interim interdict to be granted. Namely a prima facie right. The agreement/s relied upon by the applicant appear to be unenforceable on a number of grounds as demonstrated by the respondents. The respondents have in my view cast serious doubt on the existence of a prima facie right based on the two agreements relied upon by the applicants. In fact, there is only such agreement MFRA 2, it being the sole memorial between the parties. Irreparable harm, a well-grounded apprehension of irreparable harm should the interim relief not be granted: Applicants have alluded to financial loss they are likely to suffer should the first respondent not comply with the Joint Venture Agreement. The respondents have demonstrated aptly that as holders of long term fishing rights, they stand to suffer irreparable harm as their

rights and the concomitant benefits that they are designed to reap will be rendered nugatory and they will depend on the mercies of the powerful actors in the fishing space such as the applicants. Their fishing rights may even be revoked by the department by reason of breach of the conditions attached to the awarding of the fishing rights.

- [25] From what I have said above, it is clear that the prospects of success on the part of the applicants in these circumstances are very slim. For the same reasons stated, in respect of the requirement for apprehension of irreparable harm, I am not persuaded that the balance of convenience favours the applicants. In my view, the respondents, in particular the first respondent, has shown that the balance of convenience favours it.
- [26] As far as the availability of a suitable or affective alternative remedy, applicants allege that a claim for damages will not suit them and give reasons for asserting that. But, the fear that the respondents may not be able to meet their claim seems to be directed at first respondent and not third and fourth respondents who, it is suggested interfere with the applicants' contractual rights with first respondent. This remedy is therefore still available to them.
- [27] Regarding the notice of motion, Part B which is also styled – Final alternatively pendete lite relief, envisages the hearing of the application on an urgent basis. Also envisages in the alternative, referral of the dispute to arbitration whilst the second respondent is interdicted from issuing all 45 squid catching permits to first respondent. This is suggestive of an alternative remedy that is available to them. But at the same time also envisages the denial to first respondent of its long term right to fishing permits for even a longer period. Another reason that shows that the balance of convenience favours first respondent.
- [28] For these reasons, I am not persuaded that the applicants have made out a case for the relief they seek.
- [29] Accordingly, the application is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants : Adv: G Brown

Instructed by

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