

SOUTH AFRICA / JUDGMENT

Biggs and Another v Cousins and Others (3323/2013) [2014] ZAECPEHC 104 (15 July 2014) [2014] ZAECPEHC 104

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

3323/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

NOT

REPORTABLE

Case

no: 3323/2013

Date

heard: 6.3.2014

Date

delivered: 15.7.2014

In the matter between:

ANTHONY

LAURISTON

BIGGS First

Applicant

RIDGE

FARM

CC Second

Applicant

vs

ALLAN

COUSINS First

Respondent

GERALD

WHITEHEAD Second

Respondent
GYSBERT
JACOBUS VAN DEVENTER Third
Respondent
ADDO
AFRIQUE SAFARI LODGE CC Fourth
Respondent
ADDO
AFRIQUE ESTATE (PTY)
LTD Fifth
Respondent

JUDGMENT

TSHIKI J:

A)

INTRODUCTION

[1] The applicants herein had earlier approached this Court for an order, inter alia, setting aside the summons issued by the third and fourth respondents herein against them. The basis for their application is, inter alia, that the summons constitutes an irregular step (under Rule 30) as an unsustainable abuse of civil process of the High Court. Also granting a declaratory order that the determination of the substitute Directors (third and fourth respondents) made on 22nd April 2013, is lawful, final and binding on first to tenth respondents and that the loan accounts referred to therein are by virtue of the land allocation therein equalised. That application was opposed by the respondents (third and fourth respondents herein) on various grounds.

[2] That application was argued before me on the 6th March 2014 after which I reserved my judgment. Whilst the judgment was still reserved and on the 10th April 2014 the applicants herein filed the present application seeking permission to file further affidavits relating to the loan

account determination of the first and second respondents. The second application was couched in the following terms:

[2.1] directing the first and second applicants to file such supplementary affidavits within ten (10) days of the granting of this order;

[2.2] granting leave to the first and second applicants (and any of the respondents who choose to do so) to submit further written and oral arguments to me as the Judge they believe is already seized with the matter;

[2.3] ordering that costs of this application be costs in the cause;

[2.4] further and/or alternative relief.

[3] It should be noted and for obvious reasons, that this application to file further affidavits should be decided before the judgment that was reserved on the 6th March 2014.

[4] Should this application be successful I will have to first grant the applicants herein leave to amend their papers in the main action which is sought to be set aside by the respondents in the main application before considering the main application.

[5] Respondents (applicants in the main application) Van Deventer and Addo Afrique Safari Lodge, have opposed this application on the grounds, inter alia, that:

[5.1] In terms of the contents of annexure “GVD3” on page 74 of the papers herein, the parties had agreed on the correctness of the Loan Accounts Balances as at 13th December 2012.

[5.2] The Court order endorsing the parties’ agreement relative to and inclusive of the Settlement Agreement was agreed to by the parties. The order of the Court referred to herein was marked as “GVD1”.

[5.3] In terms of claim 2 of annexure “A” to annexure “GVD1”, the Substitute Directors had to determine the respective loan accounts of the parties which would include the loan accounts of the first and second applicants as well as the loan accounts of the third and fourth respondents. Their decision would be final and binding on the parties.

[5.4] In terms of the contents of annexure “GVD3” the applicants and third and fourth respondents, in writing, accepted the loan accounts determinations as aforesaid.

[5.5] On the 22nd April 2013, first and second respondents in terms of clause 8 of annexure “A” to annexure “GVD1” published their determination to equalise the loan accounts of the first and second applicants and those of third and fourth respondents.

[5.6] According to respondents herein the information disclosed by applicants is irrelevant and immaterial to the real issue to be determined in the main application to set aside the summons. In other words the present application, even if granted, does not further the applicants’ cause in the main application to set aside the summons as an irregular proceeding.

[6] Applicants herein have replied to the respondents’ answer. I have noted that the replying affidavit consists of 17 pages against the founding affidavit consisting of seven pages, whilst the respondents’ answering affidavit consists of 12 pages.

[7] It is trite practise that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit. This is so, because the applicant will generally not be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit. This is so, especially in interlocutory applications of this nature which is specifically dealing with amendment and or with the filing of additional affidavits. In this case the applicants’ replying affidavit consists of a repetition of facts already dealt with in the founding affidavit and for reasons stated in paragraph 9 supra I need not deal with the

specific therein. This practise should be discouraged at all costs because it amounts to the abuse of the Court process. In *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 4-7 (SCA) at 439G-H Schultz JA in a similar issue remarked as follows:

“There is one other matter that I am compelled to mention - replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.”

- [8] A reply in the form of the length and contents of the applicants’ reply herein is an abuse of the Court process and should be discouraged by an order striking out the irrelevant portions thereof. In some cases it would be proper to have the whole affidavit struck out as a whole. (See *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 307G-H) See also *Wingaardt v Grobler* 2010 (6) SA 148 (ECG).
- [9] In my view, had the outcome of this case been against the respondents I would have made an order of costs against the applicants relative to the unnecessary averments in their replying affidavit.

B) MAIN ISSUE

- [10] The Courts have always said that an application for filing further affidavits should be allowed as an indulgence by the Court and that good reason for doing so should be shown to exist. The Court has to exercise its discretion whether or not to grant an application for allowing the filing of further affidavits. (*Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA). In a situation where the case has already been argued before a Judge it becomes compelling for the applicant to present a strong case for adducing fresh evidence. In *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 262A Corbett J (as he then was) stated as follows in a similar application:

“Assuming in the Company's favour that this is a competent procedure, it seems to me, on the analogy of applications to re-open a party's case in trial actions, that the applicant for leave to re-open the opposed motion and to adduce further evidence must show

- (i) that the evidence is material, i.e. likely to have an effect upon the result of the case and (ii) that his failure to adduce the evidence at the proper time was not due to a lack of reasonable diligence upon his part.”
- [11] In my view, what matters in applications of this nature is that the Court should be alive to the possibility of mala fides or culpable remissness as to the cause of the facts or information not having put before Court at an earlier stage.

[12] In *Nicks Fishmonger Holdings (Pty) Ltd v Fish Diner in Bryanston CC* 2009 (5) SA 629 (W) at 641G-642D Horwitz AJ laid down the following facts that the Court will consider in such applications:

[12.1] The reason why the evidence was not produced timeously.

[12.2] The degree of materiality of the evidence.

[12.3] The possibility that it may have been shaped to 'relieve the pinch of the shoe'.

[12.4] The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted.

[12.5] The stage on which the particular litigation has reached. Where judgment has been reserved after all the evidence has been heard and, before judgment is delivered, an applicant applies for leave to place further evidence before the Court it may well be that he or she will have a greater burden because of factors such as the increased possibility of a reconsideration of the whole case, and perhaps also the convenience of the Court.

[12.6] The 'healing balm' of an appropriate order as to costs.

[12.7] The general need for finality in judicial proceedings.

[12.8] The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his or her client. If the Court is satisfied on these points it will generally incline towards allowing the affidavits to be filed.

[13] At the end of the day the party who seeks an indulgence should have the burden to convince the Court that after having considered all the circumstances his or her request should be allowed.

[14] The merits of this application must also be viewed against or in consideration with the merits of the main application. What I mean is that if I do not accept that the applicant herein does not have a good case on the merits, there will be no justification for me to grant the application. In other words, if the applicant herein has a weak case on the merits its case on this application should not succeed. In my view, common sense dictates that no such interlocutory application of this nature should succeed when the Court is of the view that the evidence to be adduced would not assist the applicant in the main action or application. It goes without saying that the applicant would in such circumstances have failed to show the requirement that the evidence has the weight to persuade the Court that the evidence sought to be adduced by applicant has material relevance in assisting the applicant in his or her case on the merits. In that case, the Court should not allow the filing of the evidence sought to be admitted.

[15] The main application is based, inter alia, on whether or not the applicants' contention that the Substitute Directors were acting as Arbitrators when they considered

the loan account determination is valid. If so, the provisions of section 33 of the Arbitration Act 42 of 1965 (the Act) should be applied. The contents of the above section provide:

“(1) Where-

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

- (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties ...”

[16] In these proceedings there is no evidence to show that the respondents or any affected party have made an application to set aside the arbitration proceedings on the grounds stated in section 33 of the Act. The contents of annexure “POC1” clearly prove that the settlement agreement which was made an order of the Court binds the parties in the litigation sought to be set aside. In my view, the plaintiffs in the main action have not shown that they will be able to attack the contents of “POC1” or in any way sought to impugn its validity or its binding effect with which they were saddled.

[17] The applicants’ request does not include the application to set aside the loan account determinations made by first and second defendants on the 19th March 2013 which the plaintiffs had seen no reason or basis to vary such loan accounts. The loan accounts determinations were in fact accepted as correct. Therefore, the facts which the applicants seek to introduce at this stage amount to introducing a new cause of action which, in my view, cannot be allowed. This is so because an amendment of pleadings or admission of further affidavits cannot be allowed if that would have the effect of introducing a new cause of action. In my view, to set aside the first and second defendants’ valuations and property exchange to equalise the loan accounts is different from setting aside the loan accounts determinations of the 19 March 2013 in respect of which no application has been made.

[18] To do so, would amount to introducing a new cause of action which to me cannot be allowed at a stage after the parties have already addressed the Court. It would simply mean that the whole cause of action would have to be reconsidered and the argument would be started de novo a situation which our Rules cannot allow. Such a procedure would have the effect of causing prejudice and irreparable harm to the defendants which cannot be cured by an order of costs. An amendment of pleadings or documents will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs, and, where appropriate, a postponement. (Bester v Goodwood 1955 (2) SA

692 (C) at 697).

- [19] It also seems to me that from their affidavit the applicants became aware of the error made by the Substitute Directors in their determination of the loan accounts which was based on the fact that the applicants and third and fourth respondents did not disclose all the relevant facts to them. This information was pointed out to them as far back as the 25th November 2013 but they preferred to ignore the warning. Their belated attempt to approach the Court at this stage cannot be accepted. They decided not to cure the error which they should have done so more than a year ago. The applicants' belated attempt to convince the Court that the information came to their knowledge recently cannot be countenanced. In my view, their explanation cannot be said to be genuine.
- [20] My reasons for judgment in the application for setting aside of the summons are delayed in reasoning and they are relevant to the decision of this application. For further clarity, my judgment on the merits therefore shall form part of the judgment in the present interlocutory application, however for obvious reasons especially that this application has to be first delivered I need not mention the specific therein at this stage. I must, however, emphasize that the reasons for judgment herein are sufficient for justifying the order arrived at herein.
- [21] Therefore, I cannot grant the application sought by the applicants herein. It follows, therefore, that if the application for filing further evidence fails so does the application for amendment.
- [22] On the question of costs on an attorney and client scale, I do not agree that the Court should award punitive costs against the applicants. I base my conclusion on the history of the party's engagement as well as their conflicting views. Therefore, the order I grant is as follows:
- [22.1] The application by applicants to file further evidence and to amend is hereby dismissed with costs which costs shall include costs occasioned by the employment of two counsel where necessary.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Counsel for the applicants: Adv

A Beyleveld SC

Instructed by: Friedman

Scheckter

PORT ELIZABETH

(Mr Friedman/L08014)

Tel: 041 395 5412

Counsel for the 3rd and 4th Respondents: Adv B Pretorius

Instructed by: Lawrence

Manual Incorporated

(Mr R Lawrence)

Tel: 041 581 0596

Counsel for the 1st, 2nd and 5th Respondents: BLC Attorneys

(Mr Schoeman)

Tel: 041 506 3700

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