

SOUTH AFRICA / JUDGMENT

Birch t/a Birch and Son v Mosstrich (Pty) Ltd (4516/2016) [2017] ZAECHGHC 32 (14 March 2017) [2017] ZAECHGHC 32

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering

CASE / FILE NUMBER

4516/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 4516/2016

Date heard: 9 March 2017

Date delivered: 14 March 2017

In the matter between

BIRCH, SIDNEY BONNEN t/a

LF BIRCH & SON

Applicant

Vs

MOSSTRICH (PTY) LTD

Respondent

JUDGMENT

PICKERING J:

[1] In this matter applicant seeks an order in the following terms:

“That respondent is ordered to pay applicant the amount of R1 209 836 in terms of the Expert Determination decision made by Mr. Jason Verwey (CA) SA dated 10 August 2016 attached to annexure SBB9 of applicant’s Founding affidavit.”

Applicant also seeks a costs order against respondent in the event that it opposes the application. Respondent does so oppose.

[2] The main application spawned a number of interlocutory applications including a counter-application by respondent in which respondent

seeks the following relief:

“1. It is declared that the appointment of Mr. Jason Verwey of Moore Stephens WK Inc., Port Elizabeth, by the Chairperson of the South African Institute of Chartered Accountants, Port Elizabeth District Association, does not constitute a valid appointment in terms of clause 17 of the contract concluded between the parties;

2. It is declared that the proceedings in front of the aforementioned Mr. Jason Verwey and his “Expert Determination”, dated 10 August 2016 (part of annexure “SBB9” to the founding affidavit in the main application) have no legal consequences;
3. It is declared that the “Expert Determination” by Mr. Jason Verwey (dated 10 August 2016) does not constitute a basis upon which the Respondent is liable to the Applicant for payment of any amount;
4. The abovementioned Applicant is ordered to pay the Respondent’s costs of the application and counter-application.”

[3] Applicant eventually, and out of time, filed a replying affidavit which, together with its annexures, amounted to 234 pages. He also filed an application for condonation of the late filing of this affidavit.

[4] This was followed by an application by respondent for the striking out of the applicant’s entire replying affidavit on the grounds, inter alia, that the entire contents thereof constitute scandalous, vexatious, irrelevant and argumentative matter as well as including new matter which ought to have been included in the founding affidavit. Applicant thereafter filed a supplementary affidavit, without the leave of the court. Respondent has applied for the striking out of this affidavit as well.

[5] It is regrettable that matters have been allowed to escalate to the extent that they have. The papers are replete with

argumentative, irrelevant and repetitive allegations and are now in excess of 420 pages. This is all the more regrettable when it is borne in mind that applicant in his founding affidavit stated that he had refrained from including all the details of previous legal wrangling between the parties arising out of the contract “so as not to confuse the very simple and crisp legal issue which is the subject matter of this application.”

[6] Be that as it may it is not necessary to deal with the issues relating to condonation, striking out and indeed the issues arising

out of the main application. Both Ms. Carruthers, who appeared for the applicant, and Mr. Coetsee, who appeared for respondent, were agreed that the respondent's counter-application should be determined first with the remaining issues standing over for determination, if necessary, depending on the outcome of the counter-application.

[7] The parties entered into a written agreement on 4 June 2013, which agreement was subsequently extended, in terms of which applicant

would sell ostriches to respondent at certain stages of their growth. It is applicant's contention that, as he puts it, the price of the ostriches delivered by him as determined in terms of the agreement exceeded the total of all the combined payments made to him by respondent. Respondent therefore, so applicant avers, is indebted to applicant in the amount set out in the notice of motion but refuses to pay such sum.

[8] For its part respondent has inter alia, placed in dispute whether applicant had performed his obligations in terms of the contract such as would entitle him to payment.

Respondent refers to the fact that the contract for the sale of the ostriches is reciprocal in nature and that applicant was obliged to act in a certain manner before offering the ostriches for sale to respondent. Respondent avers that applicant failed to comply with his obligations in terms of clause 4.1 and 4.3 of the contract. He points out that applicant has admitted such failure but that it contends that respondent was the cause of applicant not being able to comply therewith.

[9] Mr. De Wet, the Managing Director of respondent, in his affidavit in support of the counter-claim, avers that the appointment of Mr. Verwey is invalid and of no legal consequence as the process followed by applicant in having Mr. Verwey appointed was fatally flawed. In this regard respondent relies on the provisions of clause 17 of the contract. Clause 17 provides as follows:

"17.1 Any dispute whatsoever arising out of or pursuant to this agreement, or the interpretation hereof, or the termination hereof, or the rectification hereof, shall be submitted to and decided by an expert on notice given by either party to the other in terms of this clause. (My emphasis)"

17.2 The expert shall:

17.2.1 If the matter in issue is an accounting matter only, be a chartered accountant of not less than then (10) years standing and experience as such, agreed upon between the parties to the dispute, or failing such agreement, to be nominated by the President for the time being of the Port Elizabeth Regional Association of the Cape Society of Chartered Accountants.

17.2.2 If the matter is a legal matter only, by an Attorney or Senior Advocate of not less than ten

- (10) years standing, agreed upon between the parties to the dispute, or failing such agreement to be nominated by the President for the time being of the Attorneys Association of the South Eastern Cape.

17.2.3 ...

17.2.4 If the parties are unable to agree upon whether the dispute falls to be determined by a person to be appointed in terms of sub-paragraph 17.2.1 to 17.2.3 above, then the Expert shall be nominated by the President for the time being of the Attorneys Association of the South Eastern Cape taking due cognizance of the qualifications stipulated in sub-paragraph 17.2.1 to 17.2.3 above.”

- [10] On 4 June 2016 applicant wrote to respondent suggesting the appointment of Adv. Lang as an Expert. Thereafter, on 12 June 2016 he wrote again to respondent referring to his letter of 4 June and stating therein as follows:

“Neither have I received any reply to the attached letter sent to you dated 4 July (sic) 2016. Would you please reply, failing which you will leave me with no option other than to approach the President for the time being of the Attorneys Association of the South Eastern Cape to appoint an Expert to determine the dispute/s.”

- [11] Thereafter, on 24 June 2016 respondent wrote to applicant stating that “the case has been resolved and we do not see any reason to react on the letters. For the moment we decided not to open a case against you for damages, but it may on the cards.” Applicant states that on being apprised of respondent’s attitude he personally spoke to a certain Ms. Mao-Cheia, the Chairperson for the time being of the South African Institute of Chartered Accountants, Port Elizabeth, explained the dispute to her and requested her to nominate a chartered accountant in terms of clause 17.2.1 of the agreement to act as an Expert to decide the amount of money due and payable to him by respondent. Ms. Mao-Cheia nominated Mr. Jason Verwey of Moore Stephens WK Inc., Port Elizabeth, as the Expert. Applicant admits that he never gave any notice to the respondent in terms of clause 17.1 before

approaching Ms. Mao-Cheia because respondent “had to date not yet responded to my correspondence in which I suggested the appointment of an Expert other than the fact they saw no reason to react due to the fact that they considered the matter to have been resolved.”

- [12] Ms. Mao-Cheia then addressed a letter to applicant and respondent on 29 June 2016 confirming that she had appointed Mr. Verwey as the Expert. Respondent replied hereto on 30 June 2016 as follows:

“It is our instructions to place the following on record:

1. My client is not convinced that there is any merit in the alleged dispute and needs to be convinced that there is indeed a valid dispute to be resolved and therefore the appointment of an arbitrator is wholly premature;

2. If there is indeed a dispute, the agreement dictates the procedure to be followed by the parties in order to appoint an arbitrator and one party cannot act unilaterally to have an arbitrator appointed.;
3. The matter raised by Mr. Birch is a legal matter and will therefore amount to a legal dispute in which case the arbitrator will have to be a lawyer or advocate with the relevant experience as determined by the agreement.”

[13] Applicant states that respondent thereafter refused to participate in the “Expert Determination Process”. This was recorded by Mr. Verwey in his Expert Determination “relating to the accuracy of the disputed amount” owing by respondent. Mr. Verwey recorded that respondent had stated through its attorneys that they were not in agreement that clause 17.2.1 should be applied on the grounds as were set out in their letter to Ms. Mao-Cheia.

[14] Mr. Verwey states further that “per discussion and in light of my appointment by the Chairperson, South African Institute of Chartered Accountants, Port Elizabeth District Association, I decided to continue with the report regardless of the fact that Mosstrich (Pty) Ltd were not willing to engage due to the above mentioned reasons.” He then proceeded to determine that the amount owing by respondent to applicant was R1 209 836.

[15] Respondent in its counter claim submits that the appointment of Mr. Verwey was invalid and of no legal consequence as the process

followed by applicant in having him appointed was fatally flawed.

[16] In my view this submission must be upheld.

[17] Applicant concedes that he failed to give notice to respondent as required by clause 17.1. These provisions are clearly

peremptory in nature. There was no basis on which they could simply be ignored by applicant because of respondent’s refusal to pay the amount allegedly owing by it. That refusal clearly gave rise to a dispute arising out of and pursuant to the agreement between the parties. It was therefore incumbent on the applicant to have given notice to respondent of his intention to have the dispute submitted and decided on by an Expert.

[18] The letter of 12 June 2016 addressed by applicant to respondent did not constitute the requisite notice. It was no more than a warning that should applicant not receive a reply to the letter of 4 June applicant would have no option but to apply to the President of the Attorneys Association for the appointment of an Expert. Furthermore, at that stage applicant’s expressed intention was to approach the Attorneys Association. No mention was made by him of any intention to approach the relevant President of the Cape Society of Chartered Accountants and no notice of any such intention was ever given to respondent.

- [19] As was submitted by Mr. Coetsee, the reference in the letter to the Attorneys Association is a clear indication that applicant at that stage considered the dispute between the parties to be a legal matter. It is furthermore clear from the papers that the parties were unable to agree as to whether the dispute was a legal matter or an accounting matter. This was raised both with Ms. Mao-Cheia and with Mr. Verwey. Respondent has disputed throughout that the matter in issue is an accounting matter only. It has contended that the matter is, instead, a legal matter in that the Expert would have to decide applicant's claim for specific performance which would of necessity involve the hearing of evidence as to the breach of contract as alleged by each party.
- [20] As pointed by respondent, even had there been proper notification of applicant's intention to have an Expert appointed, a dispute would nevertheless inevitably arisen, as it now has, as envisaged in clause 17.2.4 of the contract, as to whether the matter in issue was an accounting matter only or a legal matter only or any other matter. In that event the Expert would be nominated by the President of the Attorneys Association of the South Eastern Cape and not by the President of the Port Elizabeth Regional Association of the Cape Society of Chartered Accountants. It is therefore abundantly clear that the appointment of Mr. Verwey was invalid and, accordingly any determination by him is of no legal consequence whatsoever.
- [21] Ms. Carruthers, however, submitted that consequent upon Mr. Verwey's determination respondent had, in effect, sat back supinely and taken no steps either in terms of the contract or at law to set it aside. It was therefore, so she submitted, not open for respondent at this stage to apply for the relief sought in its counter-application. In support of this submission she referred to the matter of *Giani v Van Rooyen en 'n Ander* 1989 (1) SA 664 (NKA), a decision of Van Rhyn JP. I have had regard thereto and am satisfied that the matter is entirely distinguishable. In that matter the applicant applied for a declaratory order whereby the issue by the relevant Minister of a Bottle Store licence to the first respondent was declared invalid. Because of an oversight on the part of applicant's attorneys his objection to the grant of the licence had not been noted. It was held that as applicant was neither an applicant or objector in respect of the licence during the hearing of the application before the Liquor Board he did not have locus standi to take the proceedings of the Liquor Board on review. With respect to Ms. Carruthers I fail to grasp the basis upon which she contends that this decision is in any way authority for her proposition that respondent is precluded from applying for a declarator that the determination by Mr. Verwey is invalid.
- [22] What emerges clearly from the papers is that the determination was invalid. In these circumstances where the determination was of no legal consequence whatsoever it was not incumbent on respondent to take any steps in respect thereof until such time as applicant applied for payment to be made to it in terms thereof.

- [23] In all the circumstances I am satisfied that the main application falls to be dismissed and that the relief sought in the counter-application must be granted.
- [24] There was some debate as to who should pay the costs previously reserved on 1 December 2016. Mr. Coetsee pointed out that the matter had been set down to be heard on that day but that applicant had filed a replying affidavit on 23 November, only one week before 1 December. This affidavit was filed out of time rendered the matter incapable of being heard on 1 December. Furthermore, applicant filed a supplementary affidavit at 9h39 on the morning of 1 December 2016.
- [25] In my view it is clear in the circumstances that the postponement which was granted was occasioned by the conduct of the applicant.
- [26] In the circumstances the following order will issue:
1. It is declared that the appointment of Mr. Jason Verwey of Moore Stephens WK Inc., Port Elizabeth, by the Chairperson of the South African Institute of Chartered Accountants, Port Elizabeth District Association, does not constitute a valid appointment in terms of clause 17 of the contract concluded between the parties;
 2. It is declared that the proceedings in front of the aforementioned Mr. Jason Verwey and his “Expert Determination”, dated 10 August 2016 (part of annexure “SBB9” to the founding affidavit in the main application) have no legal consequences;
 3. It is declared that the “Expert Determination” by Mr. Jason Verwey (dated 10 August 2016) does not constitute a basis upon which the Respondent is liable to the Applicant for payment of any amount;
 4. The main application is dismissed.
 5. The Applicant is ordered to pay the Respondent’s costs of the application and counter-application, including the costs previously reserved for decision on 1 December 2016 ”

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Carruthers

Instructed by: Mr. Michael Lubiso

Appearing on behalf of Respondent: Adv. Coetsee

Instructed by: Neville Borman and Botha,

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