

SOUTH AFRICA / JUDGMENT

BP Southern Africa (Pty) Ltd v Trade Rose Investments (Pvt) Ltd (13662/22) [2023] ZAGPJHC 1206 (18 October 2023) [2023] ZAGPJHC 1206

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

13662/22

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
Case No.:
13662/22
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
In

the matter between:

BP
SOUTHERN AFRICA (PTY) LTD
APPLICANT
And
TRADE
ROSE INVESTMENTS (PVT) LTD
RESPONDENT
In

Re: TRADE
ROSE INVESTMENTS (PVT) LTD
PLAINTIFF
And
BP
SOUTHERN AFRICA (PTY) LTD
FIRST
DEFENDANT
MOCHUDI
PETROLEUM (PTY) LTD
SECOND
DEFENDANT
TURNER
SHIPPING (PTY) LTD
THIRD
DEFENDANT
THE
COMMISSIONER FOR THE SA REVENUE SERVICE
FOURTH
DEFENDANT
And

In the matter between: TURNER
SHIPPING (PTY) LTD
APPLICANT
And
TRADE
ROSE INVESTMENTS (PVT) LTD
RESPONDENT
In

Re: TRADE
ROSE INVESTMENTS (PVT) LTD
PLAINTIFF
And
BP
SOUTHERN AFRICA (PTY) LTD
FIRST
DEFEDANT
MOCHUDI
PETROLEUM (PTY) LTD
SECOND
DEFENDANT
TURNER
SHIPPING (PTY) LTD
THIRD
DEFENDANT
THE
COMMISSIONER FOR THE SA REVENUE SERVICE
FOURTH
DEFENDANT

JUDGMENT

Vally J

- [1] BP Southern Africa (Pty) Ltd (BP) and Turner Shipping (Pty) Ltd (Turner) have each launched an interlocutory application wherein they each seek security for costs in an action proceedings instituted by Trade Rose Investments (Pvt) Ltd (Trade Rose) against them and two other defendants. The application is brought in terms of rule 47 of the Uniform Rules of Court. They each seek an amount of R2m as security. Both base their claim for security on the following undisputed facts:
- (i) Trade Rose is a peregrinus; (ii) has no immovable property situated within South Africa; and, (iii) is facing financial difficulties.
- [2] Trade Rose opposes the application on the bases that, (i) it is able to meet any adverse costs order should one be issued against it, and (ii) its case against BP and Turner is very strong and if an order for security is issued, especially in the amount sought by BP and Turner, it would effectively be non-suited, as it is not in a position to comply with such an order.
- [3] The court when considering whether to order a plaintiff peregrinus (as in this case) to furnish security to a defendant incola is required to balance the interests of the parties. To this end two basic questions would be the focus of the court's attention:
- (i) in all probability would the peregrinus be able to meet an adverse costs order? and (ii) would the peregrinus be unable to pursue its claim against the incola? The questions are not be answered in isolation from each other. They are to be considered together, and in so doing the court would ultimately have to balance the two interests in order to ensure that justice is not defeated by either granting or refusing the claim for security.[1]
- [4] While alleging that it is able to satisfy in full any adverse costs order(s) against it, Trade Rose has failed to provide any credible evidence which allows for a finding that upholds the allegation.
- [5] Trade Rose's case against both BP and Turner is that sometime in 2020, BP concluded an agreement with an entity named Idzill Yeglug CC (In liquidation) (Idzill) whereby it sold fuel distillate (fuel) to the latter. Idzill has since been placed under winding-up. An entity named Mochudi Petroleum (Pty) Ltd (Mochudi) was contracted (it is not said by whom) to transport the fuel from South Africa to Botswana and Zimbabwe. Turner was appointed (again it is not said by whom) as the agent responsible for clearance certificates to export the fuel to Zimbabwe. The four entities, BP, Mochudi, Idzill and Turner, 'stole' Trade Rose's identity, 'and registered' Trade Rose 'as the consignee' that was to receive the fuel in Zimbabwe. Trade Rose is a construction company registered in Zimbabwe and was not involved in the business of purchasing and selling fuel.

The South African Revenue Service (SARS) conducted an investigation into the business transactions between BP, Mochudi, Idzill and Turner. The investigation revealed that the fuel was not exported to Zimbabwe, and further that a number of laws were contravened by the four parties. Around March 2020 the Reserve Bank of Zimbabwe (RBZ) and the Zimbabwe Revenue Authority (ZIMRA) informed Trade Rose that it was being investigated ‘for alleged fraud in the export (presumably the pleader meant to say, ‘importation’) of fuel from South Africa’. RBZ informed Trade Rose that it had connived with the four entities ‘to defraud SARS and the ZIMRA by evading and or avoiding paying excise duty on fuel.’ Trade Rose pleads further that, ‘As a consequence of the investigation RBZ froze all the accounts of Trade Rose for approximately six (6) months hindering [Trade Rose] from conducting

any business.’ Trade Rose’s name was tarnished as it was blacklisted by ZIMRA, and all its banking transactions were delayed as a result of the RBZ placing a ‘temporary hold’ on its bank accounts. Trade Rose was ‘set to conclude huge contracts with reputable entities’ but these did not materialise because of the reputational damage it had suffered by dint of its bank account being ‘frozen; or, put ‘on hold’.

- [6] Trade Rose avers that BP owed it a duty of care, which it breached in a number of respects, and that the four entities ‘fraudulently’ used its name. The four entities ‘in conniving to evade excise duty’ acted wrongfully, ‘in that they tarnished [Trade Rose’s] business and hindered [its] business operations’. Finally, Trade Rose pleads that it suffered a loss of R37 556 656.45, for which BP, Mochudi and Turner are jointly and severally liable. It has elected not to pursue a claim against Idzill.
- [7] There are a number of problems with the pleading of Trade Rose. This is an application for security only. It is best that I do not comment in detail about these problems. Trade Rose itself is aware that its pleading is problematic and has indicated that it would soon be amending the pleading. For purposes of this application though, it can be safely concluded that on its present pleading its case against BP and Turner is far from strong or even straightforward.
- [8] Upon carrying out its stated intention of amending its pleading, Trade Rose would immediately be liable for some of the costs incurred by BP and Turner.
- [9] Counsel for BP and Turner have indicated that, on the pleading as it stands, their clients will be excepting to it on the basis that it fails to disclose a cause of action. It cannot be said that the raising of such an exception would be a fruitless or wasteful exercise. This, no doubt, is something Trade Rose realises, hence its indication that it intends to amend its pleading.
- [10] It follows that Trade Rose cannot avoid being liable for some of the costs BP and Turner have already incurred. Further, given that its pleading fails to establish that it has an unanswerable, or even a strong, prospect of success, and that it has failed to show that it can meet any adverse costs order, the relief sought by BP and Turner has to be granted.

[11] BP and Turner have each claimed a sum of two million rands (R2m) as security. The sum is excessive. It would, I hold, certainly destroy Trade Rose's right, in terms of s 34 of the Constitution of the Republic of South Africa Act 108 of 1996 to have its dispute with them 'resolved by application of law in a fair public hearing before a court'. A more appropriate sum would be ten percent of the amount each of them claims. In addition, they both are keen on raising an exception. A security of two hundred thousand rands (R200 000.00) would certainly suffice for the exception to be finalised. Thereafter, BP and Turner can seek recourse in terms of rule 47(6) to have it increased.

Costs

[12] These should follow the result.

Order

[13] As the two applications were heard together, and as the orders granted are the same in both cases, it would be appropriate to issue a single order for both applications. With regard to each of the cases, the following orders are made:

- a. The respondent is to furnish security in the amount of R200 000.00 to each of the applicants in the case brought by that applicant.
- b. The action against each of the applicants is to be stayed pending the furnishing of the security to each of the applicants.
- c. The respondent is to pay the costs of this application, which costs are to be taxed on a party and party scale and are to only include the costs of a single counsel for each of the applicants.

Gauteng High Court, Johannesburg

Date of hearing: 11 October 2023

Date of judgment: 18 October 2023

For the BP applicant:

P Carstensen SC with LF Laughland

Instructed by:

Edward Nathan Sonnenberg Inc

For the Turners applicant:

PJ Wallis SC

EVH Inc

For the respondent:

S A Rajah

Chivizhe Kanye Attorneys

[1] Giddey NO v J C Barnard and Partners

[2006] ZACC 13; 2007 (5) SA 525 (CC) at [8]. Although this case did not concern a peregrinus and an incola, the principle it established with regard to security is applicable to all applications for security.

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