

SOUTH AFRICA / JUDGMENT

Cholla (Pty) Limited formerly Dukathole Steenkamp CC t/a Dukathole Brickworks v Between Us Trading Enterprise and Another (265/2018) [2018] ZAECGHC 46 (29 May 2018)

[2018] ZAECGHC 46

COURT

Eastern Cape High Court, Grahamstown

BEFORE

R E Griffiths

CASE / FILE NUMBER

265/2018

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IN THE

HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION

: GRAHAMSTOWN

CASE NO. : 265/2018

In the

matter between:

CHOLLA
(PTY)
LIMITED
Applicant
formerly
DUKATHOLE STEENKAMP CC
t/a
DUKATHOLE BRICKWORKS
and
BETWEEN
US TRADING ENTERPRISE
1st Respondent
PHEKO
DESMOND
METHOLE
2nd Respondent

JUDGMENT

GRIFFITHS, J.:

[1] On 8 February 2018 as a matter of urgency and with the respondents' consent, the applicant obtained an order in the form of a rule nisi. That court order reads as follows:

"1. That a rule nisi do issue calling upon the Respondents to show cause the 15th day of March 2018 at 10:00 or soon thereafter as Counsel may be heard, why an order should not be made in the following terms:

1.1. That the Respondents be and are hereby directed to restore the supply of electricity at the Dukathole Brickworks Factory, District of Herschel, Province of the Eastern Cape to the Applicant ante omnia within 24 hours of the service upon of such order as the court may grant.

1.2 That the Respondents be and are hereby interdicted from preventing the supply of electricity to the Applicant by Eskom.

1.3 That the Respondents be and are hereby interdicted from restraining the Respondents from taking or attempting to take action that obstructs or frustrates:

1.3.1 the business of the Applicant;

1.3.2 the ability of the Applicant's employees to do their work;

1.3.3 the Applicant's customers of doing business with the Applicant.

1.4. that the Respondents be and are hereby interdicted and restrained from:

1.4.1 entering or occupying any of the Applicant's properties or buildings other than for the business of a landlord and strictly in accordance with the agreement between the parties, (annexure "YC1" to the Applicant's founding affidavit).

1.4.2 destroying, damaging in any way, or defacing any of the Applicant's property.

1.4.3 erecting any form of barricade, preventing access to the Applicant's business premises.

1.4.4 intimidating any person on the Applicant's property and

1.4.5 seeking to persuade or coerce any person, using intimidation and duress from continuing with their work at the Applicant's business, including inter alia, the Applicant's customers.

1.5 that the Respondents pay the costs of this application, jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client.

2. THAT paragraphs 1.1 and 1.4 operate as an interim interdict pending the resolution of this application and any action that the Applicant may be advised to launch; on condition that such action is launched with 30 (thirty) days of the granting of this order.

3. That the Applicants deposit the sum of R30 000.00 in the trust account of the Respondents' Grahamstown attorneys of record within 7 days of the granting of this Order, as security for payment of ESKOM electricity accounts of the Dukathole Brickworks Factory, District of Herschel, Province of the Eastern Cape, without prejudice and without admission of liability.
 4. That the costs of 8 February 2018 be and are hereby reserved."
- [2] On the extended return day of that rule the applicant approached this court for confirmation thereof. This has been opposed purportedly by both respondents although it is not clear as to the basis upon which the 1st respondent is before this court, as the close corporation has been deregistered. The unitary notice of opposition refers to the "above-mentioned Respondents" referring to both the 1st respondent (the close corporation) and the 2nd respondent. However, the answering affidavit is headed "Second respondent's answering affidavit". Ms. Beard, who appeared on behalf of the 1st respondent, however indicated that she and her instructing attorney act solely for the 2nd respondent, which must be so in view of the fact that it is common cause that the 1st respondent is deregistered and neither was the 2nd respondent a member thereof, nor is there any indication that he was authorized to act on its behalf. Accordingly, the 1st respondent which does not exist anymore has not opposed this application.
- [3] The case for the applicant is that it and the 1st respondent concluded a written agreement of lease during September 2013 in terms of which the applicant would lease certain premises from the 1st respondent for a period of 9 years and 11 months commencing on 1 November 2013. It appears from the written document that the "premises" were identified as per an annexure thereto, referred to as annexure "A1". As the original lease agreement had been mislaid, a copy was put up with the papers which, it became common cause, was a true copy of the original. Annexure "A1" was not included with this copy but it is clear that the parties agreed on the nature of the premises for the purposes of the lease. "The Property" was separately defined as "the allocated business site as allocated to the Lessor by the Department of Rural Development and Agrarian Reform as per Annexure "A" hereto."
- [4] Because there was no electricity to the premises, the following clause was inserted:
- "5.1 It is noted that there are currently no electricity supply at the Property and/or Premises and the Lessee will at its own costs see to it that electricity is supplied to the Property and/or Premises by Eskom;*
- 5.2 The cost of the supply of electricity to the Property and/or Premises will however be reimbursed to the Lessee by the Lessor by way of monthly the deductions from the amount payable as rental, alternatively by further agreement between the Lessor and Lessee."
- [5] The applicant's business on the premises encompasses the manufacture and supply of bricks and building supplies to hardware stores in Sterkspruit and the general public. It employs approximately 28 breadwinners and has a monthly turnover of approximately R1.2 – R1.4 million per month. In addition, it has established a pre-school in the community and

the forced closure of its factory would result in the inevitable closure of the school which is attended by approximately 20 pupils. There are apparently no other pre-schools of this nature in the area.

[6] The lease agreement was duly implemented and the factory was developed in accordance with the terms thereof. In particular, the applicant duly paid a sum of approximately R267,000 to set up an Eskom transformer for the purposes of providing electricity to the factory.

[7] Although it is clear from the papers that the 2nd respondent has been fully involved in the affairs of the 1st respondent, it has become clear from his answering affidavit that he was not a member thereof and it is not clear as to his exact

relationship therewith. The only mention of this is a statement that his girlfriend was the sole member of the corporation. The

arrangement with regard to the monthly payments for electricity appears to have been that the monthly Eskom account (which was in the name of the 1st respondent) would be presented to the 1st respondent and thereafter submitted by email from the 2nd respondent to the applicant for payment. There were, at times, complications with this arrangement as the emails were sent to an

incorrect address causing delays and minor interruptions.

[8] This state of affairs continued until the electricity was disconnected by Eskom. On investigation by the applicant, it was established that the account was in arrears and it was duly settled by the applicant, resulting in reconnection. However, shortly thereafter, the electricity was again disconnected. On further investigation, it was discovered that the main switches of the transformer had been turned off and the building which housed the Eskom transformer, referred to as “the kiosk”, had been locked and was inaccessible to the applicant’s employees. It has become common cause that it was the 2nd respondent who effected such disconnection and closure, his apparent reason being that there was a consistent delay on the part of the applicant in paying the Eskom account.

[9] The papers are replete with documentation dealing with the question of payment by the applicant on this account when so requested and the 2nd respondent's answers thereto.

[10] The 2nd respondent’s answering affidavit can only be described as being replete with argument and deplete of fact. It consists of a lengthy diatribe of argument and ad hominem attacks on the person of the deponent to the founding affidavit, one Yolandi Charlotte Kiek, who is the chief financial officer of the applicant and with whom most, if not all, of the email correspondence reflected

in the papers between the applicant and the 1st respondent occurred. I hasten to add, for the purposes of full disclosure, that Ms. Beard had nothing whatsoever to do with the compilation of this document.

[11] That being said, the answering affidavit raised a host of points in limine and argued, in effect, that the applicant had no right to an order for the restoration of the electricity and an interdict relating thereto on the basis that it was the applicant who had caused this situation to arise by failing to settle outstanding Eskom accounts.

[12] In argument, Ms. Beard limited herself largely, in effect, to 4 points in limine, a brief submission on the merits and a contention that the relief sought was in any event over-reaching. The 4 points in limine are:

1. Such an order as against a deregistered corporation is not competent;
2. The rule nisi has lapsed due to non-compliance by the applicant with an obligation imposed upon it thereby;
3. The deponent to the founding affidavit (Kiek) lacked the authority to launch the application;
4. Non-joinder of the State.

Is the order competent vis-à-vis the 1st respondent?

[13] As I have indicated, it is common cause that the 1st respondent is a deregistered close corporation. Deregistration of a corporation is defined in the Close Corporations Act[1] as being “the cancellation of the registration of the corporation's founding statement”[2]. It seems clear that once a corporation is so deregistered, it ceases to exist[3]. It is, as submitted by Ms. Beard, akin to the death of the 2nd respondent which, had it occurred, would have had the effect that the applicant could not have proceeded against him for confirmation of the rule nisi. It seems to me, by parity of reasoning, that the applicant likewise cannot obtain confirmation of the rule as against the 1st respondent.

Has the rule nisi lapsed?

[14] It is common cause that payment of the sum of R30,000, which is the subject of paragraph 3 of the court order of 8 February 2018, was paid 3 days late. Due to the dispute between the applicant and the 2nd respondent with regard to who was responsible for the late payments of the monthly electricity dues to Eskom, the applicant tendered in the email correspondence preceding the application to pay a deposit of R30,000 into its attorney's trust account to be held in favour of the 1st applicant's obligations to Eskom in this regard. Paragraph 3 of the order was predicated on these facts, the agreement being that this sum was to be paid into the trust account of the respondents' Grahamstown attorneys within 7 days of the order. The 2nd respondent has argued that this is a resolute condition which, if not complied with on due date, renders the rule nisi nugatory. It has further argued that, based in the case of *Williams v Landmark Properties & Another*[4], this court is not empowered by Rule 27(4) to revive a rule nisi which has lapsed because of the purported fulfilment of a resolute

condition ex post facto.

- [15] Whilst the latter proposition is clearly sound, it is founded on the former, that is the question as to whether or not paragraph 3 of the order amounts to a resolutive condition. A resolutive condition terminates all or some of the obligations flowing from a contract upon the occurrence of a future uncertain event in contradistinction to a suspensive condition, which suspends the operation of all or some of the obligations flowing from a contract until the occurrence of a future uncertain event[5]. A condition of a contract has been defined as follows[6]:

“The word “condition” in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, ie an accepted stipulation, as for example in the phrase “conditions of sale”. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc – in other words the so called accidentalia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain event . . . In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the

contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary

contractual remedies of a compensatory nature, ie (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these..”

- [16] In determining whether or not this is a resolutive condition, the court is obliged, in keeping with the modern trend in interpreting instruments such as this, to look at the language and construction of the document itself and the circumstances which surrounded its coming into being[7]. It should, however, also be remembered that this is a court order which would normally be interpreted by taking into account in addition the reasons contained in the judgment preceding it. However, this order was granted by consent at the time when the applicant brought it before court as a matter of urgency and thus no such reasons exist. Accordingly, the parties were not entirely at arm's length as in a normal business transaction but were subject to the constraints and rigours of a court hearing.
- [17] What emerges from the wording of the order is that the preceding paragraph, paragraph 2, makes it clear that the interim order was subject to the applicant launching an action as described therein by using the specific words “on condition that...”. Paragraph 3, on the other hand, does not include such words or their equivalent. This seems to me to be a telling distinction which would indicate that the intent of the order was to make the rule nisi conditional upon the condition contained in paragraph 2, whereas it was not intended that paragraph 3, a completely separate and self-contained paragraph, would encompass a similar condition.

[18] Whilst Ms. Beard has argued that the purpose of including paragraph 3 was to ensure that the 1st respondent was always possessed of sufficient funds to pay the Eskom account, there are so many nuances to this as contained in the lengthy documents that, in my view, the actual wording of the order must prevail. In my view therefore this was not intended to be a resolute condition and thus the 3 day delay in payment does not result in the lapsing of the rule nisi.

Was Kiek duly authorized to launch the application?

[19] It has been argued that it is not the authority Kiek to depose to the founding affidavit which is in issue, but rather her authority to launch this application. Such is a question of fact. Her authority was questioned by the 2nd respondent in his answering affidavit. In reply thereto the applicant put up a resolution dated 9 April 2018, which post-dated the institution of the application on 5 February 2018. Ms. Watt, for the applicant, has argued that there is more than sufficient evidence on the papers to indicate that Kiek was indeed so authorized. Not only does the resolution specifically state that she was so authorized at all material times, but, as indicated, she is the chief financial officer of the applicant company. Furthermore, throughout the negotiations and discussions Kiek was fully involved as practically all the extensive email correspondence was between her, on behalf of the applicant, and the 2nd respondent. There is no doubt, in the circumstances, that she was so authorized.

Has there been a non-joinder of the State?

[20] This challenge to the application by the 2nd respondent is predicated on the fact that the 1st respondent is deregistered. One of the consequences of such deregistration is that all its assets become bona vacantia and the property of the state. Accordingly, so the argument goes, the state has a direct and substantial interest in these proceedings and ought to have been joined.

[21] There are a number of fallacies in this argument. Firstly, the only property which is put forward as being such a bona vacantia is the premises, or property, upon which the applicant operates, the subject property of the lease. There is however no proof whatsoever

on the papers that this property belonged to, or was registered in the name of, the 1st respondent. Indeed, there is an indication in the lease itself that it did not. Subparagraph 1.1.7 of the lease states that the property is the “allocated business site as allocated to the Lessor by the Department of Rural Development and Agrarian Reform...”. This property accordingly appears to have always been the property of the state. Secondly, non-joinder only arises with regard to a party which has a direct and substantial interest in the order sought by the applicant. The order sought in this matter relates to matters which arise from personal obligations created by the lease itself, and otherwise. These obligations are personal to the respondents and no one else. It seems to me that a granting of the order sought, or a confirmation of the rule as it stands, cannot have any deleterious effect or any effect whatsoever on the rights of the state. I am accordingly of the view that the state has no direct and substantial interest therein and the applicant was not obliged to join it as a party to these proceedings.

The merits.

[22] It is clear that the 2nd respondent has committed an act contrary to the rights of the applicant by switching off the electricity and locking the kiosk so that it cannot be turned on again by the applicant. The applicant has been receiving such electricity pursuant to the lease for a period of some 4 ½ years largely without interruption. The 2nd respondent had no right whatsoever in the circumstances to simply, and without due process, switch it off and to put in place measures

to prevent it from being turned on again[8]. In my view the applicant has made out a proper case for such relief. As, on the papers, and particularly due to the acrimony between the parties, there is a distinct possibility that similar measures may be attempted by the 1st respondent should he not be interdicted therefrom, I am satisfied that a proper case has been made out in this regard as well. However, I am not persuaded that the applicant has made out a proper case for the relief sought in paragraph 1.4 as there is, essentially, no factual basis therefor.

[23] As regards the question of costs, I am of the view that the applicant is the substantially successful party even though it has not succeeded in all the relief it sought. I am further fortified in this view by virtue of the fact that the 2nd respondent saw fit to waste this court's time with an unduly prolific and argumentative answering affidavit as described earlier in this judgment. The applicant initially sought costs on the scale as between attorney and client but Ms. Watt indicated that the applicant would not pursue this.

[24] In the result, the following order will issue:

1. Subparagraphs 1.1, 1.2, 1.3 and 1.5 of the rule nisi issued out of this court on 8 February 2018 are confirmed as against the 2nd respondent only, save that subparagraph 1.5 is amended to read:

“That the 2nd respondent pay the costs of this application”;

and subparagraph 1.3 is amended by the deletion of the words “from restraining the Respondents” and the substitution of the words “and restrained”;

2. The 2nd respondent is ordered to pay the costs which were reserved by this court on 8 February 2018.

R. E. GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS

: Adv. Watt

INSTRUCTED BY

: Wheeldon, Rushmere & Cole Inc.

COUNSEL FOR RESPONDENTS

: Adv Beard

INSTRUCTED BY

: Neville Borman & Botha

HEARD ON

: 18 MAY 2018

DELIVERED ON

: 29 MAY 2018

[1] No. 69 of 1984.

[2] Ibid Section 1

[3] Dorbyl Light & General Engineering v Insamcor 2007 (4) SA 467 (SCA) at paragraph 23.

[4] 1998 (2) SA 582 (W) at 586 A – I

[5] Christie and Bradfield Christie's The Law of Contract in South Africa, 7th edition, page 164

[6] R v Katz 1959 (3) SA 408 (C) at 417D-H

[7] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 at para 12: "Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'"

[8] In this regard see the case of Naidoo v Moodley 1982 (4) SA 82 (TPD) where the court held that the right to electricity was an incident of occupation of the premises and could not be summarily terminated. See also: Froman v Herbmore Timer and Hardware 1984 (3) SA 609 (W); Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC).

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