

SOUTH AFRICA / JUDGMENT

Comwezi Security Services (Pty) Limited v ABSA Bank Limited and Others (8817/2008) [2008] ZAWCHC 85 (20 November 2008) [2008] ZAWCHC 85

COURT

Western Cape High Court, Cape Town

BEFORE

Ngewu

CASE / FILE NUMBER

8817/2008

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IN

THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL
DIVISION)CASE NO: 8817/2008

DATE: 20

NOVEMBER 2008

In

the matter between:

COMWEZI
SECURITY SERVICES
(PTY)
LIMITED APPLICANT
versus
ABSA
BANK LIMITED AND TWO OTHERS RESPONDENTS

JUDGMENT

NGEWU A J:

- [1] The applicant in this application was an unsuccessful applicant in the main application. He now seeks leave to appeal against the judgment and order given on 13 June 2008.
- [2] The primary question to be considered in this type of application is whether there is a reasonable prospect of success on appeal.

[3] The applicant in the main application sought a final interdict on an urgent basis against the 3 respondents in the following terms:-

3.1. That any agreements which may have been purported to have been concluded between first, second and third respondents in respect of provisioning of security guarding services by second and/or third respondents to first respondent from 1 July 2008 to the exclusion of applicants be declared to be of no force and effect.

3.2. That the second and third respondents be interdicted and restrained from performing in terms of any agreement which may have been purported to have been concluded between first and second respondents and/or between first and third respondents in respect of the provisioning of security guarding services by second and/or third respondents from 1 July 2008 to the exclusion of the applicant.

3.3. That first respondent be interdicted and restrained from concluding any agreement between first and second respondent and/or between first and third respondent in respect of provisioning security guarding services by second and third respondents for first respondent from 1 July 2008 to the exclusion of applicant,

3.4. That such respondents as oppose the application pay costs of the application jointly and severally, the one paying the other to be absolved.

3.5. Granting further and/or alternative relief.

[4] On 10 June 2008, a day before the date scheduled for hearing of the main application, applicant filed an application to amend its notice of motion couched in the following terms:

4.1. by replacement of the description of second and third respondents of the heading thereof with the description of them which appeared in the heading of the notice of intention to amend;

4.2. by addition of the following as a new paragraph 7 thereof:-

"In the alternative to paragraph 2 to 5 above, that an order be granted in terms of the draft annexed hereto marked A."

[5] The terms of the draft order relevant for purposes of this judgment provided that oral evidence is to be led in respect of the following issues:- 5.1. Whether the agreement contended by applicants to have been concluded at the meeting of 30 November 2007 ("the meeting") in respect of award of future guarding contracts was in fact concluded, Whether the person present at the meeting on behalf of the first and second respondents lacked authority to conclude agreement alleged by applicant, and if so, whether first and second respondents nonetheless remained bound by operation of an estoppel or ostensible authority of the internal or indoor management rule;

Whether official guarding contracts were put to tender in accordance with the minutes;

Pending the determination of this application no new guarding contracts had to be concluded between the parties and the status quo in respect of first respondent's guarding requirements is to be preserved.

[5] The terms of the draft order relevant for purposes of this judgment provided that oral evidence is to be led in respect of the following issues:-

5.1. Whether the agreement contended by applicants to have been concluded at the meeting of 30 November 2007 ("the meeting") in respect of award of future guarding contracts was in fact concluded,

Whether the person present at the meeting on behalf of the first and second respondents lacked authority to conclude agreement alleged by applicant, and if so, whether first and second respondents nonetheless remained bound by operation of an estoppel or ostensible authority of the internal or indoor management rule;

Whether official guarding contracts were put to tender in accordance with the minutes;

Pending the determination of this application no new guarding contracts had to be concluded between the parties and the status quo in respect of first respondent's guarding requirements is to be preserved.

5.5 Costs to stand over. [6] The Court did not grant the proposed amendment as it did not comply with the provisions of rule 28, sub-section 2 of the uniform Rules of court. Furthermore, the proposed amendment sought to introduce a totally fresh cause of action, and abandon the original one as per interdict sought. In addition, the issues the applicant sought referred for oral evidence were properly ventilated during argument and would not in any way advance or bolster the applicant's case. It would not have been proper for the Court to grant an order in terms of the amendment that was not granted. It was not in dispute that there was a closed tender process followed by Absa in which Comwezi, the applicant, participated. It is worth to mention that the proposed amendment was sought as an alternative to the order sought in the main application.

5.5 Costs to stand over.

[6] The Court did not grant the proposed amendment as it did not comply with the provisions of rule 28, sub-section 2 of the uniform Rules of court. Furthermore, the proposed amendment sought to introduce a totally fresh cause of action, and abandon the original one as per interdict sought. In addition, the issues the applicant sought referred for oral evidence were properly ventilated during argument and would not in any way advance or bolster the applicant's case. It would not have been proper for the Court to grant an order in terms of the amendment that was not granted.

It was not in dispute that there was a closed tender process followed by Absa in which Comwezi, the applicant, participated.

It is worth to mention that the proposed amendment was sought as an alternative to the order sought in the main application.

[7] During argument, counsel for the applicant conceded that it would not be successful in obtaining the final relief sought and argued for referral to oral evidence as per proposed amendment, which was, in essence, an interim relief pendente lite. The applicant failed to meet the requirements of both the final and interim orders sought, hence the Court dismissed the application. [8] The main ground of appeal was non-referral of the matter for oral evidence as proposed in the notice of intention to amend, which, as already indicated above, the Court did not grant. It became common cause during argument that the agreements the applicant referred to, allegedly reached on 30 November 2007, were never concluded. The status quo that the applicant sought maintained was not existent. In my judgment, the application for leave to appeal should accordingly fail as there are no prospects of success on appeal. In the result, the application for leave to appeal is DISMISSED WITH COSTS. NGEWU, AJ

[7] During argument, counsel for the applicant conceded that it would not be successful in obtaining the final relief sought and argued for referral to oral evidence as per proposed amendment, which was, in essence, an interim

relief pendente lite.

The applicant failed to meet the requirements of both the final and interim orders sought, hence the Court dismissed the application.

[8] The main ground of appeal was non-referral of the matter for oral evidence as proposed in the notice of intention to amend, which, as already indicated above, the Court did not grant. It became common cause during argument that the agreements the applicant referred to, allegedly reached on 30 November 2007, were never concluded. The status quo that the applicant sought maintained was not existent. In my judgment, the application for leave to appeal should accordingly fail as there are no prospects of success on appeal.

In the result, the application for leave to appeal is DISMISSED WITH COSTS.

NGEWU, AJ

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Prepared on 11 October 2026 · Esheria