

SOUTH AFRICA / JUDGMENT

Delute Investments CC v Mkambati Collection (Pty) Ltd (669/2012) [2012] ZAECHGHC 15 (5 April 2012) [2012] ZAECHGHC 15

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N Dambuza

CASE / FILE NUMBER

669/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No.: 669/2012

Date heard: 22 March 2012

Date delivered: 05 April 2012

In the matter between:

DELUTE INVESTMENTS CC

APPLICANT

And

MKAMBATI COLLECTION (PTY) LTD

RESPONDENT J U D G M E N T

DAMBUZA, J

- [1] This is an application for the winding up of the respondent.
- [2] The respondent, Mkambati Collection (Pty) Ltd is a company that was incorporated in 2003 for a specific purpose of tendering for a concession for development and operation of a “tourist and accommodation facility” in the Mkambati Nature Reserve in the Eastern Cape. At the time, the tourist facility was operated by the Eastern Cape Parks Board. After the respondent had secured the concession it concluded an agreement with the applicant, that the applicant would perform the required construction work of building and/or upgrading a

number of lodges in the nature reserve. The applicant, Delute Investments cc conducts business as a building contractor.

- [3] In this application the applicant contends that money is due and payable to it by the respondent for work done in terms of a building agreement concluded between the parties. The applicant relies, specifically, on a written building agreement which forms part of the record. The written agreement was, on the face of it, concluded and signed on behalf of the applicant on 25 July 2011. No signature appears on behalf of the respondent in the copy of the agreement before me. But the respondent does not dispute that it did conclude the contract in the terms that appears in the written agreement. The respondent's reasons for disputing that

the amount claimed by the applicant is due and payable appears later in this judgment.

- [4] Following the conclusion of the agreement the applicant moved onto the site and commenced with the contract work on 29 July

2011. In September 2011 the applicant issued its first invoice, for the work it had done thus far, in the amount of R334 148,14. A payment certificate authorising payment was issued by MLC Quantity Surveyors, purporting to act on behalf of the respondent. Only a portion of the amount claimed (R268 551.00) was paid by the respondent. In October 2011 the applicant issued its second invoice. This invoice was also certified for payment but the amount claimed in that invoice was never paid by the respondent. A third invoice was issued in November 2011. That account was never certified and was never paid. It is the amount claimed in the second and third invoices, together with the balance on the first invoice that is the basis of this application.

- [5] In disputing liability to the applicant, the respondent explains that when the written contract was concluded both parties never intended it to be the true contract between them. They were aware that the development project had been suspended until fulfilment of certain conditions stipulated in a loan agreement concluded between the respondent and the Independent Development Corporation (IDC).

- [6] The respondent had secured a loan of R30 000 000 (R30 M) from IDC for the development project. It was a condition of that loan agreement that the respondent would inject R12M of its own funds into the project. The understanding amongst the shareholders of the respondent, was that Steward Philip Cranswick, one of the respondent's directors who resigned from that position on 13 October 2011, was to provide the R12M. However, at some stage Cranswick withdrew his undertaking to provide the required R12 M. The result was that the respondent could not access the funds from the loan it had secured from IDC.

- [7] A further condition of the loan agreement was that the respondent would obtain a certificate from engineers confirming that an aircraft landing strip located within the nature reserve was repairable.

- [8] As I have stated, the respondent contends those representing the applicant had always been aware that it (the applicant) could only commence works on the site once these conditions had been met. Despite being aware that these conditions had not been met, the applicant commenced work on the site, so contends the respondent.
- [9] The application was launched on 1 March 2012, on an urgent basis, and was set down for hearing on 8 March 2012. On 8 March 2012 it was postponed to 22 March 2012, the day on which I heard it.
- [10] Although the respondent had, in its answering affidavit, agreed that the issues in the application merit urgent consideration, a suggestion was made in the same answering papers and in the respondent's Heads of Argument that the matter was not urgent. But when I raised the concession made in the answering papers on urgency the respondent did not persist in the contention that the matter was not urgent. In launching the application on an urgent basis the applicant contended that the tourist accommodation which had been in existence in the nature reserve and from which community members had derived income, had been demolished by the applicant in preparation for the development. It was further alleged that members of the community had threatened to agitate for cancellation of the concession agreement. If the agreement was cancelled, so the applicant contended, the only asset of the respondent (the agreement) would be lost. The respondent maintained that the threat of cancellation of the concession agreement, if it had occurred, could only be attributable to community members having been misled by the applicant in the absence of and without input from the respondent. Be that as it may, I was persuaded that issues between the parties' did merit some urgent consideration. Apart from the parties own contentions that the matter fell to be dealt with on an urgent basis a practice has come to be accepted in this Division, in terms of which applications of this nature are brought on a semi-urgent basis, with a Rule Nisi issued at first, to be confirmed at a later stage. This is the form in which this application was also brought.
- [11] Prior to hearing the merits of this application I considered an application brought by the respondent, seeking an order that the applicant be ordered to furnish security for the respondent's costs in terms of Rule 47 of the Rules of Practice in this Court. I dismissed that application as I was of the view that granting it would militate against the very urgency of the application in that this would entail postponement of the hearing pending determination by the Registrar, of the amount of security to be furnished by the applicant. It further seemed to me that it was rather more imperative that the issues between the parties be determined once and for all. I had also formed an impression, based on the papers that the applicant's financial circumstances were rather unfavourable, to say the least. Hence I exercised my discretion against granting the order sought.
- [12] The application was brought in terms of sections 344(f) read with section 345 of the Companies Act No 61 of 1973 (the act). Section 344 (f) of the Act provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345.

[13] Section 345 sets out the instances in which a company is deemed unable to pay its debts as follows;

where:

“(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

.....

and the company or body corporate has for three weeks thereafter neglected to pay the said sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b)

it is proved to the satisfaction of the court that the company is unable to pay its debts.”

[14] The respondent’s case, as I understand it, is that the amount claimed is not due to the applicant in terms of the agreement because it has never intended to be final agreement and, in any event all the terms of the sham agreement had been suspended pending compliance with the conditions in the IDC loan agreement. More precisely, the respondent’s contends that, although the parties did have intentions that, at some stage in the future, when the IDC loan conditions had been met, the parties would realise their intention to conclude an agreement regarding the development; the written agreement which forms part of the record was not the intended agreement. Instead it (the written agreement) was concluded at the instance of the applicant and was only aimed at inducing Standard Bank to grant “bridging finance” to the applicant. Moreover, so contends the respondent, some of the terms of the written agreement, such as the contract price, could never have been agreed on by the parties because of insufficiency of necessary related information at the time.

[15] I did not understand the applicant to dispute that the respondent’s loan agreement with IDC contained the conditions referred to or to deny awareness thereof at the relevant time. The applicant’s case could only be that when the written agreement was signed on 23 July 2011 it superseded the then prevailing understanding between the parties that performance would only commence once the conditions had been complied with. For the purpose of this application, the applicant relies in particular on the details, particularly the dates, stipulated in the “project plan” section of the written agreement which, according to the applicant, were complied with. In this regard the agreement provides, amongst others, that on 25 July 2011 the site would be handed over to the applicant, site establishment would start on that date and that demolition and clearing of existing buildings would also start on the same day.

The applicant then contends that it performed its obligations as stipulated in the agreement. The respondent was obliged therefore, in terms of the agreement, to pay the amount claimed. The applicant also contends that the respondent, in fact did consider itself bound by the agreement, as shown by certification and payment of the applicant's first invoice.

- [16] It then seems to me that the first issue to be determined is whether the written agreement is, in truth, a reduction to writing of the true intentions of the parties. The following has been said of this kind of inquiry:

“for this purpose evidence may well be necessary¹ because the true nature of the document may not appear from the document itself. Such evidence may be oral or documentary and may canvass the negotiations and oral agreements preceding or accompanying the document, provided it is directed at establishing the status or true nature of the document”.²

- [17] In this regard Mr Thatcher who appeared on behalf of the respondent referred me to evidence contained in emails exchanged, mostly between Debbie Kroukamp-Fradl, the applicant's sole member, and/or her husband Luke Leo Fradl on one side, and Cheryllyn Watson, a director of the respondent on the other side. It appears from the papers that Cheryllyn Watson (referred to in the correspondence as “CJ”) was the person in charge of the project on behalf of the respondent. I might add that although Debbie Kroukamp-Fradl is the applicant's sole member, it appears from the papers that her husband (Luke Fradl) is the person who was “hands - on”, on behalf of the applicant, on most aspects of the project.
- [18] Further relevant evidence is contained in correspondence (emails) exchanged with Stuart Clipstone of MLC Quantity Surveyors (MLC) and Solli Venter who purported to represent the respondent when the written agreement was concluded. It was common cause or not in dispute at the

hearing that although the respondent had intended to appoint both MLC and Venter as its contract administrator and principal agent respectively, such appointments were never executed.

- [19] The background evidence from this correspondence, as further explained in the answering affidavit, begins on 14 March 2011 with Luke Fradl seeking financial assistance of R30 000 per month from Watson. Fradl explains that he has “not taken” in any work in anticipation of the Mkambati project and offers that the amount advanced could be set off against “the (applicant's) final bill”. It is common cause that by this time there had already been a long delay in getting the project off the ground due to delay by the Government in signing the concession agreement. A proposal submitted by Luke Fradl to the respondent on the anticipated building work had been accepted by the respondent as far back as 2009.
- [20] A further cause for delay was a condition by the Eastern Cape Parks Board that the landing airstrip would have to be located outside the nature reserve. However this problem was resolved during June 2011 when the Parks Board gave permission for the landing strip to be located within the nature reserved.

- [21] On 14 June 2011 Watson left for Europe where she remained until 2 August 2011. The written agreement was concluded whilst Watson was in Europe.
- [22] On 1 July 2011 Fradl inquired from Watson by email whether a “letter of award (could) not be issued as his meetings at the bank (were) going nowhere”. At this time the applicant was in the process of seeking “bridging finance” from the bank as I have already stated. Fradl also stated, in that email, that he had “committed” staff for the project and they would be starting to work for the applicant on 4 July 2011. A letter dated 4 July 2011, accepting the applicant’s tender was issued by the respondent. Seemingly, the bank was not satisfied with this letter. Watson then requested the IDC to assist Fradl with “something...in order to guarantee his finance”. On 6 July 2011 Fradl sent a draft letter to IDC. The draft letter was a confirmation by IDC that the loan granted by IDC to the respondent for the project would be paid to the applicant in accordance with JB2000 (building) contract payment terms. Indeed the draft was transcribed onto an IDC letterhead and duly signed.
- [23] It seems that the bank remained unsatisfied and required a signed contract before it could grant a loan to the applicant. In an email dated 14 July Stuart Clipstone confirmed to Fradl that they (as the purported contract administrators) were “putting together another contract document as discussed”. On the same day Fradl indicated to Watson that the applicant was “happy to move onto the site asap (25 July 2011)...”.
- [24] By 15 July 2011 Fradl had still not been able to secure a loan for the applicant. Watson suggested to Fradl that “we need to get the basic contract done as no one is going to consider anything until we have that. I then need the projected time frames and order of works, and projected payments. In addition I have asked IDC to confirm all the issues have been taken care of”.
- [25] The evidence reveals that there was still a delay with the preparation of the building contract that was to be signed by the parties. On 18 July 2011 Fradl expressed his frustration with the delay to Watson also stating that he would be “going to Mkambati on Saturday (23 July 2011), trucks loaded, contract or no contract, bank loan or no bank loan.....” On 21 July there seemed to be progress. Fradl informed Watson that he would be meeting with Solli Venter, the purported principal agent, to draft the contract. However, Venter did tell Fradl that he had not yet been appointed as such. But the contract was concluded and signed on behalf of the applicant on 23 July 2011.
- [26] On 25 July Debbie Fradl informed Watson that they had finally received the contract from Venter on the Saturday (23 July 2011), Venter had signed as principal agent and Watson would sign as the employer on her return to South Africa. The contract had, already been submitted to the bank.
- [24] This is the undisputed context in which the written contract was concluded.

- [25] There is also further evidence of correspondence between the parties' representatives subsequent to the conclusion of the written agreement. These also reveal, in my view, the attitude of those involved to the status of the agreement that had been concluded and to the terms embodied therein.
- [26] On 16 August 2011 Fradl wrote to Watson and Fradl, seeking to arrange the first inspection in preparation for the applicants first invoice, it would seem. Watson responded, on the same day, that Fradl should not submit the invoices to IDC as the conditions had still not been met. She also reminded Fradl, that she had, whilst in Greece, warned him not to go on site. In response Fradl inquired as to what the other outstanding items would be if he could "get the airstrip sorted" On the same day Clipstone (MLC) forwarded to Watson for the signature, letters of appointment of MLC and Venter. Watson forwarded the letters of appointment to Cranswick in Australia. It is at this stage on 30 September 2011 that Venter decided not to sign any further certificates; he confessed that he was, "in anyway, not allowed to sign anything until appointed."
- [27] It is also apparent from correspondence from Venter to Watson that the designs and "contracts" had not yet been finalized and that Fradl had requested that this be done.
- [28] On 13 September 2011 Venter sent an email to Clipstone, Fradl and Watson attaching the signed evaluation Certificate number 1, also bringing to their attention that he had not yet been appointed and had only signed in good faith.
- [29] On 13 September Debbie Fradl sent an email to Watson inquiring about payment. Watson reiterated in her response, that she had warned Fradl not to go on site.
- [30] Watson states in her answering affidavit, that she ultimately decided to pay a portion of the amount claimed in the first invoice due to pressure from Fradl who implored her to make some payment as his children were about to be expelled from school. Payment of R50 000,00 was then made from funds from an "associated company". A second payment of R218 000 was made by Ms Colquhoun, Watson's assistant, This payment was made without Watson's knowledge and /or approval.
- [31] Watson then demanded a "breakdown" of the amount claimed by the applicant, to which Fradl responded that the contract did not require him to draw such a breakdown. Watson reminded him, yet again, that there was, in fact no contract covering the work done by Fradl at the site. According to Watson, she felt sorry for Fradl and decided that she would pay him for the expenses that he had actually incurred; hence the request for a breakdown of the claim amount(s). When Watson received the breakdown she formed the view that for some of the items the applicant had improperly claimed payment. No other payments were made to the applicant.
- [31] On this evidence I am persuaded that none of the parties intended the written agreement which is part of the record in this application to be the final and binding agreement between them when it was concluded. The allegation in the founding affidavit that the letter of

acceptance of tender dated 4 July 2011 is what it purports to be distorts the intention with which the letter was drawn, which was, on Fradl's request, for the purposes of inducing the bank to grant the loan which the applicant had applied for. So do the allegations by the applicant that:

Watson represented the applicant when the agreement was concluded;

the parties intended that possession of the site be given to the respondent on 25 July 2011;

the contract sum was R32 363 692,50;

the completion date was intended to be the 22 April 2012; and that

the agreement was intended to be the entire agreement between the parties.

[32] I am satisfied that, viewed in totality, the evidence shows that this agreement was intended to facilitate the applicant's loan application with Standard Bank. Watson, the person who was to negotiate and approve the final binding terms of the agreement on behalf of the respondent was never party to the agreement in the terms set out above, on which the applicant's claim is founded. The evidence is that when the agreement was concluded there were no designs and drawings of the buildings that were to be constructed; therefore, as contended by the respondent, no contract price could have been agreed on. Venter, who purported to represent the respondent when the agreement was concluded, had not been appointed as the respondent's principal

agent and he had informed Fradl accordingly. In any event, on the respondents version,³ I am unable to find that the applicant has proved that it has a claim as envisaged in section 344(f) and 345 of the Act.

[33] Although it appears to be common cause that the applicant did some work at the site it does not follow that it is entitled to payment, either at all or in the amount claimed or on the basis contended for in the application. The courts have held that the words "then due" in section 345 (1)(a) mean "then due and payable".⁴

[34] A debt which is not payable on receipt of a notice contemplated in section 345(1) (a), 'but has to undergo further processes in order to determine whether payment is possible cannot support a winding up order'.⁵ Further, an application for winding-up brought under section 345 of the Act will fail where there is, such as in this case, a bone fide dispute, on reasonable grounds, as to either the existence of the debt or that payment thereof is due. Winding-up proceedings are not appropriate for resolution of such a dispute.⁶

[35] For these reasons the following order shall issue; that

The application is dismissed with costs.

N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv. Brooks; Instructed by Wheeldon Rushmere & Cole High Street Grahamstown

For the Respondent: Adv. Thatcher Instructed by Whitesides Attorneys African Street
Grahamstown

1As opposed to rigid application of the parol evidence rule.

2Christie's; The Law of Contract in South Africa; 6th ed; at 202

3Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234

4Alton Coach Africa CC v Datcentre Motors (Pty) (Ltd) t/a CMH Commercial 2007 (6) SA 154

5Meskin; Hescheonberg on the Companies Act; Issue 33; at 707 .

6Meskin; (supra) at 708

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