

SOUTH AFRICA / JUDGMENT

Ditsobotla Local Municipality and Another v Elegant Line Trading CC t/a Oryx Wildlife and Game Farming Elegant Line Trading CC and Others (M146/2019) [2020] ZANWHC 38 (28 August 2020) [2020] ZANWHC 38

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

M146/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO.: M146/2019

In

the matter between:

DITSOBOTLA
LOCAL MUNICIPALITY
1st Applicant
MOTHUSIEMANG
ERIC MATLAWE N.O
2nd Applicant
and
ELEGANT
LINE TRADING CC t/a ORYX WILDLIFE
AND
GAME FARMING
ELEGANT
LINE TRADING CC
1st Respondent
MR
ATTIE A. VAN HEERDEN
2nd Respondent
SERAME
SOLOMON NNETE
3rd Respondent

OPPOSED
MOTION
GURAJ
DATE
OF HEARING
14
MAY 2020
DATE
OF JUDGMENT
28 AUGUST 2020
FOR
THE APPLICANT ADV E MOKUTU SC with ADV
M MOTLOGELWA
FOR
THE 1st RESPONDENT ADV APJ ELS

JUDGMENT

GURA J.

Introduction.

[1] This is first respondent's interlocutory application for postponement. When this matter was heard, there were three pending applications which had been set down for hearing on Thursday, 14 May 2020. These three applications were:

- 1.1 An application for the amendment of the notice of motion in the review application;
- 1.2 A separate condonation application; and
- 1.3 A review application (the main application).

The purpose of this interlocutory application is to request the Court to postpone the main application, conditional upon the amendment being granted

[2] For a proper understanding of the context in which the interlocutory application was brought, I set out the relief sought in the main application.

"1. Declaring the decision of the third respondent to award and/or to appoint the first respondent for the implementation of a public private partnership in respect of a joint venture for purposes of implementation of a game breeding and tourism enterprise for a period of twenty-five (25) years to be unlawful;

2 Reviewing and setting aside the decision of the third respondent to award and/or to appoint the first respondent for the implementation of a public private partnership in respect of a joint venture for purposes of implementation of a game breeding and tourism enterprise for a period of twenty-five (25) years;

3. Costs of suit;
4. Further and/or alternative relief"

Salient

facts.

[3] The applicants launched the main application on 20 March 2019. The first respondent delivered its answering affidavit on 13 May 2019. In the answering affidavit (of the first respondent) the following two issues were, inter alia, raised:

3.1 The relief was inadequately framed in the notice of motion in that the applicants sought to review a decision of the third respondent (an ex employee of the first applicant);

3.2 There was undue delay in the launching of the application and the necessary allegations were not made to explain the delay.

[4] It was as a result of the aforesaid two issues which were raised in the answering affidavit that the applicants subsequently delivered a notice of intention to amend and a separate substantive condonation application .

[5] On 4 June 2019, the applicants delivered an application of intention to amend in terms of Rule 28 (1). In terms of that notice (of intention to amend) the applicants essentially sought to amend the existing relief in the notice of motion by referring specifically, in the alternative, to "the decision of the first applicant". In addition, the applicants introduced a completely new prayer as paragraph 3 of the notice of motion which reads as follows:

" An order setting aside the agreement, which is annexed to the founding affidavit as annexure " FA11 " which was concluded between the first applicant and the first respondent on or about 4 September 2015. "

[6] The first respondent filed a notice of objection in terms of Rule 28 (3). In this notice, the following grounds were stipulated:

"

1. The first respondent has already filed its answering affidavit and cannot be forced to file a further answering affidavit after amendment of the relief sought in the notice of motion;
2. The amendment sought by the first applicant is of a serious nature;
3. In the existing notice of motion, the applicants did not deal at all with the setting aside of the agreement. The view that was taken in the founding affidavit is that the agreement is ab initio invalid (and that it does not have to be set aside by a Court);
4. The allegations made in the first founding affidavit do not support the relief sought in the proposed amended notice of motion;

5. In the event that the amendment is granted, the first respondent will suffer prejudice that cannot be rectified by an appropriate order for costs. The applicants should either persist with the relief sought in the notice of motion or it should launch a new application. "

[7] In response to the aforesaid notice of objection, the applicants delivered a substantive application for amendment.

The first respondent's case.

[8] The mere fact that the applicants have realised (after receipt of the answering affidavit) how important the amendment is, illustrates the fact that it is indeed an amendment of a serious nature. The view that is taken by the first respondent is that the applicants, if they intend to persist with the application for amendment, should not have set down the application for amendment and the main application on the same day. If the first respondent is not afforded an opportunity to respond to the new relief in the notice of motion, the first respondent will be prejudiced to such an extent that the first respondent will not be able to rectify this at a later stage. Unless the first respondent is allowed to deliver a further affidavit in response to the amended relief, the first respondent will suffer prejudice to such an extent that the amendment should not be granted.

[9] The first respondent also, in particular, relies on the provisions of Rule 28 (8) which provides as follows:

" Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in Rules 23 and 30."

The "consequential adjustment" that the first respondent is entitled to make is at least to deliver a further affidavit. The applicants will, in such an event, be entitled to deliver a replying affidavit in response to those allegations.

[10] Only insofar as the honourable Court finds that the first respondent is not entitled, based on the provisions of Rule 28 (8) to make a "consequential adjustment to the documents filed" by it, but nonetheless grants the amendment, the first respondent intends to ask for a postponement on the basis that the first respondent will be prejudiced if it is not afforded an opportunity to deliver a further affidavit. Regarding the necessity to deliver a further affidavit it is necessary to briefly explain to the honourable Court the legal issues that will be raised by the first respondent. The first respondent will take the view that the agreement concluded between the first applicant and the first respondent does not fall within the meaning of a contract "for goods or services" as contemplated in section 217 of the Constitution. For the same reason the first respondent will raise the issue that the agreement also does not fall within the ambit of Chapter 11 of the Local Government Municipal Finance Management Act, 56 of 2003.

- [11] In essence it is the first respondent's main argument that the agreement is not a procurement agreement at all. It is a joint venture agreement that was concluded between the applicant and the first respondent essentially to enhance game breeding and tourism on the property. It was expressly stated in the agreement that it is not a lease agreement. The view taken by the applicants is that the conclusion of the agreement amounted to administrative action which the applicants want to set aside based on the common law.
- [12] Insofar as the honourable Court finds in favour of the first respondent on the basis that the conclusion of the specific joint venture agreement does not fall within the ambit of contracting for "its own goods and services" as contemplated in section 217, the relief sought in the notice of motion cannot be granted. Only in the event that the honourable Court finds that the conclusion of the agreement indeed amounted to administrative action which can be set aside based on the common law, the first respondent is entitled to rely on the provisions of section 172 (1)(b) of the Constitution that allows a Court to make a just and equitable order including:

"(i)

An order limiting the retrospective effect of the declaration of invalidity; and

(ii) An order suspending the declaration of invalidity for any period and on any condition, to allow the competent

authority to correct the defect. "

- [13] The first respondent in particular seeks an opportunity, if the amendment is granted, to deliver a supplementary affidavit dealing in particular with the new prayer introduced in the notice of motion. The first respondent cannot be expected to prepare for this matter on the basis that the amendment will necessarily be granted. As at this particular moment in time there is no amended notice of motion. The only notice of motion is the original notice of motion. It is only once the amendment is granted that the applicants become entitled to deliver an amended notice of motion. It is only once this occurs that the first respondent will become entitled to request the honourable Court to grant a postponement to allow the first respondent to deal with the amended relief.
- [14] The first respondent could also not have been expected to deliver a supplementary affidavit in anticipation of any amendment being granted. The delivery of such an affidavit would undoubtedly have constituted an irregular step. The first respondent had to wait for the amendment to be effected. The setting down of the application for amendment together with the main application was irregular of the applicants. The notice of amendment should have been finalized first before the applicants were entitled to set down the

main application.

The applicant's version.

- [15] On 8 May 2020, first respondent's representatives sought an indulgence to file their client's heads of argument on 11 May 2020. The Municipality's attorneys granted the indulgence sought. On 11 May 2020, no heads of argument were received from first respondent's attorneys. Instead, they simply and unilaterally stated in writing that the matter was not ripe for hearing.
- [16] That necessitated a further email to be addressed to the first respondent's where the Municipality's attorneys complained bitterly about the first respondent's counsel or its representative's failure to file the heads of argument. This postponement application was brought as a result of first respondent's representative's failure to timeously prepare and file the heads of argument as undertaken.
- [17] First respondent's notice of motion does not afford the Municipality an opportunity or the dies within which to file its notice of intention to oppose and its answering affidavit. Rule 6 (5) (b)(iii) of the uniform rules provides that in the notice of motion, the applicant must set forth a day, not less than 5 days after service thereof on the respondent, in writing, whether the respondent intends to oppose such application. Rule 6 (5)(d)(ii) of the uniform rules, inter a/ia, provides that a person opposing the grant of the order sought in the notice of motion must within 15 days of notifying the applicant of his or her intention to oppose the application, deliver his answering affidavit.
- [18] By filing its answering affidavit, the Municipality is not condoning the non-adherence to the applicable uniform rules. On the contrary, the Municipality has been imperiled by the first respondent's total disregard of the aforesaid applicable uniform rules, and the Municipality was, therefore, forced to put this affidavit in an attempt to place its version before this honourable Court. The applications before this Court are not urgent at all. First respondent has requested a prayer dispensing with the requirement that the rules in as far as the dies are concerned be dispensed with.
- [19] Furthermore, the postponement application has been launched a day before the hearing of the applications presently before this honourable Court. The postponement application was only received by the Municipality's attorneys on 13 May 2020 at approximately 10h52 am. First respondent and its attorneys received the notice of set down on 27 January 2020 and nothing was done to institute the postponement application. The Municipality's heads of argument were duly filed on 07 May 2020 and the first respondent's legal representatives have committed themselves to file their client's heads of argument on Monday, 11 May 2020. Instead, a postponement application has since been served and nothing has been done or said about the heads.

- [20] The first respondent has repeatedly stated that if the amendment of the notice of motion sought is granted, then it will suffer prejudice. To date, it has not demonstrated the alleged prejudice. To the extent that first respondent is desirous to file a further affidavit, it must seek leave of this honourable Court to do so. The first respondent cannot contend that it is entitled to file a further affidavit if the amendment is granted in circumstances where only the notice of motion is being amended and the founding affidavit remains exactly the same.
- [21] The Municipality does not seek to supplement any of the review grounds in its founding affidavit in the review application. It is perplexing that notwithstanding that all of first respondent's grounds of objection or opposing the amendment sought, still seeks to further supplement its founding affidavit in the review application. It begs a question as to why were those facts, which are intended to be supplemented, never deposed to initially in the answering affidavit. First respondent does not explain why those facts or averments were never included, initially, in its answering affidavit.

Legal principles relating to a postponement

- [22] The Court has a discretion whether or not an application for a postponement should be granted[1]. That discretion must be exercised in a judicial manner, not capriciously or upon any wrong principle, but for substantial

reasons[2]. The applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application[3]. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his/her unreadiness to proceed is not due to delaying tactics, and where justice demands that he/she should have further time for the purpose of presenting his/her case[4].

Analysis

of the facts.

- [23] Procedurally, the hearing of the review (main) application could only start once the amendment has been finally adjudicated by the court. There is no way that these two processes can run side by side. The first respondent was therefore justified not to file heads of argument on the unamended notice of motion but rather to wait until the final word had been spoken by the court. On this single reason alone, the main application had to be postponed.
- [24] It is trite law that an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant[5]. If, however, fundamental fairness and justice justify a postponement, the Court may in an appropriate case allow such an application for postponement even if the application was not timeously made[6].

[25] The first respondent did not bring its application for postponement timeously despite that it was aware well in advance that the matter had to serve before Court on 14 April

2020. It decided to bring its application for postponement just a day before the proposed date of hearing of the case. The applicants are correct to say that they did not even have sufficient time to oppose the application by the first respondent. Such failure, notwithstanding, I am satisfied that fundamental fairness and justice demand that the issue of amendment to the notice of motion has to be decided first before the main application can be heard. Once an amendment has been granted and it has been made then the affected party may consider whether to exercise its option to introduce further evidence dealing with the amended particulars. The application for a postponement has to be granted.

Costs.

[26] For this unexplained delay in launching its application for a postponement, the first respondent cannot be left unscathed. It was for this reason that the first respondent was deprived of a cost order in its favour despite that it was a winning party.

Conclusion.

[27] It was due to the aforesaid reasons that after listening to submissions on 14 May 2020 the Court made the following order:

"1. THAT:

The application for amendment by the Applicant is granted;

2. THAT: The Notice of Motion is deemed to be amended and there is no need to file an amended Notice of Motion by the Applicant;
3. THAT: The matter is postponed to a date to be fixed by the Registrar;
4. THAT: Each party to pay its own costs;
5. THAT: Reasons for judgment are reserved. "

SAMKELO GURA

JUDGE OF THE HIGH COURT

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- [1] Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC) at 75G and 79B-C; Magistrate Pangarker v Botha 2015 (1) SA 503 (SCA) at 509E
- [2] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14A-C; Baron Camilo Agasim - Pereira of Fulwood v Wertheim Becker Incorporated [2006] 4 All SA 43 (E) at 49i.
- [3] Shilubana v Nwamitwa [2007] ZACC 14; 2007 (5) SA 620 (CC) at 624B-C; Grootboom case, *supra*.
- [4] Myburg Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) at 315B-C; Persadh v General Motors South Africa (Pty) Ltd 2006 (1) SA 455 (SE) at 459F
- [5] Gwenzi v Cebekhulu 1996 (1) SA 525 (N) at 528I-529C; National Police Service Union v Minister of Safety and Security 2000 (4) SA 1110 (CC) at 1112E.
- [6] Ketwa v Agricultural Bank of Transkei [2006] 4 All SA 262 (Tk) at 271g-274f; Shilubana case, *supra*.

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