

SOUTH AFRICA / JUDGMENT

Everson v Econorisk (Pty) Limited and Others (37760/2019) [2019] ZAGPJHC 460 (5 November 2019) [2019] ZAGPJHC 460

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Dippenaar

CASE / FILE NUMBER

37760/2019

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT
OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER:37760/2019

In

the matter between:

EVERSON,
LAURA
Applicant
and
ECONORISK
(PTY)
LIMITED
First Respondent
ADVOCATE
P L E R
THERON
Second Respondent
THE FINANCIAL
SECTOR CONDUCT
AUTHORITY
(FSCA)
Third Respondent

JUDGMENT

DIPPENAAR J:

- [1] The applicant seeks urgent interim interdictory relief against the first and second respondents pending the finalisation of review proceedings launched by the applicant under case number 37158/2019 on 22 October 2019.
- [2] From the papers it is unclear whether the application is opposed by only the first respondent or by the first and second respondents. At the hearing, respondent's counsel clarified that it was only the second respondent who opposed the application. The third respondent did not participate in these proceedings but indicated that it would file an affidavit to assist the court in the review proceedings. The applicant and the first respondent are involved in other proceedings before the Labour Court. It is clear that the relationship between them is acrimonious.
- [3] The genesis of this application lies in debarment proceedings which the first respondent launched against the applicant, a former employee, by way of notice of intention to debar dated 8 August 2019. The second respondent was appointed by the first respondent as chairman to conduct the debarment hearing. Such hearing was to proceed on 31 October 2019. On the first respondent's version, the second respondent is an independent party appointed to evaluate the merits who is to make recommendations to the first respondent. The applicant disputes this and moreover contends that the second respondent is acting with bias.
- [4] Prior to the launching of the current application and after the launching of review proceedings against the first and second respondents, the applicant on 21 October 2019 sought written undertakings from the first and second respondents that the debarment hearing be stayed pending the finalisation of the debarment proceedings. As no undertakings were provided, the current application was launched on 25 October 2019.
- [5] On the same date, the first respondent provided a qualified undertaking not to proceed with the debarment hearing on 31 October 2019 and to give the applicant 10 working days' notice if it intended setting down the hearing before the second respondent. The second respondent independently confirmed that the debarment hearing would not proceed on 31 October 2019. The first respondent sought confirmation that the urgent application would not be proceeding. The parties could however not agree on a consent order and the applicant was dissatisfied with the qualified undertaking provided.
- [6] Based on these facts, the first respondent disputed the urgency of the application and sought a punitive costs order against the applicant for persisting with the application.

[7] I do not agree with the first respondent that the undertaking provided was sufficient to obviate the urgency of the application. It exposed the applicant to the risk of further urgent applications and additional legal costs if at any stage the first respondent

unilaterally elected to notify the applicant of an intention to proceed with the debarment hearing before the second respondent. If the first respondent wanted to neutralise the need for the urgent application, it could and should have provided the undertaking in the terms sought. I am satisfied that the applicant has illustrated that it would not obtain substantial redress at a hearing in due course[1]

[8] The requirements of an interim interdict are trite. They are a prima facie right, although open to some doubt, the risk of irreparable

harm, a favourable balance of convenience and the absence of a satisfactory alternative remedy[2] . The applicant contends that its right to substantive and procedurally fair administrative action is in fact clear. Reliance is

placed, not only on PAJA, but also on the principle of legality and the common law.

[9] In considering the application, the proper approach is to take the facts set out by the applicant together with any facts set out by the first respondent, which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicants should, not could, on those facts obtain final relief at trial [3]

[10] In the review application, the applicant inter alia challenges the jurisdiction of the second respondent to chair the debarment hearing and accuses him of bias. She also raises various

grounds for the setting aside of the appointment of the second respondent as chairperson to preside over the intended debarment

hearing of the applicant and all actions and rulings which followed thereafter, both under Promotion of Administrative Justice Act[4] (“FAIS Act”) and in the alternative under the principle of legality or at common law. It is contended that the first and/or second respondent who took the decision were not authorised to do so by the empowering legislation, being the FAIS Act.

[11] The first respondent contends that the review proceedings are premature and that the applicant would only be entitled to institute review proceedings once a decision has been made on the issue whether to debar the applicant. This argument misses the true complaint of the applicant which is, inter alia, aimed at the procedural unfairness of the debarment proceedings before the second respondent from inception.

[12] The first respondent's reliance on its statutory obligations under section 14 of the Financial Advisory and Intermediary Services Act[5] and the principles enunciated in decisions such as *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[6] ("OUTA") are misplaced. The interim relief sought by the applicant is not aimed at barring the first respondent from complying with its statutory duties under section 14; rather it is aimed only at barring any debarment proceedings from proceeding

before the second respondent, pending the finalisation of the review proceedings. It is further by no means clear that the first

respondent would be acting contrary to the contents of the guidance notices envisaged by section 141 of the FAIS Act as contended by the first respondent.

[13] I do not intend to prejudge the outcome of the review proceedings and it would be inappropriate for me to do so. Suffice it to state that on a prima facie basis, I am persuaded that the applicant has met the necessary threshold to illustrate that she has a prima facie right to relief.

[14] It was not strenuously disputed that the applicant is not at risk of suffering irreparable harm. Considering the limited terms of the undertaking provided by the first respondent, it clearly reserved the right to proceed with the debarment hearing before the second respondent.

[15] In considering the balance of convenience, it is necessary to weigh up the prejudice of the respective parties. The weaker the applicant's

prospects of success the stronger the need for the balance of convenience to operate in her favour. [7] The first respondent's only contention for prejudice is that if an order is granted, it would impede its ability to comply with its statutory obligations. I have already dealt with the misconception in this contention. Properly considered in the context of the principles enunciated in OUTA[8], I am not persuaded that the grant of a temporary restraining order pending the review would in the present instance prevent or cut across the proper exercise of the powers and duties afforded to the first respondent in terms of the relevant legislation.

[16] On the other hand, if the applicant, who is presently unemployed, were to be debarred pursuant to procedurally unfair and unlawful proceedings, the consequences thereof would be manifestly prejudicial to the applicant. It would further have a substantially prejudicial impact on the applicant's future employment prospects in the financial services sector. Her reputation would be tarnished irrespective of whether the debarment proceedings were lawful or not and irrespective of whether the proceedings were in due course set aside.

[17] For these reasons I am persuaded that the applicant has illustrated that the balance of convenience is in her favour.

- [18] I am further persuaded that the applicant has no alternative remedy at her disposal. The powers of the financial services tribunal are limited to those regulated by chapter 15 of the FAIS act which do not afford the applicant any remedy before a decision is made by the first respondent.
- [19] It follows that the applicant is entitled to the interim interdictory relief sought.
- [20] The normal principle is that costs follow the result. There is no reason to deviate from this principle. The parties have sought punitive costs orders against each other. I am not persuaded that such an order is warranted.
- [21] I grant the following order:
- [1] The first and second respondents are interdicted from proceeding with the debarment hearing of the applicant to be heard either on 31 October 2019 or any other date, before the second respondent;
- [2] The order in [1] above shall operate as an interim interdict pending finalisation of the review application under case number 37158/2019 issued out of this court on 22 October 2019;
- [3] The first respondent is directed to pay the costs of the application.

F DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING

: 31 October 2019

DATE OF JUDGMENT

: 05 November 2019

APPLICANT'S COUNSEL

: Adv C Garvey

APPLICANT'S ATTORNEYS

: Otto Krause Inc attorneys

Mr Krause

FIRST RESPONDENT'S

COUNSEL

: Adv Millard

ATTORNEYS

: Saljee Govender Van der Merwe Inc

Mr Govender

[1] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others
(11/33767) [2011] ZAGPJHC 196 (23 September

2011)

[2] LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A-E;
Setlogelo v Setlogelo 1914 AD 221 at 227

[3] Spur Steak Ranches Ltd and Others v Saddlers Steak Ranch Claremont and Another 1996 (3)
SA 706 (C) 714B-H.

[4] 3 of 2000

[5] 37 of 2002

[6] [2012] ZACC 18

[7]

[8] Paras 64-66

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