

SOUTH AFRICA / JUDGMENT

Fusion Hotel and Entertainment Centre CC v Ethekekwini Municipality and Another (15589/2007) [2014] ZAKZDHC 8 (8 February 2014)

[2014] ZAKZDHC 8

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

15589/2007

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

CASE

NO: 15589/2007

In

the matter between:

FUSION

HOTEL AND ENTERTAINMENT CENTRE

CC.....Plaintiff

and

ETHEKEKWINI

MUNICIPALITY.....First

Respondent

COASTLANDS

ICC HOTEL (PTY)

LTD.....Second

Respondent

(formerly

IMPILO FLAT NO.314 (PTY)LTD

JUDGMENT

Delivered: 08 February 2013

MBATHA J

- [1] The Applicant in this matter is Fusion Hotel and Entertainment Centre CC; a close corporation duly registered and incorporated in terms of the Close Corporation Laws of the Republic of South Africa and which carries a business at 186 Rochdale Road, Springfield, Durban.
- [2] The First Respondent is Ethekewini Municipality, a Metropolitan Municipality duly established in terms of section 12 of the Local

Government Municipality Structures Act, 197 of 1998 and as such a Body Corporate which has the offices of Legal Services Department at 12th Floor, Shell House, 221 Smith Street, Durban.

- [3] The Second Respondent is Coastlands ICC Hotel (PTY) Limited, formerly known as Impilo Flat 314 (PTY) LTD, a private company with limited liabilities duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa with Registration no. 2006/016472/07 and which carries on business at 1st Floor, Kenilworth Park 202 Brickfield Road, Durban.
- [4] The Applicant seeks an order reviewing and setting aside the decision of the First Respondent dated 17 May 2007 as supplemented by its reasons contained in its notice dated 15 August 2007 to award Tender No. CV275L to the Second Respondent.
- [5] A week before the hearing of this matter, the First Respondent filed a supplementary affidavit that it no longer objects to the granting of an order in terms of paragraph 1 of the Notice of Motion. This disposed of the substantive relief sought by the Applicant.
- [6] The Applicant is now seeking an order for costs, including costs of two (2) Counsels for the following reasons:

4.1 That the essential invalidity of the tender process as implemented by the First Respondent was that it awarded a tender of a 30 year lease in exchange for a price for the use of the property plus the return of the property enhanced by the construction of a hotel development thereon, without a comparative money value on the return. It is submitted by the Applicant that such a system of tender award is uncertain, arbitrary and is neither competitive nor cost effective as a required by section 217 of the Constitution.

4.2 It also negates the 90% comparison of the value of what is tendered to the State in terms of PPPFA, in terms of section 3(1)(b)(i).

4.3 It was further submitted that the failure by the Second Respondent to implement the tender was due to the uncertainty regarding the validity of the tender.

4.3 That the present stage of litigation should have been reached by May 2009 at the latest. Furthermore, there is no reason submitted as to why the Respondents did not file its development plan which constituted a suspensive condition of the tender award irrespective of any appeal against such an award. More so the First Respondent resisted to the production of the plan to the Applicant.

4.4 For two (2) years the tender contract was not implemented. The Second Respondent demanded indemnification should there be a successful challenge by Applicant against both Respondents from the First Respondent. The First Respondent refused to give such indemnification.

4.5 Finally, the First Respondent relents and throws in the proverbial white towel into the ring. The Applicant gets the order it sought after all and is therefore entitled to an order for costs.

[5] This application for an order for costs is opposed by the First Respondent. It is submitted that the Applicant did not have a strong case made out in the papers, it is only capitalising on the new development. It is submitted that that the throwing in of the towel had no bearing on the merits of the application.

The First Respondent's contention is that there was a scoring process which was the basis of the tender contract. The award was made to the highest scorer. This was not challenged by the Applicant save for the issue relating to the status of women.

The Applicant failed because it had made a tender for the lowest possible amount nothing else.

[6] It was further submitted that the possible future revenue benefit of a hotel on the premises was never expressed to be a condition of the tender and no evidence was put up in regard thereto. Therefore, the bid adjudication committee would have erred if it relied on that submission.

[7] It was further submitted that the development guidelines as they appear on the papers before Court, they make it clear that the nature of the development was specified to a far greater degree than what the Applicant suggested. This was therefore not an arbitrary hotel proposal.

[8] It was argued that it was not the Applicant's case that the First Respondent never put a copy of the development plan that had been submitted by the Second Respondent. They could not have succeeded on that basis as that was not their cause of action. Nor was the development plan a condition of a tender.

[9] It was emphatically submitted that the Applicant would not have succeeded on the merits and therefore that it is not entitled to costs. Their claim for costs is opportunistic on the basis of the throwing in of the towel by the Second Respondent even before "the boxing match" started.

- [10] In general, the purpose of an award for costs is to indemnify the successful litigant for the expenses to which he was put through having been unjustly compelled to initiate or defend litigation as the case may be, as stated in *Texas Co. (SA) Ltd v Cape Town Municipality*[1]. The costs follow the cause, in that the successful party is entitled to an award for costs. In this application before me, the matter was not argued on merits, the First Respondent no longer objected to the granting of the order in terms of paragraph 1 of the Notice of Motion. This disposed of the matter. This entitled the Applicant to the relief sought.
- [11] Prima facie, the Applicant is the successful party in that the order it sought on its papers is the order that the First Respondent consented to at the end. In determining who is the successful party amongst other things, the Court must look at the substance of the judgment and not merely its form. The party that gets an order in its favour is not necessarily a successful party, as the other party may well have succeeded on the issue in dispute. It must also be borne in mind that even when success is not of a substantial nature, the Court may award costs, where the Applicant or litigant succeeds in establishing a substantial right, irrespective of the nominal success it attains.
- [12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the Court has a discretion whether to direct each party to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expenses to which he was put through to challenge or defend the case, as the case may be.
- [13] It is accepted by this Court, that the Applicant has been successful in having the award being set aside; it was only through its challenge that the desired result was obtained. The issue of costs where there is a settlement still remains a difficult issue for the Court to make an award for costs, in particular when there is a challenge to the award for costs.
- [14] In depriving the Applicant, the so called successful party, the Court may take into account the way the litigation was conducted; the taking of unnecessary steps; the adoption of wrong procedures and misconduct by that party. I find that in fact what I would turn to be misconduct emanated from the camp of the Respondents. The First Respondent was informed as early as May 2009 that the Second Respondent was no longer willing to proceed with the project. This should have been considered by the First Respondent as early as possible as this would have minimised costs for everyone involved in the litigation.
- [15] The challenge is not on who bid for how much, but the entire process was flawed as it was not competitive and fair. The Applicant's

prayer was not a request that it be awarded the tender but wanted to have it set aside as it was flawed.

[16] A substantial right has been established by the Applicant. The improper conduct of the First Respondent has encouraged the litigation and in an award for costs the Court accepts that the First Respondent's arbitrary conduct in putting a flawed tender contract led the Applicant litigate. I find that the Applicant acted reasonably in the circumstances, the focus was not on trying to get the tender for themselves, but the aim was to set aside the flawed tender process. I cannot find that this was a mere technical success, as were it not for the actions of the Applicant the order would not have been obtained.

[17] The actions of the First Respondent to oppose the application cannot be said to have been in good faith. Had the First Respondent been bona fide, it would not have hesitated in indemnifying the Second Respondent as per its request. This request gave them an opportunity to check if they had made a bona fide mistake rather than pursuing the matter.

[18] I have exercised my discretion which I considered carefully in favour of the Applicant.

I therefore make the following order:

- (a) The decision of the First Respondent dated 17 May 2007 as supplemented by its reasons contained in its Notice dated 15th of August 2007 to award Tender No. CV275L to the Second Respondent is hereby reviewed and set aside.
- (b) The First Respondent is ordered to pay costs to the Applicant including the costs of two (2) counsel.

Date of hearing: 05 September 2011

Date of judgment: 08 February 2013

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[1] 1926 AD 467 at 488

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