

SOUTH AFRICA / JUDGMENT

Hardy and Another v Jeremy Delpont Construction CC and Others (2224/14) [2015] ZAECPHC 6 (24 February 2015)

[2015] ZAECPHC 6**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

MN Hinana

CASE / FILE NUMBER

2224/14

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IN THE HIGH COURT OF SOUTH AFRICA

IN THE

HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: PORT ELIZABETH)

CASE NO: 2224/14

In the matter between

KEVIN HARDY.....1ST APPLICANT

.....

LAILA HARDY.....2ND APPLICANT

.....

JEREMY DELPORT CONSTRUCTION CC.....1ST RESPONDENT

.....

(Registration No: 98/064268/23)

MOROKE NTEENE.....2ND RESPONDENT

.....

ASSOCIATION OF ARBITRATORS (SA).....3RD RESPONDENT

ASSOCIATION OF ARBITRATORS (SA)

.....

RESPONDENT

JUDGMENT

HINANA AJ:

[1] The applicants instituted these proceedings for the relief in the following terms:-

1.1 Directing that the arbitration agreement as contained in a minor works agreement entered into between the applicants and the first respondent on 25 July 2005; is set aside in accordance with the provision of section 3(2) of the Arbitration Act 42 of 1965 (the Act);

1.2 Alternatively, that in terms of section 13(2) of the Act, the second respondent is removed from his appointment as arbitrator in respect of the current arbitration proceedings between the applicants and the first respondent;

1.3 Further alternatively;

1.3.1 that the respondents are interdicted and restrained from proceeding with, or from taking any steps to give effect to the reference to arbitration dated 25 November 2010, of various alleged disputes by the 1st respondents to the 2nd respondent and 3rd respondent; dated 18 June 2013 (“the alleged disputes”); and

1.3.2 declaring that the reference to arbitration of the alleged disputes is of no force and effect.

1.4 that the costs of this application be paid jointly and severally by the first and second respondents, and, in the event that the third respondent opposes the relief sought herein, the respondents pay costs jointly and severally.

[2] 2nd respondent Morake Nteene, is an arbitrator appointed by the 3rd respondent to arbitrate in a dispute between the applicants and the 1st respondent.

[2] 2

respondent Morake Nteene, is an arbitrator appointed by the 3
respondent to arbitrate in a dispute between the applicants and the 1
respondent.

[3] The 2nd and 3rd respondents did not oppose the application. Only 1st respondent served and filed its notice to oppose on 21 July 2014.

[3] The 2

respondents did not oppose the application. Only 1
respondent served and filed its notice to oppose on 21 July 2014.

[4] During argument, Mr Cowley premised his argument on the allegations of the respondent and that he lacked the necessary skill and experience to arbitrate on legal issues and the biasness on the part of the 2ndrespondent against the applicants.

[4] During argument, Mr Cowley premised his argument on the allegations of the respondent and that he lacked the necessary skill and experience to arbitrate on legal issues and the biasness on the part of the 2

respondent against the applicants.

[5] I do not intend expressing any views on the other relief sought in the notice of motion save to deal with what Mr Cowley referred to as “an elephant in the house”. i.e the issue of the service of the application proceedings on the 2ndrespondent.

[5] I do not intend expressing any views on the other relief sought in the notice of motion save to deal with what Mr Cowley referred to as “an elephant in the house”. i.e the issue of the service of the application proceedings on the 2

[6] Section 7 of the Interpretation Act, 1957 Act 33 of 1957 (the Act) provides:

1957 Act 33

Where any law authorizes or requires any document to be served by post, whether the expression ‘serve’, or ‘give’, or ‘send’, or any other expression is used, then unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post”.

[7] There is no evidence that service of the application papers were served by registered post to the 2ndrespondent.

[7] There is no evidence that service of the application papers were served by registered post to the 2

[8] Service in the High Court is regulated by the Supreme Court Act, 1959 (the Act 59 of 1959) (the Supreme Court Act) and the uniform Rules. Section 36 of the Supreme Court Act, provides

“(1) the sheriff or the deputy sheriff shall execute all the sentences, decrees, judgments, writs, summonses, rules, orders, warrants,

commands and processes of the court directed to the sheriff and shall, subject to the rules made in terms of the Rules Board for

Courts of Law Act, 1985 (Act 107 of 1985) make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

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Courts of Law Act, 1985 (Act 107 of 1985) make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

2.The return of the sheriff or deputy sheriff of what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated

prima facie

[9] The words “process of the court” includes a mandate by which a person, juristic person is brought to court for litigation. (Garret v Lee Hobbs Milton Co[1]. In my view, this also includes any document used in litigation and it must be served and filed.

[9] The words “

process of the court”

includes a mandate by which a person, juristic person is brought to court for litigation.

(Garret v Lee Hobbs Milton Co[1].

In my view, this also includes any document used in litigation and it must be served and filed.

[10] Section 13 of the Arbitration Act, 42 of 1965 (the Arbitration Act) regulates the removal of an arbitrator. The section also encompasses the use of “good cause” shown for the removal.

Arbitration Act)

regulates

[11] In my view, 2nd respondent should have been served with the application papers. There are serious allegations of impartiality and biasness against him and it may very well be that upon being served, he would have

(a) filed a notice to abide; or

(b) filed a notice to oppose;

(c) file on affidavit explaining himself on the allegation levelled against him[2].

[12.1] The failure to serve 2nd respondent deprived him of an opportunity to make an informed decision off what he intends doing about the allegations levelled

against him by the applicants[3].

[12.1] The failure to serve 2

respondent deprived him of an opportunity to make an informed decision off what he intends doing about the allegations levelled

against him by the applicants[3].

[12.2] 2ndrespondent is not precluded from rejecting an allegations made against him[4]

[12.2] 2

respondent is not precluded from rejecting an allegations made against him[4]

[13] The application refered to above is an application similar to the matter before court, and I must be satisfied that proper service was effected on the 2ndrespondent before granting any order. If the 2ndrespondent was not served, I cannot grant an order without hearing what the 2ndrespondent were to say.

[13] The application refered to above is an application similar to the matter before court, and I must be satisfied that proper service was effected on the 2

respondent before granting any order. If the 2

respondent was not served, I cannot grant an order without hearing what the 2

respondent were to say.

[14] On 14 July 2014 an attempt was made by the sheriff by serving the founding affidavit with annexures and the notice of motion on the 2ndrespondent. The return of service reflects that the attempt was made at Coega Port Elizabeth but the sheriff was informed that the 2ndrespondent had left and his present address was unknown.

[14] On 14 July 2014 an attempt was made by the sheriff by serving the founding affidavit with annexures and the notice of motion on the 2

respondent. The return of service reflects that the attempt was made at Coega Port Elizabeth but the sheriff was informed that the 2

respondent had left and his present address was unknown.

[15] A further attempt was made and this time, service in respect of the 2ndrespondent was effected on the 3rdrespondent.

[15] A further attempt was made and this time, service in respect of the 2

respondent was effected on the 3

[16.1] In the founding affidavit, 2ndrespondent is cited as “an adult male arbitrator who was appointed by the third respondent and has his official address c/o the 3rdFloor, Sandown House, Norwich Close Sandown, Sandton Gauteng”.

[16.1] In the founding affidavit, 2

respondent is cited as “

an adult male arbitrator who was appointed by the third respondent and has his official address c/o the 3

Floor, Sandown House, Norwich Close Sandown, Sandton Gauteng”.

[16.2] In opposing what is referred to in paragraph 15.1 above, the 1st respondent alleges, amongst others;

‘the applicants cite the second respondent in his personal capacity and not in his capacity as an arbitrator’.

the applicants cite the second respondent in his personal capacity and not in his capacity as an arbitrator’.

[17] Annexure FA3 is a letter of appointment of the 2nd respondent. The address of the 2nd respondent is in Port Elizabeth. Both the curriculum vitae (annexure FA4) and FA3 reflect the address of the 2nd respondent as “Private Bag X[...] Port Elizabeth 6000.

[17] Annexure FA3 is a letter of appointment of the 2

respondent. The address of the 2

respondent is in Port Elizabeth. Both the

curriculum vitae

(annexure FA4) and FA3 reflect the address of the 2

respondent as “Private Bag X[...] Port Elizabeth 6000.

[18] Other than what is referred to in paragraph 16 above, there is no allegation that the 2nd respondent’s chosen address is in Sandown Gauteng. Neither is it alleged that 2nd respondent would receive any communication from the 3rd respondent.

[18] Other than what is referred to in paragraph 16 above, there is no allegation that the 2nd respondent’s chosen address is in Sandown Gauteng. Neither is it alleged that 2nd respondent would receive any communication from the 3

[19] I am not satisfied that the 2nd respondent was properly served. Further, I am not convinced that he was even aware that this matter was before court.

[19] I am not satisfied that the 2

respondent was properly served. Further, I am not convinced that he was even aware that this matter was before court.

[20] In view of the position I adopt in this matter, I need not deal with other submissions by Mr Cowley.

[21] In the result, the following order is made.

1. The application is dismissed with costs.

MN Hinana

ACTING JUDGE OF THE HIGH COURT

For the Applicants : Mr Cowley

Instructed by : Lowndens Dlamini Attorneys

C/o Joubert Galpin Searle

56 wierda Road East

Wierda Valley

Sandton

For the 1strespondent: Mr Smith

Instructed by: Friedman Schekter Attorneys

75- 2ndAvenue

75- 2

Avenue

Newton Park

Port Elizabeth

Date heard: 20 November 2014

Date delivered : 24 February 2014

[1]1979(4)SA 992 (WLD) at 942 H- 925 A

1979(4)SA 992 (WLD) at 942 H- 925 A

[2]Umngeni Water v Hollis No & Another [2012] JOL 28776 (KZD)

Umngeni Water v Hollis No & Another [2012] JOL 28776 (KZD)

[3]Trust Corporation Securities (Pty) Ltd v Gabilo & Another [2009]JOL 24542(ZH)

Trust Corporation Securities (Pty) Ltd v Gabilo & Another [2009]JOL 24542(ZH)

[4]SACCAWU obo Kekezwa v Woolworths (Pty) Ltd [2010] 2 BALR 213 (CCMA)

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Prepared on 11 October 2026 · Esheria