

SOUTH AFRICA / JUDGMENT

Izaksmal and Another v BP Southern Africa (Pty) Ltd (15/38943) [2017] ZAGPPHC 674 (29 September 2017) [2017] ZAGPPHC 674

COURT

North Gauteng High Court, Pretoria

BEFORE

MA Makume

CASE / FILE NUMBER

15/38943

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, PRETORIA

(OPPOSED

MOTION - JOHANNESBURG)

CASE

NO: 15/38943

DATE:

29/09/2017

In

the application of:

IZAKSMAL

(Identity

number: [....]) First
Plaintiff/Respondent
UPANDUNDERMOTORSCC
(Registration
Number: 1994/033676/23) Second
Plaintiff/Respondent
and
BP
SOUTHERN AFRICA (PTY)
LTD
(Registration
Number: 19217002602/07)
First Defendant/Applicant
THE
WEST
RAND
DISTRICT
MUNICIPALITY
Second Defendant/Applicant

JUDGMENT

MAKUME, J:

[1] In this matter the first and second Applicants (The Applicants) seek an order in the following terms:

1.1 That the first and second Respondents (The Respondents) furnish security for the Applicants legal costs in the action instituted by the Respondents under case number 38943/15 against the Applicants.

1.2 That the form, amount and manner of security be determined by the Registrar of this court on application by the Applicants.

1.3 That the action referred to in 1.1 be forthwith stayed until such time as the Respondents shall have furnished security.

1.4 That in the event the Respondents fail to furnish security as determined by the Registrar within 20 days of the Registrar's order or determination, then the Applicants/Defendants be granted leave to apply on the same papers, duly amplified if necessary for the dismissal of the action referred to in 1.1 above.

1.5 That the Respondents pay costs of this application jointly and severally the one paying the other to be absolved.

BACKGROUND

FACTS

- [2] The facts leading to this application commence many years ago and have been characterised by legal wrangles, the basis of which is a lease and franchise agreements relating to the sale of Petroleum Products.
- [3] I shall for a better understanding refer to the first and second Applicants in their nomenclature as BP South Africa or BP and West Rand District Municipality as the Municipality or collectively as the defendants. Whilst the first and second Respondents shall be referred to in their nomenclature namely Izak Smal and Up and Under Motor CC (the CC) or simply the Plaintiffs.
- [4] The Municipality as owners of a business site bounded by Park Street South, Stubb Street, Sixth Avenue and Sutherland Avenue concluded a lease agreement with BP during the year 1986 in terms of which BP leased the premise (the Principal lease) from the Municipality.
- [5] In the year 2001 BP concluded a sublease in terms of which it sublet the premises to Izak Smal who in terms of a franchise agreement agreed to sell petroleum products on BP's behalf from the premises (the sublease).
- [6] During or about 200G/7 both the principal lease and the sublease came to an end as a result BP gave the Plaintiff notice to vacate the premises by Febru3ry 2007. A dispute arose which was referred to arbitration. The Plaintiffs were unsuccessful but still remained on the premises. The cancellation of sublease became effective as late as 5th September 2011 when the arbitrator ruled against the Plaintiff.
- [7] On the 7th March 2012 the Municipality obtained an order in this court evicting the Plaintiffs from the leased premises. There were cost orders against the Plaintiffs in both the arbitration and the eviction applications. The Plaintiff did not challenge the arbitration order nor did it appeal against the eviction order. Both judgments remain effective. The eviction order was executed and the Plaintiff are out of the premises.
- [8] On the 28th May 2015 the Plaintiff instituted action against the defendants in which they claim damages based on delict for pure economic loss in the amount of R9 655 700.00.
- [9] In their particulars of claim the Plaintiffs contend that the amount of R9 655 700 .00 comprises of loss of profit for the period 2012 - 2022 as a result of the Defendant having acted unlawfully and in cahoots to have them evicted from the premises where they had been conducting business.
- [10] It is against that background that the Defendants seek security for costs from the Plaintiffs in respect of that action.

THE APPLICATION FOR SECURITY OF COSTS

[11] The Defendants seek security from Mr Izak Smal on the basis that:

11.1 There is a likelihood that he would be unable to satisfy a potential costs order in the event the Defendants are successful with their defence.

11.2 That the action against them is not bona fide.

11.3 That such action is vexatious, reckless and hopeless.

[12] As against the Second Plaintiff the Close Corporation the Defendants seek security from it on the following basis:

12.1 That in terms of Section 8 of the Close Corporation Act 69 of 1984 there is reason to believe that the Corporation if it becomes wound up the liquidator will be unable to pay the Defendants costs if successful.

12.2 That the action instituted by the Corporation against the Defendants is not bona fide and that it is reckless, vexatious and hopeless.

[13] In support of this application the Defendants point out that the termination of the sublease and the principal lease became final when the Plaintiffs failed to challenge the judgments, including the eviction judgement by Van Oosten J in March 2012 and therefore the Plaintiffs claim discloses no cause of action.

[14] It is common cause that the Defendants have filed notice of exception to the Plaintiffs particulars of claim. It is on this basis that the Defendants hold the view that the Plaintiff's action is not bona fide it is hopeless and that there are no prospects of success.

[15] A glance at the particulars of claim and the conduct of the Plaintiff since the arbitration award and the eviction application indicate reckless behaviour on their part. The Plaintiff went about addressing letters to the Minister of Economic Affairs as well as to the CEO of BP claiming that they are exercising a right of first refusal in terms of the sublease. Despite being warned that the sublease never granted them a right of first refusal the Plaintiffs proceeded with the action.

[16] Under the Common Law an incola of the Republic which is what the

Plaintiffs are, cannot as a general rule be called upon to give security for costs. There are exceptions to this general rule and it is those exceptions that the Defendants say are applicable to the Plaintiffs and that they should be called upon to furnish security for costs.

[17] It is correct that mere inability to satisfy a costs order is insufficient reason to call upon an incola Plaintiff to furnish security. However, in my view, such happening cannot be simply ignored it is one of the

factors indicative of abuse of legal process. In the present matter it took 3 years for Mr Smal to pay off the Municipalities bill of costs it was only after this application was served that Plaintiffs made the final payment of R23 764.38 to the municipality.

[18] I am satisfied that the Plaintiffs action is not only reckless it is vexatious at all fronts. This court has a duty to prevent abuse of its processes.

[19] In the matter of Boost Sports South Africa (Pty) Ltd v South African Breweries Ltd 2015 (5) SA 38 (SCA) the court did not differentiate between a Close Corporation and a natural person in coming to a conclusion to grant an order for security. At page 51 paragraph 16, the following was said:

"Absent section 13 there can no longer be any legitimate basis for differentiating between an incola company and an incola natural

person. And as our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate our proceedings it must follow that the former can at common law be compelled to furnish security for costs. Accordingly even though there may be prior prospects of recovering costs a court in its discretion should only order the furnishing of security for such costs by incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse."

[20] The Plaintiffs should know by now that their pleaded cause of action is bound to fail as the judgments against the Plaintiffs remain legal until set aside until that is done the court order must be obeyed even if it may later be proved to have been incorrect. The Plaintiffs have not alleged any fraud against the Defendants and correctly so because the sublease between BP and the Plaintiffs terminated on 28th February 2007. The subsequent eviction judgment at the instance of the municipality also remains intact and cannot be justifiably pleaded as a cause of the Plaintiffs action.

[21] In the matter of Ecker v Dean 1937 AD 254 at 259 Curlewis J stated:

"In Western Assurance Co v Ca/dwells Trustee (1918 AD

252) this court laid down that a court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court, one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side and I know of no reasons why the court below should not have exercised such inherent jurisdiction."

[22] That Plaintiffs action is clearly unsustainable and is being continued with the intention to cause annoyance to the Defendants. I am satisfied that both the Plaintiffs action is mala fide and for that it is only proper that the Defendants be offered protection by ordering of the Plaintiffs to furnish security for costs of the Defendants.

[23] In the result I make the following order:

1. The Application is granted.
2. The Plaintiffs are ordered to furnish security for the Defendants legal costs in their action.

3. The form amount manner and of security to be provided by the Plaintiffs shall be determined by the Registrar of this court on application by the Defendants.
4. The Plaintiffs action is hereby stayed forthwith until such time as security shall have been furnished as directed above.
5. In the event that the Plaintiffs fail to provide security as determined by the Registrar within 20 days of such determination the defendants are. granted leave to apply on the same papers amplified it necessary for the dismissal of the Plaintiffs action.
6. The Plaintiffs are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

DATED at JOHANNESBURG this the 29 day of SEPTEMBER 2017.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING

28 AUGUST 2017

DATE OF

FOR PLAINTIFFS

ADV MTA COSTA

INSTRUCTED BY

HOGAN LOVELLS INC

FOR DEFENDANTS ADV R MASTENBROEK

INSTRUCTED BY

WALDING JANSEMN VAN RENSBURG INC

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