

SOUTH AFRICA / JUDGMENT

Mofomo Construction v All Star Industries CC (2930/2019) [2021] ZAFSHC 5 (28 January 2021)

[2021] ZAFSHC 5

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

2930/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 2930/2019

In

the matter between:

MOFOMO
CONSTRUCTION
Applicant
and
ALL
STAR INDUSTRIES CC
Respondent

JUDGMENT

BY: MHLAMBI J,

HEARD ON: Matter disposed of without oral hearing in terms of section
19(a) of the Superior Courts Act 10 of 2013.

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLI. The date and time for hand-down is deemed to have been 09h30 on 28 January 2021.

APPLICATION FOR LEAVE TO APPEAL

MHLAMBI, J

- [1] This is an application for leave to appeal to the full bench of the Free State Division of the High Court against the whole judgment and order granted on 20 August 2020. The application is opposed.
- [2] The application for leave to appeal is sought on ten grounds which were stated as follows in the notice for leave to appeal:

“1. His lordship erred in not concluding that the Applicant has proven claim against the respondent on a balance of probabilities and as supported by the certificates under the hand of the engineer, Mr Bakkes read together with the confirmatory affidavit;

2. His lordship erred in finding that the defences raised by the Respondents constitutes a defence/s sufficient for purpose of avoiding liquidation and in particular that these purported defences succeed in satisfying the Badenhorst-principle, i.e. that same is bona fide and reasonable dispute to the Applicant's claim.
3. In application proceedings affidavits both constitute the pleadings and the evidence. A party must make out a case on the papers and, not only is litigant not allowed to conduct a trial by ambush and has to properly plead its case, but a Court, with respect, too is not allowed to assist or condone the conduct of a trial by ambush by replying on matters appearing in annexure but not having been canvassed in the pleadings.
4. His Lordship concluded that the Respondent may rely on terms contained in Annexure “AS 11(a)”, the COLTO contract regulating the agreement between the Respondent and the employer, the Mangaung Metropolitan Municipality, without any reliance being placed on the contents of the aforementioned annexure in the Respondent's affidavit, save for stating that it regulates the relationship as aforementioned.
5. His Lordship with respect erred in concluding that the Respondent may rely on terms not pleaded as set out above, and erred in dismissing the objection raised to the Respondent placing reliance on terms not pleaded at all.
6. His Lordship erred in concluding that the Respondent has disputed the Applicant's claim on bona fide and reasonable grounds, especially where no basis is made out for the attempted dispute and furthermore not having regard to the fact that the duly appointed engineer, Mr Bakkes, provided a detailed confirmatory affidavit dealing with the amounts due and payable and confirming same, moreover, also having certified the claims as provided for contractually.

7. In so far as the other disputes raised were found to constitute bona fide reasonable disputes to the Applicant's claim, his Lordship erred in that same were unsubstantiated and without merit, clearly traversed in the Applicant's supplementary replying affidavit.
 8. His Lordship with respect erred in concluding that the Applicant was opportunistic in raising the objection as stated above. The Respondent did not plead which clauses it relies on in Annexure "AS11(a)", much less that it relies on anything emanating therefrom, and the reliance on the terms thereof constitutes trial by ambush and evidence from the Bar.
 9. His Lordship erred in not concluding that the Applicant had proven its claim on balance of probabilities and that the Court had to exercise a narrow discretion in respect of whether or not to liquidate the Respondent.
 10. His Lordship had erred in not exercising his discretion in favour of the Applicant and placing the Respondent in final liquidation."
- [3] On 15 September 2020, the applicant filed an application for the condonation of the late filing of the application for leave to appeal. As that application is unopposed and there being no prejudice to the respondent in that the condonation sought referred to a period of only two court dates, condonation is hereby granted.
- [4] In its heads of argument, the applicant submitted that the crisp issue for determination on appeal was whether the respondent had properly pleaded its defence, and if not, a final order of liquidation would be granted. The applicant's counsel correctly pointed out that, in granting leave to appeal, a measure of certainty is required that another court would arrive at a different conclusion and that the test to be applied is more stringent.[1]
- [5] The grounds of appeal and the arguments whereupon they are based, have been dealt with in the judgment but, for the sake of courtesy and propriety, will be briefly responded to. By virtue of their similarity and repetitional nature, they shall not be traversed individually but will be grouped together.

Grounds 1, 6 and 7

These grounds have been sufficiently traversed in paragraphs 25-28 of the judgment. The shortcomings of the contents of Bakkes' affidavit were pointed out as well as the failure on the part of the applicant to clarify why, contrary to the agreement between the parties, different quantities were certified. The applicant did not place in dispute that the quantities relied upon by the respondent and those contained in the applicant's invoices differed.[2]

Grounds 2, 3,4,8 and 5

In its heads of argument, the applicant's counsel submitted that the respondent did not in any of its affidavits make mention of its reliance on COLTO for purposes of attacking the quantities of the works by the applicant or the amounts.[3] Reference was made to Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others[4] to show that the respondent was conducting a trial by ambush by relying on matters appearing in annexures by not having canvassed them in the pleadings.[5]

In Swissborough,[6] it was stated that an applicant must raise and define relevant issues in an affidavit by setting out the evidence it relies to discharge the onus of proof relying on it in respect thereof. This applies equally to answering affidavits and replying affidavits. It is therefore disingenuous to suggest that the respondent relied on contents of annexures, the contents of which were not pleaded at all.[7] These contents were set out in the respondent's supplementary affidavits and duly engaged by the applicant in the supplementary replying affidavit.

Grounds 9 and 10

It is indeed so that a court's discretion is limited in instances of *ex debito justitiae*, but it has been held that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide*

disputed by the company.[8]

[6] The applications for leave to appeal are regulated by section 17(1) of the Superior Courts Act 10 of 2013, the relevant part of which reads as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned

are of the opinion that-

(a)(i) The appeal would have a reasonable prospect of success; or

(ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[7] In *Acting Director of National Director of Public Prosecution and other vs. Democratic Alliance in Re: Democratic Alliance vs. Acting National Director of Public Prosecution and others*[9], the full bench stated:

“The Superior Courts Act has raised the bar for granting leave to appeal. In Mont Chevaux Trust, Bertelsmann, J held as follows: ‘it is clear that the threshold for granting leave to appeal against the judgment of a higher court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The

use of the word ‘would’ in section 17(1) of the Superior Courts Act indicates a major of certainty that another court will differ from the court whose judgment is sought to be appealed against”.

[8] In consideration of the above, I conclude that the applicant has not satisfied the test in section 17(1) of the Superior Courts Act and the application stands to be dismissed.

[9] I therefore make the following order:

ORDER:

The application for leave to appeal is dismissed with costs.

JJ MHLAMBI, J

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[1] Applicant's heads of argument, para 12.

[2] Para72- 76: Applicant's supplementary replying affidavit.

[3] Para 18.

[4] 1999

(2) SA 279 TPD.

[5] Para 17.3.

[6] Supra.

[7] Para 17.5.

[8] Kalil v Decotex (Pty) Ltd & Another 1988(1) SA 943 (AD)

[9] [2016] ZAGPPHC 489 at para 25

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