

SOUTH AFRICA / JUDGMENT

Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd and Others (11553/2012) [2014] ZAKZPHC 64 (27 June 2014) [2014] ZAKZPHC 64

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

11553/2012

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 11553/2012

DATE: 27 JUNE 2014

In the matter between:

THE MSUNDUZI MUNICIPALITY.....Applicant

And

UPHILL TRADING 14 (PTY) LTD.....First Respondent

BUZTRADE 102 CC.....Second Respondent

ESSOP OSMAN.....Third Respondent

VASUDEVAN CHETTY.....Fourth Respondent

ROOKMONEY CHETTY.....Fifth Respondent

ROOKMONEY CHETTY N.O.....Sixth Respondent

Order:

The application is dismissed with costs, including those consequent on the employment of two counsel.

Judgment

Date: 27 June 2014

Ploos van Amstel J

- [1] This matter arises out of the erection of a building without approved plans and the occupation thereof without an occupancy certificate as required by s 14 of the National Building Regulations and Building Standards Act 103 of 1977. The applicant is the Msundizi Municipality. It seeks orders directing the first respondent to cease its business operations on the property, directing all persons to vacate the buildings and authorising the termination of the supply of water and electricity to the property.
- [2] The first respondent is Uphill Trading 14 (Pty) Ltd. The choice of its name was prophetic as it is subject to business rescue proceedings. The second respondent is Buztrade 102 CC, who has purchased the property but has not taken transfer yet, apparently because of a dispute between it and the sellers. The first respondent occupies the buildings on the property as the second respondent's tenant, where it carries on the business of granite cutting.
- [3] The second respondent applied to the municipality in 2008 for permission to erect a building on the property and submitted building plans in support of the application. It purported to do so as owner. It was told that it needed to provide a copy of the title deed in order for the plans to be considered, but never did so.
- [4] In spite of the fact that the building plans had not been approved the second respondent went ahead and constructed a factory on the site. On 5 February 2009 the municipality served a notice on the second respondent, in terms of regulation A25 (10) of the National Building Regulations, calling upon it to obtain the required approval for the erection of the building. It did not do so, and the municipality apparently took no further steps for more than three years.
- [5] On 12 June 2012 the municipality terminated all services to the property. On 14 June the first and second respondents brought an urgent application for an order that the supply of water and electricity be restored, which was granted. The municipality however says that the electrical connection is illegal and was not connected by it. It says the first respondent's factory foreman told the law enforcement officer who visited the site that he had effected or procured the illegal connection. The founding affidavit does not deal with the water supply to the property.
- [6] The first respondent contends that no order can be granted against it as it is under business rescue. Section 133(1) of the Companies Act 71 of 2008 provides that during business rescue proceedings no legal proceeding, including enforcement action, may be commenced or proceeded with against the company in any forum, except in the circumstances listed in subsections (a) to (f). The first respondent passed a resolution to begin business rescue proceedings on 19 November 2012, the resolution was filed on 20 November and a business rescue practitioner was appointed on 22 November. The current application was launched

on 11 December

2012. The proposed business plan was rejected at a meeting of creditors on 23 January 2013. Poyo-Dlwati AJ held in case 3247/2013 that because of non-compliance by the first respondent with the provisions of s 129 of the Act its resolution to begin business

rescue proceedings was a nullity. When the current application was launched it was therefore not in business rescue. She however made an order on 25 June 2013, placing the first respondent under supervision in terms of s 131 and subject to business rescue.

- [7] The municipality's answer to this is that a company which acts unlawfully cannot be shielded from legal action by virtue of the fact that it is under business rescue. Such a company is however not shielded from legal action. In terms of section 133(1)
- (b) legal proceedings may be brought against a company which is under business rescue with the leave of the court. The municipality also contends that the application falls under the exception in subsection (f), namely proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner. There are two reasons why this point cannot succeed. In the first place a regulatory authority is defined in section 1 of the Act as 'an entity established in

terms of national or provincial legislation responsible for regulating an industry, or sector of an industry'. This does

not seem to me to include a municipality. Secondly, and in any event, it is not disputed that the municipality gave no notice to the business rescue practitioner as required by subsection (f). The fact that the business rescue practitioner deposed to an affidavit in the application does not mean that the requirement of prior notice to him did not have to be complied with. There is good reason why the business rescue practitioner should be given notice before legal proceedings are commenced by a regulatory authority. He should have an opportunity to investigate and resolve the matter and so avoid unnecessary litigation.

- [8] Counsel for the municipality, in his reply, said he was asking the leave of the court for the application to proceed, as contemplated in s 133(1) (b). This is not what is contemplated in the subsection. The leave of the court is required before the matter may be proceeded with. It is not permissible to proceed without the leave of the court and when the point is taken, apply for such leave from the bar. Such an application must be a substantive one, on affidavits, and the company under business rescue must have a proper opportunity to oppose it. The court will be required to have regard to all the relevant circumstances, including the reasons advanced by both parties as to why leave should or should not be granted.

- [9] In those circumstances the present application cannot succeed against the first respondent.

[10] The deponent to the municipality's founding affidavit says the second respondent was deregistered for failing to submit an annual return. This is admitted in the answering affidavit deposed to by a director of the first respondent, which was apparently delivered on behalf of both respondents. The second respondent's existence as a legal persona ceased when it was deregistered. I raised this point with both counsel after judgment had been reserved as neither of them referred to it in argument. The response which I received from them was that when the application was launched the second respondent had been deregistered, and it was restored to the register after the application papers had been completed. I also received brief written submissions from both counsel relating to the question whether the restoration of the close corporation to the register was retrospective, as if it had not been deregistered. They differ on this point. I do not think it is appropriate or desirable in the circumstances of this case for me to decide the point without having had the benefit of full argument on it. The case does not warrant another hearing for this to be done, and neither party has asked for it. In the circumstances I propose to deal with the matter on the affidavits as they stand. The evidence

which was put before me was that the second respondent had been deregistered and no longer existed as a legal entity. It was therefore not competent for the municipality to have cited it as a respondent. The municipality has no cause to be aggrieved by this result. Its own founding affidavit established that the second respondent had been deregistered, and it chose to argue the matter on that basis.

[11] In those circumstances I cannot make an order against either the first or the second respondent. The municipality will have to start afresh if it wants to regularise the situation with regard to the property in question.

[12] The application is dismissed with costs, including those consequent on the employment of two counsel.

PLOOS VAN AMSTEL J

Appearances:

For the Applicant : Adv. A. J. Dickson SC

Instructed by : Diedricks Attorneys

Pietermaritzburg

For the 1st and 2nd Respondent: Adv. A. E. Potgieter SC /Adv. H. S Gani

Instructed by : Schoerie & Sewgoolam Inc.

Date of Hearing : 6 June 2014

Date of Judgment: 27 June 2014

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