

SOUTH AFRICA / JUDGMENT

# Phindana Properties 79 (Pty) Ltd and Another v Bluecor Holdings (Pty) Ltd and Another (2669/2022) [2022] ZAMPMHC 17 (18 October 2022)

[2022] ZAMPMHC 17

## COURT

Middelburg High Court, Mpumalanga

## BEFORE

MBG Langa

## CASE / FILE NUMBER

2669/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG [LOCAL SEAT]

Case

no: 2669/2022

In

the matter between:

PHINDANA  
PROPERTIES 79 (PTY) LTD First  
Applicant  
MARTIN  
VAN WYK DIENSTASIE (PTY) LTD Second  
Applicant  
and  
BLUECOR  
HOLDINGS (PTY) LTD First  
Respondent  
TOTAL  
N17 (PTY)  
LTD Second  
Respondent

**JUDGMENT****Introduction**

[1] In this matter the applicants seek the following relief against the first and second respondents (“the respondents”) on an urgent basis:

1. That the matter be heard as an urgent application in terms of Rule 6(12);
2. That the respondents, with immediate effect, be interdicted and restrained from continuing with, causing, conducting, embarking on and/or allowing;

2.1 Any actions in execution of the Site Licence with reference number G/2019/01/0001; and/or

2.2 Any actions in execution of the Retail Licence with reference number G/2019/01/24.0002; and/or

2.3 Any groundwork and/or construction activities in order to establish or bring about an intended filling station facility on ERF 434, Terra Nova Extension 4, Registration Division IS, Mpumalanga Province (the “subject property”) in respect of which the abovementioned Site and Retail Licences have been issued; pending the finalization of Part B of the application instituted in this court under case number 1110/2022;

3. That the respondents be ordered to ensure that all building contractors, their employees, building equipment

and building materials be removed from the subject property pending the finalization of Part B of the application instituted under case number 1110/2022.

4. In the alternative, that the interim interdict and order envisaged in paragraph 2 and 3 be granted with immediate effect in the same terms pending the finalization of Part A of the application instituted under case number 1110/2022 which has been enrolled for hearing on 17 January 2023.

5. The applicants further pray for costs against the respondents on attorney and client scale. jointly and severally, the one to pay the other to be absolved.

[2] The applicants contended that this application is aimed at preserving the status quo and the triable issue in the review application in case 1110/2022; alternatively, pending the application for an interdict already enrolled for hearing on 17 January 2023.

- [3] It is common cause that the application in case 1110/2022 (“pending application”) was launched on 14 March 2022 and comprises of Part A and B and is set down for hearing on 17 January 2023. In Part A, the applicants seek interim relief pending the finalization of Part B in which the applicant seeks the reviewing and setting aside of the administrative actions by virtue of which the Site and Retail Licences were granted to the first and second respondents to develop and operate a filling station from the subject property.
- [4] Whereas it is not disputed that there was no construction taking place when the pending application was launched, it is, however, now common cause that on or about the 19 September 2022 while the said application is still pending, the respondents commenced with the construction and development of the filling station on the subject property. As a result of the construction the applicants approached court on an urgent basis seeking the relief mentioned above which is in essence similar to the relief sought in Part A of the pending application. The applicants seek interim relief pending the finalization of Part B, alternatively, pending the hearing of the interdict application on 17 January 2022.
- [5] The applicants allege that the respondents are trying to hastily complete the building of the filling station while the application is pending so that they can confront the court with a fait accompli development when the matter comes to court for hearing in January
2023. The applicants further contended that should the respondent be allowed to continue with the building of the site, the purpose of the pending application would be defeated and the applicants severely prejudiced. The applicants argued further that when the pending application was launched there was no building or development taking place on the site and it was therefore not necessary for an urgent application. They contended that now that the respondents have started with the development of the site since 19 September 2022, the situation has changed drastically and rendered it necessary for them to launch this application on an urgent basis.
- [6] The applicants contended further that they want to stop the respondents from exercising any rights in terms of the Site and Retail Licences which form the subject matter of the review application and also to prevent them from developing their competing filling station in circumstances where their Site and Retail Licences ought to be reviewed and set aside.
- [7] The respondents opposed this application for interdictory relief on the following grounds.
1. The matter is not urgent;
  2. There was a non-joinder;
  3. The applicants have no prima facie right or locus standi;
  4. Apprehension of harm of harm has not been demonstrated; and
  5. The balance of convenience does not favour the applicants.

Lack of urgency

[8] Rule 6(12) of the Uniform Rules of this Court more specifically Rule 6 (12) (b) provides that:

*“In any affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant (i) must set forth explicitly the circumstances which is averred render the matter urgent and (ii) the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”*

[9] The respondents contended that the matter is not urgent and that the applicants have failed to advance any facts from which it can be concluded that the application requires the urgent attention of this court. The respondents argued in this regard that the fact that the applicants had the knowledge of the threat regarding the development of the site as far back as 14 March 2022, the applicants cannot now rely on urgency and should have brought the application earlier. It was furthermore argued that the applicants failed to advance reasons as to why they (the applicants), would not obtain substantial redress if the pending application in Part A is only heard on 17 January 2023 without the same relief now being claimed on an urgent basis. They point out that the founding affidavit, recording this very concern of the applicants, was dated and commissioned on 14 March 2022.

[10] On urgency I am not persuaded by the reasons advanced by the respondents. Reliance by the respondents on the argument that the applicants were aware of the threat of the development in March 2022 when the pending application was launched does not have any merit and cannot, with due respect, assist them. It is common cause that the commencement of the construction did not take place until around 19 September 2022 by the respondent's own version. The applicants surely could not have been expected to launch an urgent application in March 2022 on the basis of a threat of possible development taking place. That would have been a premature application as no development was taking place at the time.

[11] In any event, it is common cause that the applicants did not do nothing about the matter. In March 2022 the applicants launched the pending application in the normal motion roll and after the case management thereof it was eventually set down for hearing on 17 January 2022, a date which still stands. One of the issues for determination in the pending application is the construction of a filling station on the same property. The parties have completed the necessary case management forms and also filed affidavits for the purposes of the hearing of the application on 17 January 2022. The respondents chose to go ahead with the construction while the matter was pending in respect inter alia the construction of a filling station.

[12] The respondents argued that they are entitled to go ahead with the Site and Retail licences which have not been set aside and are therefore still valid. They argued that they are therefore entitled to commence building as the licences authorizing them to do so have not been cancelled or set aside. It is correct that the licences have not been set aside otherwise they would not be the subject matter of the review in Part B of the pending application. The execution of these licences and the construction of the filling station are however,

pertinently part of the issues for determination in Part A on 17 January

2023. The respondents argue that they are entitled to go ahead with the building and that if the interdict is granted against them the risk will be theirs to demolish the building. This argument does not make sense especially when this pertinent matter will be

heard in three months. The respondents have in any event waited since March 2022 when the pending litigation was initiated and only started now after 7 months. It is also not explained why the respondents cannot wait another three months for the matter to be heard.

[13] A further argument raised by the respondents is that the construction does not pose any risk or threat to the applicants. They argue that any potential harm to the applicants will only materialise once the site has become operational. They argued further that instead it is the respondents who run the risk as inter alia the failure to commence with the building prior to the expiry of the licences may result in the respondents having to re-apply for finance elsewhere. They also mention that there are undertakings and conditions with petroleum suppliers which may be negatively affected if the construction is not undertaken. They also allege that they will suffer financial consequences as a result of the delay in the construction.

[14] Once again it is not explained why the respondents would wait for 7 months if these were their concerns. Furthermore, it is important to mention that the respondents undertook the construction after having agreed to the case management order of this court in terms of which they agreed to the hearing date of 17 January 2023 and also filed papers in respect of Part A in line with the said order. In addition, despite the applicants having approached the respondents to give an undertaking that they will not proceed with the construction the respondents have refused to give such undertaking and proceeded with the earthworks and construction without giving the applicants any warning.

[15] Given the history of the matter, the applicants were in my view entitled to approach court on an urgent basis as they did. The trigger event here is the unilateral commencement of earthworks and construction of the filling station by the respondents while they were acutely aware that this is one of the matters to be decided in the pending application in which they had already filed papers. The respondents are, in my view, clearly pre-empting the pending application by commencing the building of the filling station before the hearing of the application in January 2023. The timing of the construction, 3 months before the hearing, is also questionable. I find that if the respondents are allowed to proceed with the building construction the relief sought in Part A will indeed be of academic interest as the construction constitutes the crux of action the applicants sought to interdict. The triable issue relied on by the applicants in Part A will have been smothered. I am consequently satisfied that the matter is urgent and falls within the ambit of the provisions of Rule 6(12). Therefore, respondents' contention that the matter is not urgent stands to be dismissed. The argument by the respondents that the construction will only be finished in February 2023 is immaterial and of no moment.

### Non-joinder

- [16] On this aspect the respondents take issue with the fact that the applicants have not joined the Controller and the Minister who are interested parties in the review application even though it is common cause that they are not opposing the review application to be heard under Part B of the pending application. They contended that the application is fatally defective as these interested parties are not joined.
- [17] I do not agree with this contention. Considering the test for non-joinder as articulated in *Absa Bank Limited v Naude N.O and Others* (20264/2014)
- [2015] ZASCA 97; 2016 (6) SA 540 (SCA) (1 June 2015), the non-joinder of the Controller and the Minister in a non-issue as they do not have any direct and substantial interest in the narrow issue before court in this urgent application. The Supreme Court of Appeal stated the following in paragraph [10] regarding the test.
- [10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal*[3] it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected: ....”
- [18] In this matter, unlike in the *Absa Bank Limited* above, I find that the order sought can be sustained without necessarily prejudicing the interest of the Minister of Mineral Resources and Energy and the Controller of Petroleum Products, even though they are parties in the pending litigation. The Controller and the Minister in my considered view do not have a direct and substantial interest in the matter and would not be prejudiced if the order is granted. In any event they have already filed a notice to abide and do not wish to oppose either Part A or Part B of the pending application. It was therefore not essential, in my view, for them for them to be joined in this application. Consequently, the respondents’ challenge of the application on this front stands to fail.

### Locus standi and prima facie right

- [19] The respondents’ contention in this regard is that the applicants do not allege in this matter to be acting on behalf of other filling stations even though mentioned is made of them in the application. They contended that the applicants are asserting their sole commercial interest. The respondents argued that the applicant’s own interest as litigants does not acquire standing from the invalidity of the challenged decisions or law but from the effect it will have on their interests or potential interest. While the respondents seem to accept that the applicants have standing to bring the challenge even if the decision is valid, they however state that their interest conferring standing must be demonstrated. The respondents contended therefore that the evidence does not show that the establishment of a new filling

station site will have a negative impact on the site of the applicant and further that the evidence before court does not have sufficient material to substantiate the conclusions that the new site will harm the applicants' station.

- [20] Whether the establishment of a new filling station site will have a negative impact on the site of the applicants is a matter to be decided by court under Part B and not in this urgent application. What is however, important here is for the applicants to demonstrate that they have a prima facie right which should not be confused with locus standi. The applicants, who are the applicants also in the pending application, in my view have a prima facie right to preserve the status quo and the triable issues in the pending litigation until such hearing takes place on 17 January 2023. I am therefore satisfied that a prima facie right has been established by the applicants.

#### Apprehension of harm, balance of convenience and alternative remedy

- [21] The thrust of the respondents' contention in this regard is that even if they were to build the filling station a court may still interdict them irrespective of the fact that the building has already been constructed. They contended therefore that the applicants have failed to establish apprehension of harm. Concerning the balance of convenience, the respondents contended that the construction of the site does not pose any risk on the part of the applicants and that it is they, the respondents, who are at risk. They further contended that as the applicants have launched an application which is pending and is due for hearing on 17 January 2023, they therefore have an alternative remedy to the urgent application.
- [22] The applicants in my view will certainly suffer harm if despite the pending review application, the respondents are allowed to proceed with the building and unlawfully compete with the applicants who are situated about 3km away for the respondents' site. Regarding the balance of convenience, the applicants appear to have good prospects of success in the review application, particularly if the following are taken into account.
1. That traffic impact study relied on by the Controller and the Minister is challenged as outdated;
  2. That the site visit is also questioned and alleged to have been conducted on a wrong property; and
  3. That the environmental authorisation dated 2016 relied on by the Controller and the Minister is challenged as having lapsed.
- [23] Furthermore, in the light of the facts of this matter and the pending application, the untimely construction by the respondents of the filling station while the application dealing with the same construction is still pending and about to be heard, will cause the applicant irreparable harm. The building and establishment of a new filling in the same road and 3 km away from the applicants' stands to have negative financial consequences on the applicants' business.

[24] Concerning the balance of convenience I find that the applicants have made out a strong case. The applicants have investments to protect. If the respondents are allowed to continue with the construction, the court dealing with the application on 17 January 2023 will be dealing with a completely new situation and scenario where the relief sought in respect of the construction will be moot. By their own version, the respondents confirm that the construction will be complete by

February 2023. I am of the view that considering all the circumstances the balance of convenience favours the applicants.

[25] As regards alternative relief, the applicants have no alternative remedy save for an urgent interdict. It is ironic that the respondents' contention is that the hearing of the pending application on 17 January 2023 constitutes alternative remedy while they are continuing with the construction which constitutes one of the issues for determination before court on 17 January 2023. If construction is permitted to continue that remedy would have been taken away and the horse would have bolted as far as the relief in that regard is concerned. Thereafter the only possible remedy would be an order for the demolition of the building, the construction which could be halted for now until the hearing in 3 months-time. I am therefore satisfied that the balance of convenience favours the applicants and that they do not have an alternative remedy. In the result I find that in the application the applicants have satisfied the requirements for an interdict.

## Conclusion

[26] In the light of the above I am satisfied that the applicants have made out a case for the granting of an urgent interdictory relief in the terms of the notice of motion and this is the order I intend making.

## Costs

[27] Regarding the costs, the general rule is that the costs must follow the results. There is no reason why that should not be the case in casu. The costs have to be awarded in favour of the successful party, the applicants. What stands to be determined is whether the costs should be on a higher scale as contended by the applicants. They motivate this by saying that the respondents were vexatious in

continuing with the construction while aware that the construction is the subject matter of the litigation scheduled for 17 January 2023.

[28] Although their decision and timing is suspect, I am however, not satisfied that the facts prove that the respondents were vexatious in continuing with the building to warrant the award of costs on a punitive scale. I am therefore satisfied a normal costs order should suffice for the applicants not to be put out of pocket by the respondents' conduct.

## Order

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

1. Pending the finalization of Part A of the application made under case 1110/2022 in this court, which is enrolled for hearing on 17 January 2023, an interim interdictory order is granted in the following terms:
2. That the respondents shall, with immediate effect, be interdicted and restrained from continuing with, causing, conducting, embarking on and allowing:
  - 2.1 Any actions in execution of the Site Licence with reference number G/2019/01/24/0001; and/or
  - 2.2 Any actions in execution of the Site Licence with reference number G/2019/01/24/0002; and/or
  - 2.3 Any groundwork and/or construction activities in order to establish or bring about an intended filling station facility on Erf 434 Terra Nova Extension 4, Registration Division IS, Mpumalanga Province (“the subject property”), in respect of which the abovementioned Site and Retail Licences have been issued.
3. That the respondents are ordered, with immediate effect, to ensure that all Building Contractors, their employees, building equipment and building materials are removed from the subject property pending the finalization of Part A of the application referred to in paragraph 1 above.
4. The respondents are ordered to the costs of this application pay party and party scale, jointly and severally, the one to pay and the other to be absolved.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG LOCAL SEAT

Appearances:

For the Applicant: Advocate

JA Venter

Instructed by: Adriaan

Venter Attorneys, Pretoria

For the First and Second Respondents: Advocate S Aucamp

Instructed by: Lanham-Love

Galbraith-Van Reenen

Attorneys, Saxonwold

Date of hearing: 11

October 2022

Date of Judgment: 18

October 2022

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