

SOUTH AFRICA / JUDGMENT

PMG Mining (Pty) Ltd v FH Swanepoel Plant Hire CC (1604/2010) [2010] ZANCHC 59 (8 October 2010) [2010] ZANCHC 59

COURT

Northern Cape High Court, Kimberley

BEFORE

Lacock R

CASE / FILE NUMBER

1604/2010

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NORTHERN

CAPE HIGH COURT, KIMBERLEY

Saakno: / Case number:

1604 / 2010

Datum verhoor: / Date

heard: 23 / 09 / 2010

Datum gelewer/Date

delivered: 08 / 10 / 2010

In

the matter between:

PMG

MINING (PTY) LTD

.....Applicant

and

FH

SWANEPOEL PLANT HIRE CCRespondent

Coram: Lacock

R

JUDGMENT

LACOCK J:

The applicant approached this Court on an urgent basis for the granting of an interdict pendente lite to stay the execution of all cost orders granted in favour of the respondent as against the applicant in this Court in case number 342/2009 and in the Supreme Court of Appeal in case number 651/2009. In its proposed main application or action the applicant intends to claim an order for the setting aside of the orders of this Court and the SCA granted in the cases referred to above; alternatively for granting of leave to appeal the cost orders granted in case number 1432/2009; further alternatively staying the execution of the said cost orders. A pending action between the parties had been enrolled for hearing on 13 December 2010, and it is intended by the applicant to incorporate the proposed relief in that action by means of a counterclaim.

It is trite that a litigant, in order to succeed on a claim for a temporary interdict, needs to satisfy a court on a balance of probabilities that

“(a) the right that forms the subject matter of the main action and that the applicant seeks to protect is prima facie established, even though open to some doubt;

(b) there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;

the balance of convenience favours the granting of interim relief; and

the applicant has no other satisfactory remedy.”

(Herbstein & Van Winsen, “The Civil Practice of High Courts in SA” (5th Edition) at 1456 to 1457).

I will deal with these requisites seriatem.

The applicant relied on the following factual circumstances and allegations for purposes of its alleged prima facie right to the proposed relief it intends to claim.

Under case number 342/209 the respondent applied for and obtained the following relief:-

“17.1 Die Respondent word gelas om toegang aan die Applikant te verleen tot die Respondent se perseel te Bishop Myn en om die Applikant toe te laat om 10 000 (tienduise) ton mangaanerts, welke erts deur die Applikant ontgin is, te verwyder en te verkoop.

17.2 Dit word gelas dat die inkomste verkry uit die voormelde verkoping van die 10 000 ton mangaanerts in die trustrekening van prokureurs Mnre. Jordaan & Mans, Kuruman, inbetaal sal word en op ‘n rentedraende rekening gedeponeer sal word hangende die afhandeling van ‘n aksie ingestel te word deur die Applikant, welke aksie ingestel moet word binne 30 (dertig) dae vanaf datum van hierdie bevel.

17.3 Die Respondent word gelas om die koste van die aansoek te betaal.”

(Order Majiedt, J)

This application was opposed by the applicant hereto.

The aforesaid relief was granted on the acceptance by the trial court of an agreement allegedly concluded between the parties in terms whereof the parties agreed to settle their contractual disputes emanating from an earlier written agreement. Leave to appeal this order was refused by the trial court as well as the Supreme Court of Appeal (case number 651/2009) with costs.

Subsequent to the granting of the aforesaid order, the respondent instituted action against the applicant under case number 1291/2009.

This action was set down for hearing on 17 August 2010.

Approximately one month before the trial, the respondent filed a notice of intention to amend its particulars of claim whereby it purported to abandon its reliance on the agreement referred to above and on which it relied for purposes of the relief claimed and obtained under case number 342/2009. The application was opposed by the applicant hereto. This application too came before Majiedt, J, who allowed the amendment.

On the strength of the aforesaid cost orders, bills of costs were taxed and the respondent's attorneys are in the process of executing these taxed bills against the applicant.

Fundamental to the applicant's case are the following averments in the founding affidavit:

“21. It is apparent that the Respondent precipitated the flurry of Applications and actions by instituting the pendente lite Application under case numbers 342/2009 and 244/2009. Having relied primarily on the disputed agreement in such Applications it then without explanation commits a volte face and abandons the claim based on the very agreement it obtained the interim orders. The interim orders would not have been granted had the Respondent not relied on the disputed agreement. Absent the dispute agreement, there would have been no basis for the court to have granted the order under case number 342/2009 on the terms that it did.

22. The only reasonable inference to draw is that the Respondent was mala fide and acted fraudulently in relying on the disputed agreement. It sought in doing so to disrupt the Applicants mining operations and to deprive the Applicant of its property. It effectively hoodwinked the court into granting what was, with respect an intrusive interim order. The effect of its conduct is the litany of litigation that has followed. It should not be allowed to benefit from its mala fides and fraudulent conduct by executing on court orders that I submit were improperly and mala fide obtained.”

Although the Applicant relies on allegations of fraud and mala fides, evidence of such alleged fraud, etc, are glaringly absent. The applicant merely relies on inferences based on the respondent's

withdrawal of its reliance on the second agreement. What is more, the reasons for the amendment applied for were fully ventilated in court before Majiedt, J, and although the learned judge expressed his surprise for respondent's change of direction, no finding of fraud or mala fides was made.

It is trite that a finding of fraud or mala fides is not lightly made on affidavits without the assistance of oral evidence. The application under case number 342/2009 was argued and the issues involved were properly considered by the learned presiding judge, whereafter he delivered a well-reasoned judgment and made the relevant cost order. Subsequently the SCA had the opportunity to reconsider the matter on petition for leave to appeal, declined leave, and made the further cost order. The respondent is entitled to execute these

orders.

The respondent did not exclusively rely on the second agreement for purposes of its aforesaid action, but reliance is also placed on the main agreement. The mere fact that the respondent abandoned its reliance on the second contract, does not justify an inference of fraud or mala fides – not even *prima facie*. There may be a number of reasons for doing so.

To my mind the applicant failed to demonstrate a well-grounded apprehension of irreparable harm.

Nothing prevents the applicant from pursuing its purported claims or counterclaims against the respondent in the pending action; including payment of the costs paid in pursuance of the aforesaid cost orders.

This immediately disposes of the fourth aforesaid requisite. Should the applicant succeed in proving that the relevant orders were fraudulently obtained, it will be entitled to recover whatever was paid to the respondent pursuant to such fraudulent conduct. See *Afrisure CC v Watson N.O.* [2008] ZASCA 89; 2009 (2) SA 127 (SCA) at 142 D to F. The applicant therefore has an alternative remedy to recover any losses it may prove to have suffered.

To now prevent the respondent from executing its legally obtained cost orders on the flimsy and unsubstantiated averments of fraud and mala fides, will, to my mind, be extremely unjust and unreasonable.

In regard to the balance of convenience, Mr. Cassim argued that the trial will commence on 13 December 2011, and therefore the respondent will only have to wait for a period of less than three months for the court to decide *inter alia* the issue of alleged fraudulent conduct. Even if Mr. Cassim is correct in submitting that the balance of convenience favours the applicant, which is not my finding, I am satisfied that, by reason of the applicant's failure to meet the other requisites for the relief claimed, the application must fail.

Counsel for both parties submitted that the costs of the application should be decided in the action. I agree.

The following order is therefore made:-

1. PART A OF THE APPLICATION IS DISMISSED.
2. THE ORDER ON COSTS STAND OVER FOR DETERMINATION AT THE TRIAL IN CASE NUMBER 1291/2009.

HJ Lacock

JUDGE

On behalf of Applicant: Adv. N.A. Cassim SC o.i.o. Haarhoffs Inc.

On behalf of Respondent: Adv Jansen van Rensburg o.i.o. Engelsman, Magabane Inc.

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Prepared on 10 October 2026 · Esheria