

SOUTH AFRICA / JUDGMENT

Tusk Construction Support Services v Mvula Trust and Others (3359/2015) [2015] ZAECHGHC 152 (10 December 2015) [2015] ZAECHGHC 152

COURT

Eastern Cape High Court, Grahamstown

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

3359/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

no: 3359/2015

In

the matter between:

TUSK
CONSTRUCTION SUPPORT SERVICES
(PTY)
LTD
Applicant
vs
THE
MVULA
TRUST
First Respondent
ZAMA'S
GOAL TRADING CC
Second
Respondent

MINISTER
OF BASIC EDUCATION
Third Respondent
BUTLER
ATTORNEYS
Fourth Respondent
Date
of hearing
: 19th
November
2015
Date
of delivery
: 10th
December 2015

JUDGMENT

TSHIKI J:

[1] Applicant herein filed the present application by way of urgency and in the terms that follow:

[1.1] interdicting the first and second respondents from making any payments due to the second respondent into any other bank account than the account in the name of the second respondent at First National Bank, Lifestyle Branch, account number [...] (the bank);

[1.2] directing the fourth respondent to transfer the sum of R532 223.99 paid to its trust account by the first respondent to the bank of the second respondent at First National bank, Lifestyle branch;

[1.3] interdicting the fourth respondent from paying the sum of R532 223.99 or any portion thereof paid to its trust account to any other account than the bank account of the second respondent aforementioned;

[1.4] that the first and second respondents be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved;

[2] The final order also added the following:

[2.1] that the fourth respondent shall furnish to the applicant, within five (5) days of this order, all accounting records regarding the payment of R532 223.99 paid by the first respondent to the second respondent into and out of the fourth respondent's trust account.

[3] The only remaining issue is that of costs which was reserved for argument on the first available opposed motion court. On the return day of the Rule Nisi on the 16th July 2015 the application was opposed by the first and fourth respondents only. By agreement between the applicant and the first respondent, the applicant undertook not to seek a costs order against

the first respondent and in turn the first respondent withdrew its opposition to the relief sought by the applicant. The fourth respondent persisted with his opposition to the relief sought and he filed an answering affidavit. His main grounds in opposing the application is that it would be impossible for him to comply with prayer 2.2 of the notice of motion as the amount of R532 223.00 was no longer in his trust account.

- [4] It is common cause that no costs order has been sought against the fourth respondent. The genesis of this matter stems from the contract between the first respondent in terms of which the latter awarded a contract for the construction of water infrastructure for schools in the Amathole District Municipality to the second respondent. The applicant renders construction support services

to emerging contractors such as the second respondent. In order to properly execute the contract the second respondent would open a “dedicated bank account with First National Bank, Lifestyle branch” into which the various progress payments of the construction project are paid into. The purpose of the dedicated bank account is to act as security for the undertakings

given by the applicant to its suppliers. On the 26th May 2015 the second respondent, in breach of its obligations in terms of the agreements entered into between the parties, instructed the first respondent to make payment of monies due to it into another account, being the Trust account of the fourth respondent’s attorneys. It is common cause that an amount of R532 223.99 was paid into the fourth respondent’s trust account. This deposit of the aforesaid amount was in breach of the irrevocable payment undertaking entered into between the first respondent, second respondent and the applicant. The fourth respondent became aware of the above at least as soon as the papers were served on him. He also became aware that the respondents, first to third, had withdrawn their opposition to the relief sought by the applicant. The fourth respondent decided to persist with its opposition. Indeed, at that stage the fourth respondent became aware that the deposit of the said amount into his trust account or any other account other than the account in the name of the second respondent at First National Bank, Lifestyle branch account number [...] would not be used to deposit the money. He was specifically cited in the papers as one of the respondents and for the reason that he becomes familiar with the conditions upon which the said amount in issue is to be deposited and/or conducted. Despite the letter annexure “K” to the fourth respondent that the amount paid into the dedicated bank aforementioned the fourth respondent refused to comply.

- [5] The fourth respondent does not deny that the sum of R532 223.99 paid in his trust account was deposited contrary to the terms of the construction support services agreement in that the second respondent would open a “dedicated bank account” with First National Bank, Lifestyle branch into which the various progress payments of construction project are paid into. In any event, the fourth respondent’s obligation was simply to explain how was the amount paid into his trust account. The order dated the 9th October 2015 which was by agreement instructed the fourth respondent to pay the remaining balance of R532 223.99 together with interest accrued thereon into the dedicated bank account of the second respondent in terms of the order. I would imagine that this order was granted by consent of

all the parties including the fourth respondent. This never happened notwithstanding that the order was granted by consent and on the 9th October 2015.

- [6] It is common cause that the money in issue does not belong to the fourth respondent and therefore the firm of attorneys of the fourth respondent have no reason to inform the Court of the person, body or firm into which the money was deposited or paid. As an officer of the Court Mr Butler had a duty to inform the Court of the person, juristic or otherwise, to which he paid or deposited the money that initially was earlier paid into his trust account.
- [7] In my view, there is no dispute of fact in this matter and that at the time when the matter was urgent the applicant was entitled to proceed by way of urgency.
- [8] The fourth respondent had no justification to continue with the opposition of this application especially that the money in issue did not belong to him or his business account and in fact was no longer in his trust account.
- [9] There were no issues in this matter which would justify the fourth respondent to continue with the opposition of this application more so that the money in issue did not belong to him or his business account. Indeed the owner of the money is known and it is not the fourth respondent. The fourth respondent should have simply informed the court to which account he deposited and/or paid the money which is the second respondent's account. There was therefore no need for the fourth respondent to persist in its opposition and/or debate about the money in issue by way of opposing the relief sought especially when it had already paid the money in issue to the second respondent.
- [10] The fourth respondent who deposited the money in his trust account should have been transparent enough and therefore disclose the date on which the money was removed from its trust account and if necessary, as is the case herein, should have disclosed the date and name of the person in whose account the money was deposited. This is so especially when the matter is dealt with in Court. He has no reason not to disclose such information. Instead he preferred to keep the Court groping in the dark as to such information. There was no issue between the applicant and the fourth respondent relative to the said amount.
- [11] The applicant initially did not seek a costs order against the fourth respondent and therefore at that stage there could be no reason for the fourth respondent to oppose the relief sought. In my view, there was no practical reason for the fourth respondent to oppose the application and even persisting in doing so after the other respondents in particular the second respondent have elected not to pursue their opposition of the relief sought.
- [12] It, therefore, follows that the fourth respondent should never have opposed the application in the first place. Even if he did so initially, he should have foreseen that there was no point in pursuing such opposition because there was no longer a reason for doing so.
- [13] Mr De La Harpe for the applicant submitted that the fourth respondent's argument starts on the wrong foot. The

notice of motion is superseded by the Court's order. Indeed there was no need for the fourth respondent to oppose the

relief sought. The only issue is that of costs

[14] When awarding costs the Court exercises a discretion which has to be exercised judicially upon a consideration of the facts in each case. In exercising its discretion, the law contemplates that the Court should take into consideration the circumstances of each case, thus carefully weighing the issues involved in a particular case. This will include the conduct of the parties, and any other circumstances which may have a bearing on the issue of costs. Once it does so the Court will then make such order as to costs as would be fair and just between the parties.

[15] In my view, in the present case the fourth respondent had no reason or justification to continue to oppose the application even when there were no issues at hand. That he continued to prolong the continuation of the case at a time when there was no reason to do so, he did so at the risk of attracting costs in the circumstances.

[16] I agree with Mr De La Harpe that the fourth respondent should be mulcted in costs for his unnecessary opposition of this application

against the second respondent especially when there were no costs order initially sought from the fourth respondent.

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

[17.1] The fourth respondent is ordered to pay costs occasioned by his or its opposition of the application against the second respondent.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

For the applicant

: Adv D. De La Harpe

Instructed by

: Netteltons

GRAHAMSTOWN

Ref no: Mr Nettelton

For the fourth respondent : Mr D.O. Butler

Instructed by

: Butler Attorneys

EAST LONDON

c/o Cloete & Company

Ref no: Mr P Cloete

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