

SOUTH AFRICA / JUDGMENT

Clear Cut Projects (Pty) Ltd and Another v Minister of Police and Another (2218/2020) [2021] ZAFSHC 11 (5 February 2021)

[2021] ZAFSHC 11

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

2218/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2218/2020

In the matter between:

CLEAR CUT PROJECTS (PTY) LTD

1st Applicant

W W CIVIL AND CONSTRUCTION (PTY) LTD 2nd Applicant

and

THE MINISTER OF POLICE

1ST Respondent

NATIONAL COMMISSIONER OF SOUTH

AFRICAN POLICE SERVICE

2nd Respondent

HEARD ON: 5 NOVEMBER 2020

CORAM:

MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 5 February 2021. The date and time for hand-down is deemed to be 5 February 2021 at 13:00

Introduction

- [1] The applicants, Clear Cut Projects (Pty) Ltd and W W Civil and Construction (Pty) Ltd, are companies which carries business in construction projects and rental of construction machinery including tractors and/or excavators. On 2 May 2020 members of the police service confiscated the excavator belonging to the applicants. The applicants claim an order for the return and restoration of possession and control of the excavator. The application is opposed by the repondents.

Background

- [2] On 26 June 2020, the matter under a different case number came before Molitsoane, J who struck the matter from the roll for lack of urgency and non-compliance with section 35 of the General Laws Amendment Act 62 of 1955. The applicants were ordered to bear the costs of the application. On 3 July 2020 the matter (with the new case number and fresh papers) served before Jordaan, J who struck it from the roll ordering that the applicants pay the costs. The application before me bears the same case number as the one before court on 3 July 2020 but different notice of motion and founding affidavit.

Summary of the relevant facts

Applicants' version

- [3] On 29 April 2020 the first applicant issued a quotation for the use of the excavator as per request from an entity called Vise Trading. The first applicant rented it out for the sum of R24 830.00 which amount included the services of an operator for the equipment. The site of the works (to dig and replace a sewer pipeline) were premises at Naudeville Extention, Welkom. The excavator was utilised and it was ready to be returned to the applicants on 2 May 2020 when members of the police service accompanied by Matjhabeng Local Municipality Security Officers impounded it.
- [4] According to the police they acted as such because of a criminal complaint laid by a mining company alleging its usage in illegal mining activities. Correspondence through letters and telephone calls to release the equipment did not yield any positive results. As a result of the stand-off and continued detention of the excavator, the applicants have had several contracts cancelled resulting in the loss of revenue.

Respondent's version

- [5] The respondents' deponent, Lieutenant Colonel Serame Phineas Maphethe sets out the facts that led to the excavator being impounded and kept by the police service. It was on 2 May 2020 that the police received a tip off about illegal mining taking place at a closed shaft near St. Helena. The property is owned by Harmony Gold Mining Company. While gathering information for a criminal case to wit possession of stolen property, the police stumbled on the excavator allegedly used to dig a hole for illegal mining activities.
- [6] According to the deponent, the driver of the excavator explained that he was hired by unknown people to dig a hole. There was no permission granted to him to do so. Given these set of facts, they formed a reasonable suspicion (view) that the excavator was utilised to dig a sump in the mine and a water pump was used to suck out the water out of the sump in order to harvest gold bearing material. The continued detention of the excavator is because no person has provided valid ownership documents and possession of the equipment. Not only that, but also provide explanation of its involvement in illegal mining activities.

Issues

- [7] Essentially the respondents raised two preliminary issues which need to be decided prior to the merits. The respondents contend that the applicants lack the necessary locus standi in these proceedings. The other point is whether Rule 28 of the Uniform Rules of Court is applicable and if the answer is in the affirmative, whether the applicants complied with it. In order to expedite the proceedings, I ruled that both counsel make submissions on the case as a whole to prevent piecemeal adjudication.

Submissions

- [8] Mr Manye argued that the applicants had the locus standi in the proceedings. He pointed out that the deponent of the founding affidavit Mojale Petrus Hladi stated that he is the sole director of both entities and this averment is supported by documents to that effect. Turning to the second point raised, he submitted that the rule is not generally applicable to motion proceedings. It only found application where a party sought to

introduce an additional affidavit with the leave of court. Accordingly, the nub of the case lies on the unprocedural deprivation of possession. In this matter, the police have disturbed the peaceful possession of the property which was done forcibly and wrongfully without consent. He referred to the fact that despite the lapse of a considerable amount of time no criminal proceedings have been initiated by the respondents.

- [9] Mr Jonase raised a number of issues which he contended that they demonstrated the inadequacy of the application before court. On the issue of locus standi he pointed out that the papers are not clear as to who between the applicants does the excavator belong to. In the event that it belongs to both, on what basis are they claiming simultaneous possession/ownership. Turning to the applicability of rule 28 to the papers before court, he relied on a number of authorities that the general approach to an amendment of a notice of motion is

the same as to a summons in action proceedings. He pointed out differences between the papers that served before Jordaan J and the ones before me. He also alluded to what he termed glaring dispute of facts. The respondents deny possession and as such raise different facts. Given the circumstances, the matter is incapable of being decided on the papers and must be referred for viva voce evidence. The essence of his submission on this point is that the applicants have embarked on a wrong procedure to enforce their rights. As such the application must be dismissed with costs.

Discussion

[10] I now proceed to deal with the first preliminary point pertaining to locus standi. It was contended that the applicants have not made appropriate allegations to establish locus standi.[1] This argument is unsustainable because the applicants in the founding affidavit aver that they have been in possession of the excavator having purchased the same from a dealer.[2] In matters of this nature, counsel for the respondents correctly conceded that the enquiry is limited to whether the applicant(s)

was/were in possession of a spoliated thing or not. That being the trite law, it is inconsequential to argue issues like how the excavator was purchased, its description, simultaneous possession and the like. The undeniable fact is that at all material times the applicants had possession of the excavator which is adequate to establish their locus standi in this application.

[11] This brings me to the second point relating to the amendment of the notice of motion and founding affidavit. It is common cause that the papers before me are not the same papers that served before Jordaan J when he struck the application from the roll with costs on 3 July 2020. It appears that instead of enrolling the application for hearing on a normal opposed motion court roll, fresh papers using the same case number were simply crafted and the matter enrolled for hearing. No reason(s) was/were advanced why this was deemed necessary or appropriate by the applicants.

[12] This constitutes an amendment of the notice of motion and founding affidavit. Amendments of pleadings are regulated in terms of uniform rule 28.[3] The general approach for an amendment apply equally to a notice of motion.[4]

[13] An affidavit is essentially sworn evidence before the court. If it is amended, then it means change of evidence has taken place. A litigant cannot do so merely by a notice. There must be an explanation in the form of a further affidavit to explain the circumstances for such a change and for the court to assess whether it will not prejudice the other party. There is no merit in the argument of the counsel for the applicants that the rule does not apply to applications.

[14] The applicants in this matter did not even apply for the amendment of the notice of motion. They adopted the posture that it was not applicable and not necessary to do so. Clearly they are wrong. It is trite law that the issues must be clearly defined in the pleadings to obviate litigation by ambush. It must be clear to each party which case he is called upon to meet. It

is my considered opinion that the applicants have not complied with the rules in amending their papers and as such the application is not properly placed before court. It is undesirable to have two (2) balls in the same soccer field at the same time. The striking off of the matter leaves a window of opportunity to the applicants to approach the court, at a later stage, on proper papers.

Order

[12] Accordingly I make the following order:-

12.1 The application is struck off the roll with costs.

M. A. MATHEBULA, J

On behalf of applicants: Adv. T.L. Manye

Instructed by:

Moroka Attorneys

BLOEMFONTEIN

On behalf of respondents: Adv. S.S. Jonase

Instructed by:

State Attorney

/roosthuizen

[1] Scott and Others v Hanekom and Others 1980 (3) SA 1182 (C) at 1188 H

[2] Paragraph 5.2 of the founding affidavit

[3] Rule 28: (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected. (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded. (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[3] Rule 28: (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

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- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- [4] Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC) at 261 D
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Prepared on 9 October 2026 · Esheria