

SOUTH AFRICA / JUDGMENT

BP Southern Africa (Pty) Ltd and Another v Boy No 50 Trading (Pty) Ltd (2024/089753) [2024] ZAGPJHC 803 (26 August 2024) [2024] ZAGPJHC 803

COURT

South Gauteng High Court, Johannesburg

BEFORE

D J Wilson

CASE / FILE NUMBER

2024/089753

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED.

26

August 2024

Case

No. 2024-089753

In

the matter between:

BP
SOUTHERN AFRICA (PTY) LTD
First
Applicant
AQUARELLA
INVESTMENTS 481 (PTY) LTD
Second
Applicant
and
BOY
NO 50 TRADING (PTY) LTD
Respondent

JUDGMENT

WILSON J:

1 On 20 August 2024, I granted an order in my urgent court ejecting the respondent, Boy 50, from a petrol station it operates at Erven 49 and 50 Theta Extension 3, Johannesburg (“the property”). The second applicant, Aquarella, owns the property. The petrol station is operated under the brand of the first applicant, BP. I also granted BP leave to enter the property and remove any signage or other material indicating that the petrol station is operated under the BP brand.

2 The undisputed facts in the application were that BP had terminated an agreement under which it supplied fuel to be sold under its brand by Boy 50 at the petrol station. It did so in part because Boy 50 had begun selling fuel not sourced from BP while still using BP’s branding. Aquarella had also terminated Boy 50’s lease for non-payment of various amounts due under it. In addition, a test of the (non-BP) fuel sold at the petrol station on 15 May 2024 indicated that the fuel had been mixed with paraffin, had a dangerously low ignition temperature, and was, as a result, genuinely hazardous. There was no serious dispute before me that the operation of the petrol station in these circumstances is a disaster waiting to happen. The petrol station, or any of the cars that fill up at it, are at real and continuing risk of exploding if the hazardous fuel ignites at the wrong time.

3 Notwithstanding these common cause facts, Boy 50 opposed both the ejectment and the de-branding relief. Mr. Pule, who appeared for Boy 50, argued that the application was not genuinely urgent, because the fuel test was so outdated that, had it posed a genuine concern for the applicants, they would have approached the urgent court sooner. He also argued that Aquarella’s lease contained an arbitration clause, such that I had no jurisdiction to resolve an urgent claim for ejectment.

4 I rejected both of these defences in a short judgment I gave ex tempore at the time I issued my order. I explained that, while the test confirming that the fuel being sold at the property was hazardous had been conducted on 15 May 2024, BP only became aware of the results of the test on 31 July 2024, and had thereafter acted promptly to bring its application. I also explained that the arbitration clause relied upon in the lease does not apply to applications to this court for urgent relief.

5 Shortly after I issued my order, Boy 50 sought leave to appeal against it. The application for leave to appeal was advanced on two grounds. The first ground was a reiteration of the contention that my jurisdiction to issue the ejectment relief was ousted by the arbitration clause. The second ground was that, while I had not been mistaken in concluding on the evidence before me that Boy 50 was selling hazardous fuel, Boy 50 would seek leave to introduce new evidence on appeal demonstrating that it no longer sells hazardous fuel. The contention was that, on the strength of that evidence, a court of appeal might reverse my order.

6 The indication that Boy 50 would seek leave to appeal led BP and Aquarella to bring their own application to execute my order notwithstanding any appeal that may be pursued against it. Both the application for leave to appeal and the interim execution application were enrolled before me on Friday 23 August 2024. I address each application in turn.

The application for leave to appeal

7 The application for leave to appeal was not filed on this court's electronic registry until just after 21h30 on 22 August

2024. At the outset of the hearing of the application for interim execution on the morning of 23 August 2024, I asked Mr. Pule if Boy 50 sought to enrol the application for leave to appeal before me. Mr. Pule said that it did. I enrolled the application for leave to appeal for argument. Ms. Milovanovic-Bitter, who appeared for BP and Aquarella, then argued the interim execution application and the application for leave to appeal simultaneously. When Mr. Pule came to give his submissions, I asked if he was content to do the same. Mr. Pule said he was not, because the application for leave to appeal was not before me.

8 At this point, I was confused. Mr. Pule sought to clear up that confusion by explaining that when he had said that Boy 50 wished to enrol the application for leave to appeal, he had not meant that Boy 50 wished to enrol it for argument immediately. Rather, Mr. Pule wanted the benefit of my transcribed ex tempore judgment before considering whether to supplement the application for leave to appeal and advance argument in favour of granting leave to appeal at a later date.

9 I cannot say that I found Mr. Pule's explanation particularly convincing. Nor did I consider it necessary for Mr. Pule to have my transcribed judgment before moving the application for leave to appeal. My ex tempore judgment in the main application was very short, and it was given in Mr. Pule's presence while he made notes on it. Mr. Pule was clearly fully conversant with my reasons for making my order in the main application, and he must have known that there was no

prospect of those reasons being supplemented or of them requiring the preparation of an expanded application for leave to appeal. Only the transcription of my ex tempore judgment was outstanding. That transcription is no more than a record of the reasons I had already given in court.

10 The application for leave to appeal was enrolled on 23 August 2024 at Boy 50's request. There was no prejudice to Boy 50 in motivating the application for leave to appeal on that date. There was obvious prejudice in the form of wasted time and costs to BP and Aquarella in having to argue the application for leave to appeal at a later date. Both the application for interim execution and the application for leave to appeal are urgent. For these reasons, I chose not to postpone the application for leave to appeal for argument at a later date.

11 On its merits, the application for leave to appeal is exceptionally weak. In the first place, the arbitration clause plainly does not prevent either party to the lease from seeking urgent relief on the contract in the High Court. This much is clear from clause 12.6 of the lease, which states that "[n]othing herein contained shall be deemed to prevent or prohibit a [p]arty to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim".

12 It was contended on Boy 50's behalf that the right to approach the urgent court only accrues once a dispute on the contract has been referred to arbitration. In the absence of such a referral, the parties are not permitted to seek urgent relief. However, the clause must be interpreted "having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence". The meaning ascribed to the clause must also avoid "insensible or unbusinesslike results" which "undermin[e] the apparent purpose of the document" (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA), paragraph 18).

13 Adopting this approach, it seems to me that the lease cannot sensibly be read as preventing either party to the lease from seeking urgent relief unless and until a dispute is referred to arbitration. The lease plainly means that either party may approach a court for urgent relief or judgment on a liquidated claim at any time, notwithstanding the fact that all other disputes under the lease should be referred to arbitration. I cannot foresee the reasonable possibility that an appeal court would construe the clause otherwise.

14 The second ground of appeal, which rests on a prospective application to introduce new evidence, faces two insurmountable obstacles. The first is that, in order to be introduced on appeal, new evidence must be "practically conclusive . . . on the issue to which it is directed" (*O'Shea NO v Van Zyl NO 2012 (1) SA 90 (SCA)*, paragraph 9). The new evidence Boy 50 seeks to introduce on appeal cannot conceivably have that effect. The purpose of its introduction will be, at best, to create a dispute of fact about whether Boy 50 is still selling hazardous fuel. There is accordingly no prospect of the new evidence upon which Boy 50 seeks to rely being received on appeal.

15 Secondly, and in any event, the new evidence Boy 50 tenders does not in fact show that the fuel Boy 50 sells is safe. The fuel test placed before me and sought to be relied upon on appeal relates, on its face, to diesel sold at a petrol station on Kei Road in Bisho, in the Eastern Cape. There is no link between the test and Boy 50's petrol station, which is situated in Booyssens, to the southwest of the Johannesburg inner city. Furthermore, the test results are not confirmed under oath by the person who performed the test. They are produced under cover of an affidavit from the person who asked for the fuel to be tested.

16 For all these reasons, the appeal Boy 50 envisages is hopeless. The application for leave to appeal will be dismissed.

The application for interim execution

17 Subsections 18 (1) and (3) of the Superior Courts Act 10 of 2013 permit the execution of a final order granted at first instance pending any appeal against it, provided that three jurisdictional requirements have been met. These requirements are that there are exceptional circumstances justifying such execution; that the applicant for interim execution will suffer irreparable harm if interim execution is not permitted; and that the respondent will suffer no irreparable harm if it is.

18 In this case there are clearly two exceptional circumstances. The first is that Boy 50's prospects on appeal are very weak (see *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd* 2024 (2) SA 574 (GJ), paragraph 13). The second is the ongoing risk of death or serious injury arising from the undisputed fact that Boy 50 is selling hazardous fuel.

19 On the undisputed facts, if my order is suspended pending appeal, BP and Aquarella will have to tolerate the sale of hazardous fuel in their name or on their premises until the appeal is heard. There is also no dispute that the hazardousness of the fuel creates a real risk of death or injury to those using the fuel at the petrol station. In paragraph 48 of its founding affidavit in the main application, BP says that "an explosion could occur at the premises at any time". This is met with a bare denial in the answering affidavit, coupled with the assertion that BP is not genuinely motivated by the threat to public safety. Boy 50 takes no serious issue, however, with the proposition that there is in fact an ongoing risk of an explosion at the petrol station.

20 Whether or not that happens, I think that the onus to show irreparable harm on a balance of probabilities has been discharged. BP and Aquarella do not have to wait until people are killed or injured, or their property is actually destroyed, to show irreparable harm. Having to put up with hazardous fuel – which might result in death or serious injury – being sold in their name or on their premises is harm enough.

21 That leaves only the question of an absence of irreparable harm to Boy 50. If my order is executed pending appeal, Boy 50 will be ejected, and its business will close down, at least until the appeal runs its course. That will, of course, do Boy 50 real harm.

22 But it is not irreparable harm of the kind that will be inflicted on BP and Aquarella (as well as Boy 50, its employees and customers) if the petrol station explodes. Death, serious injury or the destruction of property is truly irreparable. Having to pack up and leave the property pending appeal is not. It is in this sense that BP and Aquarella have shown that they will suffer irreparable harm if my order is not executed forthwith and that Boy 50 will not suffer irreparable harm if it is.

23 The interim execution application must accordingly succeed.

Order

24 For all these reasons –

24.1 The application for leave to appeal is dismissed with costs.

24.2 The operation and the execution of the order granted by this court on 20 August 2024 is not suspended and will continue to be operational and executed in full, irrespective of any applications for leave to appeal or pending appeals against the 20 August 2024 order to the Supreme Court of Appeal or to the Constitutional Court.

24.3 The respondent is to pay the costs of the interim execution application.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 August 2024.

HEARD ON: 23 August 2024 DECIDED ON: 26 August 2024 For the Applicants: A Milovanovic-Bitter Instructed by ENS Africa Inc For the Respondent: K Pule Instructed by Betela Attorneys Inc

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Prepared on 10 October 2026 · Esheria