

SOUTH AFRICA / JUDGMENT

Wiggett v Tshezi Community Trust and Another (2353/2017) [2018] ZAECHGC 53 (3 July 2018) [2018] ZAECHGC 53

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

2353/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 2353/2017

In

the matter between:

ALEXANDER

MARTIN

WIGGETT Applicant

and

THE

TSHEZI COMMUNITY

TRUST First

Respondent

(The

putative owner of the Property)

THE

EASTERN CAPE DEVELOPMENT CORPORATION Second

Respondent

JUDGMENT

Bloem J.

- [1] This application concerns the use of the Coffee Bay Hotel and Conference Centre (hotel) which is situated at Coffee Bay Village,

Lower Nenga area in the magisterial district of Mqanduli.

- [2] On 17 May 2017 the applicant launched an application for an order that, pending an action to be instituted by him against the second respondent, the second respondent be interdicted and restrained from interfering with his alleged contractual rights and obligations flowing from a written lease agreement concluded on 1 December 2015 between him and the first respondent, that the second respondent be directed to give him free and undisturbed possession of the hotel until the finalisation of “the proceedings” and ancillary relief. At the hearing the parties informed me that the applicant has instituted an action for damages against the second respondent. The relief sought is accordingly for the applicant’s protection pending the finalisation of the above action.
- [3] The applicant is a businessman from KwaZulu-Natal. The first respondent is cited as the Tshezi Community Trust (the trust). The second respondent the Eastern Cape Development Corporation, a juristic person capable of suing and being sued in its own name, established in terms of section 2 of the Eastern Cape Development Corporation Act[1].
- [4] The applicant seeks an interim interdict. An applicant seeking an order for an interim interdict must show a prima facie right (in the sense that an applicant must set out facts that establish the existence of a right in terms of substantive law); a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; the balance of convenience favours the granting of the interim interdict; and the absence of any other satisfactory remedy available to the applicant.[2] The above requirements should not be considered separately or in isolation, but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.[3]
- [5] The undisputed facts are that on 11 May 2015 the trust entered into a lease agreement with the Coffee Bay Hotel and Conference Centre (Pty) Ltd (the company) in terms whereof the company leased the hotel from the trust for a period of 25 years. The company required approximately R12m to bring the hotel up to standard. It applied to the Industrial Development Corporation of South Africa Limited (IDC) for financial assistance. The IDC was prepared to make a loan available to it, but limited to R6.6m. The company accordingly required a further R5.4m to meet its obligations. It applied to the second respondent for financial assistance. By a letter dated 21 August 2015 the second respondent informed the company that it was unable to proceed with its application for a loan of R5.4m “because it is against ECDC policy to refurbish a property that belongs to ECDC”. In an email dated 28

August 2015 the second respondent informed the company that it was unable to proceed with the application “because of the forensic investigation concerning the ownership of this property”. On that same day the company enquired from the second respondent as to how long the forensic investigation would take and why the investigation was not done before “the lease agreement with the trust, facilitated by ECDC”, was signed.

- [6] On 18 September 2015 the second respondent furnished the company with three documents. The first was a resolution taken by the Executive Council of the Eastern Cape Province at a special executive meeting on 1 November 2000 to the effect that fixed and movable property of inter alia the Transkei Development Corporation be transferred to the second respondent. The second was a general power of attorney dated 17 September 2015 by the then Minister of Rural Development and Land reform wherein he nominated and appointed the incumbent of the post of chief executive officer of the second respondent, as his true and lawful agent, to enter into lease agreements with other parties and execute all legal formalities associated with such lease agreements, provided that the property descriptions in such lease agreements shall clearly indicate that they only pertained to the existing improvements on the immovable assets listed in a schedule. The third document was a list of the immovable properties to which the power of attorney related. The hotel is listed in the above schedule. Those documents show that the hotel was previously owned by the Transkei Development Corporation and subsequently transferred to the second respondent.
- [7] The company was unable to comply with the provisions of the lease agreement. It alleged that it was unable to pay rental in terms of the lease agreement. The first respondent cancelled the lease agreement as a result of the company’s breach. On 1 December 2015 the applicant (and not the company) concluded a lease agreement with the trust in terms whereof the applicant leased the hotel from the trust for a period of 25 years (the second lease agreement).
- [8] Mr McTurk, counsel for the applicant, submitted that the applicant’s right, which he sought to be protected by the interim interdict, is founded in the second lease agreement. It is common cause that the second respondent, not the trust, is the owner of the hotel. It is for that reason that Mr Ntsaluba who, with Mr Mayekiso, appeared for the second respondent, submitted that the second lease agreement is invalid because the trust could not enter into a lease agreement in respect of the hotel without the second respondent’s authority.
- [9] For his submission Mr McTurk placed emphasis on the interaction between the applicant and his wife, on the one hand, and three

persons employed by the second respondent, on the other hand. The first is Arnold Meiring, the second Phakamisa George and the third Norie Makubalo. Mr Meiring was employed as the debt collections specialist. Mr George was the head of rural

development and Ms Makubalo was an accounts manager. The applicant alleged that, on advice by other business persons who were aware that he was enquiring about business opportunities in the area of the hotel, he contacted Mr Meiring and enquired whether the second respondent

would be interested in the development of the hotel. According to him Mr Meiring “emphatically explained to [him] that the second respondent would, proverbially, give the hotel to [him] and that all [he] needed to do is to enter into an agreement of lease with [the trust]”. On 8 May 2015 the company concluded the first lease agreement with the trust. The applicant alleged that Messrs Meiring and George were involved in the negotiations and “the approval process” and held out that the trust had the necessary standing to enter into the first lease agreement. He also alleged that they assured Chief Pali, who represented the trust, that the second respondent would be investing in the hotel at the time of the signing of the first lease agreement. On 30 July 2015 the applicant’s wife, Margeret Wiggett, in her capacity as one of two directors of the company, forwarded a business plan which the company had submitted to the IDC to Mr Meiring with the request that she be informed if anything else was required. Assistance from the IDC was limited. On 5 August 2015 Ms Makubalo requested Mrs Wiggett to forward the first lease agreement to her, which was done.

[10] The applicant alleged that until 21 August 2015 it was common cause or thought by him and his wife that it was common cause that the trust was the owner or putative owner of the hotel and that it had the right, title and interest to the hotel because Messrs Meiring and George and Ms Makubalo “dealt with the necessary paperwork and consistently indicated that, or through omission confirmed that the first respondent was the owner and/or putative owner of the [hotel]”. On 21 August 2015 the applicant and his wife were surprised to receive a letter of the same date addressed to the company wherein the acting Executive Manager of the second respondent informed the company that the hotel belonged to the second

respondent. The applicant alleged that the reasoning behind that letter was nonsensical and irrational, without explaining that allegation.

[11] A week thereafter Ms Makubalo informed Mrs Wiggett that the second respondent was unable to proceed with the company’s application for a loan because a forensic investigation regarding the ownership of the hotel was underway. As a result of further communication between the applicant and his wife, on the one hand, and the three employees of the second respondent, on the other hand, the three documents referred to above were made available to the company. Having gone through those documents the applicant concluded that it would seem “that the improvements on the property do possibly belong to the second respondent” although there was no suggestion from any of the second respondent’s employees that the first lease agreement was invalid. During September 2015 the second respondent’s Chief Executive Officer and three board members discussed the company’s plans for the development of the hotel with the applicant and his wife. In the meantime the other director of the company, Khaya Gqulu, caused problems for it by making negative comments about the applicant and his wife. The problems with Mr Gqulu and the company’s failure to secure a loan of R12m led to the company being unable to comply with its obligations flowing from the first lease agreement. The first respondent then terminated the first lease agreement. The applicant alleged that it was on Mr Meiring’s advice that the company terminated the first lease agreement and that he also advised

that the trust should enter into a lease agreement with the applicant in respect of the hotel.

[12] After he and his wife had left the hotel during August 2016, the applicant learned that the second respondent was actively marketing the hotel to prospective lessees and had employed security guards at the hotel who allegedly prohibited him from exercising his rights in terms of the lease agreement. By letter dated 5 August 2016 addressed to the respondents, the applicant's attorney demanded that the advertisements to prospective lessees be retracted and that all keys to the hotel be handed to the applicant. By letter dated 14 November 2016 the second respondent's manager of property rentals and collections informed the applicant's

attorney that the second lease agreement was concluded with the trust which had neither the second respondent's consent nor

authority; that the trust did "not have legal standing with regards to the ownership of the [hotel]"; that the second respondent was the only party who could enter into agreements in respect of the hotel; and that the second lease agreement was accordingly invalid.

[13] The second respondent's Chief Executive Officer, Ndzondelelo Dlulane, deposed to the main answering affidavit wherein he alleged that the company was incorporated in 2015 as a Black Economic Empowerment (BEE) vehicle to lease and operate the hotel. Mrs Wiggett and Mr Gqulu each held 45% shares in the company and the trust the remaining 10%. It was because of squabbles within the company that the first lease agreement collapsed. Mr Dlulane alleged that after the collapse of the first lease agreement the applicant concluded the second lease agreement without the knowledge of the second respondent. He furthermore alleged that throughout the information sessions and discussions that Messrs Meiring and George had with the applicant and his wife, they were informed that the hotel was owned by the second respondent. Mr Dlulane denied that the second respondent authorised the trust to alienate, let or encumber the hotel; that Messrs Meiring and George held out to the applicant that the trust was authorised to conclude the second lease agreement; or that they participated in the negotiations leading up to the conclusion of the second lease agreement.

[14] Regarding the above interaction, the second respondent's case is that Messrs Meiring and George and Ms Makubalo were involved with the applicant and his wife to assist them with information so that the company's proposal could receive a favourable consideration initially by the IDC and later the second respondent. The second respondent considered the company's proposal but rejected it because, from the proposal it appeared that the company was not investing money of its own in the hotel but required the second respondent, as owner of the hotel, to approve a loan to refurbish the hotel. The second respondent informed the company that it was against its policy to refurbish its property.

[15] Mr Meiring deposed to an affidavit wherein he confirmed that, at the invitation of the trust, he interacted with the applicant and his wife to find ways of putting the hotel back in operation. If the hotel was in operation it would have ensured that the trust met its obligations relevant to an earlier loan that the second respondent advanced to it. Messrs

Meiring and George and Ms Makubalo each denied that they represented to the applicant or his wife that the trust could enter into the second lease agreement. Mr Meiring specifically denied that he had knowledge of or a hand in the negotiations culminating in the conclusion of the second lease agreement.

- [16] To decide whether or not the applicant has established, as one of the requirements for an interim interdict, a prima facie right, even though open to some doubt, the court must take the facts averred by the applicant, together with such facts set out by the second respondent, as contained in the affidavits of its deponents, that are not or cannot be disputed and to consider whether, having regard to inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the second respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.[4]
- [17] The applicant's case is that his right to free and undisturbed possession of the hotel flows from the second lease agreement.

The second respondent, on the other hand, contended that the second lease agreement is invalid because the trust had no authority to conclude it with the applicant. Mr McTurk relied on portions of two paragraphs in Mr Dlulane's affidavit for the submission that the trust had authority to conclude the lease agreement. Those portions are the following:

"...the entity Coffee Bay Hotel and Conference Centre (Pty) Ltd was registered as the vehicle to lease and operate the hotel"

"... was a free agent and could do as it pleased with the Coffee Bay Hotel, including leasing it to third parties without the involvement of ECDC, the lawful owner of the property".

- [18] The above portions of those paragraphs must be read in their full context which are the following:

"26.1 The contents hereof are denied. In particular, as stated above, Arnold Meiring was one of the officials who had been working closely with those previously operating the hotel as well as the local community. As an official of ECDC he knew how the ECDC operates and did not present the situation as simply as the deponent suggests. Neither did he have any authority so to misrepresent the situation. As set out above, the deponent was apprised of the prescripts of ECDC, hence the entity Coffee Bay Hotel and Conference Centre (Pty) Ltd was registered as the vehicle to lease and operate the hotel".

"26.3 It is specifically denied that any of the officials held out that the local community, in whatever form, was a free agent and could do as it pleased with the Coffee Bay Hotel, including leasing it to third parties without the involvement of ECDC, the lawful owner of the property".

- [19] In context Mr Dlulane denied in paragraph 26.1 of his answering affidavit that Mr Meiring explained to the applicant that the second respondent would proverbially give the hotel to him once a lease agreement was concluded with the trust; that Messrs Meiring and George were involved in the negotiations leading to the conclusion of the first agreement; that they

held out that the trust could enter into that agreement; or that they assured Chief Pali that the second respondent would be investing in the hotel. In context I understand Mr Dlulane to have stated in the last sentence of paragraph 26.1 of his affidavit that the company was registered as a vehicle to comply with the second respondent's BEE prescripts to be able to conclude the first lease agreement. In paragraph 26.3 of his affidavit Mr Dlulane specifically denied that any of the second respondent's officials held out that any member of the local community, inclusive of the trustees of the trust, was a free agent who could conclude a lease agreement in respect of the hotel without the second respondent's involvement.

- [20] Mr McTurk submitted that, on Mr Dlulane's explanation, the second lease agreement would be valid if it is established that the second respondent was involved in the negotiations leading to the conclusion thereof. In my view the applicant failed in this regard to place any facts, other than an allegation,[5] before the court to show that the second respondent was involved in the conclusion of the second lease agreement. On his version, until 21 August 2015 the applicant laboured under the impression that the trust was the owner or putative owner of the hotel and was accordingly entitled to conclude the first lease agreement with the company. That impression was created by the conduct of Messrs Meiring and George and Ms Makubalo, he alleged. That might have been the case until 21 August 2015 when the applicant and his wife were surprised to learn that the second respondent, not the trust, was the owner of the hotel. The second lease agreement was accordingly concluded against the background of the applicant knowing that the second respondent was the owner of the hotel.
- [21] What then made the applicant to believe that the trust could nevertheless enter into the second lease agreement? It is in this regard that the applicant failed to assist the court. He alleged only that the trust cancelled the first agreement upon advice from Mr Meiring. Then on 1 December 2015 he managed to sign a new lease agreement with the trust, once again allegedly upon advice from Mr Meiring. The applicant did not say when Mr Meiring allegedly advised that a lease agreement be concluded between himself and the trust and the rationale behind such an agreement, regard being had to the fact that the first agreement was between the trust and the company. The applicant ought to have explained why he was advised to step into the shoes of the company.
- [22] In his replying affidavit the applicant summarised the facts upon which he relied for believing that the lease agreement is valid and enforceable. Those are that Messrs Meiring and George were involved in negotiations that culminated in the conclusion of the first lease agreement; that he was allowed to occupy the hotel after signing the second lease agreement on 1 December 2015; and that on 5 April 2016 Mr Meiring signed a document which shows a resolution taken by the trust.
- [23] The fact that Messrs Meiring and George may have been involved in the negotiations which led to the conclusion of the first lease agreement is immaterial because on 21 August 2015 the applicant became aware that the trust was not the owner of the hotel. At that stage he should have enquired from them or Chief Pali the basis on which the trust was allowed to

conclude the first lease agreement. The need to obtain answers to the enquiries that Mrs Wiggett made in this regard on 28 August 2015 became more important when Ms Makubalo informed her that a forensic investigation regarding the ownership of the hotel would be undertaken. Despite having made the above enquiries, neither the applicant nor his wife sought answers to those enquiries. Despite having been informed on 21 August 2015 that the hotel belonged to the second respondent, the applicant nevertheless concluded the second lease agreement, without having received answers to the enquiries made by his wife.

- [24] In his affidavit Mr Meiring unsurprisingly denied that he had any involvement in the conclusion of the lease agreement. He stated that he “had neither knowledge of, nor a hand in, the negotiation and/or conclusion of the lease agreement purportedly entered into by and between the applicant and the first respondent which the applicant seeks to uphold and/or enforce”. Mr Meiring explained that the applicant and his wife occupied a house within the precinct of the hotel “as the preparatory work for their envisaged eventual operation of the hotel unfolded”. The applicant and his wife occupied the hotel during August 2015 on the basis of the first lease agreement. That was during the time when they had knowledge that the hotel belonged to the second respondent. The conclusion of the second lease agreement under those circumstances cannot serve as a basis for the contention that the applicant believed that the second lease agreement was valid. On all the facts adduced by the parties the second lease agreement appears to be invalid.
- [25] The document that Mr Meiring signed on 5 April 2016 reveals that the trust resolved on 1 December 2015 to authorise Chief Pali to sign the second lease agreement. I agree with Mr Ntsaluba that the document shows only that Mr Meiring signed it as a witness to the fact that the other signatories signed it in his presence. It does not show that Mr Meiring acquainted himself with the contents thereof. In any event, that document must have been in the applicant’s possession when he deposed to his founding affidavit. His failure to attach it to his founding affidavit deprived Mr Meiring the opportunity to explain the circumstances under which he appended his signature thereto, approximately four months after the second lease agreement was concluded.
- [26] On the basis of the facts (or absence thereof) stated by him in his affidavits I have doubt whether the applicant would obtain final relief at the trial. From the second respondent’s affidavits deposed to by Messrs Dlulane, Meiring and George and Ms Makubalo, it is apparent that, even before the applicant and his wife arrived on the scene, Messrs Meiring and George were part of a team that was assigned the responsibility of making efforts to ensure that the hotel was a viable concern, that they were tasked to work closely with the local community and entities wanting to utilise the hotel and that they were aware of the BEE imperative of the second respondent. Their involvement led to the incorporation of the company in which Mr Gqulu and the trust held 45% and 10% shares respectively. On the basis of the above I accept that they would not have been involved in the lease agreement in question “thereby bypassing the BEE prescripts of the ECDC and Government”, as averred by Mr Dlulane. The facts averred by Messrs Meiring and George and their denial of the

allegation that Mr Meiring advised that the lease agreement be concluded, such denial not being untenable or far-fetched, throw such serious doubt upon the applicant's case that he cannot succeed. In my view the applicant has failed to establish a prima facie right, even though open to some doubt.

- [27] Another reason why the applicant should fail is that he has not established that the balance of convenience favours the granting of the interim relief. Mr Meiring alleged that the applicant and his wife vacated the house within the precinct of the hotel during or about July 2016. They are presently not in occupation of either the house or the hotel. Mr Meiring's allegations in that regard were not disputed by the applicant in his replying affidavit. It means that the applicant and his wife were off the premises for approximately ten months before they instituted this application on 17 May 2017. I am not satisfied that the balance of convenience favours the granting of an interim interdict.
- [28] The institution of a claim for damages by the applicant against the second respondent based on the second lease agreement is, in my view, an acknowledgement that the applicant has a satisfactory remedy. In all the circumstances, the applicant has failed to make out a case for the relief sought. His application should accordingly be dismissed with costs. There was no submission why the cost of two counsel should not be awarded and I can think of none.
- [29] In the result, the application is dismissed with costs, such costs to include the employment of two counsel.

G H BLOEM

Judge of the High Court

For the applicant: Adv S McTurk, instructed by Otto Krause Incorporated Attorneys, Roodepoort and Netteltons Attorneys, Grahamstown

For the second respondents: Adv T M Ntsaluba SC and M Mayekiso, instructed by Mbabane & Sokutu Inc, East London and Whitesides

Attorneys, Grahamstown

Date of hearing: 21 June 2018

Date of delivery of the judgment: 3 July 2018

[1] Eastern Cape Development Corporation Act, 1997 (Act No. 12 of 1997)(EC).

[2] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw

[2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 347A-B.

[3] Camps Bay Residents and Ratepayers Association and others v Augoustides and others 2009 (6) SA 190 (WCC) at 196H-I.

[4] Simon NO v Air Operations of Europe AB and others

[1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 228G-H.

[5] That Mr Meiring advised that the first lease agreement be cancelled and that the applicant enter into the second lease agreement.

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