

8/9/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 16283/2016

Before Her Ladyship Ms Acting Justice Grenfell

Heard on Tuesday 5 September 2017

Judgment delivered: 8 September 2017

In the matter between:

TSWELOKGOTSO TRADING ENTERPRISE CC

Applicant

and

AIRPORTS COMPANY OF SOUTH AFRICA SOC LIMITED

Respondent

JUDGMENT

GRENFELL, AJ:

[1] **INTRODUCTION**

1.1. Two applications launched by the applicant, seeking relief against the respondent fall to be determined, in particular:

1.1.1. Part B of the application launched on 28 February 2016, on the basis of amended relief sought for a declaratory order; and

1.1.2. The application launched in June 2017 for committal of various board members of the respondent for contempt of the orders handed down by Jansen J and de Vos J.

1.2. Both applications were set down for hearing on 4 September 2017, by the applicant in respect of the contempt application and the respondent in respect of the declarator sought in part B of the first application launched.

1.3. As alluded to above, the applicant amended its notice of motion, without opposition, by notice dated 18 May 2016 seeking new relief in the form of a declarator that the contract between the parties had not yet commenced.

1.4. An application for the postponement of both applications, was delivered by the applicant, on 27 July 2017. The application for a postponement was opposed by Mr Hoffman SC who appeared with Mr Mgxashe for the respondent.

1.5. In argument in support of the postponement Mr Ascar, who appeared for the applicant, submitted that the reason that a postponement was required was to afford the applicant the opportunity to join a necessary party Mabotheima Trading Enterprises (Pty) Ltd, to the declarator application. The party sought to be joined had no interest in the committal for contempt application.

1.6. Having heard the postponement application, I dismissed same and handed down reasons.

1.7. The costs of the postponement application were made costs in the application.

1.8. Once the postponement had been refused, Mr Ascar withdrew as counsel for the applicant and also stated that his instructions were that his attorney also withdrew as the attorney of record.

1.9. The legal advisor of the applicant, Mr Simon Makola, then sought to address me. Mr Makola indicated that the applicant sought a postponement for legal representation as the applicant's senior counsel was unavailable. I dismissed the second application for a postponement.

1.10. The applications will be dealt with in turn.

[2] **THE AMENDED RELIEF FOR A DECLARATOR**

2.1. Initially, the notice of motion that served before Jansen J was one in which an urgent interim interdict was sought *pendente lite* in the following terms:

2.1.1. In prayer 6 a “*declaratory order be granted that the contract came into effect on a date when the applicant received a fully completed original copy of the contract to wit 17 June 2013*”;

2.1.2. In prayer 7 that “*the three-year duration of the contract is 16 June 2016*”;

2.2. In the founding affidavit it was asserted by the applicant, that the contract commenced as at the date that the applicant received a fully completed original copy of the contract said to be 17 June 2013 and as a result the contract being a three-year fixed-term contract would come to an end on 16 June 2016.

2.3. Notwithstanding this unequivocal statement under oath, the applicant, by introducing an amendment in May 2016 to its notice of motion, now sought an order that the contract between the parties is not yet in effect and will only come into effect when the applicant receives a fully completed original copy of the agreement with all its annexures and deviations and that the three-year duration of the contract has not yet commenced.

2.4. The explanation proffered as to the change in stance was set out in a supplementary affidavit in support of the amended relief wherein the deponent on

the part of the applicant explains that the point was one that subsequently occurred to the applicant, upon taking legal advice.

2.5. I take a dim view of the applicant's opportunistic attempt to circumvent a tender process which on common cause facts the applicant engaged in as an unsuccessful tenderer. If the applicant believed that its contract was not yet in existence, it beggars belief that it would have tendered for a new contract, but would have sought to assert its rights.

2.6. In argument on the postponement, Mr Ascar made a feint attempt to suggest a tacit contract.

2.7. The facts do not allow for any construction or ambiguity, other than the fact that the contract between the parties commenced, at best for the applicant, on 17 June 2013 and came to an end on 16 June 2016.

2.8. The new version now put forward, takes no account of the fact that both parties conducted their affairs from 2013 to 2016 as if a 3 year fixed contract was in place. The applicant rendered invoices to the respondent in terms of the contract all of which were paid.

2.9. Bearing in mind the time honoured test for resolving disputes of fact in motion court proceedings when final relief is sought, such as is being done here, it is the respondent's version that must be accepted together with those allegations of the applicant that the respondent cannot seriously dispute.

2.10. The applicant and respondent were in agreement prior to the amendment that the contract between the parties was a three-year fixed-term contract which came to an end on 16 June 2016.

2.11. For the applicant to succeed in its amended relief would comprise an absurdity, where the applicant was quite content in early 2013 to commence maintenance works as undertaken and be paid for its services.

2.12. I conclude that no case has been made out for the declaratory relief sought in the amended notice of motion.

[3] **COMMITTAL FOR CONTEMPT**

3.1. The respondent contends that the order of Jansen J comprised interim relief pending the determination of part B of the original notice of motion, but always subject to the necessary requirement that a contract between the parties was remained in existence.

3.2. I have found as a fact that the contract between the parties came to an end on 16 June 2016.

3.3. In my view the interim interdict came to an end with it on 16 June 2016.

3.4. The applicant sought to contend that the interim interdict would continue pending the determination of part B, in whatever guise it was couched.

3.5. That clever lawyer's point, as it was termed by Mr Hoffman SC, cannot be countenanced and it is obvious that once the relief sought was amended to seek a declarator that the contract had not yet come into existence, shortly before the contract between the parties was due to come to an end, that if the applicant had wished to obtain an interim interdict pending that determination, it would be required to approach the court afresh.

3.6. There can be no quarrel with the proposition that there can be no extra curial extension of a judicial order, by amendment to pleadings or otherwise, yet this is the effect of what the applicant seeks to do.

3.7. In respect of the committal for contempt order that was granted by de Vos J, in my view same has become academic, by virtue of the fact that contempt is determined as at the date at which it is asserted that a party is in contempt of a court order.

3.8. There can be no continuing contempt as at 5 September 2017, by virtue of the fact that the contract has come to an end and the interim interdict with it.

3.9. Accordingly the application for committal for contempt, struck from the roll for want of urgency on 4 July 2017, together with an order for the costs of two counsel, is devoid of merit and also falls to be dismissed.

[4] **COSTS**

4.1. The respondent seeks a punitive costs order on the basis of the applicant's attack in the postponement replying affidavit on the integrity of the respondent's chief executive officer and the respondent's attorney of record.

4.2. It was argued that the allegations made are scandalous, vexatious, hearsay and inadmissible.

4.3. In the exercise in my discretion, I do not think that the attack is so worthy of disapproval and displeasure as to warrant a punitive costs order.

4.4. However, the matter did warrant the briefing of two counsel by the respondent as a necessary precaution.

[5] **ORDER**

I accordingly make the following order:

5.1. The application for a declaratory order launched on 28 February 2016, as amended, is dismissed.

5.2. The application for committal of board members of the respondent for contempt of the orders of Jansen J and de Vos J is dismissed.

5.3. The applicant is ordered to pay the respondent's costs of both applications, such costs to include the costs of two counsel.



LM GRENFELL

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 5 September 2017

Judgment delivered: 8 September 2017

Counsel for applicant: Adv CC Ascar

Counsel for respondent: Adv GI Hoffman SC

M Mgxashe