

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 15259/2016

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

GL EVENTS SOUTH AFRICA (PTY) LTD

Applicant

And

SUN INTERNATIONAL SOUTH AFRICA LIMITED

Respondent

J U D G M E N T

KEIGHTLEY, J:

- [1] This case concerns the right to provide infrastructure services for the 2016 Nedbank Golf Challenge (“the NGC”) scheduled to be held at the Gary Player Country Club, Sun City in November 2016.
- [2] The applicant is GL Events South Africa (Pty) Ltd (“GLE”). GLE asserts that it has the right to provide these services in terms of an existing agreement between it and the respondent, Sun International (South Africa) Ltd (“SI”). Further, that SI has acted unlawfully, and in breach of this agreement, by taking steps to grant the right to a third party.
- [3] GLE seeks to enforce its agreement with SI. It prays for the following relief:
 - [3.1] An order declaring that SI has appointed GLE as the supplier of infrastructure services for the NGC held annually for the period 2014 to 2016, and that such appointment remains of full force and effect.
 - [3.2] An order directing SI with immediate effect to take certain designated steps for purposes of agreeing and finalising the structural configuration for the 2016 NGC and implementing what is called the zero base document for the tournament.
- [4] The matter was brought by way of an urgent application. It is clear from the notice of motion that GLE seeks mandatory relief based on the contractual remedy of specific performance.

- [5] Urgency, or the lack thereof, was raised as an issue in the supporting affidavits filed by the parties. However, by the time the matter was heard, this was no longer a contested issue.
- [6] The incident that directly precipitated the application occurred on 18 March 2016 when SI published a closed tender request for proposals (“the RFP”) for the provision of infrastructure services for the 2016 NGC. The RFP was sent to GLE as well as to third parties. SI’s right to do this was disputed by GLE in light of what they contend is their existing status as appointed infrastructure service providers for 2016.
- [7] GLE instituted its application when it became apparent that SI intended to announce the award of the tender in terms of the RFP on 19 May 2016. I pause to record that SI has given an undertaking that it would delay the award of the tender until judgment in this matter is handed down.
- [8] As regards GLE’s right to provide infrastructure services for the NGC, it contends that it has a long-standing relationship with SI dating back to 2002. Since then, it has provided the infrastructure services for every annual NGC. Furthermore, GLE asserts that in 2014 SI awarded it the rights for the 2014, 2015 and 2016 specifically. This was initially done by way of an oral communication. However, in approximately September 2014, the parties entered into a written agreement, known as the “Marquee-Production Facility Agreement” (the “marquee agreement”). They recorded in this agreement that GLE would remain the supplier of infrastructure for the NGC for the 2014-2016 events.

[9] It is common cause that the marquee agreement dealt specifically with the parties' rights and obligations in respect of two marquees owned by GLE that were erected at Sun City, viz. a double-decker marquee, and a production marquee. However, there are two aspects of the marquee agreement that render it relevant to the broader dispute regarding GLE's status as the infrastructure services provider for 2016. These are:

[9.1] Clause 4.1, which provides that:

"The parties wish to renew the Marquee and Production facility agreement for a further period of 3 (three) years for 2014, 2015 and 2016, from signature hereof on the same terms and conditions as contained in the agreement inclusive of the additional and / or amended terms as cited herein. Note the renewal of any given year will be directly subject and related to the renewal and continuation of the Nedbank Golf Challenge Tournament year-on-year. Should the tournament for what-so-ever reason not be staged, this agreement shall become null-and-void." (emphasis added)

[9.2] Clause 4.3, which provides that:

"For the avoidance of doubt, (GLE) shall remain the Infrastructure supplier of the Nedbank Golf Challenge for the 2014. 2015 and 2016 events. This shall be subject to cost and quality approval of all products presented. The costing shall remain the same on

a zero base model provided that the obligations on (GLE) remain the same as in previous years.” (emphasis added)

[10] GLE contends that the terms of clause 4.3 are clear. Although the marquee agreement did not deal generally with the agreement between the parties that GLE would be the infrastructure service provider, it specifically recorded this arrangement in clause 4.3. This, says GLE, is binding on SI. SI has a contractual obligation to honour its appointment of GLE as the infrastructure service provider for the 2016 NGC. It has acted unlawfully in taking steps, through the RFP, to appoint a different infrastructure service provider in breach of GLE’s rights. GLE is entitled to enforce its rights through the remedy of specific performance as detailed in the notice of motion.

[11] SI disputes that GLE is vested with the right to provide the infrastructure services for the 2016 NGC. There is some dispute regarding the proper meaning and application of clauses 4.1 and 4.3 of the marquee agreement and whether it gives GLE the right on which it relies. However, the main thrust of SI’s case, as set out in the answering affidavit, may be summarised as follows:

[11.1] Up to and including 2015 the NGC operated on a very different basis to that pertaining to the 2016 tournament.

[11.2] The NGC formed part of a South African series of golf events known as the Sunshine Tour.

- [11.3] In terms of an agreement between SI and Nedbank the latter was the title sponsor of the NGC.
- [11.4] In terms of the relationship existing between Nedbank and SI under the pre-2016 NGC arrangement, SI ran the tournament in the capacity of a principal. This means that SI was the principal contractor in respect of various aspects of the tournament, including infrastructure services.
- [11.5] Nedbank's contract as title sponsor of the NGC has now run out. A new contract will have to be concluded with Nedbank if it wishes to continue being the title sponsor for 2016.
- [11.6] This precipitated a series of negotiations between certain interested parties, including Nedbank, SI and the European Tour ("the ET").
- [11.7] In 2015 the ET approached SI with a view to running a new golf tournament in November 2016 as part of the ET's year-long "Race to Dubai" series.
- [11.8] This approach was on the basis that all of the rights in and to the new tournament would be held by the ET, and not by SI.
- [11.9] Thus, the title sponsorship agreement for 2016 would not be between SI and Nedbank, but between the ET and Nedbank.

- [11.10] In addition, SI would no longer act as the tournament principal. Instead, the ET would be the tournament principal.
- [11.11] It is envisaged that as part of the “Race to Dubai”, the 2016 NGC will have an increased field of 72, rather than 30 players. The qualification criteria will also be different. The ET will procure the 72 players for the tournament.
- [11.12] To fit in with the “Race to Dubai” programme, the NGC will take place in the first part of November, rather than the first week in December as has previously been the case.
- [11.13] The negotiations between SI, Nedbank and the ET are ongoing, and no agreement has yet been concluded.
- [11.14] However, SI contends that there is “every expectation” that a new tournament will take place in 2016, with Nedbank as the title sponsor, and the ET as the principal, along the lines outlined above.
- [11.15] In light of this expectation, SI has been appointed “on a handshake” by the ET to manage certain aspects, inter alia, the provision of infrastructure, for the 2016 NGC.
- [11.16] SI’s role in this regard is subject to certain limitations. These include new budgetary requirements.

[11.17] Further, all decisions SI intends making as regards the provision of services has to be approved by the ET as principal. To this end, a representative of the ET was part of the RFP process of 18 March 2016. This was to enable the ET to benchmark the design, cost and quality of the infrastructure services proposed with the ET's international standards and expectations.

[11.18] On this basis, SI contends that the 2016 NGC is fundamentally different to the "old" NGC held in the past.

[11.19] Accordingly, insofar as GLE relies on the marquee agreement to establish its right to provide the infrastructure for the 2016 NGC, SI contends that the agreement is "null and void" in terms of clause 4.1, cited above. In other words, the tournament envisaged in the marquee agreement is no longer being held in 2016. Consequently, the terms of that agreement, including clause 4.3 regarding GLE's right to provide the infrastructure services is null and void.

[12] If GLE is unable to establish its right to provide the infrastructure services for the 2016 NGC on the papers before me, it will fall at the first hurdle of establishing its entitlement to the relief it seeks.

[13] No doubt mindful of the onus it bears in application proceedings in which final relief is sought, GLE is highly critical of the stance adopted by SI in its answering affidavit, and the version it puts forward.

- [14] GLE points out that SI's response to GLE's claim that it holds the right to provide infrastructure was subject to constant shifting in the period leading up to the launch of the application. First, SI denied that there was any agreement between GLE and SI to this effect, then it called on SI to produce documents to support its contention. When these were produced, and shortly before the application was launched, SI's attorneys contended that the NGC would not be held in 2016. Finally, in its answering affidavit, SI avers that in all likelihood there will be a 2016 tournament at Sun City, with Nedbank as the title sponsor, but that it will be a new look, and fundamentally different tournament.
- [15] GLE points to various press releases that have confirmed that the NGC will be held at Sun City in November 2016, with Nedbank as the title sponsor. These same press releases refer to the long-standing history of the tournament, with no indication that there is any fundamental change. Furthermore, GLE refers to the fact that the RFP was issued by SI, not by the ET. It specifically stated that the purpose of the RFP was to "... *convey the requirements for Sun International*" (emphasis by the applicant) for the provision of infrastructure services for the 2016 Nedbank Golf Challenge. GLE also highlights what it contends are contradictions in the answering affidavit as to whether the NGC will proceed on the basis averred by SI, or whether this is still to be determined by way of agreements yet to be concluded.

[16] It submits that the matrix of facts presented in the affidavits reveals SI's version to be untruthful, and self-contradictory. Accordingly, GLE contends that I ought properly to disregard SI's version in accordance with the established exception to the general rule laid down in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd.*¹ In this case, submits GLE, the respondents version of the facts is so far-fetched and untenable that it cannot prevail.

[17] GLE submits that the only justifiable conclusions to draw from the evidence is that:

[17.1] the 2016 NGC will take place;

[17.2] SI has been appointed to manage the event; and

[17.3] GLE retains the right to act as the infrastructure service provider.

[18] On this basis, GLE says that it has satisfied the onus of establishing its right and SI's breach thereof, and that it is entitled to the form of relief it has elected, viz. enforcement of the agreement.

[19] On the view I take of the matter, it is not necessary for me to decide whether or not GLE has established its right on the papers before me. Indeed, it may be unwise for me to attempt to reach a final decision on this issue in circumstances where the proceedings are limited to affidavits, and where disputes of fact are inevitable. I bear in mind, too, that the affidavits on both sides were prepared in haste, given the urgent nature of the application. It may well be that in the fullness of time this issue will enjoy full ventilation by

¹ 1984 (3) SA 623 (A) at 634A-I

way of oral evidence and cross-examination before another court. That court would be placed in a much better position to make a proper determination on the nature and ambit of the legal relationship between the parties flowing from the agreement relied on by GLE.

[20] Accordingly, for purposes of this application I will assume, without deciding, that GLE has established that it holds the right to provide infrastructure for the 2016 NGC.

[21] This is not the end of the matter, nor does it finally dispose of the question of whether SI's version of events should prevail before me. Even on the assumption that GLE has established its right and SI's breach, it remains for me to determine whether relief in the form of specific performance is appropriate on the facts of this case.

[22] Where specific performance is concerned, the general principle is that a plaintiff is always entitled to claim and be granted this form of relief if he or she makes out a proper case. However, this entitlement is subject to the court retaining the discretion to determine whether specific performance ought to be awarded in a particular case.²

[23] The discretion must be judicially exercised. Although certain situations are commonly cited as inviting the exercise of the discretion to refuse to grant specific performance, such as impossibility of performance, undue hardship

² *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350; *Thompson v Pullinger* (1894) 1 OR at 301

and the like, it is not confined to these situations. Nor is it circumscribed by rigid rules. Each case must be judged on the basis of its own peculiarities.³

[24] As a guiding principle, courts will be slow to subject a defendant to the possibility of being held in contempt of a court order in circumstances where the performance involved would be difficult to enforce or insufficiently clear cut so as to render it unclear whether there had been performance or not in terms of the order.⁴

[25] The exercise of the discretion ought not to be regarded as a mechanism through which a defendant may elect to pay damages rather than be required to make good his or her non-performance. The onus rests on the defendant to satisfy the courts that the circumstances of the case are such that there are impediments to specific performance.⁵

[26] SI submits that such circumstances exist in the present case. It points to the fundamentally changed role of SI in the 2016 NGC, compared with previous years, as set out in the answering affidavit. Critically, and as I have already indicated, it is not envisaged that SI will act as principal in managing the NGC. SI's version of the current state of play regarding 2016 is that the ET is likely to be the principle, with SI being engaged to act on its behalf and subject to its authority.

³ *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378G

⁴ Christie & Bradfield Christie's The Law of Contract in South Africa (6ed) pg 547

⁵ Christie, pg 54

- [27] If this version is accepted, there will be manifest difficulties for SI in complying with an order of specific performance. It will be bound to give effect to an agreement entered into when it was principal, in circumstances where, on its version, the likelihood is that it will no longer be the principle with authority to make its own decisions. What will be the legal position of SI if the ET refuses to endorse the contract with GLE? Would SI be held to be in contempt of the court order in these circumstances?
- [28] Furthermore, on SI's version, the 2016 NGC will be a much larger event, with more than double the previous field of participants, and with different aesthetic and other requirements laid down by the ET. If specific performance is ordered, what will the relative rights and obligations of the parties be, given that GLE was not required previously to provide services for a tournament of this nature?
- [29] These are some of the difficulties that may arise if an order of specific performance is granted in this case.
- [30] In short, the difficulty for GLE in terms of its prayer for specific performance is that it presupposes that SI continues to enjoy the same rights, and that for all practical purposes the tournament will proceed on the same basis, as in previous years.
- [31] Faced with this difficulty, GLE submits that SI's version falls to be rejected on the basis that it is self-contradictory and untruthful. Further, that it rests on

speculation in that, on SI's own version, final contracts with the ET and Nedbank have not been concluded.

[32] GLE points out that in the answering affidavit SI contradicts itself by averring, in one paragraph that the ET "will be" the principal, whereas in another paragraph it states that no final contracts have been concluded yet to this effect. Reference is also made to SI stating that it has been appointed to manage the 2016 NGC, and that the RFP was put out to give effect to this.

[33] At face value it may be possible to identify contradictions in the answering affidavit. However, whether or not SI's version should be rejected as being untenable must be determined on the basis of giving consideration to the general tenor of that version as gleaned from a reading of the document as a whole. It is not helpful to try to make this determination on the basis of isolated comparisons between bits of one paragraph with bits of another.

[34] Proceeding on this basis it seems to me that SI's version is clear: in short, it is currently in negotiations with the ET and Nedbank with a view to hosting the NGC in 2016, with the ET as the principal and holder of all rights in the tournament. While these negotiations have not yet been finalised, they have advanced to the point that SI feels confident about asserting that in all likelihood the tournament will proceed on the basis set out in its answering affidavit. To this end, it has been unofficially appointed ("on a handshake") by the ET at this stage to manage the tournament on the ET's behalf.

[35] This version does not strike me as being *mala fide* or untenable. GLE recognises the practical need to commence preparations for the NGC well in advance of the event that is scheduled to take place in November 2016. The event is a major tournament, with international interest (even in the past). From a commercial perspective I see nothing unreasonable or suspicious in the fact that while the ET, Nedbank and SI are negotiating the final details of the envisaged contractual relationship between them, the ET has by way of a “handshake” agreement requested SI to proceed with managing the preparations. Without this, it is reasonable to expect that the preparations would not be completed timeously. This also presents a practical explanation for the RFP being put out in SI’s name in March 2016, based on the “handshake” informal arrangement in place between SI and ET in the interim, pending the formalisation and finalisation of the relevant contracts.

[36] Significantly, GLE does not put up any facts to contradict the averments made by SI regarding the current state of affairs with the 2016 NGC. It points out that in terms of the marketing, the tournament appears to be a continuation of the same tournament held in previous years. However, this does not go to the heart of the matter, viz. whether the stakeholders in the tournament will hold the same rights and obligations they held previously. SI’s contention that its rights and those of the ET will not be the same is not substantially or materially disputed by GLE. Nor, in my view, is SI’s version speculative. It states that it has “every expectation” that the tournament will take place on the basis set out. Again, this is not materially contradicted by GLE.

[37] Consequently, I am unable to agree with GLE that SI's version regarding the 2016 NGC is so untenable that it falls to be rejected. To do so I would have to dismiss SI's version as a fabrication. I cannot reasonably do so on what I have before me. Thus, I must base my decision on the version presented by SI.

[38] For the reasons set out above, I find that SI has established that impediments exist to its performance of the obligations sought to be enforced by GLE in the prevailing circumstances. In these circumstances, it would be contrary to the interests of justice to grant an order of specific performance.

[39] This does not leave GLE without a remedy. For obvious reasons, GLE did not include in its notice of motion an alternative prayer for damages. As I indicated at the outset, the matter came before me by way of an urgent application. It would have been wholly inappropriate to seek damages as an alternative form of relief in those circumstances. I have made no determination on the question of whether GLE has established a right to provide infrastructure services for the 2016 NGC, and a breach thereof by SI. It remains open to GLE to enforce its claim in this regard by instituting appropriate proceedings.

[40] However, for the present, its urgent application for specific performance must fail.

[41] I make the following order:

“The application is dismissed with costs”

**R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard: 20 May 2016

Date of Judgment: 27 May 2016

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