

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 7168/2017

In the matter between:

MTABALASI TRANSPORT CC

APPLICANT

and

SHIKANI TRADING CC

FIRST RESPONDENT

VUSIMUSI MTHULISI MTHEMBU

SECOND RESPONDENT

FIRST NATIONAL BANK OF

SOUTH AFRICA LTD

THIRD RESPONDENT

ORDER

Judgment is granted in favour of the Applicant and it is ordered that:

- 1 Paragraphs 1.1, 1.2, 1.3 and 1.4 of the rule *nisi* issued by Radebe J on 29 June 2017 in the application instituted by the Applicant under notice of motion dated 23 June 2017 ('the main application') be and are hereby confirmed;
- 2 The application instituted by the First and Second Respondents under notice of motion dated 18 March 2021 ('the discharge application') is dismissed; and
- 3 Premised on the delay in prosecuting the main action, for which I believe both the Applicant and the First and Second Respondents bear responsibility, each party is responsible for its own costs in the discharge application.

JUDGMENT

REDDI AJ

[1] The genesis of this matter is a Joint Venture Agreement (hereafter 'JVA') entered into between the Applicant and the First Respondent on 6 February 2017. In terms of the agreement, the Applicant would help the First Respondent fulfil its contractual obligations to the Department of Transport by providing its construction machinery and finances to enable the First Respondent to perform under the construction contract.

[2] The main objective of the JVA was the completion of the construction project awarded to the First Respondent, which responsibility now fell to the Applicant under the terms of the JVA. Under the provisions of the agreement, the Applicant was responsible for the daily running of the project and the completion of the outstanding work. The First Respondent was responsible for all communications, including paperwork, with the Department of Transport.

[3] As *quid pro quo* for its help to the First Respondent, the parties to the JVA agreed that the Applicant would have control of the bank account operated by the First Respondent and held by the Third Respondent, First National Bank. Moreover, the Applicant and First Respondent agreed that the latter would be entitled to R1 000 000 of the total profits generated from the entire project while the former would retain the larger profit share.

[4] On 22 May 2017, when the first leg of the construction project had been completed, the Second Respondent, acting on behalf of the First Respondent, signed and submitted the relevant invoice to the Department of Transport for payment. The total value of the invoice was R 895 103.58. The Department of Transport's certificate of progress document indicated that the invoiced amount would be paid into the First Respondent's bank account on or before 30 June 2017.

[5] On 29 May 2017, a week after the invoice had been submitted for payment, the Applicant received an SMS notification from the Third Respondent indicating that the First Respondent's banking details had been changed to deny the Applicant access to the bank account. The Third Respondent confirmed with the Applicant that the account details had been changed at the behest of the Second Respondent.

[6] Arising from the denial of access to the bank account and a fear that the First Respondent will dissipate the funds to be paid into the bank account by the Department of Transport, the Applicant sought and was issued a rule *nisi* on 29 June 2017 granting an interlocutory interdict for the preservation of half of the invoiced funds to be paid by the Department of Transport into the First Respondent's bank account.

[7] Flowing from the order above are the following two applications before this court: (i) The Applicant seeks confirmation of the rule *nisi* issued on 29 June 2017; and (ii) The First and Second Respondents seek an order that the rule *nisi* be discharged. Both applications were heard as a single application.

[8] The issue I have to decide on is straightforward. Do I confirm or discharge the rule *nisi*? My decision will depend on whether I am satisfied that the Applicant had made a case for the confirmation of the interim interdict. At the risk of repeating what is now trite in our law on interdicts, the requirements of an interim interdict are:

- (a) a prima facie right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the final relief is eventually granted;
- (c) the balance of convenience favouring the grant of the interim interdict; and
- (d) no other satisfactory remedy available.¹

(See, for instance, D Harms *Civil Procedure in the Superior Courts* at A-40, para A5.7 and the cases cited.)

[9] The object and purpose of an interim interdict are, among others, to protect the status quo and rights of the parties from imminent harm, danger or prejudice pending the outcome of legal proceedings. My primary duty at the interim stage is to consider whether the Applicant has established a prima facie legal right to the relief sought. Although such right may be open to some doubt, provided the balance of convenience favours the Applicant, I would be obliged to confirm the interim interdict.

[10] When dealing with the requirements of an interim interdict, the test in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 as modified by Ogilvie Thompson J in *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688 has been followed in several cases including *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228G-H; *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1)

¹ Relying on *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 373A-E, counsel for the Applicant has correctly submitted that the fourth requirement does not arise in this case because of the *sui generis* nature of this type of interdict.

SA 142 (N) at 152E-F; and *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC) at 195E-196C.

[11] Applying the test laid down in *Webster*, the proper approach would be for the court to weigh the facts set out by the Applicant against the indisputable facts established by the First and Second Respondents. Then, having regard to the inherent probabilities, the court will have to determine if, on those facts, the Applicant should obtain final relief. If the Respondent, in contradiction, casts serious doubt on the Applicant's case, then interim relief should not be confirmed. However, if there is some doubt, but the balance of convenience favours the Applicant, then temporary relief should be confirmed pending the outcome of the action.

[12] Counsel for the Applicant has correctly submitted that the disputes of fact between the parties are not extensive, the main dispute being over the right of access to the funds totalling R447 551.79 currently frozen in the First Respondent's bank account.

[13] In support of the Applicant's right to the funds in question, Mr Aldworth's submission is that the Applicant has a proprietary right to the funds based on the terms of the JVA. Furthermore, it is common cause that the Applicant performed the work in terms of the JVA. This is evidenced by the invoice submitted by the First Respondent to the Department of Transport on 22 May 2017 for payment of the work completed in the first leg of the project. The completion of this work entitled the Applicant to payment. Counsel for the Applicant also submitted that the First Respondent's claim that the Applicant had repudiated the JVA on 29 May 2017 was 'farfetched' and based on hearsay evidence.

[14] To support the claim of irreparable harm should the interim order be discharged, Mr Aldworth referred to *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraph 21, and correctly submitted that the test is objective, with the pivotal question being 'whether a reasonable man, confronted by the facts, would apprehend the possibility of harm'. Counsel's submission on this issue was that the Second Respondent's conduct in removing the Applicant's access to the bank account led to the sole inference that it

sought to deprive the Applicant of the latter's portion of the contract price. Given the First Respondent's admitted past financial problems and its failure to produce any evidence that it would be able to satisfy a judgment debt in favour of the Applicant, the conclusion was warranted that success in the main proceedings would render a hollow victory to the Applicant.

[15] Counsel for the First and Second Respondents submitted the following four bases for the opposition to the interdict: (i) The Applicant had not met the requirements stipulated in *Knox D'Arcy and Others v Jamieson and Others* 1996 (4) SA 348 (A); (ii) The Applicant had failed to assert that without the interdict, it would suffer inescapable prejudice or a hollow judgment; (iii) The delay by the Applicant to prosecute its action should result in the court finding against the Applicant; and (iv) Misjoinder of the Second Respondent.

[16] In applying the test delineated in *Webster*, I am not convinced that the facts set up by the First and Second Respondents have cast serious doubt on the Applicant's chances of success in the main action. Nothing in the First and Second Respondents' submission has dislodged or palpably ousted the prima facie right established by the Applicant of a well-founded contractual damages claim against the First Respondent.

[17] Furthermore, the evidence tendered by Counsel for the First and Second Respondents, in support of the contention that a judgment in favour of the Applicant would not be a hollow judgment, is unpersuasive. Counsel referred to income anticipated from the Department of Transport for work expected to have been completed in 2017 as proof of the First Respondent's ability to meet a judgment in favour of the Applicant. This proof is untenable as no details have been provided of the First Respondent's current financial viability.

[18] The delay in prosecuting the main action has also been raised to support the discharge application. The arguments submitted to bolster the claim of the First and Second Respondents being prejudiced by the delay are unconvincing. In the context of the South African experience, of lengthy delays in the commencement of legal proceedings, conjoined with the unprecedented complexities faced by the legal

system since March 2020 in trying to operate in the Covid-19 era, I do not consider the delay to be so egregious as to be influential in the outcome of this application. Moreover, it is yet to be established whether the First Respondent is the owner of the funds in issue, so the claim of prejudice is dubious at best.

[19] I am also unpersuaded that there is a misjoinder of the Second Respondent in these proceedings. The Second Respondent has a direct and substantial interest in this matter as he has authority over the bank account held by the First Respondent. Moreover, it was at his behest that the banking account details were changed to deny the Applicant access to the First Respondent's bank account.

[20] Although open to some doubt, it would seem that the respective parties' rights are not quite evenly balanced, the scales possibly tipping slightly in favour of the Applicant. Therefore, the pivotal factor in the application lies in the balance of convenience. In determining the balance of convenience, the court must consider the consequences of an interim interdict being confirmed as opposed to it being discharged.

[21] If the interim interdict is discharged and the Applicant is successful at the trial, it may be a hollow victory if the funds have, in the meantime, been wasted by the First and Second Respondents. On the other hand, if the rule *nisi* is confirmed, the funds remain safe in the bank account of the First Respondent, who can continue to operate the bank account and run its business but without accessing the set aside amount.

[22] I am, therefore, of the view that the balance of convenience favours the confirmation of the rule *nisi*.

[23] I accordingly make the following order:

4 Paragraphs 1.1, 1.2, 1.3 and 1.4 of the rule *nisi* issued by Radebe J on 29 June 2017 in the application instituted by the Applicant under notice of motion dated 23 June 2017 ('the main application') be and are hereby confirmed;

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