



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case number: **1980/2015**
Date heard: **09/02/2018**
Date delivered: **23/02/2018**

In the matter between:-

MEC FOR ROADS AND PUBLIC WORKS

FIRST APPLICANT

**NORTHERN CAPE ECONOMIC DEVELOPMENT
TRADE AND INVESTMENT PROMOTION AGENCY**

SECOND APPLICANT

**MEC FOR FINANCE, ECONOMIC DEVELOPMENT
AND TOURISM**

THIRD APPLICANT

AND

**UMFANA BUSINESS ENTERPRISE CC AND
SILVER SOLUTIONS CC JV**

FIRST RESPONDENT

INTERNATIONAL CONVENTION SOLUTIONS CC

SECOND RESPONDENT

JUDGMENT

STANTON AJ

INTRODUCTION:-

1. This is an application in terms of which the applicants, the MEC for Roads and Public Works, the Northern Cape Economic Development Trade and Investment Promotion Agency ("the NCEDA") and the MEC for Finance, Economic Development and Tourism, seek the following relief, namely:-
 - 1.1 confirming the cancellation of the agreement between the parties;
 - 1.2 directing that the cancellation of the service level agreement concluded on 02 May 2012 between the NCEDA and the joint venture between Umfana Business Enterprises CC and Silver Solutions 1069 CC, trading as International Conventions Solutions ("the joint venture"), dated 28 July 2012, is valid;
 - 1.3 ejecting the respondents, the joint venture and International Convention Solutions CC, from the premises situated at the Mittah Seperepere International Convention Centre ("the Convention Centre"), 10 West Circular Road, Kimberley, Northern Cape;
 - 1.4 directing the respondents to furnish the applicants with a statement and a debatement of account by the respondents in respect of their management of the Convention Centre;
 - 1.5 directing the respondents to grant the applicants access to information on the revenues generated and venue hire of the Convention Centre and related expenses by the Convention Centre for auditing by the Auditor-General; and
 - 1.6 the respondents open their financial books for auditing by the Auditor-General.

2. The respondents opposed the application and raised the following defences:-
 - 2.1 The respondents are not in occupation of the Convention Centre, but same is occupied by an entity known as International Convention Centre CC trading as MSCC ("the MSCC"). According to the respondents, the MSCC has since the termination of the service level agreement by effluxion of time during October 2012, been in occupation of the Convention Centre;
 - 2.2 alternatively, that the MSCC has been occupying the Convention Centre in terms of a tacit agreement concluded with the NCEDA; and
 - 2.3 the respondents furthermore deny that the applicants have the right to call for the delivery and debatement of accounts.
3. The respondents also raised a point *in limine* that the dispute of fact pertaining to the entity that occupies the Convention Centre, cannot be resolved on the papers and as such, the application should be dismissed with costs.
4. The proceedings in the main application were lauched as far back as August 2015 ("the main application"), but were postponed on numerous occasions, due to various interlocutory applications filed by both parties.

AMENDED NOTICE OF MOTION:-

5. In its answering affidavit, the respondents took issue with the citation of the respondents, *inter alia* averring that the MSCC is the entity that is in occupation of the Convention Centre and not the respondents. This remains the respondents' position, despite the amendment to the notice of motion.

6. The applicants filed a notice of intention to amend the citation of the respondents. The respondents opposed the application for an amendment and also filed an objection thereto in terms of Rule 30 of the Uniform Rules of Court.
7. The applicants furthermore filed an application to supplement its founding affidavit, *inter alia* addressing the consequential corrections of the citation of the respondents in the founding affidavit. The respondents also opposed this application.
8. The interlocutory applications were set down for hearing on 03 February 2017. On this date:
 - 8.1 the applicants were granted leave to file their supplementary affidavit;
 - 8.2 the respondents withdrew their application in terms of Rule 30(1); and
 - 8.3 the parties agreed that the main application should be postponed to enable the applicant to supplement its papers.
9. The applicants' supplementary affidavit was consequently served and filed.
10. The respondents filed their answering affidavit on 15 March 2017.
11. The application to amend the notice of motion was heard on 25 August 2017 and on 22 September 2017 Ndlovane AJ granted the applicants' application for amendment as follows:-

"...I am allowing the amendment involving the correction of the citation of the first respondent to read: "Umfana Business Enterprises CC and Silver Solutions CC JV" and the addition of the acronym "CC" in the citation of the second respondent so that it reads: "International Convention Solutions CC".

12. The main application was accordingly postponed to 02 February 2018.
13. At the commencement of the proceedings, Mr Van Aswegen, on behalf of the respondents, took issue with the non-service of the amended notice of motion. He informed me that his instructing attorneys could not locate a served copy of the amended notice of motion. He could, however, not confirm whether it was in fact served, or not. He submitted that in view of the non-service of the amended notice of motion, the amendment was not formally effected in terms of Uniform Rule 28.
14. Mr G Ngcangisa, on behalf of the applicants, requested me to condone the applicants' failure to serve the amended notice of motion. In support of his request, he referred me to the judgment of *Becker v Member of the Executive Council for the Department of Economic Development and Environmental Affairs and others*¹ where Goosen J held that:-

"... the failure by a litigant to act in accordance with its intention to amend pleadings within the stipulated time period does not ipso facto preclude such party from thereafter filing its amendment. All that may be said is that a litigant who conducts himself in that manner exposes himself or herself to the possibility that a party may object on the basis that such constitutes an irregular step. Where there is no such objection, there can, in principle, be no objection to the Court dealing with the matter on the basis of the amended pleadings. Furthermore, Rule 28(7) confers upon the Court a discretion to permit the filing of an amendment outside of the time periods provided for in the rules."

15. Mr Van Aswegen confirmed that the respondents did not appeal the order granted by Ndlovane AJ and that the non-service was not raised in the

¹ [2014] JOL 31969 (ECP) PAGE 8 AT PARA 21

respondents' heads of argument. He added that it was not possible for the respondents to object to the non-compliance, as they were not aware of it. In addition, Mr Van Aswegen argued that the granting of the condonation would be prejudicial, as the respondents did not have an opportunity to file consequential amendments relating to the amended notice of motion.

16. Mr Ncgangisa countered that there could be no prejudice as the issues pertaining to the amendment and citation of the respondents were properly ventilated in the respondents' answering affidavit and in the application for the amendment. He argued that no consequential amendments could in any event be made to the respondents' affidavit.
17. I agreed with Mr Ncgangisa's submissions and granted the applicants' request for condonation in respect of the non-service of the amended notice of motion.

RELEVANT FACTS:-

18. The Convention Centre is the property of the Northern Cape Provincial Government and it exercises its ownership thereof through the applicants.
19. It is not in dispute that:-
 - 19.1 on 02 May 2012, the NCEDA and the joint venture concluded a written service level agreement in terms of which the joint venture was required to design the management and operational systems necessary for the successful operation of the Convention Centre, after which, the management thereof would be transferred to the NCEDA, which in turn, would appoint a permanent management company ("the service level agreement");
 - 19.2 the service level agreement was to endure for a period of three months after signature thereof, or until the parties agreed to cancel same, and

in the event of any extension thereof, both parties had to sign a letter of extension; and

19.3 the service level agreement terminated on 31 July 2012, but was extended for a further period of three months until 31 October 2012.

20. Mr Ngcangisa conceded that the service level agreement between the NCEDA and the joint venture was tacitly extended until 28 July 2014, on which date the NCEDA served the joint venture with a notice of cancellation in terms of which it was to vacate the Convention Centre within a period of one month from the date of service. This letter was addressed to International Convention Solutions. (*my underlining*).

ISSUES IN DISPUTE:-

21. The issues in dispute are crisp. In the first instance, it must be determined who is in occupation of the Convention Centre. Is it the respondents or the entity known as the MSCC? Secondly, it must be determined whether or not the MSCC has been occupying the Convention Centre in terms of a tacit agreement concluded between the NCEDA and the MSCC.

FACTUAL DISPUTE:-

22. The point *in limine* is intrinsically linked to the respondents' opposition of the application. I will accordingly deal with the point *in limine* and the defences simultaneously.
23. The approach to be taken to factual disputes in applications is set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*² by Corbett JA in the following terms:-

² 1984 (3) SA 623 (A) AT 624 G-H

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... If in such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks.....Moreover, there may be exceptions to this general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

24. In *National Director of Public Prosecutions v Zuma*, Harms DP³ emphasised the application of the exception to the general rule, and stated that where a 'version consists of bald or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, far-fetched, or clearly untenable', the court is justified in rejecting it merely on the papers.
25. In motion proceedings, as in trial proceedings, courts are also required to analyse the facts put forward in order to establish whether they are sufficient to stave off the relief sought. The position was articulated in *South Peninsula Municipality v Evans*⁴ as follows:-

³ 2009 (2) SA 277 (SCA) AT PARA 26

⁴ 2000 JOL 7117 (C) AT PAGE 17

'..... South African Courts have recognised that, in motion proceedings, disputes of fact cannot necessarily be accepted at face value and that, in each case, the Court should closely scrutinise the alleged issues of fact in order to decide whether there is indeed a dispute of fact that cannot satisfactorily be determined without the aid of oral evidence.... Thus, while the Court should be circumspect in its approach, '(i) if, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding''

WHO IS IN OCCUPATION OF THE CONVENTION CENTRE:-

26. The respondents rely on the Companies and Intellectual Properties Commission Report, attached to the answering affidavit, as proof of the registration of the entity described and trading as MSCC. This report, however, refers to the close corporation *"International Conventions Solutions CC (registration number 2007/141088/23)"*, the second respondent.
27. According to Mr Van Aswegen, the joint venture had nothing to do with the registered close corporation. Mr Van Aswegen, however, conceded that the Companies and Intellectual Properties Commission report does not include a reference to "MSCC" and that it only contains the registration details of the second respondent.
28. The letter, dated 27 August 2014, addressed by Fairbridges Attorneys, (the respondents' erstwhile attorneys) records that Fairbridges "represents International Conventional Solutions CC." This letter furthermore states that "our client" has since 31 October 2012 (the date the service level agreement expired) continued to manage the Convention Centre with the knowledge and consent of NCEDA. In addition, it is recorded that "Our client denies your contention that it has "no right to operate the MSICC as its contract has lapsed." "... it is our client's contention that it had, and still has the right to manage the MSICC." (my underlining).

29. On 30 September 2014, the respondents' new attorney of record, Duncan and Rothman, addressed a letter to the State Attorney in which it is recorded that Duncan and Rothman has been appointed to represent International Convention CC. It records that International Convention CC denies being in unlawful occupation of the Convention Centre and that any steps to evict International Convention Solutions CC, will be opposed. (*my underlining*).
30. On 10 October 2014 and in response to the NCEDA's notice, published in the Diamond Fields Advertiser newspaper, in which the public was notified of the termination of the management contract with the respondents, the second respondent responded by placing a counter notice in which it, *inter alia* stated that "*MISCC [the Convention Centre] is under the full and exclusive management of International Convention Solutions, and that "ICS has the legal and exclusive right to operate the centre and the premises."*
31. Based on the foregoing, I disagree with the respondents that a dispute of fact exists as to which entity occupies the Convention Centre. In my view, the respondents' version that they are not in occupation of the Convention Centre, but that the entity known as the MSCC is in occupation, is implausible and untenable. MSCC is merely the trading name of the second respondent. Accordingly, I find that the respondents are the entities that are currently in occupation of the Convention Centre.

APPLICABLE LAW – EVICTIONS AND TACIT AGREEMENTS:-

32. In *Chetty v Naidoo*⁵, Jansen JA articulated the position with regard to evictions as follows:-

"It is inherent in the nature of ownership that possession of the res should

⁵ 1974 (3) 13 (A) AT 20B-D

normally be with the owner, and it followed that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (eg a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need therefore do no more than allege and prove that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner.

But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will, other considerations come into play. If he concedes in his particulars of claim that the defendant has an existing right to hold (eg by conceding a lease or a hire purchase agreement, without also alleging that it has been terminated: his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but nevertheless says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract."

33. In an application for eviction, an applicant only needs to aver that it is the owner of the premises and that the respondent is in occupation. The unlawfulness of occupation is presumed in the absence of an admitted right to occupy. However, as soon as the applicant claims the termination of a previously admitted right to occupy, on which right the respondent relies, the *onus* rests on the applicant to prove that such right has been terminated.
34. In *Nedcor Bank Limited v Withenshaw Properties (Pty) Ltd and Another*⁶, Van Zyl, with whom Meer AJ concurred, articulated the requirements of a tacit agreement, with reference to cases decided by the Appellate Division in the following terms:-

⁶ 2002 (6) SA 236 (C) AT PARAS 30 AND 31

"An implied agreement can come into existence only if there has been a tacit acceptance of a tacit offer. The offer and acceptance, indicating unqualified consensus ad idem on all essential aspects of the agreement, must clearly and unequivocally be inferred from the parties. It must, in accordance with what has been described as the 'traditional' approach, in fact be the only reasonable inference that can be drawn from such conduct. See in this regard the dictum of Corbett JA in Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others⁷:-

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem.'

Corbett JA adopted a somewhat less stringent approach in Joel Melamet and Hurwitz v Cleveland Estates (Pty) Ltd; Joel E Melamed and Hurwitz v Vornier Investments (Pty) Ltd⁸:-

'In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence.....'"

35. The respondents contend that the MSCC occupies the Convention Centre through a tacit agreement concluded between the NCEDA and the MSCC (and not between the respondents and the NCEDA).

⁷ 1983 (1) SA 276 (A) AT 292B

⁸ 1984 (3) SA 155 (A) AT 165 B-C

36. Initially the respondents' defence, as proffered by them in a letter dated, 27 August 2014, were that *"they had a legal right to manage the Convention Centre since the NCEDA had verbally committed to them to award a fixed term management appointment for a period of at least one year consequent upon the completion of necessary tender processes."*
37. In view of Mr Ncgancisa's concession, a tacit agreement was concluded between the NCEDA and the joint venture after the termination of the service level agreement, which tacit agreement was terminated on 28 July 2014.
38. The respondents contend that the conduct of the Government Departments in hiring the Convention Centre, as well as the bridging finance provided by the Office of the Premier to the respondents, have all the manifestations of conduct that are unequivocally consistent with consensus between the NCEDA and MSCC on the management of the Convention Centre.
39. I am not persuaded that a tacit agreement was concluded between the NCEDA and the MSCC in respect of the period after 28 July 2014, for the following reasons:-
- 39.1 The service level agreement expressly provided for its termination by the effluxion of time. In the absence of any further extension, the service level agreement terminated by effluxion of time on 31 October 2012;
- 39.2 The applicants terminated the respondents' right to occupy the Convention Centre on 28 July 2014 when it served the respondents with a notice of eviction;
- 39.3 The conduct of the "other departments" is not relevant in determining whether consensus should be inferred;

- 39.4 The respondents do not prove that the bridging finance was provided on the instructions of or at the request of NCEDA. In my view, the provision of finance by the Office of the Premier cannot demonstrate NCEDA's intention to be bound by an alleged tacit agreement;
- 39.5 During November 2014, the applicants brought an urgent application for an order evicting the respondents from the Convention Centre. That application was, however, dismissed for lack of urgency; and
- 39.6 During June 2015, the applicants launched a further application in this Court to have the respondents evicted from the Convention Centre. The respondents objected to the second application on the ground that the "urgent application", which had been dismissed for want of urgency, was still pending.
40. In my view, the above facts are not any manifestation of conduct that is unequivocally consistent with the intention of the applicants to allow the respondents or the MSCC to occupy the Convention Centre and do not support the existence of a tacit agreement.

RELIEF REQUESTED IN PRAYERS 4, 5 AND 5.1:-

41. Mr Ncgangisa relied on the terms of the service level agreement as well as the provisions of section 51 of the Public Finance Management Act, 1 of 1999 ("the PFMA"), in support of the applicants' request for the granting of the relief in prayers 4, 5 and 5.1 of the notice of motion.
42. The service level agreement specifically requires that the joint venture shall provide a full monthly account and report on the management, which should include a financial analysis of income generated and expenses incurred.
43. Section 51 of the PFMA states that:-

"(1) An accounting authority for a public entity—

(b) must take effective and appropriate steps to—

(i) collect all revenue due to the public entity concerned; and

(c) is responsible for the management, including the safe-guarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;.."

43. Mr Van Aswegen argued that the provisions of the PFMA are not applicable as the joint venture and the close corporation are not public entities. He added that the applicants failed to make out a case for the relief set out in prayers 4, 5 and 5.1.
45. According to the applicants, the monthly reports and accounts were demanded from the respondents and, despite the demand, the respondents failed to render the accounts. In my view, the respondents failed to adequately address this aspect in their answering affidavit. In addition, the applicants dealt with the provisions of the PFMA in paragraphs 81 and 82 of the founding affidavit. I am therefore not persuaded by Mr Van Aswegen's argument.

WHEREFORE I MAKE THE FOLLOWING ORDERS:-

1. The agreement between the parties is cancelled;
2. The cancellation of the service level agreement, concluded on 02 May 2012 between the Northern Cape Economic Development, Trade and Investment Promotion Agency and Umfana Business Enterprises CC and

Silver Solutions 1069 CC trading as International Conventions Solutions JV, dated 28 July 2012, is valid;

3. The respondents, Umfana Business Enterprise CC and Silver Solutions CC JV and International Convention Solutions CC, are evicted from the second applicant's premises situated at Mittah Seperepere International Convention Centre 10 West Circular Road, Kimberley, Northern Cape;
4. The respondents shall vacate the Mittah Seperepere International Convention Centre 10 West Circular Road, Kimberley, Northern Cape, within 30 (thirty) calendar days of the granting of this order;
5. The respondents are ordered to furnish the applicants with a statement and a debatement of account in respect of the respondents' management of the Convention Centre, within 30 (thirty) calendar days of the granting of this order;
6. The respondents shall grant the applicants access to information on the revenues generated and venue hire of the Convention Centre and related expenses by the Convention Centre for auditing by the Auditor-General, within 30 (thirty) calendar days of the granting of this order;
7. The respondents shall submit their financial books for auditing by the Auditor-General to the second applicant, within 30 (thirty) calendar days of the granting of this order; and
8. The respondents shall pay the costs of the application on a party and party scale.



A STANTON

ACTING JUDGE

Northern Cape Division, Kimberley

On behalf of Applicant:

Adv G Ngcangisa (State Attorney)

On behalf of First Respondent:

Adv W A Aswagen (Duncan & Rothman Attorneys)