NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

CASE NO: 248/2018

In the matter between

THE OFFICE OF THE PREMIER: EASTERN CAPE	**Applicant**

and

REITY HOLDINGS CC	**First Respondent**
REITY TRADING ENTERPRISE CC	**Second Respondent**
HABITAT MODULAR CONSTRUCTION (PTY) LTD	**Third Respondent**

REASONS FOR ORDER

HARTLE J

[1] On Friday, 6 April 2018, the parties argued separate urgent applications before me. I took the matter under consideration and delivered an order on 10 April 2018 in the following terms:

"[1] The urgent application by the applicant for a declarator and ejectment is dismissed with costs, such costs to include the costs of the employment of two counsel;

[2] The application for spoliation by the second respondent succeeds;

[3] The applicant is directed to restore the second respondent's possession of the demarcated construction sites at the ten premises listed in paragraphs 2.1-2.10 of the second respondent's notice of counter application;

[4] The applicant is directed to pay the costs of the second respondent's counter application on the party and party scale, such costs to include the costs of the employment of two counsel;

[5] The third respondent's application for the relief sought in paragraphs 3-8 of its notice of motion is dismissed with costs, such costs to include the costs of the employment of two counsel; and

[6] There will be no order as to costs in respect of the proceedings of 29 March 2018."

[2] These are my reasons.

[3] Prior to my order, the duty judge on 22 March 2018 issued an order against the first and second respondents, ostensibly by consent, providing that:

"1. The Respondents will cease all operations at the various sites pending the hearing of the application on the 29th March 2018.

2. None of the parties and/or any person may remove any of the material at any of the various sites pending the hearings of the application on the 29th March 2018.

3. The security personnel employed by the Respondents at the various sites must ensure that the above has been (complied) with.

4. The application will be heard on the 29th March 2018 at a time to be confirmed by the Registrar on the 26th March 2018.

5. Costs are in the cause."

[4] When the matter came before court on 29 March 2018 the third respondent had by then issued out an application to intervene in the ejectment application in which it sought certain interdictory and interlocutory relief striking out passages in the second respondent's papers, also on the basis of urgency. For reasons which escape me, since neither the applicant or the third respondent believed that the latter had any interest in the *lis* in the main application, the parties agreed to a consent order in the following terms:

> "1. The application is postponed to Friday the 06th April 2018 at 11h00.
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> 2. Habitat Modular Construction (Pty) Ltd is granted leave to intervene as the Third Respondent in this application;
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> 3. The question of whether the Third Respondent should be ordered to pay the costs occasioned by this postponement on an attorney and client scale, such costs of Senior and Junior Counsel and including the travelling costs (airfare) are reserved solely to accommodate the Presiding Office(r)'s indisposition;
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> 4. The Third Respondent is ordered to file its answering affidavit in relation to the averments and allegations contained in the Second Respondent's answering affidavit, if so advised by no later than 16:00 on Monday the 02nd of April 2018;
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> 5. The Applicant and the Second Respondent will if so advised, file their Replying Affidavits, if any before 16:00 Wednesday the 04th April 2018, where after the Third Respondent will attend to the indexing and pagination of the entire application and the Third Respondent will provide the Applicant and the Second Respondent's attorneys of record with a comprehensive index by no later than 12:00 on Thursday the 05th of April 2018.
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> 6. The Second Respondent is to file its answering affidavit to the application by the Third Respondent on Thursday the 29th of March 2018, if so advised by no later than 16:00 on Monday the 05th of April 2018.
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> 7. The Parties are entitled to file further heads of argument, if so advised by no later than 12:00 on Thursday the 05th of April 2018.

> 8. The status quo pertaining to the order that was made by this Court on the 22nd of March 2018 is maintained on condition that all parties reserve their rights in relation to the disputes on the papers."

[5] Paragraph 3 of the order requires some elucidation. The duty judge had that morning been involved in a motor vehicle accident and was unable to hear the matter, resulting in the inevitable postponement, albeit the third respondent had complicated the matter by bringing its application to intervene at the doors of the court so to speak.

[6] The "status quo" referred to in paragraph 8 of the order was reserved even further pending the consideration of the matter between my hearing the application and issuing the order which I did.

[7] The applicant is the Office of the Premier of the Eastern Cape, the protagonist of the first perceived emergency. It launched an application on 12 March 2018 seeking an order ejecting the respondents from certain construction sites at school premises in the province at which it was alleged they were unlawfully holding over after cancellation or the expiry of a construction contract. It also sought related declarators confirming that the underlying agreements were cancelled or had terminated naturally by effluxion of time and that the respondents had no right to occupy, possess or hold over at the relevant construction sites.

[8] The relief sought was directed against both the first and second respondents for "want of avoiding confusion and doubt regarding relief and/or orders sought". It transpired that although the construction contract, conceded to have been "part of the tender documents" and thus "binding on the second defendant", the first

respondent had been reflected in the service level agreement as the contractor. For what it is worth, there is apparently no registered close corporation bearing the name cited by the applicant as the first respondent. The second respondent says that “Reity Holdings” is however a trade name used by it. The matter was initially opposed on behalf of both respondents but when its representatives were served with a notice in terms of rule 7(1) requiring them to produce a power of attorney from the “entity” cited as the first respondent and on whose behalf they had purported to “act”, they promptly withdrew from acting for this party.

[9] In my view nothing turns on this although the applicant made capital of it and in effect changed its cause of action based on this particular development. I will shortly explain the context. I accepted the second respondent’s legal representative’s explanation however, there being no reason not to, that it had been a mistake to go on record for the first respondent and that no *mala fides* were intended.

[10] It is common cause that a joint venture entity (“JVE”), known as Habitat Modular Designs (“Habitat”)/Reity Trading Enterprises, had been awarded a tender for a project described as the “Emergency Construction of Classrooms and Ablution Facilities Using Alternative Construction Methods”, with reference number SCMU – 16/17-0008 and that the second and third respondents were members of this JVE.

[11] Although they were supposed to be joined at the hip as it were in respect of clusters A and B of the project when the tender was awarded, the applicant alleged that a disagreement ensued between the members after the award of the tender, *inter alia* regarding the third respondent’s concerns that the second respondent was

operationally and financially incapable of carrying out the works in terms of the contract. The applicant had in consequence sought to interpose itself in this debacle, but to no avail. The upshot of this impasse is that it had resolved to split the work between the parties, giving individual responsibilities to each in respect of designated shares, which it advised the parties of by letter dated 31 May 2017. It was envisaged thereby that each party would deliver separately in terms of their respective contracts without placing reliance on the other.

[12] Although the second respondent felt it has been forced into this position as a standalone contractor against its will, as I understood its sole member to mean, this led to the signing of a separate service level agreement with the applicant in respect of the apportioned works. Whereas the tender had been awarded in March already, a fact which the second respondent says it learnt of only after seeing a published notice, the relevant service level agreement was only signed on 4 July 2017.[1]

[13] The applicant claims however that although the service level agreement arising from the award of the tender was supposed to have been entered into with the second respondent, it was instead concluded with the first respondent which is not only an unregistered close corporation, but was not accredited for construction work with the Construction Industry Development Board ("CIBD") an agency of the department of Public Works.[2]

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[1] A copy of the JBCC was never provided although the applicant sought to rely on its provisions *inter alia* to indicate that the "respondents" were not entitled to hold over after cancellation. Indeed the applicant sought to have the JBCC declared cancelled without even attaching a copy of the contract to its papers.

[2] In terms of the Construction Industry Development Board Act, No 38 of 2000, the Board leads and sets standards for construction industry stakeholders. It also maintains a national register of contractors which categorizes contractors in a manner that facilitates public sector procurement as envisaged in section 2 (d) of the Act. Contractors are restricted by their grading concerning the value of contract works they can tender for in the public sector.

[14] Although the applicant sought a declarator that both the service level agreement and the JBCC be regarded as cancelled *vis a vis* both the first and second respondents, it was clarified that the circumstances under which the "novated" or separate agreement had come to be concluded with an unregistered close corporation and an unaccredited construction entity was "not an issue" to be determined before me. The applicant should have disclosed this in my view because, as it turned out, the second respondent explained in its papers that this was clearly a mistake and that the service level agreement fell to be rectified in due course to reflect the second respondent as the true contractor.[3] In any event, seemingly accepting that the second respondent was the real macoy performing the works in terms of the service level agreement, despite what the contract in the applicant's views indicates, it noted an issue with it because it (clearly after the fact) purportedly had a level 1 contractor grading only which meant that it could not perform contract works above the value of R200 000.00 in the public sector.

[15] On 5 February 2018 the applicant sent a default notice to "Reity Trading Enterprise" (which it is common cause was received by the sole member of the second respondent) which was premised on a breach of clause 36.2 of the "JBCC Contract" (portions of which were only disclosed and relied upon in the application) and clause 8 of the service level agreement (sic).[4] The notice was all over the place but its primary concern appeared to be not that the second

[3] It is entirely probable that it was a mistake. The converse of this proposition is that the applicant was hoodwinked into entering into a service level agreement, co-incidentally signed by the sole member of the second respondent, as an imposter in a situation where the applicant had failed spectacularly to carry out any kind of due diligence. Another obvious mistake is that the member is described as a "company director", whereas the entity it was engaging with was a close corporation.

[4] Clause 8 has many sub-clauses extending over three pages. It is not clear what clause the notice was specifically based upon.

respondent had not delivered but that it might not be able to timeously and properly deliver on its obligations in terms of the service level agreement. As an aside the applicant alleged that it had extended the time period for completion for the works to 28 February 2018 as if to point to an indulgence it had shown the second respondent, but if one has regard to the applicant's letter informing it thereof, the reason for the extension self-evidently relates to the applicant's inclusion of two other schools and eleven more classrooms with a financial implication of an additional contract price of just under R6 million.[5]

[16] Despite the second respondent (as a legitimate partner in the JVE) obviously having made the grade for the award of the tender under the relevant conditions which had applied when it was awarded, the applicant in the default notice now also sought to impose upon it an obligation to provide proof of its CIDB grading. It was also called upon to satisfy the applicant as to the "availability of funding", a concern which the third respondent had notably brought to its attention.

[17] The notice evoked a response from the second respondent's legal representatives at the time, Messrs Thomas & Swanepoel Inc., who rejected the letter as an attempted repudiation of the agreement, which the second respondent was not prepared to accept. They pointed out a number of issues arising, most notably that the applicant had failed to make payment of certificate number 5 since 2017, an allegation not placed in dispute by the applicant.[6]

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[5] The applicant's failure to amend the agreement formally to include this extra work was among the complaints of the second respondent that the applicant was not giving it a fair ride. The second respondent claims it was only informed about the extension supposedly advised on 8 August 2018 according to the applicant, some three weeks before receipt of the default notice. On the probabilities the extension letter is hardly consistent with the second respondent supposedly being a defaulter. To the contrary, its responsibilities were added to rather than curtailed

[6] Failure to pay on the certificate is consistent with an earlier breach by the applicant even if the second respondent was slow in getting around to making an issue of it.

[18] The applicant simply steam rolled ahead and on 26 February 2018 wrote a further letter advising the second respondent that the contract was cancelled for its failure to rectify the default to its satisfaction and purporting to deny it any further access to the construction sites or from removing any materials. The involvement of the South African Police Service was threatened if it attempted to persist in occupying the sites. The principals of the various schools were also instructed by the applicant to inform the second respondent to stay off the construction sites and by all accounts acted upon such directions.

[19] It was on the basis of this purported cancellation alternatively the fact that the agreement had supposedly expired on 28 February 2018, since no further extension had been entertained (it is inexplicable why not when the works had been substantially increased without any formal amendment to the agreement), that the applicant sought to eject the "respondents" (sic) or anyone claiming the right to do so under their name, from occupying, possessing or holding over at the construction sites.

[20] On its own showing, in the founding affidavit and from the annexures which the applicant attached, it was abundantly plain that its entitlement to cancel the agreement was in serious contention, if not highly questionable from a simple reading of its default notice to the second respondent, and that the second respondent had asked for the issues which had arisen between them to be arbitrated in terms of the JBCC. This was reinforced by the second respondent's opposing papers put up to resist the relief sought by the applicant, a version I was obliged to accept on the basis of the well-established Plascon-Evans Rule.[7]

[7] Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 (AD) at 634E – 635C

[21] It was further clear that the allegations in the applicant's founding affidavit setting out its cause of action were all over the place, and that it was ambivalent concerning the basis for its entitlement to eject the second respondent from the construction sites. It equivocated between an expired agreement or one cancelled on proper terms on the one hand, and on the other, hinted at an "invalid agreement" by virtue of Reity Holdings having concluded the service level agreement with it instead of the real macoy. Despite this, it yet invoked the provisions of clause 36.5 of the JBCC alleging that the respondents were not entitled to remain in possession because the JBCC specifically directs the "respondents" to vacate and cease work immediately upon cancellation.[8]

[22] It further also complained after the fact that the second respondent was non-compliant with the tender conditions and also accused it of fraud, ostensibly to extricate itself from the agreement, if not on one basis then on another, and in my view to cast the second respondent in a poor light. The applicant also made capital of the fact that the second respondent had not completed the building of even one classroom or toilet in the emergency project without placing the delay in its proper context.

[23] It added the spin, to justify urgency, that the respondents' presence at the construction sites post cancellation/expiry was causing "unrest" because of issues between the contractor and its labourers which compromised the safety of learners.

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[8] The applicant alluded to clause 36.5 of the standard JBCC which apparently provides that:

> "36.5 Where this agreement is cancelled in terms of 36.0 the following shall apply:
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> 36.5.1 The employment of the contractor shall be cancelled and the execution of the works shall cease. The contractor shall vacate the site subject to provisions of 36.5.6. The contractor shall remain responsible for the works in terms of 8.1 until possession is relinquished to the employer."

The second respondent denied that the provisions of clause 36 were applicable in the scenario because of the applicant's own default.

The applicant did not stop at creating an atmosphere of explosive proportions to make its case for urgency. It alleged that the:

> "untenable delay were very likely to cause unrest to the various schools and communities. This destructive consequence has to be avoided. Violence may result in destruction of property and loss of life. I am informed by the various stakeholders that tension is brewing, more especially at the sites where the respondents had vanished and abandoned the site only to re-emerge in the face of cancellation of the contract. This alone renders the matter to be urgent."

[24] Ms. Ntshingula, a chartered accountant and programme manager of Emergency Construction of Classrooms and Ablution Facilities using Alternative Construction methods, in the Office of the Premier, who deposed to the founding affidavit on the applicant's behalf, also pointed to negative media reports arising from the respondents' poor performance which she suggested tarnished the reputation of the applicant in the eyes of the public, whereas these reports self-evidently related to construction sites in Port Elizabeth and had no bearing on the application.

[25] She also unashamedly used emotional sway, alleging that the respondents' unlawful conduct is a"

> "violation of learners' rights to education and dignity which also damages the applicant's reputation. Consequently, there is growing anxiety at various schools and communities in the areas the schools are situated which has an imminent danger to public infrastructure thus rendering this matter to be urgent."

[26] After the attorneys representing the second respondent filed a notice of withdrawal of acting for the first respondent and only in its replying affidavit, the

applicant went full tilt at this development as sealing the fate of the second respondent as a fraud, and accusing its attorneys along with it of being up to no good, justifying a costs award against them on a punitive scale. The applicant purported to pass off this so-called concession by the second respondent's attorneys as damning evidence that the service level agreement had stealthily been concluded with a non-existing entity, thus rendering the contract (which it had asserted in its founding affidavit had been <u>lawfully</u> cancelled by it) now instead voidable because it had been entered into with the first respondent and that no rights could accordingly vest for the benefit of the latter "on the facts of (the) case". Because it suited its purpose, it abdicated the reliance by any party on "the cancellation clause of an otherwise invalid and *void ab initio* contract" whereas a lawful cancellation had been the premise of its application when it was first launched.

[27] Needless to say, I found that not only had the applicant failed to make out a case for the relief sought but that it had also abused the process of court by putting up a heightened emotional plea of urgency. It is most unfortunate that whereas the parties had agreed to arbitrate any dispute arising, the applicant had motivated its entitlement to urgent judicial intervention on the basis that by holding over the respondents had purportedly undermined its constitutional imperative to provide infrastructure at the relevant schools in the form of *inter alia* decent toilets and to protect and respect children's rights.[9] It just so happened at the time that society was terribly outraged by the death of a young learner in a pit latrine at a school.

[9] The applicant alleged that the respondents continued occupation and unlawful possession of the sites undermined the rule of law and "a legitimate government constitutional obligation to provide learners with education, in a safe and dignified environment".

[28] I must say that I was appauled at the egregiously high-handed behavior of the applicant's staff involved in the handling of the entire matter and their failure to respect the contractual rights of a party which they purported to ride rough shod over.

[29] In the result the applicant's urgent application was dismissed.

[30] Concerning the spoliation application by the second respondent, I was satisfied that it had established the requisites for the grant of the relief, namely that it had been in peaceful undisturbed possession of the construction sites (even if only by maintaining a presence at the sites to preserve their lien) and that it had been deprived of its possession by the unequivocal instruction of the applicant to the various schools to disallow them access. The applicant's defence to the relief sought on this basis was a bare denial, but it could hardly have been gainsaid even on its own showing that it had gone out of its way to dispossess the second respondent from the construction sites. The status *quo* had in fact already been restored by this court's order dated 22 March 2018, albeit on the basis of the parties' consent and my order that the spoliation application, urgent by its very nature, and necessary to protect the second respondent's lien, was tantamount to confirmation of this interim relief.

[31] As for the third respondent's application, it was obvious that the parties were not happy partners in the joint venture and that separate service level agreements were concluded a result of their inability to present a unified front. The second respondent made no bones about its true feelings toward the third respondent and rather than retract the allegations which the third respondent contended were defamatory, instead repeated them in reply to the application. I made no

pronouncement on the so-called defamatory nature of the allegations. Indeed I was not required to, the third respondent's application at the hearing being confined on the basis that the allegations made in the impugned parts were "scandalous", "vexatious" and irrelevant to the *lis* between the applicant and the respondents in the main application within the meaning envisaged by rule 6 (15).

[32] Rule 6 (15) provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious and irrelevant, with an appropriate order as to costs, including costs as between attorney and client. But the court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[33] The irony of the third respondent being joined in the application is that it did not wish to concern itself at all with the *lis* between the applicant and the second respondent neither did it oppose the relief sought in this respect. (The applicant held a similar view that the third respondent should not be joined in the main application because it had no substantial interest in the relief that had been sought.)

[34] Personally I would not have entertained the intervention application but I was presented with the third respondent's joinder as a *fait accompli*. I was abundantly evident however that all the third respondent sought to do by the joinder was to come on board strictly to protect its interests by clearing its name and having the offending statements expunged as it were.

[35] In my view even if those allegations may notionally have been scandalous, vexatious or irrelevant as between the applicant and the second respondent, I was not satisfied that the prejudice envisaged by the sub-rule extends to the "prejudice" of a party coming into the litigation for the express purpose of protecting its good

name and reputation. In other words the prejudice envisaged by the sub-rule must relate to prejudice naturally arising in the litigation and which would impact on the court's determination of that *lis*.

[36] Ironically the third respondent motivated that the relief sought by it was urgent and that its application (which is in reality was an interlocutory application) had to be heard as a preliminary application at the hearing of the main application. Whilst it may well be that this is a requirement in the ordinary course, I did not believe that the right extended to a party standing outside of the litigation to enter the fray on an urgent basis to meet that requirement, only there to profess that it actually had no interest in the *lis* between the principal parties. In such a situation the so-called urgency appeared to me to be contrived and artificial. In any event I believed that the prejudice contended for by the third respondent if I failed to exercise my discretion in favour of granting its application could be ameliorated by it suing the second respondent for defamation to assuage its good name in due course. I considered it unnecessary to entertain its very parochial complaints of prejudice *vis a vis* itself and the second respondent that had no bearing on the principal *lis*.

[37] In the result I issued the orders which I did.

[38] Because of the unfortunate circumstances in which the matter could not proceed on 29 March 2018 due to my colleague's "indisposition", I made no costs order arising from those proceedings.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 6 April 2018

DATE OF ORDER : 10 April 2018

DATE OF REASONS : 5 June 2018

APPEARANCES:

For the applicant : Messrs Zilwa SC and Metu instructed by Mbana Incorporated Attorneys c/o Mase & Mukoyi Attorneys, King William's Town, ref. Mr. Mukoyi.

For the second respondent : Messrs Botes SC and Van Gass instructed by Van Der Merwe & Van Der Merwe Attorneys c/o Squire Smith & Laurie Inc., King William's Town, ref. Mrs. Frederichs.

For the third respondent : Messrs Ntsaluba SC & Matanda instructed by JK Malatji Attorneys c/o Mandla Falinthenjwa Inc., King William's Town, ref. Mr. Falinthenjwa.