

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

CASE NO: EL 939/2018

In the matter between

NTEMA INVESTMENTS CC

Applicant

and

LUKHOZI CONSULTING ENGINEERS (PTY) LTD

First Respondent

HEAD OF DEPARTMENT: EASTERN CAPE

DEPARTMENT OF HUMAN SETTLEMENTS

Second Respondent

JUDGMENT

HARTLE J

[1] The applicant launched an application for final relief interdicting the first respondent from “forcefully closing” a construction site in the Frankfort Housing Project; preventing it from carrying on its operations there, and from interfering

with and terminating “the contract” between the applicant and the second respondent.

[2] In the founding affidavit, where the applicant must make out its case, it describes itself as a close corporation. The party deposing to the principal affidavit, Ms. Paulina Ramusi, is its sole member and she asserts pertinently that it is this entity on behalf of whom the proceedings are launched and who has given her the necessary authorization to litigate.

[3] The first respondent is simply described in the founding affidavit as a company, carrying on business as consulting engineers but is not given any context in the founding affidavit in relation to the applicant, the second respondent or “the contract”.

[4] The applicant explains that on 17 April 2017 “it” entered into a contract with the second respondent in terms of which it was contracted to construct 300 top structures situated in the Amahlathi Local Municipality (“the project”). The applicant purported to attach a copy of the contract at the heart of this application but the annexure instead comprises a “Funding Agreement” entered into between the second respondent and “Ntema Investments CC JV Sedtrade (Pty) Ltd” (“the joint venture”) as the “contractor” in respect of which the deponent is ostensibly authorized as “managing member”. Another different contract features, a few pages of which were co-incidentally put up by the applicant to prove the manner in which, and who, can terminate the contract. The latter extract however put up by the applicant ostensibly forms part of a standard JBCC agreement which followed the signing of the funding agreement. Evidently, although it was not so expressly declared, this is the contract in contention in the matter.

[5] The applicant asserted, in support of its contention that the conduct on the part of the first respondent which it sought to restrain was unlawful, that the first respondent was not a party to “this contract” (ambiguously suggesting the funding agreement), and that it therefore had no right to terminate and remove the applicant from the site and prevent it from constructing the houses.

[6] The supposed act of termination complained of was given expression in a letter addressed by the first respondent, not to the applicant but to the joint venture referred to above, dated 1 August 2018, in which it gave notice “in terms of clause 36 of the JBCC Principal Building Agreement Edition 5.0 (July 2007)”, in relation to the project, that the contract was terminated by virtue of the failure of the joint venture to have rectified certain issues under the contract (“the notice”). It appears clearly from the very first sentence in the notice that it was pre-empted “on an instruction received from the employer dated 31 July 2018”. The specific grounds of termination are listed and the joint venture is enjoined, in terms of clause 36.5.7 of the principal contract, to de-establish and remove all of its temporary site structures, plants and surplus material from the site within fourteen days of the notice.

[7] Ironically, although the professed termination of the principal agreement, and the first respondent’s entitlement to give the notice at the second respondent’s behest is the real gripe of the applicant, the second respondent is cited in the application only for its interest in the matter and no relief is sought against it.¹

¹ In my view this is tantamount to a non-joinder of the second respondent. Service of the application was effected on the employer, but at an address referred to in the funding agreement nominated by the employer for those purposes. The sheriff served at this address on a “machine operator registry” rather than at the state attorney’s office where papers would customarily be served.

[8] The applicant claims that it sought to make enquiries from the second respondent about the “termination of the contract” and the intention of the first respondent to close the site on 14 August 2018 heralded by the notice, but was not favoured with any reply. Undaunted by this lack of response, the applicant instead focused its attention of the first respondent’s supposed inference with its contractual relationship with the second respondent, asserting that the first respondent is not empowered by the contract to terminate the agreement or to prevent it from continuing to perform in terms thereof. In this respect the applicant is alluding to the JBCC agreement which it did not bother to attach, notwithstanding the assertion that the contract precludes the allegedly unlawful conduct on the part of the first respondent and would probably have entailed some sort of scrutiny or interpretation to get to the bottom of.

[9] Although it is implied from the notice authored by the first respondent and addressed to the joint venture that it’s authority to act in those circumstances arises from its part as implementing agent in respect of the project, it was not until the first respondent opposed the matter and filed its answering affidavit that its role in this respect was clearly revealed for the first time.

[10] Apart from raising *in limine* objections, the most important of which is that the principal JBCC agreement in respect of the project is one between the joint venture and the second respondent and not the applicant standing alone, who therefore lacks *locus standi* to bring the application, the first respondent put into context that the relationship which came about between the joint venture and the respondents (as opposed to the applicant and the respondents) arose as a result of formal tender proceedings in accordance with the relevant public procurement

legislation. It further clarified that it was the duly appointed principal agent on behalf of the second respondent (the employer) in respect of the project, a fact of which the applicant is well aware but which it manifestly played down in my view in the founding affidavit.

[11] A copy of its letter of appointment subsequent to its formal bid in this respect was put up in substantiation of this allegation.

[12] Additionally it pleaded that the second respondent instructed it in this role to terminate the contract with the joint venture after it had failed to perform in accordance with its contractual obligations or to comply with a contract instruction given by it. The grounds upon which it did so are not material for present purposes, but suffice it to say that they appear to be compelling reasons for the second respondent's decision to terminate effectuated by the first respondent. It transpired that the relevant notice had been addressed to the joint venture on the instructions of the second respondent on the basis of recommendations which had first been made by the first respondent to it in its capacity as principal agent.

[13] The written instruction of the employer's official, Ms. Nosiselo, given in this instance was also put up in support of the first respondent's assurance that it was not acting randomly or off its own bat, but within the parameters of its role as principal agent and with the necessary knowledge and the employer's support. Moreover, so it pointed out, the intimation given in the notice was not that termination was imminent, but rather that the second respondent had in fact terminated the contract. It had merely conveyed the employer's decision in this respect. The first respondent further denied threatening closure of the construction site or the removal of the joint venture. Instead it had merely purported to spell out

the necessary processes that would ensue as provided for in the relevant provisions of the JBCC agreement, a regular trajectory which the joint venture must have expected in all the circumstances.

[14] All of this it did by virtue of its appointment as principal agent, which it was fully entitled and also obliged to do in the aforestated capacity.

[15] I should mention that the second *in limine* objection taken by the first respondent is that the joint venture, if it wishes to challenge the termination of the contract, ought to do so not in this court but as provided for in the JBCC agreement, by availing itself of the dispute resolution procedures therein catered for. There appears to me to be merit in this procedure having been adopted viz a viz the joint venture and the employer, but it is unnecessary for me to determine this objection given the view I take herein.

[16] How the applicant could have failed in the founding affidavit to disclose the first respondent's peculiar formal role in overseeing the implementation of the project entirely escapes me. Without the relevant context the impression was sought to be created, by design in my view that some random entity, without any relationship to the project, had purported to involve itself unlawfully by interfering in the contractual relationship. The non-disclosure of the true position is further demonstrated by the applicant's assertion of a "forceful" closure of the construction site and prevention of the contractor from carrying on its work. No doubt the applicant hoped to conjure up an image of being spoliated rather than resorting to a true context.

[17] Good faith is a *sine qua non* in *ex parte* applications. This must also be the case in any application launched on an urgent basis. But for the fact that the first respondent managed to file an answering affidavit in the short time frame available to it after being served, a court hearing the matter in the absence of the parties would have been forgiven for thinking that this was a spoliation scenario and the actions of the first respondent entirely unwarranted or high-handed. I am left with the unfortunate impression that the material facts of the first respondent's peculiar role was purposely suppressed or opportunistically omitted. On either basis, this is reason enough to dismiss the application.

[18] It is further a trite principle that an applicant must make out its case in its launching affidavits and not in its replying affidavit.

[19] The applicant failed to make any reference in its founding affidavit to the existence even of a joint venture in relation to the project. Clearly on the face of it the application was being made on behalf of a close corporation of which the deponent is the sole member. If this was a mistake, in its replying affidavit the applicant merely purported to suggest that the application on behalf of the joint venture was authorized, and put up a resolution, but this resolution is self-evidently one that authorizes her to sign the documents in connection with the tender for the awarded contract, or any other contract arising therefrom, and not to institute litigation on behalf of the joint venture.

[20] The applicant also purported to put up a "confirmatory affidavit" of the sole owner of Sedtrade (Pty) Ltd (the other entity forming part of the joint venture), Ms. Faatima Haffejee, who claims that she authorized the applicant to bring the proceedings on behalf of the joint venture, premised on her having "read the

founding affidavit and the answering affidavit of Mrs PAULINA RASMUSI and the accompanying annexures”. I was assured from the bar by applicant’s counsel, Mr. Seima, that Ms. Haffejee had had sight of all the pleadings, including the answering affidavit of the first respondent although her confirmatory affidavit does not say as much, but even assuming a ratification by her of what has gone before, the applicant’s founding affidavit remains premised on an application by the applicant with no disclosure whatsoever of the joint venture’s involvement in the project.

[21] A confirmatory affidavit does not ameliorate the shortcoming by the non-joinder of the joint venture, which entity would be a vital party to the application by obvious implication assuming the applicant wished to assert its *locus standi* and not the applicant’s. The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order that a court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined. It is not for Ms. Haffejee to waive the right of the joint venture which is a separate legal entity.

[22] A formal resolution from the joint venture would have been a necessity in my view, but in this anomalous situation, the applicant has not purported to convey that contrary to what is asserted in the founding affidavit the real party is the joint venture.² Instead the applicant has simply averred that the applicant “has not failed to join the joint venture in this application”. This the court is supposed to glean from the separate averment of the applicant’s sole member (who unequivocally

² It is notable that in the replying affidavit the applicant continues to assert its privity of contract with the second respondent and not that of the joint venture. Indeed in articulating prejudice the deponent referred to the personal effect on her and did not allude to the interests of the joint venture.

brought the application on behalf of the applicant itself and not as an authorized entity on behalf of the joint venture), and the glib assertion of Ms. Haffejee that she is content with the applicant dealing with “this matter in this manner” and litigating on behalf of the joint venture.

[23] Given these odd circumstances, the joinder must either be effected properly, or not failing which the first respondent’s first *in limine* objection is well taken.

[24] As I have said, it is perhaps a mistake on the deponent’s part that the close corporation was cited as the applicant, but it is not for this court to condone the misapprehension or to read in essential averments at the expense of the respondents especially where the joint venture’s lack of legal standing has been pertinently raised.

[25] It is the applicant who must make out its *locus standi* in the founding affidavit, which it has woefully failed to do.

[26] Even on the assumption that the party whose interests are before me is the joint venture, the applicant has failed in my view to establish the requirements for the grant of a final interdict.

[27] Ms. Rasmusi relies for the first respondent’s supposed unlawfulness on the provisions of clause 29 of the JBCC contract, but the extract provided which spells out the circumstances under which the employer can terminate in fact supports the first respondent’s assertion that it was within its rights to give the required notice to the joint venture of its default on behalf of the employer (Clause 29.2). Although sub-clause 3 provides that where the contract has not remedied a

specified default, “the employer may give notice to the contractor of the termination of this agreement forthwith”, the first respondent has explained that it was the conduit through which this election on the part of the employer was conveyed to the joint venture. It also put up a copy of that authorization or instruction to act on its behalf which supports the first respondent’s recommendation that a termination is apposite in all the circumstances. No violence or threat of force is apparent in the notice and the request to the joint venture to vacate the site is in accordance with the contract and follows as a consequence to termination.

[28] On the basis of “dooming principle” of the Plascon-Evan Rule³ as Mr. Kotze for the first respondent put it, there can be no unlawful conduct on the part of the first respondent warranting the restraining order sought as the latter was instructed (as the employer’s agent) to give the requisite notice of termination. If the joint venture does not accept this as constituting formal notice of termination it is not for it to take on the first respondent in this respect, but rather the second respondent concerning the basis for its decision.

[29] Absent proof of a clear right, it is unnecessary to go any further.

[30] In the result the application falls to be dismissed with costs. I am constrained to order such costs on the punitive scale given the applicant’s lack of disclosure concerning the first respondent’s role in the matter as principal agent and the fact that the first respondent was obliged to come to court to answer the unfounded claim on an urgent basis even after the first respondent’s attorneys had

³ Plascon-Evans Paints (Pty) Ltd. V Van Riebeck Paints (Pty) Ltd. 1984 (3) SA 623.

confirmed to the applicant's attorneys that the former had issued the termination notice on the instructions of the employer.

[31] In the result I issue the following order:

1. The application is dismissed, with costs on the scale of attorney and client.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 21 August 2018

DATE OF JUDGMENT: 24 August 2018

Appearances:

For the applicant: Mr. Seima instructed by Ramusi Attorneys c/o Nozuko Nxusani Inc, East London (ref. LOT/RAM/NTE/002).

For the first respondent: Mr. D Kotze instructed by Clark Laing Attorneys, East London (ref. Mr. Laing).)