

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 1891/2012

In the matter between:-

BUILDON CONSTRUCTION (PTY) LTD
K P NOONAN

1st Applicant
2nd Applicant

and

RASDI CC

Respondent

JUDGMENT BY: THAMAGE, AJ

HEARD ON: 29 NOVEMBER 2012

DELIVERED ON: 13 DECEMBER 2012

- [1] This is an application to compel the respondent to furnish security in terms of Rule 47 of the Uniform Court Rules.
- [2] First applicant is Buildon Construction (Pty) Ltd, a company with limited liability duly registered in terms of the Laws of South Africa and the first defendant in the main case.
- [3] Second applicant is Kelly Patric Noonan, a major male and a director of the first applicant, he is the second defendant in the main case.

[4] Respondent is Rasdi CC, a close corporation duly registered in terms of the Laws of South Africa, he is the plaintiff in the main case.

[5] Respondent issued summons against the two applicants claiming the following:

- “1. Delivery and debatement of all documentation, accounts and invoices in respect of the joint venture;
2. Auditing of the financial statements of the joint venture;
3. Payment of an amount to be determined after delivery, debatement and auditing of the account;
4. Costs on attorney and client scale;”

[6] Applicants invoked the provisions of Rule 47(1) and subsequently the provisions of Rule 47(3). Applicant brought the current application and request the following relief:

- “1. Respondent is ordered to furnish security for the Applicants’ cost of suit in the main action under case no 1891/2012 in the amount R180 000,00 (ONE HUNDRED AND EIGHTY

THOUSAND RAND) within such a period of time as the honourable Court in its discretion may direct.”

- [7] It is common cause that both first applicant and respondent entered into a joint venture to secure a contract from Sasol Infrachem for the erection of a library, which contract was ultimately secured and the library was erected. There is however a dispute on the contract value as well as whether the joint venture had made a profit or loss, hence the action instituted by the respondent.
- [8] Applicants application is twofold, namely the provision of security for costs, firstly based on section 8 of the Close Corporation Act and secondly on the basis that respondent's litigation is vexatious. Respondent contest that the litigation is not vexatious.
- [9] The provisions of section 8 of the Close Corporation Act, Act 69 of 1984 are as follows:

“When a corporation in any legal proceedings is a plaintiff or applicant or brings a counterclaim or counter application, the court concerned may at any time during the proceedings if it appears that

there is reason to believe that the corporation or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent, or the defendant or respondent in reconvention, if he is successful in his defence, require security to be given for those costs, and may stay all proceedings till the security is given." (my emphasis)

[10] According to the applicants, the reason to believe that respondent will be unable to pay their costs if successful was prompted by the following:

10.1 that they know respondent's financial position because they have been using respondent on various projects as a subcontractor;

10.2 respondent does not own any assets;

10.3 respondent is not credit worthy because he has been requesting applicants to get credit at suppliers on his behalf;

10.4 and that on various occasions respondent requested loans from the first applicant for the purchasing of materials.

[11] Respondent denied the averments as stated above and further stated that the close corporation is continuously doing subcontracting work with other contractors and that with

abatement of the accounts of the joint venture between him and the first applicant, his financial position will improve.

[12] Section 8 of the Close Corporation Act must be interpreted and applied in accordance with principles and case law developed over the years on section 13 (now repealed) of the Old Companies Act. See **HENRY v R E DESIGNS CC** 1998 (2) SA 502 (C).

[13] The applicants must discharge the onus by adducing facts on which the court can conclude that there is reason to believe that the respondent would be unable to satisfy the costs order if he is unsuccessful. In **KINI BAY VILLAGE ASSOCIATION v NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS** 2009 (2) SA 166 (SCA) at line 5 (F) the court held as follows:

“The party seeking security must, however, first establish, **by credible testimony**, that its opponent, if unsuccessful, will be unable to meet an adverse costs order.” (my emphasis)

[14] The respondent, although having not submitted a balance sheet or financial statement, had indicated that the close corporation is still operating as a business, thus has source of income. Furthermore,

the testimony by the applicant that because he knows the respondent and had prior dealings with him in the past, hence respondent will be unable to pay adverse costs order cannot be regarded as credible testimony. Respondent did not provide any financial statement and the reason for not doing so, is that he said he does not have any. It is now that he had employed someone to do his bookkeeping.

[15] Coming now to the second ground of the applicants' application, namely that respondent litigation is vexatious. Applicants' submission in this regard is as follows:

15.1 that respondent action ought to have been referred to mediation and/or arbitration;

15.2 that the respondent's claim had prescribed;

15.3 that the attorney (Mr M Khang), who allegedly signed respondent's particulars of claim, denies having instituted an action against applicants and that the second applicant is not linked to the litigation although cited.

[16] The last-mentioned submission that second applicant is only cited but not linked to the case, has been raised on applicants' heads of argument and does not appear anywhere in the founding affidavit

nor the replying affidavit. Litigants are supposed to stand and fall by their papers and thus I am not going to consider this aspect in my judgment as the respondent was not afforded an opportunity to respond on it.

- [17] In **KINI BAY VILLAGE ASSOCIATION v NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS**, *supra*, the court stated as follows at page 17 paragraph [10] referring to section 13 of the Old Companies Act:

“These provisions are intended to protect persons against liability for costs relating to litigation instituted by impecunious companies by deterring such companies from litigating vexatiously or in circumstances where they have poor prospects of success, thus exposing their opponents to unnecessary and irrecoverable legal expenses.”

- [18] The factors raised by the applicants which allegedly intend to prove vexatious litigation are technical legal points and do not go to the nature (and not merits) of the case. An action is vexatious if it is obviously unsustainable. See **AFRICAN FARMS AND TOWNSHIPS LTD v CAPE TOWN MUNICIPALITY** 1963 (2) SA 555 (A) at 565D – E.

[19] Respondent is seeking full financial disclosure of the joint venture operations for the erection of the library. He did, however according to him, get R30 000,00 out of the contract value of R10 million. Respondent did exhibit through his papers filed of record that the account done by the first applicant is not up to standard and there are questionable entries. Also stated that applicant had all the contracts even the money paid by Sasol and he never had a say in the financial management of the joint venture. I am of the view that the respondent's claim is neither vexatious nor an abuse of the court processes, he is exercising his legitimate right.

[20] Having considered the previous section 8 of the Close Corporation Act and related section 3 of the old Companies Act with its case law and also taking cognisance of the provisions of section 34 of the Constitution of the Republic of South Africa Act, no 108 of 1996 which states as follows:

“34. Access to courts – Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”

I am of the view that applicants failed to satisfy the court that the respondent litigation is vexatious.

[21] I therefore make the following order:

21.1 Application is dismissed with costs.

S. J. THAMAGE, AJ

On behalf of applicant: L A le Roux
Instructed by:
Goodrick & Franklin Inc.
BLOEMFONTEIN

On behalf of respondent: Adv. R P Cronjé
Instructed by:
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