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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 3/4/2009

NOT REPORTABLE CASE NO: 3108/09

In the matter between

E. H. HASSIM HARDWARE (PTY) LTD

T/A E.H. HASSIM

REGISTRATION NUMBER: 2006/005211/07 APPLICANT

And

THEMBAF CONSTRUCTION CC 1ST RESPONDENT

REGISTRATION NUMBER: 2004/121284/23

SOUTH AFRICAN REVENUE SERVICES 2ND RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant by way of urgency sought an order:

"1. That this application be heard as a matter of urgency in terms of rule 6 (12) and that strict compliance with the forms and service provided for in the rules of this Honourable Court be dispensed with.

2. That any non-compliance by the Applicant with the provisions of Section 35 of the General Law Amendment Act, 62 of 1955, be condoned for such lesser period as the Honourable Court may consider reasonable.

3. Restraining and interdicting the First Respondent from:

3.1 Taking possession or receiving any payment due to the First Respondent by the Second Respondent in regards (sic) to any VAT refunds payable by the Second Respondent to the First

Respondent in respect of the project known as '335 RDP Houses at Emsagweni/Enkanini informal Settlement' (hereinafter referred to as 'the project') other than into the First Respondent's current account conducted at Standard Bank under account number: 031517668. (hereinafter referred to as 'the Designated Account')"

4. restraining and interdicting the Second Respondent from:

   4.1 making payment (electronically or otherwise) or handing possession of any cheque payment due to the First Respondent by the Second Respondent in regards (sic) to VAT refunds payable by the Second Respondent to the First Respondent in regards (sic) to the Project, other than into the Designated Account;

5. That the First Respondent shall pay the costs of this application as between attorney and own client;

provided that, should any other Respondent oppose this application, that the First Respondent and such other Respondent be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

6. Granting such further or alternative relief as the Honourable court may deem fit."

BACKGROUND FACTS

[2] The Applicant , in its papers, contended that the parties concluded two agreements namely, the Credit Application agreement, Annexure EH 2 to the Applicant's founding affidavit and the joint venture agreement, Annexure EH3 to the founding affidavit. The Credit Application agreement, the Applicant averred, governed the legal relationship between the parties in respect of the order, supply and payment terms for the building materials that the Applicant supplied to the First Respondent. The

Credit Application agreement according to the Applicant, made provision for cession of all the First Respondent's right, title and interest in and to its claims against its debtors both present and future and from whatsoever cause arising as security for all or any amount which the First Respondent presently owes to or may at any time in the future owe the Applicant (clause 17 Annexure EH 2 to the founding affidavit). For the purpose of this judgment, I find it unnecessary to deal with the cession. The Applicant, in terms of the joint venture agreement, would supply building materials to the First Respondent to enable it to build 335 RDP houses at Emsagweni/Enkanini informal settlement, Witbank. ("the project"). The project had been allotted to the First Respondent by the Department of Housing and Land Administration. The parties, according to the Applicant, in terms of the joint venture agreement, agreed:

1. to open a joint bank account. Such joint bank account was opened with Standard Bank being

account number 031517668 ("the designated account")

2. that Mr T. Finca and Mr S. O. Tayob would represent the Respondent and the Applicant respectively as the only signatories in respect of the designated account (clause 5.2 Annexure EH 3)

3. that all payments received from the Department or from any other source on behalf of the Department, in execution of the main agreement, would be paid into this bank account. (clause 5.3 and 6.1 Annexure EH 3)

4. that the account would be in the name of the Respondent (clause 5.1 Annexure EH 3)

The appointment of the Applicant as the supplier of the building materials for the execution of the project was confirmed by way of a letter EH4 to the founding affidavit.

The Applicant contends that it is owed R1.038.913.05 together with interest at 24, 00% per annum by the First Respondent for the building materials supplied as per annexure EH5 to its founding affidavit. The Applicant further contends that the First Respondent has breached the joint venture agreement by diverting funds from the designated account into the account of Double M Financial Consultancy CC in November 2008. the Applicant further contends that it has now established that the first Respondent intends to divert all VAT refunds into accounts other than the designated account. Mr Prinsloo, on behalf of the Applicant, submitted that the Applicant had established that the matter was urgent, had established a clear right which has been harmed, and that there is no other remedy which can be of assistance to the Applicant and that the Applicant has made out the case for the relief that it seeks.

[3] Mr Mphahlele, on behalf of the First Respondent, submitted, to the contrary, that the matter was not urgent, that the Applicant had not satisfied the requirements for a final interdict, that there were serious disputes of fact in that the First Respondent avers that it does not owe the Applicant as the Applicant alleges and that the Applicant had been receiving all the money and that it had been administering it.

THE ISSUES TO BE DETERMINED

[4] The issues to be resolved are whether the matter is urgent and whether the Applicant has made out a case for the relief that it seeks.

[5] Having heard arguments by both Counsel, it is prudent, in my view, that I deal with the issues that both of them have raised.

COMMON CAUSE FACTS

[6] The following facts are common cause.

1. That the Applicant would supply the First Respondent with the building materials.

2. that the parties entered into a joint venture agreement

3. that the parties concluded the construction agreement

4. that the joint venture bank account was to be opened in the name of the First Respondent and that it was in fact opened with Standard Bank as account number 031517668

5. that Mr T Finca on behalf of the First Respondent and Mr S. O. Tayob on behalf of the Applicant would be the only signatories to the said designated account.

6. that all payments received from the Department or from any other source on behalf of the Department in the execution of the main agreement 'shall' be paid into the designated account referred to in clause 5.3 of annexure EH 3

7. that all refundable VAT payable by the Second Respondent to the First Respondent would be deposited into the designated account (clause 2.3.3 and clause 3.2 of annexure TF2 to the answering affidavit)

8. that payments received from the Department were made into the designated account.

9. that the cheques copies of which are annexed to the answering affidavit were signed by Mr O. S. Tayob and Mr T. Finca.

10. that the Applicant kept the cheque books.

11. that the bank statements relating to the joint venture's bank account were sent to Mr Finca the

sole member of the First Respondent as evidenced by TF 4 to the answering affidavit.

12. the agreements between the parties have not been cancelled.

13. none of the parties has called on the other to remedy whatever wrong the party might have engaged in.

[7] It is evident from the evidence that the relationship between the parties has gone sour. There is, in deed, such acrimony between them that the sooner the issues are properly disposed of and resolved, the better.

[8] It is further evident from the evidence that there is unhappiness on the part of the first Respondent relating to the management of the money which went into the designated account. Whether the disputes raised are proper or not, these, in my view, are not issues to be dealt with by me for the reasons that will be shown shortly. This is also so because the construction

agreement makes provision for the resolution of such disputes by arbitration. (clause 6 thereof).

[9] Clearly,

9.1 the parties agreed that there would be a joint venture with a designated account;

9.2 designated account number 031517668 was opened with Standard Bank;

9.3 money was deposited into this designated account;

9.4 by way of cheques signed by Mr O. S. Tayob and Mr T. Finca, the money in the said account was used to make payments evidenced by TF4 to the answering affidavit;

9.5 the First Respondent received the bank statements relating to the designated account;

9.6 the First Respondent changed its particulars with the South African Revenue Services. This is admitted by it. However the reason that it furnishes for such a change, namely that that was due to the appointment of a new accountant, cannot be convincing. The First Respondent forgets that the parties agreed that a designated account would be opened into which all the money relating to the joint venture would go. I also find the First Respondent's denial that payment into the designated account included the money received from the South African Revenue Services astounding in light of clauses 2.3.3 and 3.2 of the construction agreement which the Applicant had not even made reference to in its founding affidavit.

[10] The First Respondent breached the joint venture agreement and the construction agreement if it diverted the money meant for the designated account into another account.

[11] The First Respondent was not entitled to change its particulars with SARS relating to the designated account in respect of the refundable VAT payable to the First Respondent by the Second Respondent. This is breach of the agreements between the parties by the First Respondent. The First Respondent does not deny that it is 'experiencing a serious financial instability and inability to make payments of its debts'. If this is so and coupled with its instructions to the Second Respondent to make payments of refundable VAT into a different bank account then, and in such an event, that makes this case urgent. it at the same time evinces that unless relief of some sort is afforded the Applicant it will be utterly exposed with no remedy to resort to should it succeed in the arbitration proceedings or in any court in the event that it proceeds against the First Respondent for payment of the money that it alleges the First Respondent owes it.

[12] That there are disputes in this application does not assist the First Respondent which is doing what the agreements do not allow it to do.

[13] Mr Prinsloo, on behalf of the Applicant, submitted that an order that the money that should go into the designated account should not be withdrawn by both the Applicant and the First Respondent 'pending the finalisation of the arbitration proceedings for the dissolvement (sic) of the joint venture established between the Applicant and the First Respondent" which proceedings should be instituted within 14 days from the date of my order and that the costs of the application be reserved for the arbitration. This submission has merit. Regard being had to the facts of the case, in my view, it will be prudent to grant an interim relief, which I believe, will go a long way towards resolving the disputes between the parties.

[14] I find no merit in the submission that the First Respondent did not know how the designated account was run particularly if regard is had to the fact that the cheques were co-signed and that the statements in respect of the account were received by the First Respondent. That the First Respondent was forced to sign the cheques ending up receiving petty cash from Mr Tayob equally has no merit. Without the two signatories no money could be withdrawn.

[15] As I said above, the application, on the common cause facts, stands to succeed and the order I make in the result is as follows:

1. Pending finalisation of arbitration proceedings to be instituted by the Applicant against the First Respondent for the determination of the disputes

between them whether by the dissolution of the joint venture established between them or otherwise:

1.1 the First Respondent is restrained and interdicted from taking possession or receiving any payment due to the First Respondent by the Second Respondent in respect of any VAT refunds payable by the Second Respondent to the First Respondent pertaining to the project known as '335 RDP Houses at Emsangweni/Enkanini Informal Settlement' (hereinafter referred to as 'the project') other than taking possession or receiving same into the First Respondent's current account conducted at Standard Bank under account number : 031517668 (hereinafter referred to as 'the Designated Account'),

1.2 the Second Respondent is restrained and interdicted from making payment (electronically or otherwise) or handing possession of any cheque payment due to the First Respondent by the Second Respondent in regard to VAT refunds payable by the Second Respondent to the First Respondent in respect of the project, other than into the Designated Account,

1.3 the Applicant and the First Respondent are interdicted from withdrawing any funds from the designated account,

2. The Applicant is to institute the said arbitration proceedings within a period of 14 days from the date of this order.

3. The costs of the application are reserved for determination by arbitration.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 04 March 2009

For the Applicant: Adv. D. Prinsloo

Instructed by: Marius Botha Inc

For the 1st Respondent: Adv. M. S. Mphahlele

Instructed by: A. P. Ledwaba Inc.