

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no:	1595/2008
Date heard:	2008-12-03
Date delivered:	2008-12-15

In the matter of:

TAURIS GARDEN TRADING 500 CC

APPLICANT

versus

KHARA HAIS MUNICIPALITY

RESPONDENT

Coram: MAJIEDT J

JUDGMENT

MAJIEDT J:

1. This is the return day of an urgent application for a prohibitory interdict in terms whereof the Applicant seeks an order against the Respondent, restraining it from interfering in any way with the Applicant's performance of its contractual obligations under contract number TK015/2008, in respect of the resealing of streets in Upington. The application for an interim order was brought on extreme urgency (virtually as an *ex parte* application, given the

fact that the application has been launched with less than two hours' notice to the Respondent).

2. On the return day the application is opposed by the Respondent. A number of preliminary issues have been raised by the Respondent on its papers and in argument, in addition to the extensive responses and submissions in respect of the Applicant's averments on the merits. At the outset I must point out that in the answering affidavit, the Respondent in particular challenged whether the matter was indeed as urgent as the Applicant initially made it out to be and also pertinently challenged the authority of the deponent to the Applicant's founding affidavit, one Omar Fortune, to bring the application on behalf of the Applicant close corporation. Quite astoundingly, these direct challenges were left completely unanswered by the Applicant in a replying affidavit which can only be described as a shoddy document and completely lacking in substance. This omission, whether deliberate or not, will have grave consequences for the Applicant as I will show in due course. It is trite that an Applicant is obliged to answer and refute in his replying affidavit the case put up by a Respondent in the answering affidavit.

See in this regard, *inter alia*: **Reiter v Bierberg and others 1938 SWA 30.**

SMM Holdings (Pty) Ltd v Southern Asbestos Sales (Pty) Ltd [2005] 4 All SA 584 (W) at 599 E.

I shall revert to this particular aspect later.

3. It is common cause that a written agreement was concluded between the parties on 6 October 2008. In terms thereof the

Applicant was selected as the preferred tenderer in respect of the resealing of the streets in Uppington. By way of reference the terms of the agreement was set out in Applicant's general conditions of contract which was incorporated into the parties' written agreement. Also by way of reference the General Conditions of Contract for Road and Bridgeworks for State Road Authorities ("*Colta*") has also been incorporated into the contract. On the merits, concerning the alleged unlawful suspension of works by the Respondent, the Applicant relies on clause 42 of Colta, which provides that:

"The contractor shall, under the written order of the engineer, suspend the progress of the works or any part thereof for such time or times and in such manner as the engineer shall order and shall, during such suspension, properly protect the work so far as is necessary."

It is the Applicant's case that the suspension of works has not occurred in accordance with the aforementioned clause in Colta. Given my ultimate finding in this matter it is not necessary to deal with this aspect at this juncture.

4. While there is considerable merit in the Respondent's contention that the Applicant was not justified in bringing the application on short notice as it did, I am satisfied that there was sufficient urgency for the Applicant to launch the application on short notice. This urgency was precipitated by the actions of Mr. H. Auret, the Respondent's acting director for technical services, on 7 November 2008 through his instruction to a Mr. Ashley Williams, an employee of the Applicant, to summarily stop all work on the contract. The contract was due to expire on 5 December 2008, hence the urgency of the matter. For the reasons that follow, I do,

however, uphold the Respondent's contentions with regard to Mr. Omar Fortune's lack of authority to bring the application on behalf of the Applicant close corporation.

5. In the case of a corporate entity, such as a close corporation, a resolution of the close corporation that the proceedings have been properly authorised, may constitute sufficient proof of authority to act. See, *inter alia*.: **Poolquip Industries (Pty) Ltd v Griffin and Another 1978 (4) SA 353 (W)**.

See also: **Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)** at par [19], 624 F-J, where an attorney deposed to an affidavit declaring that he was duly authorised to institute proceedings on behalf of the Respondent in that matter. The facts are of course different in the present matter and, unlike in the Ganes-case, *supra*, the authority of the deponent Fortune to institute the proceedings was directly and pertinently challenged by the Respondent.

6. The said Omar Fortune purports, in his founding affidavit, to derive his authority to act on behalf of the Applicant close corporation from a resolution which was attached to the founding affidavit. That resolution reads as follows:

"RESOLUTION

The members of Tauris Garden Trading 500 CC on the 10th November 2008 at Century City Cape Town resolved that Tauris Garden Trading 500 CC represented by Omar Fortune is authorised to depose to the affidavit and to bring the application on behalf of Tauris Garden Trading 500 CC in the matter against the Khara Hais Municipality, Upington.

DATED AT CAPE TOWN ON THIS THE 10TH DAY OF NOVEMBER 2008.

(SIGNED)
MEMBER R. TIKA

In the answering affidavit the Respondent points to the fact that a company search had revealed that the members of the Applicant close corporation are the following:

- a) “Ticka, Anisha Pragalathan”
- b) “Ticka, Rajemdhra Lakhman”

It is plain that the person who had signed the ostensible resolution, quoted above, has a last name that does not resemble any of those revealed in the company search. In addition, it is not clear whether “*R. Tika*” (assuming that it is supposed to be “*R.L. Ticka*”) also signed the resolution on behalf of the other member. The matter is further considerably complicated by the fact that, as the Respondent alludes to in the answering affidavit, in the tender documents Fortune was cited as a member of the Applicant close corporation. This, on the evidence of the company search, is patently incorrect and was correctly conceded thus by the Applicant.

7. As I have stated, the Applicant made no effort whatsoever, notwithstanding this express denial and challenge to the authority of Fortune, to deal with this aspect in its replying affidavit. I was quite taken aback when told from the Bar by Mr. Coetzee that this failure is due to an “*oversight*”. It is beyond comprehension how such a material direct challenge can be overlooked. It is not always necessary to attach in motion proceedings to the

application a resolution authorising the institution of proceedings on behalf of an artificial person (such as a close corporation) and normally a deponent's allegation that he/she is duly authorised would suffice in the absence of a challenge to his/her authority.

See: **SWA National Union v Tjozongoro and others 1985 (1) SA 376 (SWA)** at 381 E.

Where, however, a resolution authorising a person to institute proceedings is attached a court, in deciding whether such person is in fact authorised to act and to bring the proceedings, can only interpret that resolution itself.

In **SWA National Union v Tjozongoro and others**, *supra*, this was indeed the case where the president of the applicant union was purportedly authorised to institute proceedings. In his judgment on this aspect, Strydom J held as follows at 381 F:

"However, where, as in this case, the resolution authorizing the president to institute proceedings and setting out the powers given to him, is attached, the Court, in deciding whether the president acted within his authority can in my opinion only interpret the resolution for this is the very foundation on which he based his allegation that he was duly authorized."

8. Mr. De Bruyn, for the Respondent, has drawn my attention to the judgment in **Cyberscene Ltd and others v i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C)** at para [9] to [11] where Hlophe DJP (as he then was) held that where proof of the authority of the person purporting to represent a company is absent, a court has a discretion to permit reliance on evidence in a replying affidavit of the retrospective rectification of the relevant conduct. He referred to the leading judgment in this regard, namely **Moosa and Cassim NNO v Community Development Board 1990 (3) SA 175 (A)** in support of his decision. As stated,

in the present matter the Applicant has not even attempted to avail itself of this opportunity in the replying affidavit, despite a direct challenge.

9. The Applicant has woefully failed to meet the challenge regarding Fortune's authority to act and, given the totality of the facts and circumstances surrounding this particular issue (including the fact of Fortune having been misrepresented as being a member of the application close corporation in the tender documents), I hold that the Applicant has failed to prove Fortune's authority to institute these proceedings on behalf of the Applicant. Mr. De Bruyn has correctly pointed out that Fortune's emphatic denial in the replying affidavit can safely be rejected as false and disingenuous. It is correct as he argues that, if Fortune was indeed duly authorised by the Applicant close corporation, the failure to produce any form of documentary proof in support of this or any explanation for such failure, warrants an inference that no such authority in fact exists.
10. Mr. Coetzee has submitted that, in the event that I find for the Respondent on this point, namely that there is no proof of authority for Fortune to bring these proceedings on behalf of the Applicant, I should merely strike the application from the roll and make no order as to costs. This would be an incorrect route to follow in my view. There is presently a rule *nisi*, obtained on an urgent basis, and same will have to be discharged and a costs order ought to be made. Striking the matter from the roll would leave the rule *nisi* in limbo, which would create an intolerable situation in law.

See: **SWA National Union v Tjozongoro and others**, *supra* at 3874 A-B where Strydom J discharged certain orders on the basis

that there was no authority to apply for the said orders.

It is self-evident that the Applicant has failed on a technicality and can therefore re-enroll the matter for hearing once the fatal defect in its papers has been cured, should it choose to do so.

11. I issue the following order:

**THE RULE NISI ISSUED ON 11 NOVEMBER 2008 IS HEREBY
DISCHARGED WITH COSTS.**

**SA MAJIEDT
JUDGE**

FOR THE APLICANT	:	ADV WJ COETZEE
INSTRUCTED BY	:	ENGELSMAN MAGABANE INC
FOR THE PLAINTIFF	:	ADV WJ DE BRUYN
INSTRUCTED BY	:	VAN DE WALL & PARTNERS