

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 947/2002

In the matter between:

EDENBLOEM (PTY) LIMITED

Applicant

and

HIGHWAY JUNCTION HARRISMITH
(PTY) LIMITED

Respondent

CORAM: **LOMBARD, J**

HEARD ON: **11 MARCH 2004**

DELIVERED ON: **25 MARCH 2004**

This is an application for the variation of an order of this Court (Hancke, J) dated 14 November 2002 reading as follows:

“1. Die sitering van die respondent waar dit ookal in die stukke verskyn, gewysig word deur na die respondent te verwys as “Highway Junction Harrismith (Edms) Beperk”.”

(Record p.326)

to read:

“1.1 Dat die sitering van die Respondent, waar dit ookal in die stukke verskyn, gewysig word deur na die Respondent te verwys as “Harrismith Highway

Group (Edms) Bpk”.

(Record p.363-364)

It is for present purposes common cause that:

- (i) The applicant launched winding up proceedings against Harrismith Fuel and Service Centre (Pty) Ltd (Harrismith Fuel) by way of notice of motion dated 18 March 2002, which application is still being opposed.
- (ii) The applicant by way of notice of motion dated 4 November 2002 applied for an order:

“1. Dat die sitering van die respondent, waar dit ookal in die stukke verskyn, gewysig word deur na die respondent te verwys as “Highway Junction Harrismith (Edms) Beperk;”

(Record p.307)

This application was, without any opposition, granted on 14 November 2002. (The basis of this application was according to the deponent on behalf of the applicant, attorney Kets that the respondent, Harrismith Fuel and Highway Junction Harrismith (Pty) Ltd “een en dieselfde entiteit is” (Record para 4.4 at p.312).)

(iii) Thereafter and by way of notice of motion dated 18 March 2003 Highway Junction (Pty) Ltd alternatively Harrismith Highway Group (Pty) Ltd (formerly trading as Harrismith Fuel) launched an application for the dismissal of applicant's winding up application. In the supporting affidavit deposed to by one Barend Christoffel Deysel he, *inter alia*, states that:

- (a) there is no company registered under the name of Highway Junction Harrismith (Pty) Ltd;
- (b) there is a company registered under the name of Highway Junction (Pty) Ltd of which he is a shareholder and director;
- (c) Harrismith Fuel has changed its name to Harrismith Highway Group (Pty) Ltd on 19 October 1998 (record p.352);
- (d) Highway Junction (Pty) Ltd is not indebted to the applicant and has never had any dealings with it.

- (iv) Thereafter and by way of notice of motion (incorrectly dated 19 November 1998) applicant launched “’n teenaansoek” in terms of which it seeks to have the order dated 14 November 2002 varied to read as follows:

“1.1 Dat die sitering van die Respondent, waar dit ookal in die stukke verskyn, gewysig word deur na die Respondent te verwys as “Harrismith Highway Group (Edms) Bpk”.

The notice of motion and supporting affidavit (again deposed to by attorney Kets) were delivered on 30 April 2003. (Record p.363-366).

This application is being opposed by Harrismith Highway Group (Pty) Ltd and Highway Junction (Pty Ltd. No replying affidavit was delivered.

Before debating the merits herein the following remarks by Van Dijkhorst J in **DUNCAN NO v MINISTER OF LAW AND ORDER 1985 (4) 1 SA (TPD) at 3C** are relevant:

“In *Bell v Bell* 1908 TS 887 at 894 Innes CJ stated that Courts will not lightly vary their own orders even though they may be of a merely interlocutory character. On the other hand, the words of Damhouder

Practijcke in Civile Saken 146.2 and 4 are apposite. It is not dishonourable to come from error to the light of the truth and he who corrects himself needs not be corrected by another.”

It is common cause that the provisions of Rule 42(a)(1) find application herein. It reads as follows:

“The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;”

It is clear from the wording of the sub-rule that for the variance of the order herein three requirements must be met:

- (1) The order must be erroneously sought or erroneously granted;
- (2) such an order must have been granted in the absence of the applicant, and
- (3) the applicant’s rights or interests must be affected by the order.

(My underlining).

(See **MUTEBWA v MUTEBWA 2001 (2) SA 193 (TkHC) at 199F-G**).

The order presently under scrutiny was granted upon an application by the applicant – let alone in its absence. On this ground alone the

application cannot succeed.

The application for the variation of the order dated 14 November 2002 must, in my view, in any event, be refused. Attorney Kets in applicant's founding affidavit alleges, *inter alia*:

- “1.1 Ek is ‘n prokureur van die Agbare Hof en wat praktiseer as direkteur van Strydom & Bredenkamp Ing te Schoemanstraat 983, Hatfield, Pretoria.
- 1.2 Ek is die prokureur van rekord van die Applikant.
- 1.3 Ek is behoorlik gematig om hierdie verklaring namens die Applikant af te lê in my voorname hoedanigheid.
- 1.4 Die inhoud van hierdie verklaring val binne my persoonlike kennis en wete, tensy waar anders aangedui, en die feite hierin vervat is waar en korrek.
- 3.1 Die Applikant het ‘n aansoek gebring vir likwidasie van die maatskappy wat voorheen bekend was as Harrismith Fuel and Service Centre (Edms) Bpk. Die aansoek is geloods onder saaknommer 947/2002 in hierdie afdeling van die Agbare Hof.
- 3.3 Dit het onder my aandag gekom teen ongeveer September 2002 dat die naam van die Respondent in die registers van die Maatskappykantoor verander is wat tot gevolg het dat ek onder saaknommer 2002/3968 namens die Applikant ‘n aansoek geloods het in terme waarvan die sitering van die Respondent gewysig word na Highway Junction Harrismith (Edms) Bpk.
- 3.4 Die omstandighede van die regshulp gevorder, blyk volledig uit die aansoek onder saaknommer 3968/2002. Ek het die aansoek en die verandering van die sitering na Highway Junction Harrismith (Edms) Bpk, gebaseer daarop dat ‘n dagvaarding aangeheg by die aansoek daarvan melding maak dat Harrismith Fuel and Service Centre (Edms) Bpk, soos wat die Respondent voorheen gesitêr was, verander is na Highway Junction Harrismith (Edms) Bpk.
- 3.5 Ondanks die feit dat die aansoek op die Respondent se prokureurs van rekord beteken was, en ondanks die feit dat die Respondent se prokureurs bewus was daarvan dat die

besonderhede in die dagvaarding wat betref die naamsverandering ook foutief is, is die aansoek van die Applikant onder saaknommer 3968/2002 ontmoet deur stilswe.

3.6 Die Agbare Hof het op 14 November 2002 'n bevel toegestaan in terme waarvan die sitering van die Respondent verander is deurdat daar na die Respondent verwys word as "Highway Junction Harrismith (Edms) Bpk". 'n Afskrif van die bevel word hierby aangeheg as Aanhangel "MK1".

3.9 Eers op 17 Maart 2003 en soos blyk uit die aangehegte skrywe, het die Respondent se prokureurs, Greyling Orchard Ing in 'n skrywe aangedui dat die huidige beskrywing van die Respondent, Harrismith Highway Group (Edms) Bpk is, nadat 'n naamsverandering op 19 April 1998 by die Registrateur van Maatskappy geregistreer is soos blyk uit Aanhangel "RISP2" tot die Applikant se aansoek. Ek heg 'n afskrif van die skrywe van Greyling Orchard Ing hierby aan, gemerk Aanhangel "MK2".

3.9.1 Ek het op 18 Maart 2003 op die gemelde brief van die Respondent se prokureurs geantwoord, soos blyk uit Aanhangel "MK3" hierby. In die brief het ek onder andere die Respondent se prokureurs daarop gewys dat die Respondent reeds maande tyd gehad het om die ware toedrag van sake met betrekking tot die beskrywing van die Respondent aan die lig te bring.

3.9.2 Dit is immers duidelik uit die kontrakte aangeheg dat die aansoek vir likwidasië, dat die kontrakte aangegaan is met die Respondent onder die voormalige benaming daarvan, naamlik Harrismith Fuel and Service Centre (Edms) Bpk.

3.9.5 Ek voer aan, met eerbied, dat die aansoek en die regshulp daarin gevorder, geen regsbasis het van enige aard nie en dat die aansoek afgewys behoort te word met 'n gepaste kostebevel soos op die skaal van prokureur en eie kliënt op grond daarvan dat die Respondent en sy prokureurs opsetlik en maande lank versuim het om die korrekte beskrywing van die Respondent bekend te maak deur bloot 'n opponerende verklaring te liasseer. Verder, het die Respondent en sy prokureur opsetlik versuim om niteenstaande die feit dat dit duidelik was dat die aansoek wat voor die Agbare Hof gedië het op 14 November 2002, 'n foutiewe hofbevel tot gevolg sal hê, nogtans die aansoek met stilswe begroet het.

3.9.7 Ek vra die Agbare Hof om verskoning dat hierdie verklaring nie binne die tydperke soos gelas deur die Agbare Hof op 20 Maart 2003 geliasseer is nie. Weens die teenstrydige bewering oor die ware beskrywing van die Respondent wat telkemale deur die Respondent alternatiewelik sy prokureur opgehaal word het ek dit nodig geag om navraag te rig aan die Registrateur van Maatskappye. Ten spyte van vele versoeke en opwagtinge by die kantore van die Registrateur van Maatskappye te Pretoria gedurende die laaste maand was ek egter nie in staat om die inligting te verifieer nie aangesien die Registrateur nie die maatskappylêer kon opspoor nie. Die Applikant is dus verplig om staat te maak op die feite soos nou deur die Respondent en sy prokureur geopenbaar."

(Record pp. 367-373. Correspondence referred to not annexed).

In an answering affidavit delivered on behalf of Harrismith Highway Group (Pty) Ltd and Highway Junction (Pty) Ltd the following is, *inter alia*, stated:

“7.1.2 By causing the name of the Respondent to be changed in terms of His Lordship’s order of the 14th of November 2002, Applicant introduced a non-existent party and accordingly the proceedings were rendered a nullity.

7.1.3 The proceedings having been rendered a nullity, it is not open to the Applicant to now attempt to resuscitate same by substituting Highway Group as the Respondent.

7.2.1 In its incorrectly dated notice of motion, the Applicant seeks to vary His Lordship’s order of the 14th of November 2002.

7.2.2 I respectfully submit and I am so advised that such a variation can only be secured in terms of Rule 42 of the rules of the above Honourable Court which sets out the specific parameters/circumstances which need to be present in order for such an order to be granted.

7.2.3 In its application for variation, the Applicant has failed to set out the jurisdictional facts which would fit in with one or more of the requirements of the Rule and accordingly and on that basis alone, Applicant’s application cannot, with respect, succeed.”

(Record pp. 444-446).

No replying affidavit was delivered.

Mr Farrell, for the applicant, accepts that the founding affidavit does not clearly and fully explain why the said order was erroneously sought and or granted. He contends, however, that such facts can be gathered from what has been alleged in other affidavits delivered in these winding up

proceedings.

Mr Basslian, for the respondent, on the other hand, points out that in the answering affidavit the applicant's attention was, *inter alia*, specifically drawn to its failure to comply with the provisions of Rule 42(1)(a). (Record p.445).

Applicant obviously ignored such a warning as no replying affidavit was, as already indicated, delivered.

It is trite law that in notice of motion proceedings an applicant's cause of action must be fully set out in the founding affidavit(s).

As was properly conceded by Mr Farrell no cause of action has been set out in applicant's founding affidavit. The application was based on "hearsay information" obtained mainly from respondent's attorneys – the deponent Kets failed to satisfy herself about the correctness thereof – what is more, the attorneys now get blamed for furnishing her with such wrong information and are threatened with costs orders – an attitude which is disappointing. She is in control of her client's case and if she in the process errs she must face the consequences and not endeavour to blame

or hide behind others for her mistake – if the latter compels her to approach this Court for relief it is imperative that she should take it into her full confidence. To contend, as Mr Farrell did, that this Court can and must collect the relevant facts supporting applicant’s application from other affidavits delivered herein, is unacceptable – surely the respondent is entitled to be afforded an opportunity to reply to the applicant’s cause of action as set out in its founding papers.

Finally it is, as already mentioned, common cause that there is no company registered under the name of the respondent.

By granting the said order, the winding up proceedings were, according to Mr Basslian, rendered a nullity as no such company existed at the time when the winding up application was launched and a nullity cannot be amended.

- **VAN HEERDEN v DU PLESSIS 1969 (3) SA 289 (O);**
- **FRIENDS OF THE SICK ASSOCIATION v COMMERCIAL PROPERTIES 1996 (4) SA 154 (D&CLD);**
- **DEVONIA SHIPPING LTD v LUIS (YEOMAN SHIPPING CO LTD (INTERVENING)) 1994 (2) SA 363 (CPD);**
- **ROSSNER v LYDIA SWANEPOEL TRUST 1998 (2) SA 123 (W)**

Although the facts in all the above quoted cases differ from the facts herein the principle remains in essence the same and that is where a party to any legal proceedings is non-existent and accordingly not a legal persona, such proceedings are a nullity and a nullity cannot be amended.

The application is consequently dismissed with costs, including the costs of 4 December 2003.

D.J. LOMBARD, J

On behalf of Applicant:

Adv. S.T. Farrell
instructed by
Symington & De Kok

On behalf of Respondent:

Adv. M. Basslian
instructed by
McIntyre & Van der Post

/scd