



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: 2038/2023

In the matter between:

HANEKOM PLANT & CIVILS CC

APPLICANT

And

KOPANENG CONSTRUCTION & CIVILS (PTY) LTD

FIRST RESPONDENT

EZRA BRIDGITT MOUERS SELBORNE

SECOND RESPONDENT

THE GAP INFRASTRUCTURE CORPORATION (PTY) LTD

THIRD RESPONDENT

PIETER STEYN LANGE N.O.

FOURTH RESPONDENT

ALBERTUS JACOBUS HANEKOM N.O.

FIFTH RESPONDENT

ISABEL ELIZABETH HANEKOM N.O.

SIXTH RESPONDENT

Neutral citation: *Hanekom Plant & Civils CC v Kopaneng Construction & Civils (Pty) Ltd and Others* (Case no 2038/2023) (08 March 2024)

Heard: 10 November 2023

Delivered: 08 March 2024

Judgment

Phatshoane AJP

Introduction

- [1] The present proceedings, instituted on 03 November 2023 on an urgent basis, were essentially about the preservation of certain monies to obviate an alleged dissipation

pending the settlement of the dispute between the parties or final outcome of the trial in due course. The applicant, Hanekom Plant & Civils CC (HPC), sought a rule nisi calling upon Kopaneng Construction & Civils (Kopaneng), Ms Ezra Bridgitta Mours Selborne (Ms Selborne), The GAP Infrastructure Corporation (Pty) Ltd (GIC), Mr Pieter Steyn Lange N.O, Mr Albertus Jacobus Hanekom N.O, and Ms Isabel Hanekom N.O (the first to the sixth respondents) to show cause on the return date why a final order, substantially in the following terms, ought not to issue.

- 1.1 That the third respondent, GIC, be interdicted from paying out any amounts due to the first respondent, Kopaneng and or the Second respondent, Ms Selborne, in respect of a certain Opwag Project pending an agreement between HPC and Kopaneng on the payment thereof to HPC or Kopaneng or pending the outcome of the action to be instituted by HPC against Kopaneng within 30 days from the date of confirmation of the rule nisi.
- 1.2 That GIC be ordered to pay the aforesaid amounts, when they became payable to Kopaneng, into HPC's attorneys trust account pending the agreement between HPC and Kopaneng on the payment thereof to either HPC or Kopaneng or pending the outcome of the action.

- [2] On 10 November 2023, the date of the hearing of the application, HPC, Kopaneng and Ms Selborne handed up an order by consent on terms identical to the relief sought in the Notice of Motion which was made an order of this Court. What remained to be considered was the question of wasted costs occasioned by the postponement of 03 November 2023 and the costs of the application.

HPC's case

- [3] HPC owns numerous earthmoving machines and plant Hire equipment. According to HPC, Kopaneng was registered in 2020 so as to increase demand for the rental of the said equipment. Ms Selborne and a certain Mr Hansie Hanekom were the directors of Kopaneng and each held 51% and 49% shares, respectively, in Kopaneng. Mr Hansie Hanekom's shares were later transferred to Hanekom Family Trust. HPC further states that it was agreed between Mr Hansie Hanekom

and Ms Selborne that Hanekom would manage the payments of accounts for Kopaneng.

- [4] On 20 May 2022 GIC appointed Kopaneng to conduct the earthmoving works for some erven situated near Groblershoop, Northern Cape, referred to as the Opwag Project (the project), which commenced during June 2022 for a period of a year and would end mid-2023. Later in that year, on 04 August 2022, HPC entered into an agreement with Kopaneng in terms of which Kopaneng would lease earthmoving equipment from HPC at a certain hourly and cubic meter rate. Rental deposits for the equipment and overtime were dispensed with. HPC would also provide technical expertise and financial assistance to Kopaneng, refuel the equipment and recover its costs from Kopaneng. HPC intimates that, in light that Kopaneng was unable to obtain finance for its operational costs, HPC largely funded the project costs, diesel and salaries.
- [5] HPC invoiced Kopaneng in terms of the lease which in turn invoiced GIC for work done in respect of the Opwag project. HPC states that Ms Selborne, in order to be up to date with Kopaneng's finances, had access to a certain Xero Computer program on which management reports were generated. HPC maintains that it had complied with its contractual obligations in terms of the lease.
- [6] According to HPC Kopaneng is indebted to it in an amount of R6 386 902.08. It further says that Kopaneng does not possess assets of any significant value save for some small amount in its bank account. HPC went on to state that, based on the management reports, Kopaneng's liabilities far exceeds its assets.
- [7] The amount allegedly due to Kopaneng for payment by GIC, in respect of the Opwag Project, is R2 554 161.74 excluding VAT and consist of 10% retention fee for the project. 5% of the retention fee would be payable by GIC to Kopaneng upon receipt of the final completion certificate and the remaining 5% would be payable in July 2024, a year after the final completion certificate had been issued. HPC fears that should GIC pay any of the amounts it owes Kopaneng, the latter would not be able to discharge its payment obligation to HPC which holds no security for any monies due to it.

- [8] HPC's attorneys dispatched a letter of demand dated 05 October 2023 to Kopaneng for the payment of R6 386 902.08. In addition, Kopaneng was placed on terms that unless an agreement was reached on the payment of HPC's outstanding debt, HPC would apply to this Court for the liquidation of Kopaneng.
- [9] HPC states that Ms Selborne had on 16 October 2023 removed Mr Hansie Hanekom as a director of Kopaneng which left her as the only remaining director. It further says that Ms Selborne took steps to take control of Kopaneng's bank account with the intention not to pay the amounts due to HPC. HPC is of the view that Ms Selborne may dissipate any monies GIC paid to Kopaneng. Should HPC not obtain the relief it seeks, it was contended, it would be impossible for it to recover any monies due to it from Kopaneng or Ms Selborne.

The case for Ms Selborne and Kopaneng

- [10] Ms Selborne attested to an answering affidavit on behalf of Kopaneng and herself. HPC initially took issue that Ms Selborne could not represent Kopaneng. As support for this contention HPC relied on *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue*¹ where it was held that an artificial person, such as an incorporated company, cannot, as a general rule, be represented in a High Court except by an advocate or by an attorney with the right of appearance. It was contended for HPC that Kopaneng was not properly before court. However, on the date of the hearing of the application Mr RL Kruger, a practising advocate, appeared for Kopaneng and Ms Selborne.
- [11] Ms Selborne submitted that the application was an abuse of court process and not urgent. She denied the allegations set out in the founding papers. In particular, she disputed that Kopaneng owed the specified amount to HPC and said that HPC inflated and duplicated its invoices. According to Ms Selborne, HPC owes Kopaneng R7.2 Million, for which it would have a counterclaim. She also disputed that Kopaneng was trading in insolvent circumstances. In her view, HPC attempted to evade a forensic investigation and invoice review or verification process already embarked upon by Kopaneng and herself by launching the present application which was intended to delay and frustrate the said investigation. She held the view

¹ 1956 (1) SA 364 (A)

that Kopaneng was used as a front and that HPC dealt with the Opwag Project in a fraudulent manner.

- [12] Ms Selborne further intimated that any funds held by GIC would be safer if deposited in Kopaneng's accounts than placed in HPC's hands. In any event, she intimated, the application may be rendered academic due to the impending forensic investigation which, she says, the parties ought to have agreed on a time-line for its completion. She contended that it was not in the interest of justice to grant the application as it was fatally flawed and fell to be dismissed with costs.

HPC's brief reply

- [13] HPC repeatedly stated in its replying affidavit that it was also "desirous to fairly and amicably resolve the matter" and to cooperate with the investigation suggested by Ms Selborne as this would avoid the incurrence of further litigation costs. However, HPC states that it is unaware of any forensic investigation which Kopaneng and Ms Selborne commissioned. It says that it had no choice but to file the application to obviate any dissipation of the funds that GIC would pay to Kopaneng in due course.

Discussion

- [14] The dispute with regard to the amounts the parties owed to each other may well be considered at the hearing in due course. It is not in dispute that GIC is holding certain amounts due for payments to Kopaneng. What the proposed relief does is to temporarily preserve or safeguard the said monies, through their payment into HPC's attorneys trust account, pending the agreement between the parties regarding the allocation of those funds or the outcome of the action concerning the funds.
- [15] Save to state that she has commissioned a forensic investigation into the affairs of Kopaneng and its accounts with HPC, Ms Selborne failed to show what prejudice she stood to suffer if the relief was to be granted. Regardless of this application, there was nothing preventing the parties from pursuing the investigation and verifying the amounts they allegedly owe each other. Ms Selborne also did not demonstrate that Kopaneng had sufficient assets (movable or immovable) to satisfy the present HPC's claim were it to be found to be

legitimate at the hearing in due course. She also did not controvert evidence that HPC was its main creditor and held no security for its claim.

[16] In my view, the application was sufficiently urgent and warranted being heard on a truncated basis because nothing barred GIC from paying out Kopaneng in respect of the project. HPC had a clear right to have the monies protected pending the agreement or the outcome of the action; it also had no alternative remedy but to approach this court and would suffer irreparable harm if the interdict, which stood to benefit all parties, was not granted. The balance of convenience favoured HPC with very little inconvenience to Kopaneng and Ms Selborne. Accordingly, I am of the view, that the opposition was not well-founded.

[17] When this matter was called in Court on 03 November 2023 Ms Selborne appeared in person and sought a postponement to enable her to secure the services of a legal representative. There can be no question that the application for the postponement interfered with her opponent's procedural right to proceed with the application. However, she was granted that indulgence whereas the wasted costs occasioned thereby were reserved for later argument and determination. Any prejudice resulting from a postponement is ordinarily cured by an appropriate costs order. The usual rule is that the party responsible for the postponement must pay the wasted costs. It follows that Kopaneng and Ms Selborne ought to pay the wasted costs occasioned by the postponement.

[18] On the foregoing exposition, HPC would have succeeded in obtaining the relief sought. No persuasive argument was made to depart from the general principle that costs ordinarily follow the event. In the result, Kopaneng and Ms Selborne would have to bear the costs of the application jointly and severally. An order is therefore made:

Order:

1. The first and second respondents, Kopaneng Construction & Civils (Pty) Ltd and Ms Ezra Bridgitta Mours Selborne, are to pay costs of the application jointly and severally, the one paying the other to be absolved.

2. The first and second respondents are to pay the wasted costs occasioned by the postponement of 03 November 2023 jointly and severally, the one paying the other to be absolved.



MV PHATSHOANE AJP

Appearances:

For the applicant:

Adv AG Van Tonder

Instructed by:

Duncan & Rothman Inc, Kimberley.

For the respondents:

Adv RL Kruger

Instructed by:

The second respondent (*in person*)