IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

EASTERN CAPE – MTHATHA **Case No.: 1896/2013**

Date Heard: 8 August 2013

Date Delivered: 29 August 2013

In the matter between :

SESFIKILE INVESTMENT PIONEERS (PTY) LTD. **First Applicant**

MPUMELELO MABANGA **Second Applicant**

MFUNDO NTIRARA **Third Applicant**

and

KING SABATA DALINDYEBO MUNICIPALITY **First Respondent**

LANDMARK MTHATHA (PTY) LTD. **Second Respondent**

AFRICAN BULK EARTHWORKS (PTY) LTD. **Third Respondent**

LANDMARK REAL ESTATE SERVICES (PTY) LTD. **Fourth Respondent**

LEONMED INVESTMENTS (PTY) LTD. **Fifth Respondent**

JUDGMENT

BROOKS A J

INTRODUCTION

[1] The applicants approached the court as a matter of urgency, armed with a directive issued by one of my brother judges on 26th July 2013 pursuant to Practice Rule 12 (a) (i) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province (The Joint Rules of Practice). The directive required that the matter be issued and served upon the respondents in terms of the Uniform Rules of Court on or before 1st August 2013 and that the matter be set down for hearing on 8th August 2013. Regrettably, for reasons which will become apparent, it is necessary to set out something of the subsequent history of this matter at this point.

[2] The existence of the matter first came to my attention on the morning of 7th August 2013, when the answering affidavit of the second and fourth respondents was handed to my secretary. The matter did not appear on the roll which had been prepared by the Registrar for 8th August 2013. The reason soon became obvious. No Court file could be found in the matter. At my request a so-called dummy file was prepared containing a copy of the notice of motion and founding affidavit. In this regard, the attorney of record for the second and the fourth respondents was most helpful. That afternoon, at my request, representatives from the applicants' attorney of record presented themselves in my chambers, together with the attorney for the second and

fourth respondents. When I expressed my reservation about the ability of the matter to proceed on the following morning, the attorney for the second and fourth respondents indicated that counsel briefed on behalf of those parties was already on his way from Johannesburg and that a legal representative for the third respondent was on his way from Port Elizabeth.

[3] No explanation from the applicants' attorney of record was forthcoming about why the original notice of motion and founding affidavits were missing, why steps had not been taken to ensure that the matter was properly enrolled by the Registrar for 8th August 2013 in accordance with the directive issued, utilising a dummy file if necessary, with the contents indexed and paginated in compliance with the requirements of the Joint Rule of Practice to enable the matter to be prepared. I was informed that the applicants' replying affidavit had been emailed to the relevant attorneys and would be made available to me in due course. I was further informed that heads of argument from all participants would be available on the day. I expressed the view that the applicants' attorneys had fallen far short of the standard required in the fulfilment of the duties of an attorney of record to ensure that a matter is properly enrolled and presented for hearing. It was only considerations of the extreme inconvenience of legal representatives who were travelling from afar and the preservation of the dignity and good reputation of this court, that prevented me from indicating at that stage that the matter would not be heard the following day.

[4] The same considerations, together with an awareness of the possibility that the matter may indeed be urgent and require swift resolution, prompted me to give the undertaking to read the extensive papers overnight and to meet with the full team of legal representatives in the morning. I requested that the applicants' attorneys spend the same time indexing and paginating another dummy file to enable informed argument if this could be accommodated at the end of the roll on the next day. During the course of the afternoon, the answering affidavit of the third respondent made its way into the dummy file which had been left with me.

[5] No indexed or paginated papers were available to me on the morning of 8th August 2013. Nor was there any explanation why this had not been done. The matter was called at the end of the morning. *Mr Tshiki*, who appeared on behalf of the applicants undertook to place an indexed and paginated set of the papers in my chambers during the lunch adjournment. This was done. Argument was heard during the afternoon. At no stage was any explanation offered for the failure of the applicants' attorneys of record, who had first sought to bring the application as a matter of urgency, to perform their function timeously, either to ensure that the matter was enrolled by the Registrar initially and in a proper state or to ensure, at the very least, that it was in a proper state on the morning of 8th August 2013.

NATURE OF THE RELIEF

[6] The applicants sought a preliminary order in terms of rule 6 (12) of the Uniform Rules of Court. The further relief, expressed in convoluted and extensive terms, was for

a rule nisi returnable on 5 September 2013 embodying an interdict, with a specific directive that substantial portions of the order operate as an interim interdict with immediate effect pending the final determination of the application. An order directing any respondent who elected to oppose the application to pay the costs thereof was also sought, but did not form part of the rule nisi contended for.

[7] The application was opposed by the second, third and fourth respondents. At the hearing of the matter, *Mr Sakhela*, who appeared on behalf of the first respondent, handed in a notice from that party indicating its willingness to abide by any decision reached by the court.

THE ORDER OF 8TH AUGUST 2013

[8] After hearing argument, I made the following order :

1. The application is dismissed.

2. The issue of costs is reserved.

3. Reasons for the order will be given in the judgment on costs.

What follows is my judgment on the issue of costs from which the reasons for the dismissal of the application will be apparent.

URGENCY

[9] In considering the arguments placed before me in support of the allegations made in the full set of affidavits filed of record, I was of the opinion that a consideration of the applicants' entitlement to an order in terms of rule 6 (12) of the Uniform Rules of Court was intertwined with a consideration of the applicants' entitlement to an interdict. *Mr Coetzee*, who appeared on behalf of the second and fourth respondents, contended that no purpose would be served by the issue of a rule nisi given that the arguments had now all been placed before the court, and urged me to treat the matter as an application for final relief. *Mr Tshiki*, who appeared on behalf of the applicant, at first expressed the view that there was merit in this submission, but later reverted to his earlier stance contending for the issue of a rule nisi. The motivation for this was the submission that it would be easier for the applicants to obtain a rule nisi.

PROVISIONAL OR FINAL RELIEF

[10] The requirements for the granting of a final interdict are trite. A clear right must be shown, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy. (**Setlogelo v Setlogelo** 1914 AD 221). The same applies to the requirements for the issue of an interim interdict. Here, a right which, though *prima facie* established, is open to some doubt is sufficient. A well-grounded apprehension of irreparable injury is a prerequisite, as is the absence of ordinary remedy. In exercising its discretion on whether to issue the interim interdict, the court weighs, *inter alia*, the prejudice to the applicant if the interdict is not granted, against the prejudice to the respondent if it is. This is referred to as the balance of convenience. (**Eriksen Motors (Welkom) Ltd. v Protea Motors, Warrenton & Another** 1973 (3) SA

685 (A) at 691 C to G). For reasons which will become apparent, on a consideration of the affidavits as a whole it was not necessary to decide on the nature of the interdict which would be apposite in the circumstances.

***LOCUS STANDI* OF THE FIRST APPLICANT**

[11] In the founding affidavit, the first applicant was alleged to be a private company duly incorporated in terms of the company laws of the Republic of South Africa, with its registered office at 106 Chief Nkwenkwezi Drive, Southridge Park, Mthatha. The founding affidavit was deposed to by one Ncikazi Sarpong, who alleged that the first applicant had resolved in a prescribed manner to institute the proceedings and to authorise her to act on its behalf. No supporting documentation was annexed to the affidavit in support of these allegations. Such documentation should have been available to the deponent, who alleged further that she is a director and shareholder of the first applicant. The answering affidavit deposed to on behalf of the second and the fourth respondents alleged that the first applicant did not exist. In support of this allegation, a printout of the result of an online search commonly referred to as a CIPC search was annexed to the answering affidavit. It demonstrates that the first applicant is in a state of final deregistration. This allegation is met somewhat lamely in the replying affidavit by a bare denial, bolstered by an alternative submission to the effect that the

first applicant does exist, but only as a firm in terms of rule 14 of the Uniform Rules of Court, enjoying a right to sue or to be sued, up until the time of re-registration. Plainly, the contention doesn't withstand scrutiny. I accept the veracity of the allegations made on this point in the second and the fourth respondents' answering affidavit. The effect of deregistration upon the first applicant is unequivocal. It simply does not exist. (**Miller & Others v NAFCOC Investment Holding Co. Ltd. & Others** 2010 (6) SA 390 (SCA) at 395 D to E).

CLEAR OR *PRIMA FACIE* RIGHT

[12] It follows that, contrary to the submissions made by *Mr Tshiki* from the bar on behalf of the first applicant to the effect that a clear right had been established, that party does not enjoy either a clear right or a *prima facie* right.

[13] The second and the third applicants approach the court as former shareholders in the second respondent. The first applicant makes a similar claim. It is common cause that the second respondent is a company with limited liability duly registered in accordance with the company laws of the Republic of South Africa with its registered office in Johannesburg. It is also common cause that the shareholding enjoyed previously by the applicants ceased on 13th July 2009 when the shares held by them in the second respondent were sold by public auction in the hands of the sheriff and in execution of a judgment taken against the three applicants by the fifth respondent. Applications for the rescission of the judgment underlying the sales in execution have already been pursued unsuccessfully. The circumstances which gave rise to the claim

in the hands of the fifth respondent against the three applicants are, for present purposes, irrelevant.

[14] In short, the relief contended for, whether interim or final, amounts to an attempt to obtain a veto in favour of the applicants over the finances of the second respondent. The motivation is the imminence of the payment by the first respondent to the second respondent of an amount in excess of R252 000 000.00 in satisfaction of a judgment debt. The attempts to create the impression that the three applicants enjoy a right to participate in the benefits which will accrue to the second respondent from the payment are disingenuous. In order to attempt to establish them, it is clear that in this application at least, the applicants have been dishonest about the circumstances in which the judgment came to be taken against them in the hands of the fifth respondent, the date upon which they became aware of such judgment and their previous unsuccessful attempts to seek the rescission of that judgment. The reason that these attempts have been made is to generate a foothold for the applicants on which they can attempt to gain control over the damages to be paid shortly by the first respondent to the second respondent. Even if the applicants were to have been able to succeed in establishing before this court that they have an entitlement to be restored as shareholders of the second respondent at some stage, they still fail in their demonstration of any right to gain control over the imminent pay out by the first respondent. The judgment against the first respondent is in favour of the second respondent. It is an asset of the second respondent, a juristic person, not of any of its shareholders

[15] Moreover, it is evident from the longwinded and vituperous allegations made in the founding affidavit in purported support for the relief claimed, that the applicants erroneously believe that they are entitled to what they refer to as an “anti-dissipation interdict”. This is a remedy which provides that a creditor can obtain an interdict against its debtor which precludes the debtor from dissipating or hiding its assets with the intention of defeating the claims of the creditor. (**Knox D’Arcy Ltd. v Jamieson** 1996 (4) SA 348 (A) from 372 E). This type of order does not create a right in favour of an applicant; its only function is to prevent an existing right from becoming empty. (**Carmel Trading Co. Ltd. v Commissioner, South African Revenue Service & Others** 2008 (2) SA 433 (SCA)).

[16] I am of the view that all three applicants fail dismally to establish any right, whether clear or *prima facie*, though open to some doubt.

A REASONABLE APPREHENSION OF AN INJURY

[17] The same criticism must be levelled at the applicants in their attempt to demonstrate a reasonable apprehension of an injury. They rely upon vague and generalised allegations that the current directors of the second respondent are likely to fail in their duties to administer the incoming award of damages. Indeed, the mechanism of the relief claimed was designed to frustrate the fifth respondent from obtaining payment by the second respondent of a judgment debt in favour of the fifth respondent in a total amount (capital plus interest) of R16 300 000.00. The relief contemplated was also crafted to prevent the second respondent from making payment

to the third respondent of R11 260 148.85 together with interest. I am of the view that in both instances, this amounts to little more than an illegitimate attempt on the part of the applicants to prevent the directors of the second respondent from exercising their fiduciary duties towards the second respondent. Vague allegations of maladministration and funds dissipating into thin air are unsubstantiated in the founding affidavit. They are met with suitable contempt in the answering affidavit. In my view, once again the applicants fail dismally in their attempt to demonstrate a reasonable fear of imminent injury.

FURTHER REQUIREMENTS FOR AN INTERDICT

[18] In circumstances in which the applicants fail to establish any right before the court, and plainly do not face circumstances amounting to an imminent threat of injury, no purpose is served by a consideration of whether the applicants establish the further requirements to either an interim or final interdict.

APPROPRIATE COSTS ORDER

[19] Inevitably, costs must follow the result in this matter. The question is what sort of costs order, and how such an order should be worded. For this reason, judgment on this aspect was reserved.

[20] The first respondent was entitled to serve and file a notice indicating its preparedness to abide the decision of the court. Whilst it may be argued that it was not necessary for an appearance to be made on behalf of the first respondent in order to

hand up such a notice in open court, it can also be said that had the relief been granted in either form, the effect may well have been that the first respondent was prevented from discharging legitimate obligations to the second respondent arising from the terms of a court order, and in those circumstances was well advised to maintain a presence in court, particularly when called to indicate its attitude towards the litigation at such short notice. The second, third and fourth respondents were entitled to oppose the application and did so successfully.

[21] In meeting the first applicant's allegations about its *locus standi* as set out in the founding affidavit, the director of the second respondent who deposed to its answering affidavit specifically called upon the attorneys of record acting for the first applicant, in terms of the provisions of rule 7 (1) of the Uniform Rules of Court, to satisfy this court that they are authorised to represent an existing client. They were warned that if they failed to do so, the second respondent would ask that those attorneys themselves be ordered to pay the costs payable by their purported client, the first applicant. In the replying affidavit, the following is the response :

> "The founding affidavit of myself together with the instant affidavit is clear proof of the authority of our attorney. For the sake of completeness, a power of attorney signed by myself will be filed as confirmation of existence of the 1st applicant as a firm envisaged in rule 14 of the uniform rules." (sic).

This statement indicates something of a shift from the bold assertions in the founding affidavit by the same deponent, who there alleged that she was the director of the first applicant, a private company which was duly registered and which has its registered office in Mthatha. The founding affidavit alleges that the deponent deposes to the

affidavit in her capacity as both director and shareholder of the first applicant, alleging further that the first applicant has resolved both to institute the application and authorise her to depose to the affidavit and act on behalf of the first applicant. That resolution was never produced. What the sub rule requires is that the court be satisfied that the first applicant's attorney is authorised to act. (**Firstrand Bank Ltd. v Fillis** 2010 (6) SA 565 (ECP) at 569 A). For obvious reasons, the first applicant's attorney of record could never produce a resolution. No power of attorney of the sort referred to in the replying affidavit was produced either. No direct response under oath was forthcoming from a member of the first applicant's attorney of record.

[22] The allegations, at best, are now that the first applicant exists as a firm as defined by rule 14 of the Uniform Rules of Court. Little needs to be said about the refuge sought in rule 14. Its provisions are applicable to unincorporated bodies of persons, not being partnerships (associations), businesses, including a business carried on by a body corporate, carried on by the sole proprietor thereof under a name other than his own (firms) and partnerships. The rule creates a climate of some leniency towards the manner in which these three categories of litigants may be cited. It is a procedural aid to assist in the citation of certain legal entities which do not have any existence separate from their members or owners. (**Ex-TRTC United Workers Front and Others v Premier, Eastern Cape** 2010 (2) SA 114 (ECB) at 125 D to E). The rule does not refer in any terms to companies or close corporations which are duly incorporated in terms of the company laws of the Republic of South Africa. It cannot be used to avoid the consequences of the deregistration of the first applicant.

[23] A court making an order as to costs has a wide discretion, to be exercised judicially on a consideration of all the facts and, in essence, as a matter of fairness to both sides. (**Blou v Lampert & Chipkin**, **N N.O., & Others** 973 (1) SA 1 (AD) at 15 E). When awarding costs against an attorney *de bonis propriis***,** this should be done when "justice requires that a special order as to the costs be made". (**Machumela v Santam Insurance Co. Ltd.** 1977 (1) SA 660 (A)). Such an order has been made against an attorney who had the propensity of embarking on legal proceedings without prospect of success, mostly relying on technical points in the litigation. (**Webb & Others v Botha** 1980 (3) SA 666 (N) at 672 C to 673 H).

[24] I am of the view that where it is clear that the application was brought at a time when the first applicant did not exist, had no *locus standi*, and the revelation of this fact in the answering affidavit is met with no more than a dogged persistence in the litigation on a platform which is opportunistically seized from the Uniform Rules of Court and is without merit, it can only be assumed that the allegations made in the founding affidavit were intended deliberately to mislead the court, and the respondents. There can be no right of recovery pursuant to an order for costs issued against the first applicant. The injustice of a successful litigant being faced with this reality is plain. The first applicant's attorneys of record had no authority to represent the first applicant in these proceedings. *De jure*, the first applicant was not before the court, and did not litigate, and cannot be ordered to pay costs. The right persons to be mulcted in costs for the abortive application must be the persons who purported to bring it on behalf of the first applicant, without authority to do so, together with the unsuccessful second and third applicants. (**Blou v Lampert & Chipkin N N.O. & Others** (*supra*) at 14 B to F). The attorneys who

purported to act on behalf of the first applicant were warned that such an order would be sought, and persisted with the application regardless. As demonstrated at the commencement of this judgment, this was also done in a most cavalier and inefficient manner.

[25] I pertinently raised with *Mr Tshiki* during his argument before me the prospect of an order *de bonis propriis* being made against his firm as contended for by *Mr Coetzee* on behalf of the second and fourth respondents and on the basis that was set out in their answering affidavit. His response was simply that in the event that I concluded that any costs to be awarded against the first applicant appeared to be irrecoverable, I should order them to be paid by the second and third applicants. I am unable to establish any basis upon which this would be apposite in the circumstances of this matter. In my view, it is plain that justice requires that a special order as to those costs be made.

[26] The wide discretion of the court when it comes to an order for costs includes the possibility of making a punitive costs order on the attorney and client scale, where such an order is justified on a consideration of all relevant factors. (**Rautenbach v Symington** 1995 (4) SA 583 (O) at 588 A to B). The fifth respondent seeks such an order upon the dismissal of the application in the final section of its answering affidavit. Such an order would be apposite were I to be of the view that the manner in which the applicants brought and conducted this application warranted a demonstration of the censure of this court. In the exercise of my discretion, I am of the view that such an

order would be apposite. The founding affidavits are full of allegations designed to mislead the court and to create a perception of legitimacy in the claims of the applicants where none existed. The extensive answering affidavits and annexures were replete with full and necessary allegations and supporting documentation upon which the court relied heavily in being able to identify the sham that represents the true identity of the applicants' case. The extensive background to this matter indicates that the applicants are no strangers to the court and it can never be said that they were simply mistaken about the nature and extent of their rights in this matter. They persisted with the application, clearly relying upon deliberate legal advice, alleging an untenable basis for urgency, flouting the rules of court as they went, notwithstanding the legitimate and thought provoking opposition to their claims which eventually carried the day. In doing so, they plainly acted in concert, as seems to have been the case throughout the factual history disclosed in the matter. In my view, such an imposition upon the court and upon the respondents warrants the censure of this court.

[27] In the circumstances, I make the following order for costs :

1. *Tshiki & Sons Incorporated*, which purported to act on behalf of the first applicant, shall be liable *de bonis propriis* jointly and severally, together with the second applicant and the third applicant, the one paying the others to be absolved, for payment of the costs of this application on the scale as between attorney and client.

2. For the purposes of liability under paragraph 1 of this order, it is specifically directed that the costs of this application shall include the costs attendant upon the appearance of counsel and attorneys acting on behalf of the first, second, third and fourth respondents, respectively, in this court on 8th August 2013.

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R W N BROOKS
JUDGE OF THE HIGH COURT (Acting)

Appearances:

For the Applicants:	*Mr Tshiki of Tshiki & Sons Incorporated., Mthatha*
For First Respondent:	*Mr Sakhela of Dayimani Sakhela Incorporated, Mthatha*
For Second and Fourth Respondents:	*Mr Coetzee S C instructed by J F Heunis & Associates, Mthatha*
For Third Respondent:	*Mr Friedman of Friedman Scheckter, Port Elizabeth*
For Fifth Respondent:	*No appearance.*