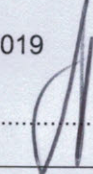




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 7972/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
DATE: 9 May 2019	
SIGNATURE:	

In the matter between:

MURENDI PROPERTIES AND BUILDING SUPPLIES
(PTY) LTD

Applicant

and

THE MINISTER OF TRADE AND INDUSTRY

First Respondent

THE DIRECTOR GENERAL OF THE DEPARTMENT OF
TRADE AND INDUSTRY

Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

- [1] This is an application in terms of the provisions of rule 18 of the Superior Courts Act, 10 of 2013, for the execution of an order granted by Mavundla J on 22 March 2019.
- [2] The order was granted in the urgent court and reasons for the order are still to be furnished by Mavundla J. I was, initially, reluctant to hear the application without the benefit of a judgment delivered by the court *a quo*, but Mr Mpofu SC, counsel for the applicant, referred me to the matter of *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) in which it was clearly stated that an application in terms of section 18 may still proceed, provided that the prospects of success will not be taken into account as a factor in deciding the application.

[3] Although the respondents have not filed an application for leave to appeal to date, the respondents in a letter dated 29 March 2019 made their intention to apply for leave to appeal the order and judgment clear.

[4] In view of the absence of a judgment from Mavundla J and an application for leave to appeal, I will adjudicate the application on its merits without taking the prospects of success on appeal into account.

BACKGROUND FACTS

[5] The relevant portion of the order granted by Mavundla J, reads as follows:

- "2. *Declaring that the applicant has met all the qualifying requirements for the payment of the grant.*
3. *The respondents are directed to pay the applicant the grant in the amount of R 14 210 953."*

[6] The following facts appear from the founding affidavit:

[6.1] the applicant is a Black industrialist firm that conducts business as a retailer of building supplies sourced from different suppliers and manufacturers. The applicant also has a manufacturing business;

[6.2] during 2016 the applicant identified an opportunity to expand its business to include the manufacturing of concrete roof tiles and to this end

planned on building a factory capable of producing 35 000 roof tiles per day;

[6.3] the project would sustain 92 existing employees of the applicant and create 46 additional jobs;

[6.4] to finance the project, the applicant obtained a loan in the region of R 31 million from the Industrial Development Corporation. The loan was granted on condition that the applicant obtained a grant from the Department of Trade and Industry ("the Department") for not less than R 12 million;

[6.5] on 19 October 2017, the applicant was informed by the Department that *"the DTI has pleasure in informing you that the BIS Financing Forum Adjudication Committee meeting of 19th October 2017 has approved for a merchant grant of R 14 210 953"*. The grant was approved subject to certain terms and conditions;

[6.6] from October 2017 until the launch of the urgent application in March 2019 the applicant and the Department were at odds in respect of the fulfilment of the terms and conditions upon which the grant was approved. Mavundla J in paragraph 2 of the order, declared that the conditions were fulfilled, which led to the order in paragraph 3 that the Department must pay the grant to the applicant.

EXCEPTIONAL CIRCUMSTANCES

- [7] The applicant avers that, without receiving payment of the grant immediately, the entire project faces imminent collapse. Mr Mpofu SC, emphasised that it is for this very reason that Mavundla J granted the relief on an urgent basis.
- [8] Consequently, and if the applicant is successful on appeal, it will be too late to save the project embarked upon by the applicant.
- [9] In support of the allegation that the project faces imminent collapse, the applicant relies on annexure "B" attached to its founding papers which contains *"financial information that amply demonstrates the risk of employment loss and the poor financial prospects of the applicant as a consequence of the failure to receive the funding"*. [own emphasis]
- [10] Annexure "B" reads as follows:
- "Murendi PBS – Restructuring"*
- When Murendi applied for the BIS grant it had 92 employees in total. All previously disadvantaged and 99% from the rural communities of Venda where unemployment rate is high. Each individual has between 7-10 dependants and most are single breadwinners in their households. It was indicated on DTI BIS application that Murendi will sustain those 92 jobs and will create additional 46, as part of job creation and rural economic development.*

The company worked towards that since the approval of both the BIS grant and the IDC loans. As part of preparing for the new plant operations, the company continued to employ and train new staff. Skilling the workforce that never had any opportunity or ever dreamt of being employed before. Eradication of poverty requires both men and women in particular youth in the rural communities to be economic empowerment. That is exactly what Murendi has been doing in its contribution to the country's drive to create jobs through manufacturing.

With the current concrete tile plant set-up, the operation will only be able to achieve just a break-even point by November 2019 because the plant is limited to achieve 54% of its full production volumes. For this tile plant to run profitably and sustainably it has to run with full 100% capacity now than later or else we must find a way to cut cost (and at this point the only option left is to cut labour costs).

Currently the company has employed just over 130 employees which makes 38 new jobs of 46 promised jobs to date. The current employment costs are R704 110 monthly as per February 2019 payroll data. (See the 5 page employment costs summary.) The loss of income by all the soon to be affected employees due to the DTI malicious attempt to ignore the court order and play delaying tactics has serious implications and consequences for innocent lives and yet our own government policy claims to address better lives for all." (sic)

- [11] The applicant, further, avers that, without the grant payment, it is facing the risk that it will not be able to service its loan repayment obligations in respect of the R 31 million loan received from the IDC. The applicant emphasises that

it embarked on the project on the strength of the grant approval by the Department. Without the grant, the project would not have been feasible.

- [12] The respondents do not deny the factual allegations set out by the applicant, but deny that the facts constitute exceptional circumstances. The following paragraphs in the answering affidavit are relevant:

"The so-called harm is manufactured and the Applicant has not demonstrated that it will suffer irreparable harm if the order is not put into operation. There is no prejudice to the Applicant, as the DTI grant is only for manufacturing constituting only 15% of the turnover for the business."

and

"There is no financial information marked "B" attached to the founding affidavit and as set out hereinbefore, funds are only paid out once actual costs have been incurred and the allegation that there is a risk of employment loss is without merit due to the fact that in terms of the Black Industrialist Scheme, staff wages and salaries and staff related costs incurred in implementing the project and salary and wages do not qualify as part of the grant money."

DISCUSSION

- [13] In *Inchubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 180 (GJ), Sutherland J held that exceptional circumstances are fact dependent and that in each instance the predicament of the litigants should be examined.
- [14] *In casu* the applicant was, prior to embarking on the project, a retailer of building supplies sourced from different suppliers and manufacturers and it had a manufacturing business. At that stage the applicant had 92 employees. It is not clear from the founding affidavit what the present state of the financial standing of these businesses are. According to the applicant, the project was embarked upon in order to expand its business to include the manufacturing of concrete roof tiles. This entailed the building of a factory capable of producing 35 000 roof tiles per day.
- [15] Due to the department's refusal to pay the amount of R 14 million, the factory is only 54% operational. Since the inception of the project the applicant has only appointed 38 new employees. The applicant alleges that as a result of its "*imminent demise*" it will be unable to pay the salaries of its 130 employees in the foreseeable future.
- [16] The list of employees on which the applicant relies, however, include the 92 employees it had prior to embarking on the project. As indicated these

employees were employed in the applicant's business ventures prior to the project.

[17] I agree with Mr Mhapaga SC, counsel for the respondents, that the applicant has failed dismally to take the court into its confidence in respect of its current financial position. Taking into account that the applicant had existing businesses prior to the project, I am simply not in a position to determine whether the non-payment of the grant amount would lead to the project's *"imminent demise"*.

[18] According to the respondents, the purpose of the grant was not to pay salaries. I am mindful that the payment of salaries is closely connected to the successful running of a business. Due to the lack of any financial information, I am however not in a position to assess the viability of the businesses of the applicant. The plant is currently operating at 54% capacity without the assistance of the grant money.

[19] Should the applicant be successful on appeal, it can still at that stage proceed with the expansion of the plant and the employment of further employees.

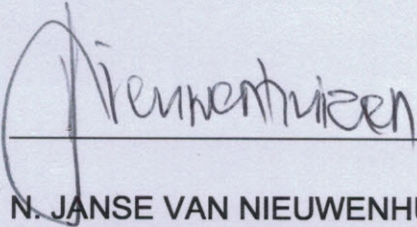
[20] In the premises, I am of the view that the facts *in casu* do not constitute exceptional circumstances for the purposes of section 18(1).

[21] In view of the aforesaid finding it follows that the applicant will not suffer irreparable harm if the order is not put into operation.

ORDER

[22] In the premises the following order is made:

The application is dismissed with costs.

A handwritten signature in dark ink, appearing to read 'Nieuwenhuizen', is written over a horizontal line. The signature is stylized with a large loop at the beginning.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD

29 April 2019

JUDGMENT DELIVERED

9 May 2019

APPEARANCES

Counsel for the Applicant:

Advocate D. Mpofu SC

Instructed by:

Falcon and Hume Inc

(010 5945000)

Ref: No: K Wilson/J Cloete/MAT1551

Counsel for the First Respondent:

Advocate M. Mphaga SC and Advocate H.C.

Janse van Rensburg

Instructed by:

The State Attorney's Office

(012 309 1567)

Ref: No: 0658/2019/Z17