REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

24643/15

CASE NO: ~~75876/2013~~

2/8/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

..... 2·8·2016
SIGNATURE **DATE**

In the matter between:

CANYON COAL (PTY) Applicant

and

CALWELD CONSTRUCTRION CC Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The applicant, in this application, seeks an order as follows:

"1. That the application be dealt with as a matter of urgency within the meaning if Rule 6(12) of the Uniform Rules of Court and that the Rules in relation to forms and service be dispense (sic) with to the extent that this Honourable Court deems meet.

2. The Respondent is ordered to release immediately the Applicant's screening and crushing plant.

3. That the Applicant is entitled to collect from the Respondent's premises situated at 17 Celsius Street Middelburg, the plant referred to in paragraph 2.1 above.

4.1 It is noted that the Applicant has paid into the Trust Account of its Attorney of Record the amount of R750 985.18.

4.2 The said amount of R750 985.18 shall remain in an interest bearing Trust account under control of the Applicant's Attorney of Record, and shall so remain invested and held separately as a potential earmarked fund from which the Respondent may possibly execute, subject to the following conditions:

4.2.1 The Respondent is to institute an action against the Applicant within 30 days from date of this order.

4.2.2 The said amount referred to above shall be held in the Trust Account of the Applicant's attorney until finalization of the action, if the Respondent institutes an action as contemplated in paragraph 4.2.1 above, and subject to the condition that the respondent pursues the action with due diligence.

4.2.3 The obligation of the Applicant's its (sic) attorney to maintain the said amount in the Attorney's Trust account shall lapses (sic) and seize (sic) to exist if any one of the following events occurred: (sic)

4.2.3.1 If the action contemplated above is not instituted within 30 days from the granting of this order.

4.2.3.2 If the Respondent receives payment from HHIL of the outstanding amount which may possibly be due to the Respondent.

4.2.3.3 If the aforementioned amount substituted with any other form (sic) security to which the parties may agree, or which this court may order.

4.2.3.4 If the action is not diligently pursued by the Respondent. It is noted that if the action is not diligently prosecuted the Applicant may approach the Court for suitable direction for the release of the said amount.

5. Cost of the application on an attorney and client scale

6. Further and/or alternative relief."

BACKGROUND

[2] In brief, applicant in this application, seeks an order, that the lien that the respondent claims to have and exercise over the screening and crushing plant which belongs to the applicant, be substituted with an alternative form of security. The applicant concluded a verbal agreement

with a company called HHIL, Trading and Supplies (Pty) LTD (HHIL). HHIL, in terms of the agreement, had to service and repair the screening and crushing plant. ("the plant"). The company provided the applicant with a quotation for the work which is annexure "B" to the founding affidavit, for an amount of R627 256 67.The applicant accepted the quotation and issued a purchase order which is annexure "C" to the founding affidavit. HHIL concluded another contract with the respondent in terms of which the respondent was to do the work which HHIL had agreed to do for the applicant. This appears from Mr Bradley Hammond's founding affidavit (Hammond). The work was to be done at the respondent's premises. The applicant's representatives, in December 2014, inspected the plant. Hammond contends that the presence of the plant at the respondent's place did not worry the applicant which had been under the impression that a relationship existed between HHIL and the respondent. HHIL issued a tax invoice number Canyon/065 dated 30 November 2014 and this is annexure "D" to the founding affidavit. In terms of the invoice the applicant was to pay R627 256 67. The applicant paid R659 435 45 electronically on 15 January 2015. Proof of electronic Payment appears on Annexure "E" to the founding affidavit. It appears that HHIL never paid the respondent for the work that it did. This resulted in correspondence between the parties and their attorneys. Ultimately, the problem culminated in this application which is opposed.

[3] The applicant, after paying the amount to HHIL, arranged to have the plant returned. Before the plant could be removed, the applicant received a letter which was addressed to HHIL by the respondent's attorneys. The letter is marked "F" and annexed to the founding affidavit. It is important to note that the letter is not addressed to the applicant. The letter informs HHIL that it owes the respondent R 750 985 18. Part and parcel of the indebtedness, according to the letter, relates to "an amount" in respect of the costs of repairing a crusher machine belonging to Hakhono Mine. This is the plant referred to above. The letter threatened an action against HHIL unless it paid the

demanded amount "*by close of business on Thursday, 19th March 2015*". Paragraph 5 of the letter states that their client intended selling the plant to defray expenses and to recoup the indebtedness.

[4] The applicant, through its attorneys, addressed a letter to the respondent's attorney, demanding an undertaking that the plant would not be sold. The letter dated 23 March 2015 is annexure "G" to the founding affidavit. The letter further informed the respondent's attorneys that the applicant intended removing the plant from the respondent's premises. The respondent's attorney, on 25 March 2015 wrote to the applicant's attorneys informing them that their client had "no immediate plans or intention to sell the crusher" and that they would keep the applicant's attorneys timeously informed should their "client's plans and/or intentions alter in any manner". The respondents attorneys further advised that the applicant would not be permitted to remove the plant "unless and until the costs incurred by their client in effecting repairs to the plant, and the storage costs incurred to date and further incurred on a daily basis were paid in full". The respondent's attorneys held the view that the respondent had the right of retention over the plant. The letter, regarding the undertaking, did not satisfy the applicant's attorneys.

[5] The applicant, through its attorneys, in a letter to the respondent's attorneys, did not admit the respondent's right of retention. However, it tendered substituted security in paragraph 5 of the letter dated 30 March 2015. The letter is annexure "I" to the founding affidavit. The applicant tendered security in an amount which was more that the amount that the respondent demanded from HHIL, by almost R120 000 00. The applicant regarded the tender as more than adequate. On 31 March 2015, the respondent's attorneys rejected the tender and reiterated that the respondent did have a lien over the plant.

[6] I must mention that the application started as an urgent application. The respondent, in its answering affidavit, stated that it knew that it could not sell the plant. It only sated that it, indeed, would sell the

plant merely to "galvanise" the applicant into action. The applicant contends that urgency having been removed, the matter was removed from the urgent roll and then placed on the opposed motion roll for adjudication.

[7] Advocate F Vaccaro (Mr Vaccaro), for the respondent, submitted that the respondent's right regarding urgency had been reserved and that the issue of urgency had to be argued before the court dealt with the merits of the case. Advocate G. J Scheepers (Mr Scheepers), for the applicant, on the other had, submitted that the issue of urgency would be relevant only insofar as the question of costs was concerned.

[8] Mr Vaccaro also submitted that the applicant had not delivered its replying affidavit within the time prescribed by the Uniform Rules of Court. The argument which Mr Vaccaro mounted in this respect, was such that at the end, the Court found that accepting the replying affidavit would be in the interest of justice. The Court made such ruling.

[9] The other submission that Mr Vaccaro made was that HHIL ought to have been joined as a party in the application. Mr Scheepers disagreed. The court, according to Mr Vaccarro, ought to dismiss the application as HHIL had not been joined.

THE ISSUES

[10] The issues to be determined are:

1. Whether the respondent could still argue the issue of urgency after the matter was placed on the opposed motion roll.

2. Whether the court could still entertain the issue of urgency and strike the matter from the roll instead of dealing with the merits.

3. Whether the applicant should have joined HHIL to the proceedings and also whether the non-joinder should result in the dismissal of the application.

4. Whether an agreement was concluded between the applicant and the respondent.

5. Whether the respondent could successfully resist releasing the plant to the applicant based on the lien which it claims to have over the plant.

COMMON CAUSE FACTS

[11] These are that:

1. The applicant is the owner of the plant;
2. The respondent is in possession of the plant;
3. The respondent claims payment for work done on the plant;
4. The amount said to be due for the work done is an amount of R750 985 18;
5. The Respondent demanded payment of the amount of R750 985 18 from HHIL and not the applicant;
6 HHIL invoiced the applicant;
7. The applicant paid HHIL the amount of R 659 435 45.

[12] According to Mr Scheepers, the issues to be determined are:

1. Whether the respondent has a lien on the plant enforceable against the applicant.

2. Whether the applicant is entitled to an order substituting the alleged security held by the respondent.

[13] The respondent concedes that it concluded an agreement with HHIL. However, it contends that there is an implied agreement between it and the applicant arising from the fact that the applicant knew from the outset that the respondent was "contracted" to HHIL to attend to the repair and service of its

plant and that the applicant's representatives even attended at the respondent's premises to inspect the work performed by the respondent without any objection to the presence of the plant and the fact that the respondent was to do the work.

[14] The respondent did not write to the applicant about the amount that it demanded from HHIL, possibly because the express agreement to repair and service the plant had been between HHIL and the respondent. What emerges from the evidence is that the plant is a very valuable equipment worth millions of rands. The applicant, because of this, should have enquired from HHIL as to how far it had gone with the repair and service of the plant. No doubt, the applicant would have wanted to see the progress itself. The applicant, therefore, must have known that the respondent and not HHIL was doing the work. Indeed, the applicant inspected the plant while it was in the respondent's possession.

[15] The applicant, upon being told that the respondent was not prepared to release the plant unless it was paid for the work that it had done, should have immediately gone to HHIL and complained about this given the fact that it had already paid HHIL for the work. It was incumbent upon the applicant to there and then demand repayment of the money in order to go and pay the respondent so that the plant could be released to it. The court is not told anything about this. The applicant, instead, expects the respondent to release the plant because it has paid HHIL for the work done. Much more than this should have been told by the applicant.

[16] This then takes us to the relevance of joining HHIL to the proceedings. It was, on behalf of the respondent, submitted that the money that the applicant paid HHIL might not have had anything to do with the repairing and the servicing of the plant. This, because the amount that the applicant was invoiced for is different from the amount that the applicant paid HHIL. Without a proper explanation by the applicant the submission seems to have merit.

[17] One would have expected to hear more about the money that the applicant allegedly paid HHIL. Nothing other than that the applicant paid HHIL an amount of R659 435.45 is explained. Nothing is said about the different amounts.

[18] HHIL, clearly did not pay the respondent. The plant would have been released had the respondent received payment. The Court, had HHIL been joined to the proceedings, would have been in a better position to adjudicate the matter.HHIL, in my view, should have been joined to the proceedings.

[19] The applicant inspected the plant and, being satisfied with the work that was done, paid the money to HHIL. Neither the applicant nor HHIL complained about the work, the price for the work and the storage fees.

[20] The respondent, in my view, did the work that it was expected to do. It was also entitled to charge for the work and to receive payment therefor.

[21] It must be borne in mind that the plant was lawfully transported to the respondent for the work to be done. The plant was safely and lawfully in the possession of the respondent. No one complained or objected to the fact that the plant was in the possession of the respondent. There is no evidence to show that the applicant was not aware that the plant was in the respondents possession. All applicant contends is that there was no agreement between it and the respondent. However, impliedly, the applicant was aware of what was happening. It never objected to the arrangement. The applicant never stopped the respondent from proceeding with the work that it was aware the respondent was doing. It was also very clear to the applicant that the respondent would have to be paid. It was also obvious that the applicant would have to pay for the work. Whoever did the work would have to be paid by the applicant unless evidence revealed other terms of the agreement. The respondent has done the work and, in my view, is lawfully retaining the plant until it is paid.

[22] It is equally true that unless the parties agreed otherwise, the plant would not be released unless, the work was paid for. It is not clear whether the applicant, aware of the fact that the respondent was doing the work, enquired whether the respondent would be paid by it or by HHIL. One would have expected the applicant to have made such enquiries. The Court is told nothing about this. Surely, the applicant and HHIL must have discussed this. The respondent could not be expected to do the work for free. It is significant that nothing is said about this.

[23] Mr Vaccaro, for the respondent, submitted that the applicant ought to have paid the respondent before the plant was released even if it meant paying without prejudice or under protest. Having regard to the work which the respondent did and that neither the applicant nor HHIL complained about the work, the price for the work and their storage fees, the submission has merit. Why should the respondent have to wait when it has performed in terms of the agreement. The applicant has to pay to get the plant released to it. It is, in my view, its responsibility to pay the respondent and then look to HHIL for repayment.

[24] The respondent appears to have done a perfect job but has had to wait for a long time before payment for the job is made. The work was done in October 2014 and to date no payment therefor has been received. The respondent is armed with the lien which, if substituted, may result in the respondent having to wait even much longer before payment is received while the plant has been repaired and serviced.

[25] Mr Scheepers submitted that the applicant, for purposes of this application, does not attack the existence if a lien enforceable against the applicant. The respondent, in my view, will severely be prejudiced should the court order that the security held by the applicant be substituted with an alternative form of security which has already been rejected by the respondent or any form of security. The security tendered has been rejected by the respondent on the basis that it has done work with which both the

applicant and HHIL are satisfied. Both have never complained about the work, the price for the work as well as the storage fees.

[26] Had the respondent been paid, the plant would long have been released. All the applicant needs to do is to pay the respondent and then claim repayment from HHIL. The respondent, in my view, does not have to be forced to sue either the applicant, or HHIL or both when the work has clearly been done to the satisfaction of both HHIL and the applicant.

[27] The respondent, should it relinquish the debtor/creditor lien it has over the plant, which entitles it to retain the plant until it is fully paid by the applicant, being the person that needs the plant released to it, will suffer immense irreparable harm and prejudice.

[28] The respondent, as correctly submitted on its behalf by its counsel, is, indeed, an innocent party which has fully performed what it had contracted to do. There appears to be no grounds in the circumstances of this case for the Court to exercise its discretion in favour of substituting the possession which the respondent lawfully has with the conditional form of security tendered by the applicant or any other. The delay that may follow the substitution is too ghastly to contemplate. The application, in my view, should fail.

[29] Regarding the issue of urgency, Mr Scheepers submitted that the matter was urgent. The urgency appeared to be stemming from the fact that the respondent had threatened to sell the plant to defray expenses and to recoup the indebtedness. The letter which was addressed to the applicant's attorneys disclosed that the respondent was not intending to sell the plant and that in the event that it changed its mind, the applicant would be notified timeously. This, in my view, conveyed a clear message. However, the respondent in its answering affidavit further explained what the message conveyed. The answering affidavit restated the message namely, that the plant could not have been legally sold.

[30] I pointed out earlier in this judgment that the matter would have been adjudicated with much ease had HHIL been joined to the application. This was not done. The result has been lack of information which would have been useful to the Court. Only the applicant, which knew the truth of the matter, knows why this vital information was not disclosed to the Court.

[31] All the aspects that I referred to above are a clear indication that the application should fail.

[32] The matter was clearly not urgent. The matter was removed from the urgent roll and placed on the opposed motion roll. Urgency, consequently, and in the process fell away. The facts of the matter clearly reveal that the matter was not urgent. This aspect as far as I see it is only relevant to the issue of costs. The respondent, in my view, given the facts of this case, is, indeed entitled to the costs on a punitive scale.

[33] The following order, in the result, is made:

The application is dismissed with costs on the scale as between attorney and client.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA