REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO:2020/24081

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

23 December 2020

In the matter between:

SOMIKA SARL **Applicant**

and

SAARTHY PROPRIETARY LIMITED **Respondent**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 December 2020.

Summary: Urgent application to compel the amendment of a bill of lading and a pre-forms invoice and packing list. No substantial remedy available to the applicant- matter treated as urgent.

JUDGEMENT

[1] The following are the reasons for the order made on 11 September 2020 by this Court. The order reads as follows:

"1 The Respondent is ordered, directed and compelled to forthwith procure the amendment of bill of lading number MEDUI 823919, annexed to the founding affidavit marked "FA3" to reflect the consignee as Somika SARL, Lubumbashi, DRC and the notified party as Vin Mart Ltd, P.Q. Box 77007, Dar es Salaam, Tanzania; and

2 The Respondent is ordered, directed and compelled to forthwith to deliver the Bill of Lading and additional necessary documents by hand or by way of telex copy to the applicant by close of business on 10 September 2020 together with:

2.1. the respondent's corresponding invoice for the full shipment procured; and

2.2. the detailed packing list on the respondent's letter head.

3 The respondent is ordered and directed to forthwith provide the applicant with its pro-forma invoice and packing list in respect of the shipment of sulphur loaded aboard the MSC Jessenia, and all other required supporting documentation.

4 The Respondent is ordered to pay the costs of this application."

[2] The application was opposed by the respondent both in relation to urgency and the merits. The respondent has now requested the reasons for the order which are set out in this judgment.

The parties

[3] The applicant is Somika Saarl is a company registered and incorporated in the Democratic Republic Congo ("the DRC"), and is based in Lubumbashi. It carries on business as a copper miner and producer of copper cathodes. It also manufactures and supplies of sulphuric acid to several of its copper mining and beneficiation undertakings in the DRC.

[4] The applicant imports and processes sulphuric acid at its plant in the Democratic Republic of Congo (the SAP plant). The SAP plant consumes some 2500 metric tonnes of sulphur per month and produces some 7 500 metric tonnes of sulphuric acid each month. The SAP plant generates electricity which is also sold to the applicant's Lupoto mine for the running of its DMS plant.

[5] The respondent is Saarthy Proprietary Limited, a private company registered in terms of the Companies Act,[1] in South Africa and has its office in Melrose Arch, Johannesburg. It carries on business as a resources trader by sourcing sulphur pellets, for industrial processing.

Background facts

[6] The dispute between the parties in this matter arose from a consignment of semi granular, D shape and dark yellow sulphur pellets (the consignment). The

[1] Act number 71 of 2008.

consignment was placed on some forty shipping containers on board a vessel which was to dock in Dar es Salaam on 14 September 2020.

[7] The placing of the consignment at the dock was according to a written agreement concluded between the parties on 3 July 2020. In terms of that agreement, the applicant was to purchase 8000 metric tonnes of sulphur from the respondent. The terms of the agreement appear in the Purchase Order (PO) and are summarised in the applicant's founding affidavit as follows:

"64.4. . . . the applicant purchased 8000 metric tonnes of sulphur from the respondent;

64.5. the applicant would pay a purchase consideration of USD 98 per metric tonne to the respondent;

64.6. the sulphur would be delivered, CFR, in four consignments to the applicant in Dar es Salaam;

64.7. the applicant would pay the purchase consideration for the sulphur as follows:

64.7.1. full pre-payment, in advance of the first shipment, on presentation of a pro-forma invoice;

64.7.2. full pre-payment in advance of the second shipment against delivery of the Bill of Lading for the first shipment;

64.7.3 full pre-payment in advance of the third shipment upon delivery of the Bill of Lading for the second shipment; and

64.7.4. full pre-payment in advance for the fourth shipment against delivery of the Bill of Lading for the third shipment;

64.8. the shipments, in equal quantities of approximately 2000 metric tonnes, would be delivered to Dar es Salaam in mid-August, mid-September, mid-October and mid-November 2020."

[8] After signing the acceptance of the applicant's purchase order the respondent raised the pro-forma invoice in respect of the first shipment on 6 July 2020 and the following day the applicant made payment of the respondent's pro-forma invoice.

[9] The applicant contended in its founding affidavit that the respondent has failed to provide it (the applicant) with the bill of landing for the consignment, including invoice and detailed packing list on the respondent's letterhead. The ownership of the property is transferred by means of the bill of landing. Based on such a document, the applicant is authorised to collect and transport the consignment.

[10] The applicant further testified in its founding affidavit that failure to procure the Bill of Landing could have severe consequences on its sustainability, such as having to stop production and closure of the plant. The estimated loss in the event of the closure of the plant is USD 2 million. The prospects of recovering the loss once it has materialised are very poor. The respondent has failed to provide the applicant with the bill of lading for the consignment.

The reasons for urgency

[11] The applicant contended that it would not be able to obtain a remedy if it was to bring this application in the ordinary course. The delay, according to the applicant, is likely to result in the closure of the plant. The consequence of the closure may, as alluded to earlier have severe consequences for the applicant.

[12] The applicant avers in the founding affidavit that to obtain delivery through other means would entail a further cost of USD 10 000.00 and a delay of the delivery of the consignment to the plant of about 10 to 15 days. This would be prejudicial to it and would not be able to recover through a damages claim from the respondent.

[13] The applicant contends that it would not be able to recover from the respondent it's loss through a damages claim because the respondent is a small company that has no significant assets in South Africa to can defray any damages claim. The other point made by the applicant is that it could take several years to recover such damages.

The respondent's case

[14] As indicated above the respondent opposed the application both on urgency and merits and in this respect had filed an opposing affidavit. The late filing of its answering affidavit was condoned.

[15] The respondent contended in the answering affidavit that the applicant was not entitled to the relief sought because it delayed in instituting these proceedings. It further complained that the applicant did not:

(a) afford it reasonable time within which to file the answering affidavit,

(b) comply with paragraphs 5.1 and 5.2 of the Practice Manual,

(c) not comply with the rule concerning enrolling the matter on Tuesday for a hearing on a Thursday.

Evaluation and analysis

[16] The approach to adopt when dealing with the issue of urgency was dealt with in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*,[2] as follows:

> "[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.
>
> [7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[17] After considering the submissions made by the parties' legal representatives, this Court was satisfied that the applicant had made out a case for condonation for

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[2] (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paras 6 and 7.

none compliance with the time frames and the rules and accordingly accepted that the matter deserved to be entertained as urgent.

[18] Having regard to the circumstances of this case, it was clear that deviation from the periods provided for in the rules by the applicant was reasonable. The applicant explained the circumstances why the matter required urgent attention. And more importantly, the applicant set out in its founding affidavit why it believed that it would not be able to obtain substantial redress at a hearing in due course. It, in this respect, averred that the respondent does not have enough assets in South Africa to can satisfy a damages claim. In response, the respondent proffered a bare denial of the allegation. It follows, therefore, that the allegation that the respondent conducts a small scale business in South Africa and that its assets would not satisfy a damages claim in due course is sustainable. Thus whilst accepting that the applicant may obtain a remedy against the respondent through a damages claim in due course, it will however, not be substantial.

[19] It was for the above reasons that this Court formed the view that the applicant would not be able to obtain substantial redress if it was to wait for the normal course of prosecuting a damages claim.[3]

The merits of the case.

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[3] See In re: Several matters on the urgent court roll [2012] ZAGPJHC 165; [2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ) (18 September 2012).

[20] The terms of the contract concluded between the parties are not in dispute. The respondent, in particular, does not dispute the contents of paragraphs 64 to 68 of the applicant's founding affidavit. In paragraph 50 of the answering affidavit, the respondent avers that it did not refuse to transfer the bill of landing to the applicant, but that it is unable to do so because the applicant has breached the contract. It contends that as a result of the breach, it was unable to effect the transfer of the bill of landing to the applicant.

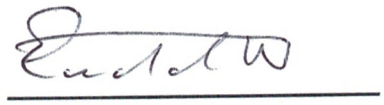
[21] In essence, the respondent's defence is *exceptio non adempleti contructus.* In other words, the contention is that the applicant has to pay for the consignment before the bill of landing can be amended to reflect the name of the applicant.

[22] The case of the applicant is that the respondent is obliged to provide it with the amended bill of landing to reflect it, as the consignee. It contends further that in refusing to provide it with the bill of landing the respondent was in breach of its obligation under the contract.

[23] In my view, the respondent's defence is unsustainable because the defendant has not made out a case that the obligation to deliver the bill of landing is a reciprocal obligation to that of transfer of ownership. It is also not clear what the alleged breach was and how it impacted on the bill of landing papers. There is also no disclosure of repudiation of the contract and why the respondent did not place the applicant in *mora* concerning the alleged breach of the contract.

Conclusion

[24] It was for the above reasons that the order quoted at paragraph 1 of this judgment was made.



E Molahlehi

Judge of the High Court,

Gauteng Local Division,

Johannesburg.

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Date of order: 11 September 2020

Date of reasons: 23 December 2020