REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

24/7/2014.

CASE NO: 49657/2014

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

24 July 2014 EMKubushi

DATE SIGNATURE

In the matter between:

DLM CONSTRUCTION (PTY) LTD **APPLICANT**

and

LIKHANYILE TRADING ENTERPRISE (PTY) LTD **FIRST RESPONDENT**

FIRST NATIONAL BANK LIMITED **SECOND RESPONDENT**

STANDARD BANK LIMITED **THIRD RESPONDENT**

EKHURHULENE METROPOLITAN MUNICIPALITY **FOURTH RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] On 4 July 2014 the applicant obtained an order, *ex parte* in chambers, freezing two bank accounts held by the first respondent with the second and third respondents' banks respectively. The said order interdicted the first respondent from making payment from monies received from the fourth respondent and deposited into either of the two bank accounts. The two bank accounts were as a result frozen pending the outcome of an action to be instituted by the applicant against the first respondent. There were other ancillary relief sought by the applicant which the court postponed to the 15 July 2014.

[2] No actual relief was sought against the second to the fourth respondents. The second and third respondents were cited in the papers insofar as the applicant sought relief pertaining to the bank accounts that the first respondent held with them. The fourth respondent was cited as an interested party insofar as it awarded a tender to the first respondent.

BACKGROUND

[3] The application for the said interdict was pursuant to a sub-contracting agreement entered into between the applicant and the first respondent which the applicant alleged the first respondent has breached. On 7 August 2014 the first respondent was awarded a tender for the upgrading and completion of a ring water network

in the Brakpan CBD area (the main contract). Subsequent to the award, the applicant and the first respondent negotiated and entered into an agreement in terms of which the applicant was appointed as a sub-contractor to the main contract. The terms of the sub-contract entailed, amongst others, the amount of the value works in terms of the main contract and how it was to be shared between the parties. During the commencement of the sub-contract, it was established that there was an error contained in the main contract, specifically relating to the costs of laying pipes. The problem being that the excavation rates were erroneously quoted as R20 *per* metre instead of R300 *per* metre. The applicant negotiated with the fourth respondent and the excavation rates were increased to R300 *per* metre. As a result of this increase, a dispute ensued between the parties to the sub-contract as to how this amount of the increase should be shared. The parties could not come to an agreement after a lengthy negotiation, hence the *ex parte* application.

[4] Having heard the matter and due to the lateness of the hour I postponed the handing down of the judgment 15 July 2014. I as a result granted an order extending the *rule nisi* and postponing the remainder of the relief sought to the 15 July 2014. On the morning of 15 July 2014 before the judgment could be handed down, I was approached by both counsel for the parties with a request to further extend the *rule nisi* and to allow the applicant to file a supplementary affidavit to address certain issues which arose in the first respondent's answering affidavit and the applicant's replying affidavit. The *rule nisi* was thus further extended and the remaining relief sought postponed to the 22 July 2014.

[5] On 15 July 2014 the applicant filed the supplementary affidavit, and on the 18 July 2014 the first respondent filed its answering affidavit to the supplementary affidavit. The applicant's replying affidavit to the answering affidavit to the supplementary affidavit was handed in court on the morning of 22 July 2014 before the hearing of the application. The applicant's counsel applied for the condonation of the filing of the further affidavits on the grounds that they serve to place material facts before the court and I granted the application. I shall deal with the contents of these affidavits later in this judgment.

[6] At the hearing of the anticipated application, the applicant and first respondent were common cause that there was a major dispute of fact as regards the interpretation of the agreement between them, which dispute, correctly so, could not be resolved on the papers as they stood and ought to be referred to trial. The first respondent having anticipated the application submitted however, that the application should in any event be dismissed at that stage on four grounds. The first respondent's submission was that firstly, the applicant did not make out a case for a preservation order; secondly, that the applicant failed to disclose all material facts to the court hearing the *ex parte* application; thirdly, the applicant ought to have foreseen that there would be disputes of fact that could not be resolved on the papers as they stood and not approached the court by way of application procedure; and lastly, the applicant did not make out the requirement for an interim interdict. In the alternative, the first respondent in the answering affidavit to the supplementary affidavit tenders payment into the trust account of the applicant's attorneys of the amount of R 597 490. 12 which it says it is its calculation of how much is due to the applicant.

FAILURE TO DISCLOSE MATERIAL FACTS

[7] My view was to first look into whether the *ex parte* application itself was in order, that is, whether the applicant disclosed all material facts.

[8] It is trite that an applicant opting to approach the court by way of an *ex parte* application should be scrupulous when disclosing facts material to the issues. It is also trite that the facts which should be disclosed are those that are within the knowledge of the applicant at the time of the launch of the application. Thus the question at that stage of the proceedings was whether the applicant disclosed all the material facts to the court hearing the application and if so, the application would be in order. However, if not, the question to follow would be whether the facts alleged not to be so disclosed were in the knowledge of the applicant at the time the application was moved. If the facts were not in the knowledge of the applicant then the application would be in order, and if they were, I would have to find that the application was not in order and to dismiss it.

[9] The submission by the first respondent was that the applicant did not disclose the material facts and that, such facts were within its knowledge when the application was launched. The applicant in its founding affidavit claimed that it was entitled to the amounts it claimed since the agreement between the parties was allegedly amended by agreement. The amended agreement allegedly entitled the applicant to receive an increased excavation rates agreed by the fourth respondent from certificate 9 and thereafter. For this submission the applicant relied on the

addendum in annexure "RA6" to the founding affidavit as part of the sub-contract between the parties and annexure "RA 19" to the founding affidavit, which it said was authored by Tendai Dakwa (Dakwa), the site agent of the first respondent, as confirmation that there was agreement between the parties which amended the sub-contract and as such entitling the applicant to a 50/50 split of the increased excavation rates. The first respondent in its answering affidavit denied this and contended that the applicant failed to disclose to the court that granted the preservation order that annexure "RA 19" was a proposal for the escalation of its excavation rates which it (the first respondent) refused to accept. According to the first respondent's counsel such refusal would have been within the knowledge of the applicant because after the proposal in annexure "RA 19" was rejected the applicant came up with a new and third proposal which was also not acceptable to it. The proposal is contained in annexure "BB1" to the answering affidavit. All this, according to the first respondent was not disclosed to the court. This is the information which the applicant's supplementary affidavit sought to correct.

[10] The applicant's submission in the supplementary affidavit is that an incorrect document was attached as annexure "RA19" to the founding affidavit. The deponent to the supplementary affidavit, on behalf of the applicant, contends that the error was brought to his attention by his attorney, Mrs L Hutten, during the afternoon of 14 July 2014. He explains this oversight to have been caused by the extreme haste in which the applicant had to prepare its replying affidavit. Another annexure, annexure "RASS1" was attached to the supplementary affidavit as a replacement for the incorrect annexure "RA19". The applicant still insists that the amounts reflected on annexure "RASS1" to the supplementary affidavit were presented to it by Dakwa, while acting as agent for the first respondent, and in

confirmation of the amendment of the agreement between the parties. The said amounts, according to the applicant, are payable by the first respondent to the applicant.

[11] The first respondent contends in the answering affidavit to the supplementary affidavit that the applicant's supplementary affidavit is as a result of advice received from the first respondent's attorney after Dakwa confirmed that annexure "RA19" attached to the founding affidavit was not the document he sent to the applicant as annexure to his letter dated 4 June 2014. He produced the correct document which is the one attached as annexure "RASS1" to the supplementary affidavit. The first respondent's submission is that the applicant's explanation of the error is a disingenuous excuse and an attempt to shy away from the blatant untruth committed in the applicant's replying affidavit. The first respondent persists with its denial that the applicant is entitled to the relief it seeks on the ground that it (the first respondent) never agreed to an amendment of the agreement between the parties. It further contends that no harm is done by the filing of annexure "RASS1" to the supplementary affidavit since the figures on that annexure still outline what was outlined in "RA19". As such, according to the first respondent, neither the email of 4 June 2014, nor the correct table as *per* annexure "RASS1" constitute an agreement to an amendment of the sub-contract, or an offer which is open for the applicant to accept; the correct table simply furnishes a calculation of the proposed amount which the first respondent intends to claim in respect of certificate 9. The further proposal "BB1" to the answering affidavit serves as a further confirmation that the applicant is grasping at straws, so the argument goes.

[12] In my opinion the applicant's supplementary affidavit does not take its case any further. The first respondent's complaint that the applicant did not disclose all material facts to the court that heard the *ex parte* application still stands, particularly its failure to disclose that the first respondent rejected the proposal stated in annexure "RASS1" to the supplementary affidavit. This to me is a material fact which the applicant ought to have disclosed to the court. I am also prepared to accept the first respondent's claim that this fact was within the applicant's knowledge at the time the application was launched. From the reading of the applicant's replying affidavit it is apparent that the applicant was aware of annexure "BB1" to the answering affidavit and that it was within its knowledge well before launching the *ex parte* application. The applicant's explanation, in the replying affidavit, as to when and for what purpose the proposal was made does not assist its case. As was submitted by the first respondent the annexure should and ought to have been disclosed in the founding affidavit.

[13] Even if I am wrong on this finding, the applicant's *rule nisi* and other ancillary relief it seeks can still not be sustained on the other grounds raised by the first respondent.

PRESERVATION ORDER

[14] A court order, which interdicts a respondent from disposing of or dissipating his or her assets is said to be a preservation and/or anti-dissipation order. Such an order is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain that order the applicant has to satisfy the court that the

respondent is wasting or secreting assets with the intention of defeating the claims of creditors. See *Carmel Trading Co Ltd v Commissioner, SARS and Others*[1].

[15] The question to be asked when considering whether to grant the remedy is whether or not the respondent is in good faith disposing of his assets. The strength or weakness of the applicant's proof in this regard is a factor to be taken into account, along with the surrounding circumstances. See *Knox D'Arcy Ltd and Others v Jamieson and Others*[2].

[16] The submission by the first respondent's counsel is that the applicant has not made out a case for a preservation order. According to him, the applicant has sought an order to freeze two bank accounts of the respondent effectively shutting down the operation of the business. He submits further that for a preservation order to be established there must be an objective fear that the stock or money will be dissipated. The claim must be objective. Counsel's contention is that there are no allegations in the applicant's founding affidavit that established that the first respondent was dissipating its property so that when execution comes the applicant's judgment will be hollow. The allegation by the applicant of a threat of termination of a sub-contract and refusal to pay salaries does not, according to counsel, amount to dissipation of property. This is not the test as set out in the *Knox D'Arcy* judgment above. Counsel's further contention is that the replying affidavit does not take the case of dissipation any further because the e-mail sent by the first respondent, as alleged by the applicant, that state that the R1m investment funds expected from the applicant was meant to cover historical debt, does not justify the

1 2008 (2) SA 433 (SCA) para [3] at 435C – D

2 1996 (4) SA 348 (A)

allegations that the first respondent is hiding money. He referred me in this regard to the judgment in the *Knox D'Arcy* judgment above at 372F – H wherein it was stated that an applicant needs to show a particular state of mind on the part of the respondent, that is, that the respondent is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of the creditor.

[17] In this instance, the applicant's case was based on a written indication that the first respondent did not intend to honour the terms of the agreement, specifically that it (the first respondent) did not deem itself bound to the terms and rates applicable to the main contract and which flowed over to the sub-contract; and that the first respondent had already made a threat to terminate the sub-contract without any basis.

[18] The first respondent on the other hand contended that it had a problem with the increased aggression with which the applicant wished to pursue a half share of the amounts received from the fourth respondent. And furthermore, it had a significant difficulty with the applicant's attempts to undermine the first respondent by communicating directly with the fourth respondent's employees, and the apparent attempt to tarnish the first respondent's reputation with the fourth respondent. The first respondent as such viewed this behaviour of the applicant as a breach of its fiduciary duty and accordingly felt that there was no option other than to threaten to terminate the sub-contract between the parties. These facts are not seriously contested by the applicant save to show that the first respondent was aware that the applicant did communicate directly with the fourth respondent with the consent and knowledge of the first respondent. The documents I was

referred to, which entitled the applicant to communicate with the fourth respondent show that the applicant's contract manager, one Jaap van den Berg, was to liaise with both the engineer as well as the fourth respondent

[19] To my mind, the first respondent's fear was justified. The fact that it was the applicant who discovered that an incorrect rate was quoted for the excavation works did not entitle the applicant to communicate with the fourth respondent in respect of the increased rates or any remuneration due to the first respondent. The agreement does not entitle them to do so. Be as it may be, the crux of the matter is whether the conduct of the first respondent in threatening to terminate the sub-contract should be viewed as a deliberate disposal of or concealment of its property or the funds received or to be received from the fourth respondent with the intention to ensure that the first respondent will be devoid of the funds by the time the applicant obtains judgment against it. I do not think so. A preservation order should be sought where a person arranges his or her affairs such that the sheriff will find nothing to attach – there was no such allegation made by the applicant. See Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*[3].

[20] I am also of the view that the emails which the applicant alleges to have been sent by the first respondent indicating its inability to pay its creditors and the fact that Dakwa's salary had been withheld and even its threat to terminate the sub-contract, do not justify and/or establish facts for a preservation order. The applicant should have in the founding affidavit alleged and proved that the respondent was wasting or secreting assets with the intention of defeating the

3 5th ed Volume 2 at 1488 and 1491

creditor's claims. The applicant's submission in its replying affidavit that the first respondent gave clear intention that it did not deem itself bound to the agreement does not take its case any further. This to me is an indication that the applicant had other remedies available to it and surely a preservation order was none of those remedies.

[21] I am also in agreement with the further submission by the first respondent's counsel that the circumstances of a preservation order is where litigation has ensued and success in inevitable, and which is not the case in this instance.

[22] The further submission by the first respondent's counsel, that it was wrong of the applicant to seek an unlimited amount to be preserved, is in my view correct. The counsel's contention is that as of now the amount as to the remuneration due to the applicant cannot be readily established because of the dispute between the parties. It is so that a preservation order should be limited to the amount claimed provided it has been established that the amount will be recovered. In this instance the alleged claim is limited to R3, 095, 998. 72, which is the amount the scope of the preservation should have been limited to. There was therefore no justification to freeze the accounts before a debatement or accounting has been done.

[23] Case law seems to indicate that the success rate of the granting of this order is minimal, and this should be kept in mind to prevent optimistic applications aimed at the unnecessary deprivation of property. This remedy is aimed at preserving a respondent's assets and preventing the respondent from dissipating or hiding his or

her assets. It does not appear to me to be the case in this instance, and on that basis the *rule nisi* should be discharged.

DISPUTES OF FACT

[24] It is trite that factual disagreements in motion proceedings are to be dealt with in accordance with the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] which stipulates that, subject to certain exceptions, a court should rely only on evidence given by the deponents for the respondent. However, it is also trite that a court may dismiss the application if the applicant should have realised when launching the application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* [5] and *Tamarillo (Pty) Ltd v NB Aitken (Pty) Ltd* [6].

[25] It is common cause that the papers before me are riddled with disputes of facts and as a result the parties have agreed that the matter should be referred to trial for the resolution of the disputes. The applicant's interim relief was also sought pending the institution of a claim against the first respondent. I therefore do not intend to deal with the merits of the application safe to say that the applicant should have foreseen that disputes of fact incapable of resolution on the papers would ensue, and should have not proceeded by way of application.

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4 1984 (3) SA 623 (A) at 634E – 635C

5 1949 (3) SA 1155 (T) at 1162 and 1168

6 1982 (1) SA 398 (A) at 430G – 431A

[26] Because of my findings above, I find it not necessary to deal with the issue of the applicant's failure to establish a basis for interim relief raised by the first respondent's counsel. I do not intend to dismiss the application as I would normally do in circumstances such as these. I have taken note of the exigencies pertaining to this matter and am thus of the opinion that I should, without dismissing the application, discharge the *rule nisi* granted on 4 July 2014 and dismiss the other prayers postponed to the 22 July 2014 but also make an order referring the facts in dispute in respect of the agreement stated in paragraph 2.2 of the notice of motion, to trial.

COSTS

[27] The first respondent being the successful party in this instance is entitled to costs of the application on an opposed basis. I am however of the view that it is not entitled to costs on a punitive scale as prayed for. The circumstances of this case are not such that the applicant was vexatious in launching this application.

ORDER

[28] In the premises I make the following order:

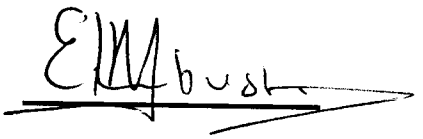
28.1 The *rule nisi* granted on 4 July 2014 in respect of prayer 6, 7, 8 and 9 of the notice of motion is discharged;

28.2 The remaining prayers of the notice of motion are dismissed.

28.3 The applicant is ordered to pay the costs of the application on an opposed basis.

28.4 The facts in dispute in respect of the agreement stated in paragraph 2.2 of the notice of motion are referred to trial.

28.5 The parties are granted leave to approach the court on these papers, duly supplemented if so required.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance

HEARD ON THE	**: 11 JULY 2014**
DATE OF JUDGMENT	**: 24 JULY 2014**
APPLICANT'S COUNSEL	**: ADV M HUGO**
APPLICANT'S ATTORNEY	**: HUTTEN & ODENDAAL INC**
FIRST RESPONDENT'S COUNSEL	**: ADV JG BOTHA**
FIRST RESPONDENT'S ATTORNEY	**: SCHULER HEERSCHOP PIENAAR ATTORNEYS**