



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

2022-05-18

DATE

SIGNATURE

Case Number: 76000/2019

In the matter between:

**BROAD-BASED BLACK ECONOMIC**

**EMPOWERMENT COMMISSION**

Applicant

and

**CARGO CARRIERS PROPRIETARY LIMITED**

Respondent

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**JUDGMENT**

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## POTTERILL J

- [1] The applicant is seeking leave to appeal the judgment handed down on 28 January 2022. Leave is sought to the Supreme Court of Appeal alternatively the Full Court.
- [2] The application for leave to appeal is heard on 17 May 2022, three and a half months after judgment was handed down, which is regrettable. This was brought about by myself contracting Covid-19 a week before my long leave started. I requested the Deputy Judge-President to allocate the leave to appeal to another Judge for hearing [in terms of s17(3), but the Deputy Judge-President reverted it back to me. Thereafter senior counsels' availability was a problem, hence the matter only being heard today.
- [3] This court was urged to grant leave to the Supreme Court of Appeal, because similar matters are presenting and the Supreme Court of Appeal needed to pronounce on important principles in these matters..
- [4] The crux of the application was that I erred on three principles of law.

The first ground of appeal was that I should not have applied the *Plascon-Evans*<sup>1</sup> principle to this matter.<sup>2</sup> This argument is simply bad in law; where on

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<sup>1</sup> *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A); *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375D-F

<sup>2</sup> The *Plascon-Evans* principle: "It seems to me, however, that this formulation of the general rule and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

application a final order is sought, where there is a dispute of fact, this is the only principle on which to decide whether the applicant came to the correct findings. The disputes of fact were numerous and are unnecessary to repeat as they are crystallised in the judgment. But, just to mention two relevant and important disputes of fact; did the complainants derive an economic benefit from the ODI's; did the respondent front the complainants? I find it inconceivable that the applicant can now as a ground of appeal set out that there were no factual disputes. No court would use any other principle than the *Plascon-Evans* principle.

- [5] The second ground of appeal in law, as coined by the applicant, is that the court incorrectly found that the *Swissborough*<sup>3</sup> matter is applicable in a review: i.e. it can simply attach the UBAC report (the record) without referencing in the affidavit what passages and findings it relied on when it made its findings against the respondent. But, that is the law as it stands. I know of no other law to be applied to reviews and the applicant does not inform me what law I should have applied. There is no niche law for state organs; i.e. because the complainants are vulnerable therefore the law can be ignored. There are no reasonable prospects of success on this ground.
- [6] The third ground was that the new evidence of training in the replying affidavit was wrongly admitted. The judgment clearly sets out what was contained in the affidavits. The applicant baldly denied that there was training. Cargo Carriers evidenced the training. There was never a contention by counsel for the applicant that the training was new evidence. I am sure at the hearing he would have done so, if indeed it was the situation. He also did not revert to the UBAC report to sustain his argument that there was no proof of the training before the respondent. On the *Plascon-Evans* principle this dispute of fact was correctly decided.

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<sup>3</sup> *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)

- [7] On the facts, there was no evidence from the applicant that there was a condition from Afrisam that ODI's were a requirement, and no other court would on the papers find same.
- [8] As for the ground of appeal pertaining to the benefit Cargo Carriers received, there was no evidence in the applicant's affidavit setting out any benefit, but for a general remark that benefit is somewhere in the UBAC report. On the other hand, Cargo Carriers provided this court with the necessary proof of their BBBEE status. In applying the *Plascon-Evans* principle no court could come to another conclusion.
- [9] No other court could find that the non-adherence to a contract is to be ignored, especially if this is why the ODI failed. The applicant taking a one-sided analysis hereof is to be frowned upon and no court could find otherwise.
- [10] The applicant simply did not demonstrate how the jurisdictional facts of fronting was established; there was simply no evidence put up by the applicant.
- [11] Counsel for the applicant argued this matter on a level of atmosphere, requesting this court to ignore the body of law that exists. A court cannot ignore the law and "rescue" a litigant by ignoring the law. The law needs not to be developed as there is no hindrance to the applicant in fulfilling its statutory duty by adhering to the body of existing law.
- [12] There are no prospects of success that another court would come to another conclusion.
- [13] I accordingly make the following order:

The application is dismissed with costs, including the costs of two counsel.

A handwritten signature in black ink, consisting of a large, stylized 'S' shape with a horizontal line through it.

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**S. POTTERILL**  
**JUDGE OF THE HIGH COURT**

CASE NUMBER: 76000/2019

HEARD ON: 17 May 2022

FOR THE APPLICANT: ADV. R. BEDHESI SC

ADV. L. BEDHESI

INSTRUCTED BY: State Attorney, Pretoria

FOR THE RESPONDENT: ADV. J. BABAMIA SC

ADV. H. MUTENGA

INSTRUCTED BY: Werksmans Attorneys

DATE OF JUDGMENT: 18 May 2022