

Sneller Verbatim/ASS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J2007/02

2003-02-24

In the matter between

Applicant

and

NATIONAL ENTITLED WORKERS UNION obo

1st Respondent

2nd Respondent

3rd Respondent

J U D G M E N T

LANDMAN J:

At the outset of this judgment I should record that there was no opposition to the joinder of Madala Mnisi, Petrus Mabilo, Richard Khumalo, Justice Mkhize and Ruth Choma and they

were consequently joined as parties to this matter. The application to join the National Entitled Workers Union was in dispute. There are no good grounds for joining this party and that part of the application is refused.

On 24 April 2002 this court granted an order against Biscuit King under case no JS7101 for certain relief. The order was granted at the instance of the persons that I have just mentioned. A warrant of execution was issued on 29 April 2002. The judgment creditors attempted to attach the funds of Biscuit King Benoni CC trading as Biscuit King Brakpan. On 14 May the sheriff attached movable property at the premises of Biscuit King Benoni in Brakpan. Biscuit King Benoni CC alleges that the attached property belongs to Marlodo Enterprises CC. However, Biscuit King Benoni CC, decided to seek an interdict against the four judgment creditors, the National Entitled Workers Union and the sheriff of Brakpan for an order declaring that the writ be set aside.

The application is brought at the instance of Biscuit King Benoni CC. This means that the issue which I must decide is primarily whether this CC is the proprietor of Biscuit King against which judgment has been granted. It does not, in the first instance, require that I decide who is the proprietor of

Biscuit King (the judgment debtor), but it probably comes down to the same thing.

The judgment creditors say that on 27 October 1996 Gideon Christoffel Nel and Gert Nel formed and registered a close corporation Nelbis Ondernemings BK to carry on the biscuit business trading as Biscuit King Benoni (well-known as Biscuit King.) It commenced the biscuit business on 18 November 1996. Gert Nel senior was also present on 18 November when his sons G C Nel and G Nel commenced the business.

The applicants were employed, they say, in the biscuit business in Benoni. Nelbis Ondernemings BK trading as Biscuit King Benoni also employed the other judgment creditors at different dates. On 21 January 1998, G C Nel and G Nel, the members of Nelbis Ondernemings BK converted the trading name of Nelbis Ondernemings BK from Biscuit King Benoni into a new close corporation namely Biscuit King Benoni CC to take over the biscuit business, employees, assets, equipment, vehicles, machinery, tools and goods of Nelbis Ondernemings BK. Thereafter Biscuit King Benoni CC continued with the business of Nelbis Ondernemings BK without interruption.

The founding affidavit goes on to say that on 8 March

2001, Gideon Christoffel Nel and Gert Nel, the owners of Biscuit King Benoni ceased to be the members of that CC and Gert Nel senior became the new member of Biscuit King Benoni CC and took over the business as a going concern.

The applicant, Biscuit King Benoni CC, in a founding affidavit by its member says:

"I wish to point out that the deponent is correct in stating that he and the four others referred to in paragraph 4, were employed by Nelbis Ondernemings CC t/a Biscuit King Benoni. The deponent is, however, wrong in the submission that my sons G C Nel and G Nel and Gert Nel 'converted the trading name' of Nelbis Ondernemings CC into Biscuit King Benoni CC.

What in fact happened is that the business, Nelbis Ondernemings CC trading as Biscuit King Benoni at 65 Princess Avenue, Benoni, had strenuous competition from Biscuit King Brakpan. As a result my sons' business (Nelbis Ondernemings CC) was no longer a viable enterprise and as a result was closed down during September 2000. (Approximately when the four employees were retrenched.)

I bought the Biscuit King franchise in Brakpan which started trading, during 2001, as Biscuit King Benoni CC trading

as Biscuit King Brakpan. The Biscuit King Brakpan enterprise was bought for a price of R210 000,00 for equipment, goodwill etcetera which is paid in instalments by way of a lease agreement to Marlodo Enterprise CC, the owner of Biscuit King Brakpan. I am the only member of Biscuit King Benoni CC. I was an employee and manager in Biscuit King Benoni (Nelbis Ondernemings CC trading as Biscuit King Benoni.)

As my sons business did not make it, I offered them employment in my business i.e. Biscuit King Benoni CC trading as Biscuit King Brakpan.

The CC, Biscuit King Benoni, was a shelf CC and during 2001 I became the only member of Biscuit King Benoni. As a result, my sons, G C Nel and G Nel were simply employees in the employ of Biscuit King Benoni CC. My sons never traded any business in Biscuit King Benoni CC.

I am informed by my sons G C Nel and G Nel, that the shop fittings or equipment on the premises of Nelbis Ondernemings CC t/a Biscuit King Benoni at 65 Princess Road, Benoni was sold to Bakery and Catering Supplies for an amount of R7 000,00. (See the confirmatory affidavit of G C Nel, G Nel and John Jordaan annexed hereto as annexures A, B and C respectively.) I am also advised that the amount of

R7 000,00 was utilised by Nelbis Ondernemings CC to pay outstanding rent and was the rented property painted before it was vacated by Nelbis Ondernemings CC.

As referred to in the founding affidavit Nelbis Ondernemings CC trading as Biscuit King Benoni is dormant since September until this day. The business enterprise at Biscuit King Benoni CC t/a Biscuit King Brakpan is a totally separate entity and none of the shop fittings or equipment in Biscuit King Brakpan belongs to or was transferred from Biscuit King Benoni.

I refer the honourable court to the affidavit of Marthinus Gysbert Botha of Marlodo Enterprises CC who is still the owner of all the movable assets in Biscuit King Brakpan. The ownership of the movable assets will only be transferred to Biscuit King Benoni CC when the last lease payment is paid to Marlodo Enterprises.”

The judgment creditors were employed by their employer who used the name Biscuit King as part of its trading name. Biscuit King Benoni CC carries on business at Shop 16 Checkers Centre, Kritzinger Avenue, Brakpan. There is no proof that Nelbis Ondernemings CC was converted into Biscuit King Benoni CC. The evidence is that Biscuit King Benoni CC

was created at a time when Nelbis Ondernemings CC was still in operation.

When an applicant sues and obtains judgment against a firm and then seeks to enforce the judgment against that firm, the judgment creditors must prove, on a balance of probabilities, who the proprietor of that firm is. It is not permissible to attach the assets of another party who may be using that name. I assume that the judgment debtor in terms of the judgment should be (or should have been) described as Biscuit King Benoni. This is most probable. However, the judgment debtors have not shown that Biscuit King Benoni CC was the proprietor of Biscuit King Benoni when the judgment was granted. The judgment creditors did not make use of Rule 20 of the Rules of this Court. Had they done so the onus, as a matter of substantive law, would have rested upon them to prove who the proprietor of the business was. The onus does not change when a respondent applies for relief denying that it is the true proprietor.

In the premises, therefore:

1. The writ issued by the Registrar and the Sheriff Brakpan under case no JS71/01 of 14 May 2002 is set aside.
2. The 1st, 2nd, 3rd, 4th and 5th respondents are interdicted

from executing further writs under case no JS71/01 against Biscuit King Benoni CC (98/003108/23 trading as Biscuit King Benoni.)

3. The 1st, 2nd, 3rd, 4th and 5th respondents are ordered to pay the applicant's costs jointly and severally.

**SIGNED AND DATED AT BRAAMFONTEIN ON APRIL
2003**

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA