



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1820/12

In the matter between:

NICO KRIEK CONSTRUCTION (PTY) LIMITED

1st Appellant

and

KOTGOVE INVESTMENTS (PTY) LTD

1ST Respondent

SALGAOCAR SWAZILAND (PTY) LTD

2ND Respondent

Neutral citation: *Nico Kriek Construction (Pty) Ltd vs Kotgove Investments (Pty) Ltd & Another (1820/12) SZHC 269 [21 December 2012]*

Coram: **MAPHALALA PJ**

Heard: **26 OCTOBER 2012**

Delivered: **21 DECEMBER 2012**

Summary: (i) The Applicant seeks to exercise a lieu over certain works at the 2nd Respondent's mine at Ngwenya. There is no privity of contract between the Applicant and the 2nd Respondent. The Applicant is a sub-contractor having been contracted by another sub-contractor who in turn was

contracted by the 2nd Respondent. Applicant was never in possession of the site and as such is not entitled to the relief that it seeks.

- (ii) Therefore, the Application is dismissed with costs.

[1] The Applicant launched the present Application on an urgent basis on 26 October 2012 for an order in the following terms:

- “1. That dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.
2. Condoning Applicant's non-compliance with the rules.
3. Interdicting and restraining the 1st Respondent and any of its personnel or agents from interfering, removing and/or damaging the civil works carried out at the jigging plant, Ngwenya Mine, Hhohho District, pending settlement of the dispute between Applicant and 1st Respondent.
 - 3.1 an order restraining and interdicting the 1st Respondent from engaging services of the third party sub-contractors from carrying out any works at the jigging plant, Ngwenya Mine, Hhohho District and/or alternatively, interdicting third party sub-contractors from continuing any works at the site engaged by the 1st Respondent if same has already commenced.
4. That a *rule nisi* returnable on a date to be determined by the above Honourable Court calling upon the Respondents to show cause why prayers 1, 2, 3, 5 and 6 should not be made final.

5. Costs of suit if the matter is opposed.
6. Further and/or alternative relief.”

[2] The Application is founded on the affidavit of Mr. Nico Kriek who is the Managing Director of the Applicant where he has outlined the background to this dispute. He also attached pertinent annexures from “NK1 to NK7” and more importantly annexure NK1 the Memorandum of Agreement between the parties.

[3] The Respondents oppose the granting of the above orders and have filed the requisite affidavit answering to all the averments of the Applicant in the founding affidavit mention above in paragraph [2] supra.

[4] The court heard arguments of the parties on an earlier occasion where before their conclusion an agreement was reached by the parties that the court refer the dispute to mediation. The matter was then postponed to allow mediation to take effect.

[5] However, the parties failed in their mediation efforts and the matter was then enrolled before me for continuation of the arguments.

[6] When the matter appeared before me the Applicant was represented by Mr. Mdladla and 1st Respondent was represented by Mr. Ngcamphalala and there was no appearance for the 2nd Respondent who was represented by Mr. Henwood at the last hearing of the matter. I allowed the attorneys present to make their respective arguments and towards the close of these arguments the court ruled that expert evidence be called regarding a point *in limine* raised by the attorney for the 1st Respondent that of *bruten fullen*.

[7] On the 13 December 2012 the Applicant called an expert witness by the name of Mr. Stanley K. Smith who gave *viva voce* evidence and submitted a report which was entered as exhibit A. He was duly cross-examined by the attorney for the 1st Respondent. The attorney for the 1st Respondent then applied to also call an expert witness for his client. The matter was then adjourned to 17 December, 2012 to allow the 1st Respondent to lead this witness.

[8] However, before this could take place Mr. Henwood for the 2nd Respondent who had joined the defence was in attendance for the 2nd Respondent and made a pertinent submission from the bar that this matter is not what the Applicant say it is.

[9] The gravamen of Mr. Henwood's submission is that the 2nd Respondent has said in the answering affidavit that there is no legal connection between itself and the Applicant. That 2nd Respondent said it had a contract with Fine Mining and Melting instead. The court was told that, in fact, the Applicant was sub-contracted by a sub-contractor to Fines, Mining and Melting, Kotgove.

[10] That as a result there was no contract that existed between the Applicant and the 2nd Respondent. Mr. Henwood further informed the court that his client has already paid what was due.

[11] Mr. Mdladla for the Applicant accepted the arguments as advanced by Mr. Henwood and outlined in paragraph [9] and [10] of this judgment.

[12] On these arguments it is important to reproduce what is averred by the 2nd Respondent in its answering affidavit of one Sivarama Prasad Pitla its Chief Executive Officer at paragraph 4, 5 & 6 as follows:

"4. Having said that, I do wish to bring the following facts to the attention of this Honourable Court. The 2nd Respondent contracted Fines, Mining and Melting (Pty) Limited to carry out design, engineering, manufacture,

supply, foundation construction, placement of foundation, installation, erection and commissioning of an iron ore jig plant at Ngwenya. Fines, Mining and Melting have sub-contracted a portion of the works to the 1st Respondent who in turn have sub-contracted a portion of their work to the Applicant.

5. The Applicant and/or the 1st Respondent are therefore subcontractors of Fines, Mining and Melting (Pty) Limited and there is no legal relationship between the Applicant and the 1st Respondent.
6. In spite of this however, were the Applicant to obtain the order which it seeks, this would effectively delay the final commissioning of the jiggling plant is already late. Fines, Mining and Melting (Pty) Ltd had undertaken to erect commission and/or operate the jig plant b the 7th October 2012. It is already three (3) weeks late.”

[13] Having considered the above averments and Mr. Mdladla reply I have come to the considered view that Mr. Henwood is correct that the Application ought to fail on these facts. I am also of the considered view that the legal authority cited by Mr. Henwood in his Heads of Arguments is correct. Reference is made to the case of *Wynland Construction (Pty) Limited vs Ashley Smith & Another 1985(2) SA 532* to the following legal proposition:

“Approaching the matter on a fair and equitable basis, the grant the Appellant a lieu in such circumstances, will lead to the absurd result that an owner would be held to ransom by a sub-contractor who refuses to give up possession despite

the fact that the owner might already have paid the main contractor in terms of the contract.”

[14] In the result, for the foregoing reasons the Application fails and is dismissed with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For Applicant : Mr. S.V. Mdladla

For 1st Respondent : Mr. Ngcamphalala

For 2nd Respondent : Mr. J. Henwood