Reportable/Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 1792/2012
Date Heard: 29 June 2012
Date Delivered: 3 August 2012

In the matter between

CORDUSTEX MANUFACTORING (PTY) LTD Applicant

and

BUILDING PRODUCT DESIGN LTD Defendant

JUDGMENT

REVELAS J

[1] The applicant seeks confirmation of a rule *nisi*, issued on 12 June 2012, which it had obtained in an *ex parte* application for the attachment of certain equipment ("the equipment") in its possession, which is the property of the respondent. The respondent herein is a peregrine company based in England. The purpose of the attachment is to confirm the jurisdiction of this Court in an action to be instituted by the plaintiff against the respondent for payment of the purchase price for goods sold and delivered to the respondent.

[2] In terms of the rule *nisi* issued, the Sheriff was directed to keep the equipment in attachment until its release. The applicant was also given leave to serve the rule *nisi* and the founding papers by way of edictal citation at the respondents registered office and principal place of

business in Cheshire, England.

[3] The respondent then anticipated the return date (7 August 2012), in terms of rule 6(8) of the Uniform Rules of Court, by six weeks to 26 June 2012. Its main objection to the attachment of its property is that the agreement between the parties, which pertains directly to the applicant's possession of the equipment, contains an ouster clause which excludes this court's jurisdiction. The existence of this particular clause was not disclosed by the applicant in its founding papers attached to its *ex parte* application. The respondent also applied to have certain averments in the applicant's replying affidavit struck out.

[4] The factual background to this matter is briefly this: The applicant is a manufacturer and distributor of polypropylene spunbond textiles used mainly in the construction and industrial markets. The respondent is a manufacturer of building products, including construction membranes for roofs and walls. The equipment, the property of the respondent sought to be attached in this application, is a 3.2 metre single beam non-woven spunbond machine (known as line 3). On 17 April 2008, the applicant and the respondent entered into two agreements, referred to respectively as the Equipment Loan Agreement ("ELA") and the material Supply Agreement ("SMA"). In terms of the ELA the respondent lent the equipment under consideration to the applicant for a period of five years terminating on 13 April 2013, against payment by the applicant of royalties. In terms of the MSA, the respondent was obliged to purchase a stipulated annual quantity of the material manufactured by the applicant, at prices to be agreed upon from time to time. By virtue of the terms of the ELA, the equipment is in the possession of the applicant at its premises in Walmer Industrial, Port Elizabeth.

[5] The action which the applicant intends to institute against the respondent is for moneys owing in respect of materials supplied by the applicant to the respondent pursuant to the MSA during 2011. It is not in

dispute that the amounts of GBP 96 485.70 and GBP 79 678.80 respectively, were due and owing to the applicant in January and February 2012.

[6] On 19 March 2012, the respondent launched an application on an urgent basis under case number 929/2012 in this court seeking:

(1) Confirmation of its termination of the ELA, which it had effected in two written notices. The validity of the latest notice was in dispute;
(2) Access to the applicant's premises and to have its equipment re-in-stalled, dismantled and transported to or loading dock or similar facility.

[7] The matter was postponed for the filing of further affidavits and was only enrolled for hearing, on 10 May 2012, when it came before Eksteen J who heard the application and reserved judgment. The present application was argued while Eksteen J was preparing his judgment which was handed down on 3 July 2012. Due to *inter alia*, the several disputed facts issues which arose on the papers in that application, Eksteen J held that the question relating to the validity of the notice of termination could not be determined on the papers before him, and he referred the matter to trial with the necessary procedural directions.

[8] In the present application before me, the applicant only made a cursory reference to the application which was argued before Eksteen J where it was cited as the respondent, in brackets, and as follows:

> "(The continued validity of the ELA is the subject of an ongoing dispute between the Applicant and the Respondent, which is being heard in a contested application in this Court under case number 929/12)".

[9] Noteably, no reference was made to the vindicatory nature of the relief sought in that application, namely the return of the very same equipment the applicant sought to attach in these proceedings, in order to found jurisdiction.

[10] The respondent challenged the confirmation of the rule on two grounds. It contended that the applicant had acted in bad faith since it was obliged to attach the MSA to its *ex parte* application which it failed to do, and further that it should have drawn the attention of the court issuing rule, to clause 17 of the MSA which reads:

> "The construction, interpretation, meaning validity and performance of this agreement shall be governed by English Law which is agreed to be the proper law of this Agreement, and each party hereby submit to the exclusive jurisdiction of the English Courts" (emphasis added).

[11] The respondent argued that the terms of clause 17 of the MSA, an ouster clause, precluded this court from ordering the attachment of the equipment for purposes of founding jurisdiction. The respondent argued for a punitive costs order to be made against the applicant whom it accused of abusing the court process and deliberately causing delays to "stifle any possible future competition from the respondent", which it maintains, was demonstrated by the applicant's failure to provide for a time limit its *ex parte* application, for the institution of its intended action.

[12] The respondent also pointed out that it had always been represented by attorneys in Port Elizabeth, a fact which the applicant had been aware of, and accordingly there was no need for an application on an *ex parte* basis.

[13] The first question to be determined is whether clause 17 of the MSA precludes this court from granting an order for the attachment of the

respondent's property which is in Port Elizabeth. In my view, it does not. The words "*each party hereby submit to the exclusive jurisdiction of the English Courts*" might be a strong indication that the parties intended for the matter to be adjudicated upon in an English Court, and the South African trial court may very well hold that view but that is ultimately for the trial court to decide. Hearing an application to found jurisdiction and actually deciding upon jurisdiction are separate matters.

[14] Attachment to confirm jurisdiction is an extraordinary remedy which should be granted with caution, but all the applicant must establish is a *prima facie* case against the respondent.[1] That much must have been accepted by court who granted the rule and it is supported by the fact that the respondent had admitted that it owed the applicant the amounts as alleged in the founding affidavit. A court has no discretion, but to grant an order for attachment *ad fundandam jurisdictionem* of the property of a peregrine defendant, once an *incola* plaintiff has established *prima facie,* good cause of action against the defendant, if other requirements are satisfied. It may also not enquire into the merits as to whether it is fair in the circumstances to grant such an order[2]. The same would apply to where the attachment is sought *ad confirmandam jurisdictionem*[3]*.*

[15] The ELA (the other agreement concluded by the parties on 17 April 2008) contains an identical clause to clause 17 of the MSA (Clause 24.1). It also contains clause 24.2 which provides that:

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1 Owners of the *MT "Tiger" v Transnet t/a Portnet* [1998] 3 All SA 453 (SCA) at 459; *Simon NO v Air Operations of Europe AB and Others* 1991(1) SA 217 (A); *Ex parte Acrow Engineers (Pty) Ltd* 1953 (3) SA 319 (T) at 321 G-H.

2 *Pollak The South African Law of Jurisdiction* at 64; *Naylor and Another v Jansen; Jansen v Naylor and Another* 1978 (2) SA 705 (W) and see: *Longman Distillers Ltd* v *Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914 E-G.

3 Chetty J in *Frost NO and Others v Vermaak,* unreported judgment under case number 3753/2011 dated 1 June 2012.

> "Notwithstanding the provisions of clause 24.1 with respect to jurisdiction only, BPD [the respondent] retains the right and will be entitled to, in its discretion, commence legal proceedings in the courts of South Africa for the recovery of the equipment. CDX [the applicant] hereby irrevocably waives any objection to, and agrees to, the jurisdiction of such other courts".

[16] The respondent exercised that right and had already commenced litigation in a South African Court for the recovery of the equipment, and the trial in that matter will be proceeded with in the Port Elizabeth High Court in terms of the order by Eksteen J referred to above. For practical and financial considerations it is certainly more advantageous for the two matters to be adjudicated in the same court, which is a factor which would be considered by the trial court.

[17] In these circumstances, clause 17 of the MSA, does not present an obstacle to the attachment of the equipment which is already in the applicant's possession for purposes of founding jurisdiction.

[18] The fact that the parties agreed that English law will apply, should also not preclude an attachment to found or confirm jurisdiction. South African Courts will, as a general rule, tend to give effect to exclusive jurisdiction clauses and provisions in contracts[4]. Even if the matter is adjudicated in South Africa, the English Law could be applied. At common law the applicable foreign law is ordinarily proved by the evidence of an expert witness about it. However, section (1) of the Law of Evidence Amendment Act, 45 of 1998 has changed that position somewhat and provides that:

"(1) Any court may take judicial notice of the law of a foreign state and of indigenous law, in so far as such law can be ascertained readily and with sufficient certainty: . . .

(2) The provisions of subsection 1 shall not preclude any party from adducing

4 *Society of Lloyds v Prince; Society of Lloyds v Lee* [2006] JOL 175 (SCA) at para [41] pages 24-25.

evidence of the substance of a legal rule contemplated in that subsection which is [i]in issue in the proceedings concerned".

[19] Exactly how to "readily" ascertain foreign law with "sufficient clarity" may not always be possible[5], and therefore the aforesaid section should not be interpreted to mean that expert evidence is no longer required where the provisions in the aforesaid Act are not met[6]. Eksteen J approved of this approach adopted in the cases cited in footnotes 2 and 3 below, when he had to consider clause 24 of the ELA and the questions of jurisdiction raised in it, but for different purposes than those presently under consideration. In any event, as I have said, it is for the trial court to decide how to go about applying the English law in determing the dispute between the parties.

[20] The view I take in this matter renders it unnecessary to deal with the respondent's application to strike out certain paragraphs in the replying papers. I had no regard to them in coming to my decision herein.

[21] I do however wish to state that I strongly disapprove of the conduct of the applicants' legal representatives in not making full disclosure of the nature of the litigation which was before Eksteen J in these papers, especially in view of the potential complications which could have presented themselves if Eksteen J granted that application. It is also significant that the applicant sought to attach equipment which was already in its possession, while another judge was preparing a judgment in a matter where the order sought was for it to release that same equipment. Counsel for the applicant, who appeared before me on the return day, did not appear in the *ex parte* application. The legal representatives who appeared then, filed affidavits with an explanation to

5 As recognized by Flemming DJP in *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA (W) at 485 D-E and more particularly, *C Hoare and Co v Runewitsch and Another* 1997 (1) SA 338 (W) at 340 G-I.

6 *The MT Yeros v Dawson Edwards and Associates and Another* [2007] 4 All SA 922 (C).

the effect that whereas they have come to see the error of their ways, at the time of drafting the papers, they did not think it necessary to attach the MSA to the application or refer to clause 17 in particular.

[22] The failure to disclose the vindicatory nature of the other application pertaining to the same equipment (thus a competing claim) was not addressed in the explanatory affidavits and neither was the reason why the application was brought *ex parte.* Clearly it ought to have been brought on notice to the applicants. Since these were my main concerns, the explanation given did very little by way of assuaging my disapproval of their conduct. Notwithstanding the view I take of their conduct, it is *per se* no bar to the relief sought by the applicant. The question was whether the applicant had met all the requirements for an attachment order and it did. However as a mark of my disapproval of the aforesaid conduct, I am inclined to grant the relief sought, but I decline to make any order as to costs against the respondent.

[23] The following order is made:

The rule is confirmed.

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E REVELAS
Judge of the High Court

Counsel for the Plaintiff	:	Adv J Nepgen Port Elizabeth
Instructed by	:	Ruchmere Noach Inc Port Elizabeth
Counsel for the Defendant	:	Adv J Huisamen Port Elizabeth
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