

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

Case No: 1706/04

Date: 15/05/2007

UNREPORTABLE

In the matter between:

MULTI OPTIMA ENGINEERING CONSULTANTS CC P
S VAN DER MERWE
P W COETZER

1st Applicant

2nd Applicant

3rd Applicant

And

PUBLIC INVESTMENT COMMISSIONERS
RONNIE NTULI

1st Respondent

2nd Respondent

In re:

PUBLIC INVESTMENT COMMISSIONERS

Plaintiff

And

ISAGA PRIVATE EQUITY (PTY) LIMITED
ISAGA ADVISORY SERVICES (PTY) LIMITED RONNIE
NTULI
NATHAN BALAKRISHNAN
MULTI OPTIMA ENGINEERING CONSULTANTS CC P
S VAN DER MERWE
P W COETZER

First Defendant

Second Defendant

Third Defendant

Fourth Defendant

Fifth Defendant

Sixth Defendant

Seventh Defendant

JUDGMENT
HARTZENBERG, J

The applicants are the 5th, 6th and 7th defendants in an action in which the respondent claims R21 million, together with interest thereon, from the seven defendants. The money claimed was government money which was advanced to the applicants through the first four defendants. The money was advanced in three draws of R7 million each during 2000, 2001 and 2002. It was advanced to finance a mining venture. The mining company was liquidated and the government lost all the money. The plaintiff alleges that the first four defendants made serious misrepresentations, of which the applicants were aware, to it and that the seven defendants are jointly and severally liable to repay the money with interest.

The plaintiff was cited as "The Public Investment Commissioners, a body established in terms of the Public Commissioners Act, No 45 of 1984, as amended". The summons was issued on 23 January 2004. The plaintiff wants to change the citation to "The Public Investment Corporation Limited, a Company incorporated in terms of Section 2 of The Public Investment Corporation Act, No 23 of 2004" It attempted to do so in terms of a notice in terms of Rule 15. The applicants object to the proposed amendment.

It is the applicants' case that Act 45 of 1984 never created a legal entity such as the Public Investment Commissioners with standing to institute legal proceedings. Such an entity was created in the 2004 Act. The argument is that the summons was a nullity by a non-existing plaintiff which cannot be amended to animate it without causing prejudice to the applicants. There is a difference of approach whether the amendment

sought is a correction of a misnomer or the substitution of the original plaintiff with a totally different legal entity. However that may be, the prejudice that the applicants allege that they will suffer, if the substitution takes place, is that they will not be able to raise a plea of prescription, which would have been available to them if a new summons had to be issued.

The respondent's answer is that the notice of substitution was given at a time before the claim prescribed as the claim is one based on a misrepresentation, of which it only became aware after the liquidation of the mining company. It does not appear from the respondent's papers when in fact it acquired such knowledge. The exact date when the misrepresentation became known to the respondent seem to me to be relevant for a proper adjudication of the matter. When I raised it with the respondent the first reaction was that as the applicants did not file a replying affidavit it must be accepted that they admit that there is no such defence available. The difficulty with the argument is that the respondent just alleged a conclusion of law without alleging the actual facts on which the conclusion is based. There was accordingly no allegation of fact with which it was necessary for the applicants to deal.

The respondent then asked for a postponement and leave to supplement its affidavits and tendered the wasted costs. At the time I was not certain whether the respondents were entitled to a postponement as the allegation of prejudice was made, and they dealt with it. I reserved judgment to decide whether the postponement could be granted and to consider whether an order could not be made one way or the other on the

papers as they stand. I have come to the conclusion that as the amount of money involved is enormous a decision not based upon all the relevant facts may invite an appeal with

sizeable t	<u>Representation</u>	
without it	For the Applicants	: Adv R Deminey
	Attorneys	: De Witt Attorneys
before the	For the Respondents	: Adv. I Opperman.
	Attorneys	: DMO Attorneys
		c/o Coetzee & Partners

It follows that the request for a postponement must be granted and leave must be granted to all the parties to file supplementary affidavits if so advised.

The following order is made:

1. The matter is postponed *sine die*.
2. Leave is granted to the respondent to file supplementary affidavits, dealing with the question of possible prejudice to the applicants in the case of a change in the citation of the plaintiff in the main claim.
3. Leave is granted to the applicants to file affidavits, if so advised, to deal with the new matter raised by the respondent.
4. The respondent is ordered to pay the costs wasted as a result of the postponement