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IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. :45/04

IN THE MATTER BETWEEN:

RUSTENBURG PLATINUM MINES LTD **APPLICANT**

AND

J H CRAUSE **RESPONDENT**

MMABATHO

JUDGMENT

NKABINDE J:

[1] The applicant launched an application against the respondent for ejectment in the Transvaal Provincial Division. It withdrew the application when it realized that that Court did not have jurisdiction to entertain the matter. On 15 January 2004 the applicant launched this application for ejectment of the respondent and persons living through or under him from its premises situated at 2 - 6th Street Kliptfontein Villages, Farm Klipfontein, 300JQ, North West Province ("the premises"), the reimbursement for rental and

incidental costs incurred from 17 December 2002 to date of judgment ("the second claim") and costs. On 24 April 2004 the applicant set the matter down for a determination of the second claim and costs Annexed to the founding affidavit as annexure "A" is an unsigned and undated document purporting to be a resolution authorising:-

" 1. THAT the Company apply to the High Court of South Africa [Transvaal Provincial Division] for an order evicting **Johannes Hermanus Crause** from company accommodation situated at 2 - 6th Street, Klipfontein Village.

2.THAT **Shalk Willem Louw**, in his capacity as Hospitality Manager, be authorised to sign and depose to any necessary documentation or affidavits and to take all necessary steps on behalf of the Company to apply for the said Order.

3. THAT **Warren Robert Beech**, or failing him, Foina Elizabeth Leppan or failing her, Susan Jane Peart of the firm Leppan Beech Attorneys, is hereby authorised to do whatever may be necessary to bring such application, including the briefing of Counsel, and to appear on the Company's behalf before the High Court of South Africa.

4.THAT all previous acts by **Shalk Willem Louw** in respect of this matter are hereby ratified.".

[2] Service of the application was effected upon the respondent on 20 January 2004 through his son at "c/o Builders Warehouse, Waterfall Mall Rustenburg".

[3] The respondent filed the answering affidavit dated 9 February 2004 on 13 February 2004 and incorporated therein his answering affidavit to the initial application. The respondents' opposition, briefly summarised, may be analysed as follows:

(a) He puts in issue the fairness of the dismissal culminating to the ejectment application. He maintains that his occupation of the premises after the demand was lawful;

(b) He denies the amounts claimed as reimbursement for rentals and incidental costs;

(c) He avers that when he was served with the papers he had vacated the premises and therefore the eviction application is vexatious and amounts to the abuse of the process of the Court; and

(d) As to the second claim he avers that there exist a serious factual dispute which cannot be decided on the papers.

In addition to the summary hereinabove the respondent also raised two points in *limine*, namely, that the applicant has no *locus standi in judicio* and that the deponent to the founding affidavit was not duly authorized to launch the application.

[4] In the replying affidavit dated 27 February 2004 the applicant takes issues with the respondent on all the matters raised in his opposing papers. It is alleged that the respondent vacated the premises on 12 February 2004 and that on 20 February 2004 the applicant's attorneys addressed a letter to the respondent's attorneys intimating an intention to withdraw the application and suggesting that each party should pay its/his own costs. This, according to the attorneys, was a step to prevent incurring further legal costs as the respondent had vacated the premises. Relying on the said annexure "A" the deponent avers further that he had been authorised to depose to the replying affidavit. On 16 April 2004 the applicant filed with the Registrar an unsworn extract from resolution passed at the meeting of Directors held on 31 March

2004 and a resolution ("second resolution"). The heading of the two documents reads as follows:

> **"RUSTENBURG PLATINUM MINES LIMITED**
> **("the Company")**
> **CERTIFIED EXTRACT FROM RESOLUTION PASSED BY THE DIRECTORS OF THE COMPANY AT JOHANNESBURG ON 31 MARCH 2004**
>
> ---
>
> **APPLICATION TO THE HIGH COURT OF SOUTH AFRICA**
> **[BOPHUTHATSWANA PROVINCIAL DIVISION]**
>
> ---

".

Save that the second resolution is dated and signed both annexure "A" and the second resolution are substantially in similar terms.

[5] On 11 March 2004 the applicant filed a supplementary affidavit seeking to amend the amounts claimed in the founding papers in respect of the second claim the reason therefor, as I gather from the reply, being that the amounts initially claimed were estimates and had been denied in the answering affidavit. As expected the respondent opposed the permissibility of the supplementary affidavit.

[6] The respondent's first point in *limine* relates to the lack of *locus standi,* firstly of the applicant in launching the application for ejectment and the second claim and, secondly, to *locus standi* in the sense of lack of authority of Mr Shalk Willem Louw to deposed to the affidavits on behalf of the applicant. The first point is premised on the averments that:-

(a) the premises from which the respondent was to be ejected were provided by virtue of an employment contract which

was unfairly terminated; and

(b) that in terms of the provisions of s 8 of the Extension of Security of Tenure Act No 62 of 1997 ("ESTA") the respondent was entitled to remain in occupation of the premises until the unfair dismissal dispute was resolved in terms of the provision of the Labour Relations Act No. 66 of 1995 ("the LRA").

The respondent's case on the first point, in its proper context, is that he could not, at the very whim and fancy of the applicant, be ejected from the premises and therefore onus was on the applicant to prove that he was fairly dismissed and that the applicant was entitled to an order ejecting him from such premises. The second point relates to the question of authorization.

[7] A determination on the first point will, in my view, be an academic exercise as the claim is no longer pursued by the applicant. The applicant, by virtue of the notice of set down, has abandoned the claim. I may remark, however, that a question of the fairness or otherwise of the respondent's dismissal does not appear to be germane to the claim for ejectment given the fact that the applicant was the possessor of the premises which the respondent occupied at its will (Wille Landlord and Tenant in South Africa 4th edition at 44; Maharaj v Sing 1955 (1) SA 41(N)). Clearly, whether or not the respondent was unfairly dismissed would of necessity be the subject matter of another action which, according to the papers before me, is pending under the auspices of the Commissioner for Conciliation Mediation and Arbitration (CCMA) in terms of the LRA. If follows therefore that the respondent's first point and the basis

therefor must fail.

[8] I proceed to consider the attack on the authorization to bring the application. In his replying affidavit Mr Louw attempted to meet the point raised by relying on annexure "A". As I have already indicated, that document is defective. The question remains whether regard could be had to the extract and second resolution which documents were not incorporated by means of an affidavit.

[9] Mr Hitge, on behalf of the respondent, contended that I should not. He relied on the judgment in **South African Allied Workers' Union and Others v De Klerk NO and Other 1990 (3) SA 425 (ECD) at 436 I-J** where the Court opined that-

> "... it could not have been contemplated by the law giver that a refutation by a respondent as to the existence of general authority to act could be met by the filing of and unsworn piece of paper. ...".

He contended further, in essence, that Mr Louw had no authority to bring the application and could not, after an objection had been taken, amend or seek to amend his founding affidavit by relying upon a resolution that did not exist when the objection was taken. He relied on the judgments in **Moosa and Cassim NNO v Community Development Board 1990 (3) SA 175 (A)** and **South African Milling Co (Pty) Ltd v Reddy 1980 (3) SA 431.**

[10] It is correct that when the application was launched a defective resolution was annexed to the founding affidavit. It is also correct that the subsequent resolution with defect of no moment (regarding

mention of the Transvaal Provincial Division) was filed without being incorporated by means of a sworn affidavit. This is a matter governed by rules of procedure in terms of which the applicant should have incorporated the extract and second resolution by means of a sworn affidavit. Failure to do so does not appear fatal as it is manifest that the decisions were indeed taken at a meeting held on 31 March 2004 as appears from the extract filed together with the resolution. The applicant is surely asking for an indulgence for such document to be considered. Ignoring the documents simply because of non-adherence to the rules of procedure will, in my view, result in a failure to thrash out important matters by allowing rules of procedure to tyrannise the Court. Hiemstra J in **Registrar of Insurance v Johannesburg Insurance Co Ltd (1) 1962 (4) SA 546 (WLD) at 547 C-D** refused to allow the Court to be so tyrannised. I, likewise, am not prepared to allow the rules of procedure to tyrannise the Court. In my view this Court has a discretion to aid the applicant. I have exercised my discretion in favour of granting the applicant such indulgence as the substance of the resolution, in the circumstances, is of moment than the manner of its presentation particularly because the respondent suffered no prejudice.

[11] I now turn to consider the question of ratification. The Learned Judge in Reddy at 437 B-F, above, remarked as follows:-

> " ...Wilkinson had no authority to launch sequestration proceedings. He cannot now, after objection has been taken, amend or seek to amend his founding affidavit by relying upon a resolution that did not exist when the objection was taken. The fact of Wilkinson's *locus standi* is of cardinal

> importance. He failed to establish *locus standi* in his founding affidavit on which he must stand or fall. Secondly the question is whether the purported ratification could cure the lack of *locus standi* in any event. Generally speaking ratification relates back to the time when the act ratified was done. There, however, are exceptions to the general rule. In *Finbro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380 Watermeyer J (as he then was said:
>
> " We are satisfied, however, that when an act has to be done within a fixed time, performance of that act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance with the fixed time. . . In the present case the respondent acquired a right under Rule 528 to claim that the appeal lapsed four weeks after it was noted unless application for a date of hearing was made in the meanwhile. Consequently, on the principle stated above, the appellant could not ratify an unauthorised application for a date of hearing after such four weeks had elapsed."
>
> By analogy, when a person purporting to have authority to act on behalf of another launches an application without having such authority, the respondent acquires a right to move for the dismissal of the application on the ground of lack of *locus standi*. The applicant cannot then deprive the respondent to his prejudice of the right he has acquired by ratification.".
>
> (My underlining)

[12] In this case the right involved the rights which the respondent became vested with when served with the application and when the objection was taken to the applicant's authority. When dealing with the question of vested right Goldstone J in **Baeck & Co v Van Zummeren & Another 1982 (2) SA 112 WLD at 119 H** said-

> " The right to move for the dismissal of the application on the ground of lack of *locus standi* is, with respect, hardly what one would envisage as constituting a "vested right".".

In **Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another 1994 (1) SA 659 (C)** Conradie J agreed with Goldstone J, and remarked as follows:

> "The right involved is no more than (the right) to take a point and to require a Court

not to turn a good point into a bad one".

Harms JA in **Smith v Kwanonqubela Town Council 1999 (4) SA 947 at 954 D-E** agrees with the analysis and conclusion reached by Conradie J in Merlin Gerin. He remarked that the analysis and reasoning-

> "Apart from making perfectly good sense and being practical, ... is legally sound. A party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise, one party would for instance not be entitled to amend a pleading, especially not after the filing of a valid exception. The ratification in the present instance did not affect any substantive rights of Smith.".

[13] Following the reasoning by Harms JA in Smith, above, it is manifest that the ratification by means of unsworn documents which I have allowed does not affect any substantive right but have cured a defect in annexure "A". It is noteworthy that when the decisions were taken on 31 March 2004 and when the extract and resolution were filed with the Registrar on 16 April 2004, the applicant had not yet abandoned its claim for ejectment as the said notice of set down was only filed on 24 April 2004. This view is fortified by what is stated in the letter that in the light of the refusal by the respondent to accept the proposals-

> "14. We will therefore not withdraw the application and tender your client's costs and will proceed to set the matter down for ejectment.".

I must, however, hasten to mention that such ratification does not relates to the bringing of the application for the second claim. Mr

Snider submitted that although no mention is made regarding the relief for the second claim such relief is ancillary to the claim for ejectment. He submitted further that an omission in the extract and the resolution of such relief is inadvertent. I do not, with respect, agree with Mr Snider as that is nothing more than speculation. Sight should not be lost of the fact that the rules in motion proceedings, unlike in action proceedings where something unexpected may suddenly crop up giving rise to an amendment, are unambiguous and clear. The applicant must set out exactly what its case is to enable the other party to prepare itself. Besides, ratification must be clear and must bear clear distinct reference to the facts of the particular case (Halsbury's Law of England Vol 1(2) para. 83).

[14] The applicant in this case knew, as early as 13 February 2004 when the respondent's response was delivered, that its authorization in terms of annexure "A" to the founding papers was challenged. The very same applicant, in its replying affidavit, elected not to react to the point put in issue. It relied on the same defective document. An opportunity presented itself twice during March for the applicant to set the record straight. The first opportunity was when a supplementary affidavit was deposed to. Notably, even at that time, the applicant was still relying on the said annexure. The second opportunity was on 31 March 2004 when the directors met to make decisions about the matter. Had it been the intention of the directors to apply for an order in respect of the second claim such an intent could be manifest not least in such

extract. My view in this regard is strengthened by the fact that in the letter dated 20 February 2004 ("the letter") no mention is made to the second claim. Evidently, the letter makes mention of the eviction application and nothing else. The contents, in so far as herein relevant, reads as follows:

> 1. We act on behalf of... the Applicant in an eviction application ... against J H Crause.
>
> 2. The eviction application relates to accommodation which your client was in unlawful occupation....
>
> 3. The eviction application was .... served on your client on 16 January 2004.
>
> ...
>
> 7. At the time of the service of the application on your client on 16 January 2004 and at any stage thereafter, our client was not aware that your client would vacate the premises. Our client had no other choice but to institute the eviction application against you client due to the fact that he had no vacated the accommodation. It is interesting to note that you client only vacated the accommodation after service of the eviction application upon him.
>
> 8. It is a common tactic employed by those unlawfully occupying accommodation to vacate accommodation on threat of an eviction application.
>
> 9. Having regard to the fact that your client has vacated the accommodation it was unnecessary for him to oppose same and to serve and file an opposing affidavit.
>
> 10. We contacted you yesterday with a proposal that as your client had vacated the accommodation we withdraw the eviction application and that each party pay their own costs.
>
> 11. Your client has not accepted this proposal.
>
> ...
>
> 13. It is our opinion that your client should not have opposed this eviction application considering, firstly his intention to vacate the accommodation as at 16 February 2004 when the eviction application was served on him and secondly, his actual vacation of the accommodation on 12 February 2004, a day before the service of his opposing affidavit.".

[15] The contents of the letter are clearly consistent with the content of

the extract and resolution. I am satisfied, on a balance of probabilities, that the application for an order in respect of the second claim was not authorized as alleged. In the result the second point raised, in so far as it relates to the second claim, succeeds.

[16] The outstanding matters relate to the permissibility of the supplementary affidavit in which the applicant seeks to amend the amounts in respect of the second claim and the determination of such a claim. In the view which I have taken of the matter it is unnecessary to deal with them. If I am wrong in upholding the second point raised then there is still, in my view, another stumbling block as to the determination that claim: There is a serious dispute of facts which was and should have been anticipated when the application was launched and which cannot therefore be decided on the papers. That notwithstanding the applicant launched the application proceedings for an order in respect of the second claim.

[17] On the final issue regarding costs Mr Snider submitted that the respondent should be ordered to pay the costs because he refused its proposals in the letter and unreasonably continued to "drive the application". Mr Hitge contended that the tender was not accepted firstly because the applicant did not offer to pay the respondent's costs and that the opposition was reasonable given the fact that the hinted withdrawal pertained to the eviction application only. As I have already indicated the letter makes no mention of the second

claim. Clearly, the respondent was entitled to pursue his opposition with regard to that claim which the applicant had neither withdrawn nor abandoned. I may mention also that as at the date of the proposals (20 February 2004) the deficiencies in annexure "A" were not corrected meaning, in effect, that the respondent was at the time entitled to pursue his opposition regarding lack of authority and that the respondent had already vacated the premises given the fact that when he deposed to the answering affidavit he was resident at 150 Main Road, Olifantsnek. In the circumstances an order for costs in favour of the respondent is inescapable. Having considered the matter carefully it appears to me that both parties have achieved a measure of success with regard to the costs pertaining to the ejectment claim.

In the result, I make the following order:

1. The application is dismissed.

2. Each party is to pay its or his costs up to and including 20 January 2004.

3. The applicant is ordered to pay all the respondent's costs from 20 January 2004.

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B.E. NKABINDE
JUDGE OF THE HIGH COURT

Date of Hearing: 12 May 2004
Date of Judgment : 20 May 2004

Appearances:

For the Applicant	:	Adv A. N. Snider
For the Respondent:		Adv M. G. Hitge