REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 386/2013

In the matter between:

CLOVER DAIRY NAMIBIA (PTY) LTD	**1ST APPLICANT**
PARMALAT SA (PTY) LTD	**2ND APPLICANT**

And

THE MINISTER OF TRADE AND INDUSTRY	**1ST RESPONDENT**
DAIRY PRODUCERS ASSOCIATION OF NAMIBIA	**2ND RESPONDENT**
NAMIBIA DAIRIES (PTY) LTD	**3RD RESPONDENT**
THE MEAT BOARD OF NAMIBIA	**4TH RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**5TH RESPONDENT**

Neutral citation: *Clover Dairy Namibia (Pty) Ltd v The Minister of Trade and Industry (A386/2013) [2014] NAHCMD 245 (15 August 2014)*

Coram: SMUTS, J

Heard: 1 August 2014

Delivered: 15 August 2014

Flynote: Application to execute judgment pending appeal to the Supreme

Court. Principles restated, following *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545. Applying the principles set out in that judgment, the court found that the balance of hardship or convenience favoured the applicant and granted the application

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ORDER

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1. The judgment delivered on 16 May 2014 is to be carried into execution immediately pending the outcome of the appeal noted by the first and fifth respondents on 19 May 2014;
2. The costs of this application are to stand over for determination by the court on appeal.

JUDGMENT

SMUTS, J

(a) This is an interlocutory application, seeking the execution of the judgment of this court given on 16 May 2014, pending an appeal to the Supreme Court against that judgment.

(b)

(c) This court in that judgment set aside a notice providing for quantitative restrictions on the importation of certain dairy products published in Government Notice 245 of 2013 in terms of s2(1)(b) of the Import and Export Control Act[1] by the Minister of Trade and Industry, cited as the first respondent in that application, The Minister and the Attorney-General, cited as the 5th respondent in that application, have appealed against the judgment and order of this court.

(d)

(e) That order was given in two separate applications for the review of the notice, raising different but also overlapping review grounds in the respect of the

[1]Act 13 of 1994 (the Act).

challenges to the notice. They also both challenged the constitutionality of s2(1)(b) of that Act. The applicants in both applications seek the execution of the judgment. It was my intention to hear both applications together. But the applicant in the other matter (Matador Enterprises (Pty) Ltd in case number A 352/2013) had also sought to strike down a portion of rule 121 of the rules of court as unconstitutional and was not ready to proceed with its application to execute the judgment on the date designated for this application. Matador's application was accordingly postponed to a date to be arranged with the Registrar.

(f) In the main application, the Dairy Producers Association of Namibia (DPA) and Namibia Dairies (Pty) Ltd, the acknowledged the beneficiaries of the notice, opposed the main application and were represented in those proceedings. They have not however appealed against the judgment of this court delivered in the main application. Nor they opposed this application for the execution of that judgment pending the appeal.

(g)

(h) I do not propose to set out the factual background which gave rise to the main application as it is detailed in the judgment. This application is brought by the first applicant, (Clover) established some two years ago to import dairy products for distribution from its parent company, Clover South Africa. The second applicant, Parmalat S.A exports (Pty) Ltd dairy products to Namibia which are sold and distributed by Matador as its agent. Parmalat does not apply for the relief sought in this application but merely abides the decision of this court.

(i) Both Mr Frank SC, who together with Ms Bassingwainghte appeared for Clover, as well as Mr Maleka SC, who together with Mr Namandje appeared for the Minister and Attorney-General, agreed that the principles set out *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[2] and adopted by this court,[3] apply to applications of this nature. Those principles are

[2]1977 (3) SA 534 (A) at 545.

[3]*Walmart Stores Incorporated v Chairperson of the Namibian Competition Commission and Others case no. A 61/2011*, unreported 15 June 2011 and in *Witvlei Meat v Agricultural Bank of*

neatly summarised in the following passage from that judgment.

> 'The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. V Estate Marks and Another, supra at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fismer v Thornton, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:
>
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
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> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
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> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
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> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

(j)

(k) It was also held in *South Cape Corporation* that the onus is upon an applicant to establish that leave to execute should be granted pending an appeal.[4]

Namibia 2014 (1) NR 22 HC at par [13].

[4]South Cape Corporation supra at 548D.

(l) In *South Cape Corporation*, Corbett, JA (as he then was) made it clear with reference to authority that the purpose underlying the common law rule suspending a judgment upon the noting of an appeal, now set out in rule 121 of the rules of this court, is to prevent irreparable damage from being done to the intending appellant 'either by a levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgement appealed from.'[5] Corbett JA also made it clear that in considering and application of this nature a court has 'a wide general discretion to grant or refuse leave and, if leave be granted, determine the conditions upon which the right to execute shall be exercised.'[6]

(m) Mr Frank relied upon the approach Goldstone AJ, (as he then was) in *Tuckers Land and Development Corporation v Soja* which, in applying *South Cape Corporation*, stated the following:[7]

'The question thus must be resolved on the respective potentiality for irreparable harm or prejudice being sustained by the applicant and the respondent respectively. It seems to me that the primary consideration here is whether or not there is a potentiality of irreparable harm being suffered by the respondent. If there is not such a potentiality then execution should levy. The applicant does not have to establish in addition that it will suffer irreparable harm if execution is not levied. In my opinion this follows from the purpose of the rule suspending execution. That purpose is described as follows by CORBETT JA in the *South Cape Corporation* case at 545B - C:

> "The purpose of this rule as to the suspension of a judgment on a noting of an appeal is to prevent irreparable damage from being done to the intending appellant either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from. (Reid's case supra at 513.)"

'Where there is a potentiality of harm to the respondent then one must examine the potentiality of harm to the applicant, and find where the balance lies. That this is so is also demonstrated by the 'appropriate case' referred to by CORBETT JA at 548D - F

[5]Supra at 545 B-C.

[6]Supra at …….

[7]1980 (1) SA 691 (W) at 696 E-H.

of the judgment, where in the case of a money judgment, which the respondent can pay, the furnishing of security *de restituendo* would

> "go a long way to establishing, prima facie, the applicant's claim for relief, and, in the absence of any rebutting evidence from the other party, might be conclusive.'"

(n) Mr Maleka however questioned the correctness of this approach and submitted that the incidence of the onus required that it was for the applicant to establish that leave to execute should be granted, as was held in *South Cape Corporation*.[8] Mr Maleka is entirely correct that the overall onus is upon an applicant to establish that leave to execute should be granted. But the approach of Goldstone AJ in *Tuckers Land* which expressly followed and applied the approach of the court in *South Cape Corporation*, is to be viewed within the context of the overall onus upon an applicant. Where an appellant is unable to show the potentiality of harm, then it would follow that an applicant for execution would be greatly assisted in discharging the overall onus upon it.

(o) The question after all is, as Goldstone AJ stressed, to be resolved on the respective potentiality of harm or prejudice being sustained by an applicant in this application and the appellants in the appeal respectively and to find where the balance lies, taking into account the factors articulated in *Southern Cape Corporation*.

(p) I turn to the potentiality of harm to Clover and the Minister and Attorney-General respectively and the question as to where the balance lies. I do so because there are no grounds raised in this application upon which it can be found on the papers that the appeal is frivolous or vexatious in the sense of the appeal being noted without the *bona fide* purpose of seeking to reverse the judgment but for some ulterior motive.

(q)

(r) In its founding affidavit, Clover in some detail sets out the difficulties it encounters with the implementation of the restrictions in the notice and particularly with the manner in practice in which applications for permits are to

[8] Supra at 548.

be made, dealt with, approved and then how importation then occurs. Clover sets out the delays which are inherent in that process and which in most months thus far have arisen. Certain of these delays are occasioned by the Ministry itself in imposing a process which is contrary to the terms of the notice itself – by entertaining applications only on the 20th day of a month for the following month. Clover also sets out the consequences of these delays upon its business.

(s)

(t) The Minister in opposition to this application points out that his Ministry is largely not responsible for the full extent of the delays in the process. But the fact remains that the evidence of these delays as a result of the notice is not gainsaid and the deleterious effect of them is demonstrated by Clover in its founding affidavit.

(u) Clover also points out that its business has shrunk considerably as a consequence of the notice and that it has become a loss making entity as a consequence. Its General Manager stated that it had initially expected a drop of about 50% in its business but this forecast had been surpassed and a 70% drop in its business had been experienced. He stated that this translated itself into an actual financial loss of approximately N$500 000 per month to Clover. He further stated that Clover had been obliged to retrench employees and may need to lay off even more employees. It was also stated that Clover may need to discontinue its operations if the current regime of restrictions were to continue. Many of these allegations are not materially put in issue although the Minister in his affidavit questions the financial statements relied upon and raises a lack of evidence to support the retrenchments. The Minister pointed out that the financial statements are those of a third party, Clover S.A., and not Clover itself.

(v)

(w) Retrenchment notices are attached in reply. But it was stated by Clover's General Manager in the founding affidavit that these retrenchments had occurred as a consequence of the restrictions. It was also stated in the founding affidavit by Clover General Manager that the attached financial statements reflect its position. It is explained in reply that the statements were prepared in the name of Clover's South African parent company but that these statements pertain to the applicant's (Clover's) business. That would appear to be evident

from those statements. But the evidence given by Clover's General Manager on retrenchments and its financial position was not controverted in any material sense including the deleterious effect of the restrictions in the notice upon its business and that retrenchment which have occurred as a consequence.

(x) In the answering affidavit, the Minister takes the point that the applicant failed to show special circumstances to grant the application. I have already spelt out the applicable test. The term 'special' is used in early authorities both with reference to the nature of the application and to the circumstances which are to be present. But the use of that term is to be understood within the nature of the test spelt out in *South Cape Corporation* and not as a self standing requirement.

(y)

(z) As to prejudice, the Minister states the prejudice faced by the Government respondents is essentially that the Government will be frustrated in implementing an important economic Governmental policy which underpins the notice. He further points out that the prejudice is irreversible because the continued importation of affected dairy products would undermine the domestic dairy producers and that the public interest, which is the criterion for the exercise of his powers in s2 of the Act, would as a consequence be undermined. That is the essential nature of the prejudice contended for by the Government respondents.

(aa)

(bb) Mr Frank referred to the fact that the DPA and Namibia Dairies had not appealed against the judgment and that also not opposed for its execution pending the appeal. He pointed out that those respondents in the main application were the principal beneficiaries of the notice – as was correctly acknowledged by Mr Maleka – and that they as beneficiaries of the notice and for whose protection it had been promulgated had not opposed this application. Mr Frank submitted that the Minister's prejudice is more apparent than real, and rather amounted to a loss of face.

(cc) It is correct that it is those entities which stood to benefit from the notice, namely DPA and the Namibia Dairies. As I have pointed out, they had not

appealed against the judgment. Nor had they opposed this application. Nor have they filed any affidavits in support of the Government respondent's opposition to this application. It was open to the Government respondents to obtain affidavits from them. They are the parties who would primarily be directly prejudiced if the judgment were to be executed, as stated in the main application. (The restrictions in the notice were after all imposed after an application from them had been directed by them to the Minister.)

(dd)

(ee) I agree with Mr Frank that the prejudice to the Minister is far less tangible than the other protagonists namely Clover on the one hand and Namibia Dairies and the DPA on the other. The Minister in this application did not set out factual matter demonstrating the effect of a further delay in the implementation of quantitative restrictions or taking other measures. His assertions on prejudice in this context are to be viewed within the factual matrix of the main application. There was infant industry protection accorded to the Namibian dairy industry for an extended period of several years, there was then the period thereafter without that protection, the application then made by DPA for further protection, and the time taken for the promulgation of the notice after the receipt of that application and its subsequent implementation.

(ff)

(gg) The Minister did not place evidence before this court as to the impact upon the local dairy industry in the absence of the notice, pending an appeal. Mr Maleka pointed out that it was open to the applicant to make application to the Chief Justice for the early hearing of the appeal. He accepted that if this application were to be granted, it would be open to the Minister to make a similar application. In view of the competing considerations involved in this matter, it would be appropriate that an appeal in this matter should, if possible, receive some priority in the allocation of an early hearing date.

(hh)

(ii) On the basis of the facts before me in this application and the findings I have made, it would follow in my view that the balance of harm – should the order not be implemented pending the appeal – would militate in favour of granting the relief sought as the balance of convenience clearly favours the applicant.

(jj)

(kk) In reaching this conclusion, I also take into account to the issue of prospect of success in the context of the test set out in the *South Cape Corporation*. As I have said, no grounds have been raised that the appeal is not *bona fide* in the sense referred to.

(ll)

(mm) In the Minister's answering affidavit to this application, he states that he would want to seek leave to introduce new evidence on appeal in the form of an affidavit by himself concerning the decision-making and his role. This is raised in order to support the contention made on his behalf in respect of prospects of success.

(nn) Mr Frank referred to the test for tendering evidence on appeal adopted by the full court in *SOS Kinderdorf International v Effie Lentin Architects*[9] as follows:

'This Court's power to grant an order to lead further evidence derives from s 19(1) of the High Court Act 16 of 1990 and is similar to s 22(a) of the Supreme Court Act 59 of 1959 of the Republic of South Africa. It is therefore permissible to look at decisions in that country. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) the Appeal Court of South Africa entertained a similar application. That Court referred to the oft-quoted statement of Innes ACJ in *Shein v Excess Insurance Company Ltd* 1912 AD 418 at 429 that:

> "The investigation of the facts by the tribunal of first instance ought to be, as a rule, final; and if a suitor is willing to close his case and to submit to the finding of the trial Judge upon the evidence adduced, he should not, save in exceptional circumstances, be allowed to bring forward further evidence. Otherwise there would be no finality to these matters."

The Court in *Benjamin's* case then added the following (at 427H-428):

> "In addition to the rule requiring finality this Court, in *Colman v Dunbar* 1933 AD 141 at 161-2, mentioned among the guiding principles that may be adopted in an application of this kind, *inter alia*, that the applicant must show that the fact that he had not brought the fresh evidence forward was not owing to any remissness on his part, that he must satisfy the Court that he could not have got this evidence if he had used reasonable diligence, and that he must establish

[9]1992 NR 390 (HC) at 397 A-E.

> that the evidence tendered is weighty and material and that it will presumably be believed. This latter evidence must be such that if adduced it would be practically conclusive, for, if not, it would still leave the issue in doubt and the matter would still lack finality.'"

(oo) Mr Frank pointed out that this approach had been followed and endorsed by the *Supreme Court in JCL Civils Namibia (Pty) Ltd v Steenkamp*.[10] The Supreme Court confirmed the nature of the test to be followed and the pre-requisites for granting relief to receive evidence on appeal, stressing that it is a power which that court would exercise sparingly and only where the requisites had been complied with. The requisites are firstly establishing a reasonable explanation why the evidence was not tendered at trial. Secondly the evidence is to be the essential for the case at hand and thirdly that it would probably have the effect of influencing the result.

(pp) Mr Frank criticised the reasons for the Minister not providing an affidavit within the ample time for furnishing an answering affidavit in the main application until the hearing of the application some several weeks subsequently.[11] But it and is suggested by the Minister that the decision not to file an affidavit was on the basis of advice received at the time. Mr Frank submitted, with reference to sound authority,[12] that the Minister in electing not to give evidence would need to live with the consequences of his decision, taken upon legal advice.

(qq)

(rr) Mr Maleka on the other hand contended that the Minister's affidavit would be a mere confirmatory affidavit and would not raise new evidence. Whilst that contention may be correct with regard to what would be stated in the affidavit (by confirming what was stated by the Permanent Secretary), it would need to be viewed within the context of facts of the main application and the

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[10]2007 (1) NR 1 (SC) at par [27 – 30].

[11]Both applications were served in October 2013. Two answering affidavits were provided by the Permanent Secretary in Matador – on 14 October 2013 and 12 February 2014 – and an answering affidavit in Clover's application on 27 February 2014. The main application was heard on 14 and 25 March 2014.

[12]SOS Kinderdorf supra at 397G – 398 B and the authorities referred to by the by the full court, especially Florence v Florence 1948(3) SA 71 (D) at 73.

manner in which the decision was challenged. In both of the applications which served before me, the challenge was squarely made that there had not been a proper application of the mind on the part of the repository of the power to make the decision, namely the Minister. After the record had been provided, the applicants in both applications pointed to the absence of any piece of paper forming part of the record, apart from an earlier memorandum to the Cabinet, upon which the Minister had himself subscribed to the decision. The applicants explicitly challenged the decision making process, in particular the application on the part of the Minister of his mind to that process, and questioned whether the decision had been taken by the Minister himself. It was also nowhere stated what documentation served before him in the context where he had at no stage been present during public consultations. The Minister did not file any affidavit in response to these express challenges when the answering affidavits were filed. Nor was there any application made on his behalf to file an affidavit subsequently up to the hearing of the application some weeks after the answering affidavits had been filed.

(ss)

(tt) There may thus be some difficulty for the Minster to establish the pre-requisites to file the affidavit on appeal on the one hand. But on the other hand if it were to be contended that the evidence of the Minister is material, which is one of the pre-requisites, then it would undermine the contentions as to the prospects of success against the judgment which was made on the basis of the evidence which served before the court.

(uu)

(vv) But even if the further evidence on part of the Minister were to be admitted, this may in any event not affect the issue of prospects of success with regard to certain of the other bases upon which the notice was set aside, namely with regard to the flawed nature of the hearing afforded to interested parties, the exercise of the wrong statutory powers and the nature of the memorandum to the Cabinet concerning DPA's application (with regard to the Clover's (and Parmalat's) stance as to the use of rBST and the undertaking they had obtained from producers which had not been conveyed to the Cabinet and which appeared to be a material factor in the decision making process on the Cabinet's part). Mr Frank also referred to the fact that there were issues not

dealt with in the judgment which were raised in both applications upon which argument may and can be advanced on appeal in support of the judgment. These included argument advanced that the notice was contrary to the provisions of the Southern African Customs Union (SACU) agreement.

(ww) Mr Maleka however contended that the reasoning of the court in respect one of the grounds upon which the notice was set aside was internally inconsistent. But, as he acknowledged, there were other grounds on which the court had set aside that notice.

(xx) In the circumstances, the application to receive further evidence on the appeal would appear to undermine the respondents' contention with regard to prospects of success. But there were also other different bases upon which the notice was found to be invalid, including weighty arguments by both applicants with reference to the SACU agreement which were not found to be necessary to be determined in view of findings on other issues. It would follow in my view that the issue of prospects of success in the appeal considered in the context of this application would be a factor favouring the granting of this application.

(yy) Exercising my discretion, I accordingly find that the requisites for relief of this nature have been met by Clover and that the application should be granted to execute the judgment of this court pending the appeal to the Supreme Court.

Costs

(zz) Although Mr Maleka initially argued that he would be seeking an order of costs, both counsel ultimately agreed that I should follow the approach of the Supreme Court in *Wal-Mart*[13] that, as a general rule, the costs of applications of this nature should be determined by the court of appeal. No special circumstances were put before me which would justify a deviation from that approach.

(aaa) The order I make is as follows:

[13] *Namibia Competition Commission and Another v Wal-Mart Stores Inc* 2012 (1) NR 69 (SC).

1. The judgment delivered on 16 May 2014 is to be carried into execution immediately pending the outcome of the appeal noted by the first and fifth respondents on 19 May 2014;
2. The costs of this application are to stand over for determination by the court on appeal.

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D SMUTS

Judge

APPEARANCES

APPLICANT:	T.J. Frank SC (with him N. Bassingthwaithe) Instructed by LorentzAngula Inc.
1ST AND 5TH RESPONDENTS:	V. Maleka SC (with him S. Namandje) Instructed by Government Attorney