

SOUTH AFRICA / JUDGMENT

Botha v Malibra Hire BK (1960/2010)

[2012] ZANCHC 25 (25 May 2012)

[2012] ZANCHC 25**COURT**

Northern Cape High Court, Kimberley

BEFORE

Hughes-Madondo

CASE / FILE NUMBER

1960/2010

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE

NO: 1960/2010

HEARD:

20/04/2012

DELIVERED:

25/05/2012

In the matter between:

MARIE BOTHA

.....APPLICANT

and

MALIBRA HIRE BK

.....RESPONDENT

JUDGMENT

HUGHES-MADONDO, AJ

This is an opposed application where the applicant seeks the following order as set out verbatim in the notice of motion:

“(a) Dat die kooporeenkoms tussen die partye, se kansellasië op 25 Oktober 2010 hiermee bekragtig word, alternatiewelik dat die kooporeenkoms hiermee gekanselleer word;

- (b) Dat die respondent gelas en beveel word, om die lys van bates, soos uiteengesit in aanhangsel “A1” tot die koopoooreenkoms, aangegaan tussen die partye op 1 Oktober 2008, onverwyld aan die applikantterug te lewer;
- (c) Dat die balju van bogemelde Agbare Hof gemagtig, gelas en bevel word om die bates soos uiteengesit in aanhangsel “A1” tot die koopoooreenkoms tussen die partye gedateer 1 Oktober 2010, op beslag te lê, te verwyder en aan die applicant te lewer;
- (d) Dat die respondent gelas word om die koste van die aansoek te betaal op die skaal soos tussen prokureur en eie kliënt.”

Adv A G Van Tonder appeared on behalf of the applicant and Adv A D Olivier for the respondent.

The applicant a business woman, Martie Botha, alleged that on 1 October 2008, she entered into a purchase and sales agreement with the respondent company, Malibra Hire BK, which was represented by Lee-Ann Thuynsma. This agreement involved the sale of the applicant's tool hiring business, inclusive of all the tools, as appears on annexure “A” attached to the agreement. The salient features of the agreement were that the purchase price would be R700 000.00, a further amount of R11 666.67 together with interest would be paid in addition to the purchase price and the total amount was to be paid in 60 equal monthly instalments.

The respondent company's attorney drew up the purchase and sales agreement. This agreement reflected Johan Botha, identity number 670920 5036 08 0 as the seller of the business concerned. The agreement was signed by the respondent's representative, Lee-Ann Thuynsma, on 30 September 2008, in Kathu, Northern Province and signed by the applicant on 1 October 2008. On the applicant signing the agreement she made amendments to the details of the seller by inserting her name and identity number. She submitted that she did so as she was the rightful owner of the business that was being sold to the respondent. The applicant submits further, that she complied with the terms of the agreement however the respondent has not complied, in that, it has failed to make good regular monthly payments since June 2009 and from December 2009 the respondent stopped making payments completely.

On 13 October 2010 the applicant instructed her legal representatives, Johan Kotzé Attorneys, to issue a letter of demand to the respondent. This letter placed the respondent on terms as they were behind with their payments. They were in breach of clause 4.2 and 4.4 of the agreement and if the outstanding payments were not received within seven days clause 9.2.2 of the agreement would be invoked.

Clause 9.2.2 reads as follows:

“...om hierdie ooreenkoms sondermeer te kanselleer deur skriftelike kennisgewing aan die versuimende party: en die benadeelde party sal daarbenewens geregtig wees om sodanige skadevergoeding wat die benadeelde party mag gely het van die versuimende party te verhaal

(insluitende alle verkwisteregskostesduer die benadeelde party aangegaan op die skaal soos tussen prokureur en eien kliënt).”

On the 25 October 2010 the applicant duly cancelled the agreement in terms of the above clause 9.2.2.

The respondent denies having entered into a written agreement with the applicant. In amplification of this denial the respondent submits that it entered into an agreement with Johan Botha senior (the husband of the applicant), who represented that he was the owner of the business. The respondent further submits that its attorney's were instructed to draw up the agreement reflecting

Botha's details. Eventually the respondent was informed that in fact the applicant was the actual owner and on the request of the applicant, the respondent was to draft another agreement which included the necessary amendments. The respondent states that this was forwarded to the applicant, however to date this agreement has not been returned to the respondent. The respondent states that payments were made to Johan Botha as per the terms of the agreement. The respondent concedes that it ceased making payments as of December 2009.

The applicant in her reply to the respondent's answering affidavit sought that this court find that there was a valid written agreement between her and the respondent, if not, then this court should find that at the least a verbal agreement exists between the parties, the terms of which appears in the written agreement signed by the applicant. Applicant states that this is because at that time her husband (Johan Botha) acted as her agent in the concluding the sale. I refer to paragraph 21 of her replying affidavit:

"Dit is inderdaad so dat my man, Mnr Johan Botha Jnr, die onderhandelings met Mnr André Thuynsma hanteer het, met betrekking tot die verkoop van my gereedskapsverhuuringsbesigheid, maar het Mnr Johan Botha Jnr te alle tye as my agent in die verband optree."

The applicant further states that on or about 30 September 2008 or 1 October 2008 Ms Lee-Ann Thuynsma, who signed the agreement on behalf of the respondent came to her home at 1 Rivierstraat, Postmasburg. She had in her possession the agreement which was already signed by her. At this stage the applicant brought it to Ms Thuynsma's attention that she was in fact the owner of the business. The applicant states that there and then the amendments were made and then the applicant signed. The applicant submits that Ms Thuynsma undertook to have a new agreement drafted reflecting the relevant amendments.

Against above backdrop it is appropriate to make mention of the cardinal principle of the law of contract being that, a simple contractual offer [my emphasis] made to a specific person can be accepted only by that person and that the acceptance by another person is ineffective and does not bring about the conclusion of a contract. See *FRASER AND ANOTHER v VILJOEN* [2008] ZASCA 24; 2008 (4) SA 106 SCA at 109J-110C; *LEVIN v DRIEPROK PROPERTIES (PTY) LTD* 1975 (2) SA 397 (A) at 407C and *BLEW v SNOXELL* 1931 TPD 226 at 229-230 where KRAUSE J said:

"Now it is trite law that an offer made by one person to another cannot be accepted by a third person...for the simple reason that there was no intention on the part of the one person to contract with the other person whatever the subject matter of the contract may be."

In this case an offer to purchase was made by the respondent to Johan Botha, the husband of the applicant, who represented to the respondent that he was the owner of the business that was to be sold. It evident that this amount to a simple purchase and sales agreement of which the negotiated terms were eventually reduced to writing. The offeror, the respondent, signed the agreement, and what was outstanding was the signature of Johan Botha, the offeree.

The acceptance of the respondent's offer to Johan Botha was not forth coming. Instead the applicant made amendments to the agreement, one of which pertained to the details of the seller. She deleted her husband's name, Johan Botha and his identity number, amidst and inserted her name and identity number as the seller. I am of the view that this amounted to a change in a material term of the original agreement, agreed upon between the respondent and Johan Botha. See *DA SILVA v JANOWSKI* 1982 (3) SA 205 AD at 219B-C where the following was stated: "Essentially the dispute between the parties related to the terms of the contract and, that being so, the onus rested squarely on the plaintiff to prove the contract on which he founded his action. It was accordingly not enough for the plaintiff to prove that the signatory put his name to the document-it was incumbent on him to show that the signatory put his name to the contract on which he, plaintiff, was suing, including all its material terms." [My emphasis]

In this case what is brought to the fore is that as the applicant's cause of action rest upon the agreement, she has to prove that the respondent signed the current agreement, agreeing to it in its final form inclusive of the amendments. It is relevant to state again that the respondent affixed its signature to the agreement without the amendments thereon. Thus the final form that the respondent agreed upon was without the amendments and the applicant cannot rely on the agreement to prove her cause of action.

The conduct of the applicant when she made amendments to the agreement amounts to a counter offer to the initial offer that the respondent made to Johan Botha. However the applicant persist that she contracted with the respondent and that her husband, Johan Botha, merely acted as her agent. To validate the agreement the respondent would have to have accepted the applicants counter offer and would have had to communicate its acceptance in writing, as the counter offer was in writing. Non acceptance of the counter offer by the respondent amounts to the respondent's offer being destroyed by the applicants counter offer. See *COLLEN v RIETFOONTEIN ENGINEERING WORKS* 1948 (1) SA 413 (A) at 420 and Refer to The Law Of Contract in SA 5th Edition R H CHRISTIE at page 49-50. From the evidence before me there is no written acceptance by the respondent of the counter offer made by the applicant.

Adv Van Tonder argued that I infer from the conversation between the applicant and Ms Thuynsma, where the applicant advised Thuynsma that she was in fact the owner and that Ms Thuynsma should ensure that a new agreement was drafted in line with the amendments made, that this constituted a verbal agreement. My view is that even though the respondent was advised as to who the owner is, this being new material information, and there is no new contract that can be produced before this court upon which the applicant can rely on, is an indication that the counter offer cancelled the original offer of the respondent to Johan Botha and there is no agreement between the respondent and the applicant. My conclusion can only be that

the aforesaid counter proposal destroyed

the initial offer made by the respondent and as such no agreement exists between the parties.

The order sought by the applicant was that the cancellation of the agreement on 25 October 2010 be ratified, alternatively the agreement be cancelled. No agreement existed between the parties and as such cancellation thereof could not have been effected on 25 October 2010. Likewise as there is no agreement ratification cannot take place.

As regards the costs these will follow the successful party being the respondent.

The following order is made:

The application is dismissed with costs.

W HUGHES-MADONDO

ACTING JUDGE

Northern Cape High Court, Kimberley

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APPEARANCE On behalf of the Applicant: Adv. A.G.VON TONDER Instructed by HUGO
MATTEWSON OOSTHUIZEN On behalf of the Respondent: Adv.A.D. OLIVIER Instructed by
DUNCAN & ROTHMAN

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Prepared on 9 October 2026 · Esheria