

SOUTH AFRICA / JUDGMENT

Carriem v Fareed (10262/2005)

[2008] ZAWCHC 48 (15 August 2008)

[2008] ZAWCHC 48**COURT**

Western Cape High Court, Cape Town

BEFORE

Samela

CASE / FILE NUMBER

10262/2005

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REPORTABLE COVERSHEET

Case No.: 10262/2005

Date/s of hearing : 10, 11, 12, 13 December 2007; 11, 12, 13 March 2008; 5, 6, 7, 8 May 2008; 4 July 2008

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In the matter between

MS SARA CARRIEM (previously CELESTE COCKRELL) Plaintiff

MR AHMED SEDICK SHEIK FAREED Defendant

[1] In this matter, the Plaintiff, Mrs Sara Carriem, sues the Defendant on a written contract of sale. The contract was signed by the parties at the end of August 2004, backdated the 1 st August 2004. In terms of the Deed of Sale, the Plaintiff sold to the Defendant all her loan claims and authorised issued share capital in Sara-C Retreat Panel & Spray (Pty) Ltd at a purchase price of R950 000.00 (Nine Hundred and Fifty Thousand Rand).

FACTUAL BACKGROUND

[3] The following facts are common cause between the parties:

3.3 Written Deed of Sale by Mrs Sara Carriem and Mr Ahmed Sedick Sheik Fareed (signed at the end of August 2004);

3.4 The Defendant took exclusive control of the business as if he was the owner, on 1 August 2004;

3.7 The keys to the business premises were returned and handed to the Plaintiff's husband not to the Plaintiff herself. They were returned at the end of July 2005;

- [4] Messrs M H Abbas, A Burns, F Phillips and M F Carriem were called as the Plaintiff's witnesses to give viva voce evidence. The Defendant called Messrs H Wilken, G W Reid and D D Assure to give viva voce evidence as witnesses. The Plaintiff testified that she is married out of community of property to her husband, Mr M F Carriem. She was in control or owned three panel shops which she bought from her husband. She told the court how she managed to persuade her husband to sell all three panel shops to her despite the fact that there were other potential buyers for the businesses. On 1 March 2003 she had purchased the Retreat business (previously known as Action Auto Body Retreat) and renamed it Sara-C Auto Body (its official name being Sara-C Retreat Panel & Spray (Pty) Ltd). The other two panel shops, namely, Brackenfell and Salt River were sold by the Plaintiff to Mr Tommy Nel as she had some problems with insurance companies. The Retreat panel shop was situated at the premises owned by a landlord. The Plaintiff had hired Mr Roy Kolby as a manager at Retreat. Subsequently the Plaintiff dismissed Mr Kolby as a manager and employed the Defendant as manager. The defendant's wife worked as a bookkeeper in all the three abovementioned panel shops. With regard to the Retreat branch, the Plaintiff had a potential buyer, namely Mr Hanken, and the purchase price was R950 000.00 (Nine Hundred and Fifty Thousand Rand). However, Mr Hanken did not have the money upfront. The Plaintiff was approached by the Defendant's wife (Farzaana Patel) requesting the Plaintiff to sell the Retreat business to her and the Defendant. As the Defendant and his wife worked for the Plaintiff for a long time, the Plaintiff decided to give them the opportunity to purchase the Retreat business. At the discussions and negotiations about the selling of the Retreat business, the Plaintiff's husband was present. The Defendant and his wife did not have the money then, they would pay the Plaintiff monthly over a period of five years. The Plaintiff testified that as she was not desperate for money, she decided to give the Defendant and his wife the opportunity of purchasing the Retreat business.
- [5] The Plaintiff decided to sell the business as a going concern by selling shares in the company (Retreat) to the Defendant for R950 000.00 (Nine Hundred and Fifty Thousand Rand) payable in sixty instalments. The first 59 instalments each amounted to R16 000.00 (Sixteen Thousand Rand) monthly, and the 60th instalment was to be R6 000.00 (Six Thousand Rand). Each instalment was payable on the first day of each month. The first instalment was due and payable by the 1st September 2004 and the last instalment was due and payable on the 1st September 2009.
- [6] After the Deed of Sale was drafted by the Plaintiff's attorney, Mr Abbas at the Plaintiff's request, facilitated the signing of the document. The Plaintiff as the seller signed the document (Deed of Sale Agreement) in the morning of the 30th August 2004 and the Defendant as the buyer signed the same document in the afternoon of the same day. The contract was backdated 1st August 2004, as the Defendant was already in possession and control of the business as from the 1st August 2004. It was the only agreement the Plaintiff signed on the 30th August 2004. On the 16th August 2004, the Plaintiff handed over the signing powers to the Defendant over the ABSA Bank account which had R29 859.82 (Twenty Nine Thousand Eight Hundred and Fifty Nine Rand and Eighty Two Cents) credit. Later on various VAT refunds by the Receiver of Revenue were paid

into this account. The Plaintiff stressed that there was an intention on her part to sell the business to the Defendant. The latter also had an intention to buy the business from her. The Plaintiff on numerous occasions requested payment from the Defendant, but in vain, until the business keys were returned to the Plaintiff's husband in July 2005. When the Plaintiff requested payments from the Defendant, the Defendant informed her that the Defendant was waiting for profits to increase, and the Plaintiff was also not desperate for the money. During this period, that is, August 2004 and July 2005, the relationship between the parties was good. During July 2005, the Plaintiff exerted much pressure on the Defendant to pay. It was in July 2005 when the business keys were handed over to the Plaintiff's husband, when her husband informed her that the Defendant had evacuated and locked the premises on the same day. The Plaintiff, her husband and Mr Faiek Phillips went to inspect the premises. The Plaintiff found the premises in a shocking state. The fixed equipments were stripped, unusable, and movable equipments missing. The equipments that were left needed to be repaired. The Plaintiff tried to get hold of the Defendant telephonically, but was unsuccessful. Mrs Carriem stuck to her testimony though she differed with the Defendant's version. She also differed to Messrs Wilken's and Reid's versions regarding the options discussed in their meeting to have her companies back on the Santam panels. Her evidence was corroborated by Mr Abbas regarding the validity of the Deed of Sale. Her evidence was also corroborated by her husband, Mr Carriem. She was a credible and reliable witness. She performed well in the witness box and gave evidence in a clear and satisfactory manner. Therefore there is no reason to reject her evidence.

[7] Mr Carriem confirmed that he was married to the Plaintiff. He testified that he had been in the panel beating industry since 1988. Mr Carriem also confirmed that he owned the Brackenfell, Salt River and Retreat businesses which he sold to his wife. Mr Carriem informed the court that as he had problems with Santam Insurance Company, he had decided to sell all his businesses. He also informed the court that he has a case pending against Santam Insurance Company in the Equality Court. Mr Carriem told the court that he had attended three out of four meetings they (his wife and himself) had with Santam Insurance Company. He also confirmed that the Defendant's wife worked for him before she worked for the Plaintiff. However, he denied that the Defendant worked for him. Mr Carriem denied that he had entered into any Deed of Sale and also a second agreement (the so-called back-to-back agreement) with the Defendant. Mr Carriem confirmed accompanying the Plaintiff on the day she signed the Deed of Sale Agreement at the auditors' offices. Mr Carriem, though argumentative, stuck to his version. His evidence corroborated that of the Plaintiff in material respects. Like the Plaintiff, Mr Carriem gave evidence in a satisfactory manner. He was an honest and reliable witness who was unshaken in cross-examination.

[8] Mr Abbas testified that the Carriems (Plaintiff and her husband) attended at his office in the morning while the Defendant and his wife came in the afternoon for the purpose of signing the Deed of Sale. Mr Abbas (had 24 years experience) testified that the Plaintiff and her husband and the Defendant and his wife never attended at his office at the same time on the day of signing the Deed of Sale. He told the court that he did not know anything about the so-called back-to-back agreement that was purported to have been signed by the parties that

day. Mr Abbas was very certain that the Deed of Sale signed by the parties in his office was a valid document. Mr Abbas was an independent witness who facilitated the meetings between the parties (between Seller and Purchaser) for signing purposes. He never deviated from his version. He was a credible and reliable witness.

- [9] Mr Burns' evidence was short. He testified that the Plaintiff had cancelled the short term insurance in 2004. Subsequently he had received a call from the Defendant's wife requesting for a short term insurance as they were taking over the business. Mr Burns, a short term director of Intasure South Cape Insurance Brokers, testified that he furnished a short term insurance quotation to the Defendant's wife, at her request. He was an independent witness, reliable and credible. Mr Phillips testified that he had 22 years experience in the panel beating business. The Plaintiff had offered him to purchase the business for about R1 000 000.00 (One Million Rand) and that was early to mid 2004. At that time Mr Phillips went to inspect the business, i.e. "the way the business was set up and the equipment it had". He testified further that in his opinion R950 000.00 (Nine Hundred and Fifty Thousand Rand) the business was purported to have been sold for Mr Fareed was a fair price. For economic reasons he could not afford to purchase the business. In July 2005 he visited the premises in the company of the Carriems (i.e. Mr and Mrs Carriem). He testified further that when they entered the building, the reception and office areas were abandoned and empty. The workshop was dirty and was empty, most movables or all the movables and equipment were removed from the premises. Mr Phillips, who had inspected the premises before and after the Defendant had left, also stuck to his story. He was reliable and credible. There is no reason to reject his evidence.

- [10] The Defendant testified that in February 2004 the Plaintiff's husband owned three panel shops, that is, one in Salt River, Brackenfell and Retreat. Mr Carriem had requested the Defendant to stand in as a manager in Retreat shop, which he agreed, as the then manager left and it was agreed that he would get 25% share of the net profit of the business. The agreement was between the Defendant and the Plaintiff's husband (Mr Carriem). The Defendant did not get the 25% net share agreed to between himself and Mr Carriem and when he complained to Mr Carriem, he was paid only R10 000.00. The business was not doing well due to Mr Carriem's problems with Santam Insurance Company. The Defendant and Mr Carriem discussed a name change proposal, whereby the Retreat business would be renamed from Action Autobody Group to Sara-C and the Defendant's name would appear as the new owner not Mr Carriem. Later on it was agreed to take off the name Sara-C and replace it by the Defendant's one as the business still was not doing well. The Defendant knew that Sara-C belonged to the Plaintiff though the negotiations were done by the Plaintiff's husband. The Defendant regarded the offer as an opportunity for him as he would earn 25%, though it was a 'sale on paper', that is, according to the Defendant 'sale on paper' means that he was not the owner of the business, it was done only to attract work from insurance companies. The Defendant confirmed signing the deed of sale agreement (copy shown to him), however, reiterated that it was a fictitious sale or agreement. The Defendant testified that before signing the deed of sale agreement, there was no discussion as to the price (of the business) or terms or conditions thereof. At the signing, people present were the

Defendant and his wife, the Plaintiff and her husband, Mr Abbas and his secretary. The Defendant also signed the so-called back-to-back document, which explained that the Defendant was not the company's owner. The Defendant regarded Mr Carriem as his boss. After the signing of the sale agreement, the Defendant was still taking instructions from Mr Carriem.

[11] From September until end of November 2004 the Defendant assisted and stood in for a manager at M12 Service Station in Belhar. The Defendant confirmed that he was given signing powers on the bank account. The Defendant felt that he could not manage the business any longer and left the business, having notified the Carriems. The Defendant testified that when he left the premises, the books of account were handed to an attorney's office of Mr Carriem, the keys were with Mr Assure. Mr Fareed was a very evasive witness. He contradicted himself on a number of occasions without explanation. When it came to the finances of the business, he implicated on numerous occasions his wife, but never called her as a witness. He was a poor witness. He was indeed not a reliable and credible witness. His evidence was not satisfactory. He gave me an impression that he was being economical with the truth. Quite frankly, I got an impression that he was a liar.

[12] Mr Wilken testified that he worked for Sanlam Insurance Company as executive head, executive director and was in charge of the distribution. He left the company in October 2003. Mr Wilken confirmed several meetings he had with the Carriems (that is Mr and Mrs Carriem) in Santam Offices in Tygervalley and in Illovo, Johannesburg. The discussions at these meetings were exploratory in nature as they discussed various options as to how to put the Carriems back to the Santam Insurance Company's panel. Mr Wilken also confirmed getting some documents from Mrs Carriem which he handed over to Santam legal department for assessment (handed to Mr Reid). Mr Wilken, though he differed with the Plaintiff regarding their meetings, was not a bad witness. After those meetings, Mr Wilken had no dealings with the Carriems again. Mr Reid testified that he is employed by Santam Insurance Company as a legal adviser. He confirmed that Mr Wilken requested him to verify a marriage ante-nuptial contract and a documentation indicating that there had been transfer of shares from Mr Carriem to Mrs Carriem. Mr Reid confirmed that the ante-nuptial contract and the share transfer documents appeared to be genuine documents to him. He denied that he communicated to the Carriems then that they would be accepted back to Santam panel. He also informed the court that he was not aware of the reason why he had to verify the documents. Mr Reid was a reliable and credible witness. He corroborated in particular that the Carriems were married out of community of property.

[13] Mr Assure, who had 40 years experience in the panel beating industry, testified that he was employed by Mr Carriem as a foreman in the Salt River panel shop. Eventually he was posted at Retreat panel shop still in the same position, under the Defendant. Mr Carriem had approached the Defendant and Mr Assure for a name change in order to generate more business. Mr Carriem did inform the staff that the Defendant would be the "supposed owner" of the business and to generate more business but that Mr Carriem would still remain the owner of the business. He also confirmed that the Defendant was at Belhar

petrol station for three to four months. As the business was bad the Defendant informed him that he was going back to Durban. Mr Assure confirmed that the spray booth, the burner, the chassis straightening machine, the compressors and hand tools were some of the main equipments which were at Retreat panel shop. Mr Assure had given the keys to Rafiek (who used to be a driver at Salt River and Retreat) to hand them to Mr Phillips at Mr Phillips' business in Wynberg (as per Mr Phillips' request). Mr Assure was an honest man who knew nothing about the Deed of Sale. He indeed confused dates and was of limited assistance regarding the Retreat business.

[14] This Court is called upon to decide, whether the signed Deed of Sale by the parties is a simulated transaction. If it is a genuine contract of sale, then the normal rule relating thereto would apply, that is, offer and acceptance, defined and ascertainable object and fixed or fixable price in money.

[15] Evidence was led that a Deed of Sale Agreement was indeed signed by both parties. The Plaintiff told the court that she had intention to sell and that the Defendant had intention to buy. The Defendant said the transaction was a "fictitious agreement" as it was a simulated transaction. Mr Tredoux for the Plaintiff argued that:

- (a) The Deed of Sale made provision for the payment of the purchase price over a period of five (5) years. If the agreement between the parties was a simulated one, there was no need to or purpose for allowing the Purchaser to pay the purchase price in instalments.
- (c) Mr Abbas had testified that the Defendant and his wife took some time to read through the agreement before signing it and this was never disputed. If this was a simulated agreement, why did the Defendant and his wife take some time reading through the agreement before signing it.

[16] Mr Shepstone argued on behalf of the Defendant that:

[17] Against the aforesaid, I ask myself the following:

[18] It is trite law that where the transaction purports to be a sale, and one party disputes its authenticity, the court has to look to the real transaction and not the form. It is also the duty of the disputing party to prove that the transaction is something different from what it purports to be. (See *Zandburg v Van Zyl* 1910 AD 302 at 314; *Ameer v Hasim* 1946 NPD 189 at 193; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) at 611 B-E; *Skjelbreds Lederi and Others v Hartless* 1982 (2) SA 710 (A) at 732-733).

[19] In this matter Mrs Carriem is certain that the transaction is a genuine one. She produced a written Sale Agreement as a proof of her claim. The signing of this document by the parties was facilitated by Mr Abbas. Mr Abbas also testified that according to him, the document was a valid one. Mr Abbas denied that on the day of the signing, all parties attended at the same time. He testified that the Plaintiff attended the signing during the morning session, while the Defendant attended the signing in the afternoon. Mr Abbas testified that there was never a back-to-back agreement signed on that day as claimed by the Defendant.

[20] Mr Fareed initially denied that he was aware that the Plaintiff was the owner of the business, but later on conceded that indeed he knew that the business belonged to the Plaintiff. It is difficult to accept Mr Fareed's explanation that the transaction is not a genuine one for the following reasons:

- (i) why the Defendant and his wife lived on the income generated by the business, if the business did not belong to him;
- (ii) why the Absa and Nedbank accounts were used by the Defendant for his own personal benefit to the exclusion of the Plaintiff;

unfortunately these questions will remain unanswered.

[21] In conclusion, I am of the view that the Plaintiff has succeeded in proving on a balance of probabilities that the Deed of Sale Agreement signed between herself and the Defendant was a valid one. I am of the view that the important requisites for sale in this matter had been met, namely:

The written and signed Deed of Sale Agreement is a testimony to this view. I am not persuaded that Mr Shepstone is correct in his submissions. I hold the view that Mr Shepstone's submissions are untenable.

- (a) the Defendant shall pay to the Plaintiff the sum of R950 000.00 (Nine Hundred and Fifty Thousand Rand) within 21 days;
- (b) plus interest thereon at 10,5% per annum as from 29 August 2005 to date of final payment;

SAMELA, AJ

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