

SOUTH AFRICA / JUDGMENT

Collett v Marais (39970/2015) [2018] ZAGPPHC 511 (1 June 2018)

[2018] ZAGPPHC 511

COURT

North Gauteng High Court, Pretoria

BEFORE

Dodson

CASE / FILE NUMBER

39970/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: 39970/2015

1/6/2018

In the matter between -

JACQUELINE-ANNE COLLETT

Applicant

and

RAYMOND MARAIS

Respondent

JUDGMENT

DODSON AJ

Introduction

- [1] This is an application for payment of the balance of the purchase price allegedly due in terms of an oral sale of shares agreement.
- [2] The applicant and the respondent were together the sole directors and shareholders in a company Container King (Pty) Ltd ("the company".) The applicant had a thirty per cent shareholding.
- [3] During November 2014 they entered into negotiations. On 3 November 2014 and following the negotiations, the applicant sent an email to an in- house labour lawyer at the company, which read as follows:

"Hi Liechen

As per our telephonic conversation Raymond and I have agreed to part company on the most amicable terms, due to the state of the business and the fact that it cannot support the both of us.

Please will you draw up a contract which Raymond has agreed upon, acknowledging the debt due to me. We have agreed upon the following

1. TRANSWIN: Debt of R360 000-00 for the deposit on the trucks. Repayment terms R30 000-00 per month commencing end November 2014 until paid in full (IMPORTANT. No payment will be made end December but will recommence end January 2015)
2. CONTAINER KING: Debt of R1,5 Million for Shares purchased from Raymond Marais. Repayment terms R30 000-00 per month commencing end November 2014 until paid in full (IMPORTANT. No payment will be made end December but will recommence end January 2015).
3. The above is with immediate effect
4. This hereby cancels my Directorship
5. Raymond also agreed that if funds do become available, he will endeavour to pay back the monies earlier
6. As of Monday 3rd November 2014 I am no longer with Container King but will continue to assist Raymond should he require it until 12th December 2014
7. Any monies owed t [in the only copy of the email available, this paragraph is incomplete]

Please will you get this through to all on this mail, including my husband Huw, today if possible.

Kind regards

Jackie-Anne Collett

- [4] Seemingly it was subsequently decided that the applicant's attorney rather than the in-house labour lawyer would prepare the written agreement because, on 7 November 2014, her attorney sent an email to the respondent attaching a draft sale of shares agreement and confirming the "amicable agreement" reached between them. The email also referred to the purchase price as well as "the repayment structure (which we have been advised is R60 000 per month until the total purchase consideration is repaid)". In the email, the applicant's attorney asked the respondent to "peruse the agreement and provide us with your comments, if any".
- [5] When there was no reply from the respondent, the applicant's attorney sent a reminder email on 14 November 2014. According to the applicant, the respondent replied, saying that the documents had been sent to his attorneys and he would respond shortly after that. Another reminder email was sent by the applicant's attorney to the respondent on 25 November 2014. Yet another was sent on 27 November 2014.
- [6] On 28 November a payment of R60 000 was duly made to the applicant's attorneys. The proof of payment attached to the founding affidavit refers to "payment from" as being "Container King (Pty) Ltd".
- [7] On 22 January 2015 the applicant's attorney sent another email to the respondent requesting that he provide the signed version of the sale of shares agreement, failing which the applicant would "pursue other legal remedies available to [her]".
- [8] The applicant alleges further that during the period 22 January to 4 February 2015 the respondent advised her attorney that he (the respondent) required an amendment to the payment terms in the draft sale of shares agreement so as to provide that the monthly instalments would be payable by no later than the 15th day of the month following the month in which the instalment fell due. The payments due mid-month could be made in increments and were not required to be made in a single sum. The respondent was, according to the applicant's attorney, satisfied with the remaining terms of the draft.
- [9] The applicant avers that a second draft of the agreement, amended as to the payment terms in accordance with the respondent's request, was sent to the respondent "on or about 9 February 2015".
- [10] Both versions of the draft agreement provided that in the event of failure to make any payment, the respondent would be entitled to seven business days' written notice to remedy the breach, failing which the applicant would be entitled either to cancel the agreement and claim return of the shares or to claim immediate payment by the purchaser of all the purchaser's obligations whether or not the due date for payment had arrived. The second draft also incorporated a new provision providing for interest on any outstanding amount to be paid at prime plus 3% per annum.

[11] The applicant avers that pursuant this development the respondent made payment of R15 000 on 9 February

2015. On 16 February 2015 the respondent informed the applicant that he was no longer in a position to make payment as agreed and asked that he be allowed to make weekly payments of R15 000. This she agreed to. A payment of a further R15 000 followed on 17 February 2015.

[12] On 27 February the applicant's attorney sent a letter to the respondent requesting an urgent meeting in respect of the finalisation and signing of the amended sale of shares agreement.

[13] The applicant avers further that on 2 March 2015 the respondent sent an email to her attorney saying that he would confirm his availability

for the requested meeting, but no such confirmation was received from him. A reminder email of 3 March 2015 from the applicant's attorney went unanswered. On 5 March 2015, the applicant's attorney told the respondent that the applicant would proceed to take legal action.

[14] On 16 March 2015 the applicant's attorney sent a letter to the respondent notifying him that he was in breach of the agreement and

called upon him to remedy his breach within seven days by making payment into their trust account in the sum of R90 000. This elicited

a further payment of R15 000 on 16 March 2015. A further letter was sent demanding the balance of R75 000 and this elicited what turned out to be a final payment of R15 000 on 23 March 2015.

[15] The failure to pay the balance resulted in a letter being sent by the applicant's attorney to the respondent on 1 April 2015 stating the following:

"We confirm that we have not received the remaining R60 000 ... due by you and, the above mentioned period having expired, we confirm that you have failed to rectify your breach. As set out in the notice, read together with the written sale of shares agreement, having failed to rectify your breach, our client has the right to claim immediate payment of all your obligations, whether or not the due date for payment has arrived, which right our client hereby exercises.

Accordingly our client has instructed us to demand from you, as we hereby do, payment of the amount of R1 740 000.00 ... within 20 business days from date hereof, failing which we will have no other alternative but to institute legal action against you for the recovery of same."

[16] No further payment or payments were made and the upshot was the present application.

[17] In his opposing affidavit the respondent-

[17.1] challenged the use of motion proceedings on the basis that there were foreseeable disputes of fact;

[17.2] in the alternative, placed reliance on the arbitration clause in the draft settlement agreement to suggest that there should be a stay;

[17.3] denied that he had "ever agreed to repay the amount of R360 000 to the applicant" because this was a debt owed to her by the company;

[17.4] denied that the purchase consideration of R1.5m had ever been agreed to, or that the amount of R1.5m represented the value of the shares;

[17.5] asserted that it was the company that would have paid for the shares and not the respondent and that the company ought to have been joined in the application;

[17.6] disputed having made the payment of R60 000 or any of the subsequent payments but acknowledged that he had "caused the company" to make the payments;

[17.7] denied any agreement having been reached with the applicant regarding the terms of the draft agreement and asserted that "[he] did inform him [the applicant's attorney] that the company will attempt as and when funds are available to make payments sporadically to the applicant"

[17.8] asserted that the first payment of R60 000 "was a gesture of goodwill";

[17.9] asserted that he informed the applicant that "the company's business is floundering and that it is unable to pay me my salary as well as the amounts that she suggested that should be paid to her. I advised that as and when monies are available I would pay an amount to her within my discretion so as not to put the company under further financial strain";

[17.10] placed reliance on the fact that the "effective date" is referred to in the draft agreements as the date upon which the last party signs the agreement and that on this basis neither the written agreement nor any other could have come into effect;

[17.11] denied that there was any agreement in terms of which either the company or he was obliged to make payments to the applicant.

[18] The respondent conceded that he "could not deny" that the email of 27 February 2015 requesting the urgent meeting was addressed by the applicant's attorneys to the respondent but asserted that he could "honestly not recall that [he] read it". He denied having sent any email in reply on 2 March 2015 and that the applicant's attorney addressed further emails to him on 3 and 5 March 2015.

[19] The respondent asks that in the circumstances, the applicant's claim be dismissed with costs.

[20] The applicant attached to her replying affidavit certain emails that the respondent denied receiving as well as certain emails that the respondent denied having sent. These include:

[20.1] The email sent by the applicant's attorney to the respondent on 14 November 2014 enquiring about whether the respondent had had an opportunity to peruse the draft agreement and was satisfied with it;

[20.2] The respondent's email in reply, sent on the same day, 14 November, saying:

"Hi Dale,

Thank you I have sent to my attorney just to have a quick run through ...

Should have it back to you by Monday ... Tuesday latest ...

Raymond Marais"

[20.3] the email sent by applicant's attorney's to the respondent dated 27 November 2014 asking that the agreement be signed by the next day;

[20.4] the respondent's email to the applicant's attorneys sent on 2 March 2015 in response to the request for an urgent meeting in which he says:

"Linda

I shall confirm ...

[21] During oral argument, the applicant sought an order for payment of the full outstanding balance of R1 740 000 plus interest and costs. The respondent sought the dismissal of the application, alternatively, a referral to oral evidence of the question as to whether or not an oral agreement was concluded on 3 November 2014 on the terms set out in the email of that date.

[22] The applicant contends that I am entitled to find in her favour on the basis of her version on affidavit in motion proceedings because the respondent's version is palpably implausible, far-fetched and clearly untenable. The respondent disputes this. The respondent contends that a decision cannot be reached on the papers. If any decision is to be reached on the papers, then it should be that no oral agreement was reached. This is so because the exchange of emails and drafts attached to the affidavits suggest that the parties intended that an agreement would only come into effect upon signature by them of a written document.

[23] An issue that can be dispensed with at the outset is whether any oral agreement could have been concluded on the terms set out in either of the draft agreements that were sent to the respondent by the applicant's attorney. Both drafts envisaged that the sale would be effective from the "effective date" which was defined to be "the date of signature". The "date of signature" was defined as the "date upon which the last Party appends its signature hereto". It is common cause that neither draft was ever signed, There is accordingly no basis for contending that an oral agreement was concluded on the terms set out in the drafts. Had there been such an oral agreement, the applicant would be faced with the further

difficulty that both drafts included a clause providing for the arbitration of disputes arising from the agreement.

[24] The questions which then arise are whether or not an oral agreement was concluded in the terms set out in the email of 3 November 2014 and whether or not it was agreed that no agreement would come into existence until it was reduced to writing and signed by both parties.

[25] The following aspects are common cause between the parties:

[25.1] The applicant was a director and 30% shareholder in the company;

[25.2] The applicant had a credit loan account in the company in the amount of R360 000;

[25.3] The applicant and respondent (in the respondent's own words) "negotiated the exit of the applicant from the company";

[25.4] The email of 3 November 2014 was sent by the applicant to both the in-house labour lawyer and the respondent;

[25.5] Until he deposed to the answering affidavit on 23 June 2015, the respondent had never responded to the applicant's emails or those of her attorney, disputing their assertions as to the agreement reached on the terms set out in the email of 3 November 2014;

[25.6] Pursuant to the negotiations, the applicant resigned her directorship and terminated her employment with the company;

[25.7] A payment of R60 000 was made to the applicant at the end of November 2014;

[25.8] No payment was made to the applicant at the end of December 2014;

[25.9] Further payments of R15 000 each were made to the applicant on 9 and 17 February 2015 and on 16 and 23 March 2015;

[25.10] The draft agreements, substantially incorporating the terms of the agreement as summarised in the email of 3 November 2014, but elaborating upon them, were sent to the respondent and although he never signed them, he never wrote to dispute their terms (save that on the applicant's version he asked for an amendment of the repayment terms).

[26] All of these common cause facts are consistent with an oral agreement having been concluded on the basis set out in the email of 3 November

2014. This notwithstanding, the respondent contends that no such agreement was concluded. Instead, he says that he. informed the applicant that "as and when monies were available I would pay an amount to her within my discretion so as not to put the company under further financial strain."

[27] There are the following difficulties with the respondent's version -

[27.1] He failed to dispute the repeated assertion in the email from the applicant and her attorney of the existence of an agreement on the basis set out in the email of 3 November 2014;

[27.2] He asks the court to accept that the applicant would have given up her job, a R360 000 credit loan account, her directorship and her 30% shareholding which (on the respondent's version) she valued at one and a half million rand, in return for nothing but a vague possibility that the respondent might make occasional payments in indeterminate amounts to her from time to time as he saw fit;

[27.3] The payments that were made, albeit that they were insufficient, irregular and then ceased, were consistent with the agreement contended for by the applicant ie monthly amounts of R60 000 initially, no payment in December 2014 and then, pursuant to the oral amendment, weekly payments of R15 000;

[27.4] It is improbable that discretionary payments, dependant upon the company's financial position, would be in amounts that correlated with the amounts agreed upon orally;

[27.5] His assertion that any acquisition of shares from the applicant would have been by the company and not by him is not supported by any company resolution to this effect;

[27.6] The respondent was dishonest in relation to certain emails, the existence of which he denied, despite some of them having been sent by him personally. These emails were put up in reply;

[27.7] The denials in the answering affidavit lack substance and appear to be tactical and designed to manufacture disputes of fact. They do not provide any cogent competing version.

[28] It is so that the payment confirmations reflect the company as having made the payments. However, faced with the emails asserting an agreement with the respondent, the absence of any contemporaneous recordal that the payments were being made by the company in its own right and not by the respondent, means that these payments must be taken as having been made by the company on behalf of the respondent.

[29] Having regard to these difficulties, the respondent's version is demonstrably false in certain respects and palpably implausible and untenable as to the balance. In these circumstances, the court is justified in deciding the matter on the papers.[1]

[30] In the circumstances, I find that an oral agreement was concluded on 3 November 2014 on the terms set out in the email of the same date.

[31] The only issue that then remains for determination is whether the agreement was subject to a suspensive condition in terms of which it would only come into force after it had been reduced to writing and signed by both parties.

[32] The legal position in this regard is summarised in Christie's Law of Contract in South Africa[2] as follows:

"It often happens that during the negotiations leading to the formation of a contract, or in terms of an informal contract itself, mention is made of a written document, or of the reduction of the terms of the contract to writing. This immediately raises the question whether the informal contract is binding, and the written document intended for purposes of proof only of the terms of the contract, or whether there is to be no contract until the written document has been drawn up and executed. Grotius gives clear directions for the answering of this question:

'The contract of sale may be made in writing or without writing. A written sale is not considered to be complete until the writing has been fully executed. But with us, although there is mention of writing, this is understood not to be with a view to a written contract, but merely for the purpose of reducing to writing the terms agreed upon for better remembrance and proof, unless there is clear evidence of a contrary intention.'

This principle, that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed, was adopted by the Appellate Division in *Goldblatt v Fremantle*, in which Innes CJ said:

'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the court will assume that object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract... At the same time it is always open to parties to agree that their contract shall be a written one ... and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.'

[33] The respondent relied in particular on *Goldblatt v Fremantle*[3] in support of his assertion that the facts showed that no contract was to come into existence until it had been reduced to writing and signed by the parties. However in that case, it was found that the verbal agreement required that before the contract would come into force, Fremantle would reduce the agreement to writing and, upon production to Goldblatt, he would have to confirm it in writing. Consistent with this, Fremantle addressed a letter to Goldblatt summarising the verbal agreement and concluding with the request "please acknowledge and confirm". Goldblatt proved unwilling to provide the written confirmation. In those circumstances, it was held that no agreement had come into force, even though performance had commenced in anticipation of its formal

conclusion.

[34] In the present case, if regard is had to the email of 3 November 2014, it is nowhere stipulated that the agreement would only come into force once reduced to writing. On the contrary, paragraphs 1 and 2 of the email set out the subject matter of the sale, the contract price and the terms of payment and paragraph 3 then goes on to say:

"The above is with immediate effect".

[35] That the contract was immediately effective is also borne out by paragraph 4 of the email in terms of which the applicant recorded that:

"This hereby cancels my directorship."

[36] So too paragraph 6 of the email which provides that

"As of Monday the 3rd November 2014 I am no longer with Container King."

[37] The respondent also relied on *De Bruin v Brink*.^[4] In that case, the court found that the plaintiff was unable to show that reduction of the contract to writing was a requirement for validity. The outcome tends to support the applicant in this matter. There the court said:

"The fact that mention of writing was made after the terms had been agreed upon ... and just as the defendant and his brother were leaving, seems to fit in better with the view that a record merely was required, than with an intention that the only binding contract should be in writing."

[38] In the present matter, the email of 3 November 2014 requesting the in-house labour lawyer to "draw up a contract" followed oral agreement had been reached on the basis of the terms listed in paragraphs 1 to 7 of the email.

[39] The respondent also relied on *First National Bank Ltd v Avtjoglou*.^[5] That case is distinguishable on the facts, however, in the following respects:

[39.1] in that case there was no separate, prior document recording the terms of an oral agreement reached between the parties, as there is here;

[39.2] there the defendant had sent a letter to the plaintiff in which he expressly stipulated that he required a signed returned copy of the agreement before he would pay the first instalment due under the agreement - here there was no such stipulation by the respondent and he commenced payment consistently with the terms of the oral agreement without waiting for any signed version;

[39.3] there the defendant had signed the relevant agreement and the plaintiff was willing to sign it but the defendant refused to return the original agreement to the plaintiff, resulting in the court finding that the defendant was nonetheless bound by the unsigned (as to one party) written agreement on the basis of the doctrine of fictional fulfilment.^[6]

[40] The respondent sought to make something of the fact that on 5 November 2014, when the applicant forwarded the 3 November 2014 email to her attorney for purposes of preparing a written document, she said -

"This is all we have agreed to, there is no Sale of Shares agreement in place."

- [41] However, read in the context of the email of 3 November 2014 and given the purpose of the email of 5 November 2014, she was explaining to her attorney that no signed, written agreement was yet in place.
- [42] In the circumstances, the respondent has failed to satisfy the onus of proving that the oral agreement required reduction to writing and signature before it would become binding.
- [43] In the circumstances, the plaintiff is entitled to payment in accordance with the terms of the oral agreement. That agreement (as orally amended) contemplated payments during the first 13 months following conclusion of the agreement of R30 000 per month in respect of the shares and R30 000 per month in respect of the loan account, excluding the month of December 2014 in respect of which it was agreed that no payment would be due. After settlement of the amount due in respect of the loan account, payment in respect of the shares would continue to be made at an amount of R30 000 per month until the purchase price was paid in full.
- [44] R120 000 of the purchase price has been paid. On this basis, the capital amount that was due but unpaid as at 15 May 2018 was R1 470 000. The plaintiff is entitled to judgment in respect of that sum. The outstanding amount of R270 000 remains payable in instalments of R30 000 per month.
- [45] There was no claim in the notice of motion for interest, but interest was claimed in the replying affidavit on the full outstanding balance of R1 740 000 from 25 March 2015 to date at the rate of 9%.
- [46] That claim was based on a claim for the full balance in terms of the acceleration clause in the draft agreements. However, I have found that no agreement was proved on the basis of the draft agreements. The email of 3 November 2014 did not contain any acceleration clause. Nor did it include any provision for interest.
- [47] The respondent contends that no interest is payable because of the failure to claim it in the notice of motion and to support that claim in the founding affidavit and on the further basis that the email of 3 November 2014 did not provide for it.
- [48] The applicant contends that interest is payable as damages from the time that the respondent was in mora. The respondent was in mora from the date that each instalment fell due on the then outstanding balance. The prayer for alternative relief would cover a claim for interest. Mora arose *ex re* because the time for performance was stipulated in the agreement.[7]
- [49] In my view, the respondent received adequate notice of the claim for interest in the replying affidavit. More than two and a half years have passed since it was filed and the respondent has not sought leave to file a further affidavit. The courts are seemingly accommodating of a late claim for interest *a tempore morae*.[8]

[50] The absence of any provision for interest is not an answer to the claim for interest because interest a tempore morae is a form of damages to which the applicant is entitled on account of the respondent's breach.[9]

[51] I accordingly make the following order:

[51.1] The respondent is ordered to pay the applicant an amount of R1 470 000.

[51.2] The respondent is ordered to pay the applicant an amount of R270 000, payable monthly in instalments of R30 000 commencing on 15 June 2018.

[51.3] Interest is payable on each outstanding instalment from the date it fell or falls due until the date it is paid, at the rate prescribed from time to time in terms of section 1(2)(b) of the Prescribed Rate of Interest Act No. 55 of 1975.

[51.4] The respondent is ordered to pay the applicant's costs on the party and party scale.

AC DODSON

Acting Judge of the High Court

Date of hearing 11 May 2018

Date of judgment 1 June 2018

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[1] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26.

[2] Bradfield Christie's Law of Contract In South Africa 7th edition Lexis Nexis pp126-127.

[3] 1920 AD 123.

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- [4] 1925 OPD 68.
- [5] 2000 (1) SA 989 (C).
- [6] At 9950 - 996H.
- [7] Christie ' s Law of Contract in South Africa above at 590-1.
- [8] See, for example, Woolf Engineering Co. Ltd v Fourie, 1948
(2) SA 180 (0).
- [9] The Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd
(460/12) [2013] ZASCA 105 (13 September 2013) par 11 - 14.
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