

SOUTH AFRICA / JUDGMENT

Da Cruz v Manzella and Others (42640/2021) [2024] ZAGPJHC 136 (16 February 2024)

[2024] ZAGPJHC 136

COURT

South Gauteng High Court, Johannesburg

BEFORE

SC Mia

CASE / FILE NUMBER

42640/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 42640/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

16 FEBRUARY 2024

In

the matter between:

DA
CRUZ, MANUEL JORGE MAIA Applicant
And
MANZELLA,
PATRICIA MARLENE First
Respondent
SOLBEL
PROPERTIES CC
Second Respondent
MANZELLA,
PATRICIA MARLENE N.O.
Third Respondent
In re
DA
CRUZ, MANUEL JORGE MAIA Applicant
and
MANZELLA,
PATRICIA MARLENE First
Respondent
SOLBEL
PROPERTIES CC
Second Respondent

JUDGMENT

- [1] The applicant brings this application to be granted leave to file a supplementary replying affidavit as well and to order the first respondent to debate the accounts of the first respondent. The relief in the main application was requested as follows:

“1. That the first respondent be ordered to make the accounting records of Sorbel Properties CC, from 2007 to date, available for inspection by the applicant and his account within 10 days from the date of this order, at the premises of its registered office situated at 1[...] R[...] A[...], K[...], Johannesburg, such records to include but not limited to:

- 1.1 All books of first accounting entry including cashbooks, ledgers, journals, and invoice books;
- 1.2 Lease agreements;
- 1.3 Bank statements.
2. That the applicant be granted leave to approach the court on the same papers, amplified in so far as is necessary, for any further or alternative relief related to this order.
3. Cost of the application on a party and party scale, and only in the event of opposition, costs on the attorney and client scale.”

This application was opposed; the respondent filed an answering affidavit, and the applicant filed a replying affidavit. In addition, the applicant now seeks to have a supplementary replying affidavit admitted and an order to have the accounts debated. The applicant

abandoned the relief seeking to join the the third respondent. The first respondent opposed the main as well as the interlocutory application.

- [2] Some background to this application is useful. The applicant is a male restaurateur and holds a 50% interest in the second respondent. The first respondent is a bookkeeper with a 10% interest in the second respondent. The remaining 40% of the members' interest was held by the first respondent's husband(the deceased), who passed away on 15 July 2021. The first respondent was nominated as the executrix of the deceased estate. The second respondent is a close corporation with limited liabilities, with its principal place of business at 1[...] R[...] A[...] K[...]. . The second respondent is a property-holding corporation. It owns the immovable property described as erf 2[...] K[...] at 1[...] R[...] A[...] K[...]. There is a commercial property situated on the premises that lets out premises to various tenants.
- [3] The applicant and the deceased each held a 50% interest in the closed corporation and were indirect tenants. The applicant conducted a restaurant from the premises at some point and moved out of the property. The deceased's estate agency also operates from the premises. The deceased and the first respondent managed the administrative affairs of the closed corporation from the premises. The applicant also held an interest in another entity with the deceased. That interest does not relate to this matter and merely indicates that there was an ongoing business relationship. The parties experienced difficulties relating to that business interest, resulting in litigation before Francis J. In that matter, the court ordered the defendant to transfer 50% of the member's interest back to the plaintiff, who is the applicant in the present matter.
- [4] The issues for determination in the present matter are by agreement :
1. The applicant's request that for condonation that the supplementary affidavit be admitted.
 - 2 Whether the first respondent has accounted to the applicant before and after the applicant launched the application on 21 September 2021.
 3. Whether the first respondent can be ordered to debate the second respondent's accounts with the applicant.
 4. The costs reserved before Turner AJ.
 5. The costs relating to the heads of argument to be delivered.

- [5] The applicant referred to the decision in *Broodie NO v Maposa and Others*[1], where the court was also required to consider the admission of an affidavit. In motion proceedings, the exchange of papers is determined, and the applicant is entitled to reply, after which no further pleadings are filed unless on application with the permission of the court. The applicant filed his replying affidavit on 28 October 2021, after the first respondent filed an answering affidavit

on 4 October 2021. The applicant filed an application requesting that a further supplementary replying affidavit be admitted with leave of the court. The application falls under the same case number. The applicant explained the reasons for seeking to have the supplementary replying affidavit admitted. The reasons furnished were that after the replying affidavit was filed, the first respondent was not able to furnish the information requested to proceed with the debatement of the accounts, as she reported her laptop and backup drives were stolen from her vehicle whilst parked at Eastgate.

- [6] The loss of the financial documents in the care of the first respondent necessitated the applicant having to request the second respondent's information such as bank statements directly from Standard bank and from ABSA bank. Whilst Standard Bank was able to furnish some statements from December 2011 to August 2021, ABSA bank was not able to furnish information due to the incorrect account number being furnished. The applicant requested insight into the lease agreements and the remaining accounting records. The first respondent furnished a flash drive with limited information. In addition, the first respondent requested an hourly tariff be paid for the time she spends discussing and debating the accounts. She maintains that she is not an employee of the first respondent and needs to be compensated for her time.
- [7] In considering whether the affidavit should be admitted, the court is exercising a discretion with regard to the facts and bearing in mind the administration of justice that must be served by observing the rules of court relating to the number of sets of affidavits as well as the sequence of affidavits in motion court proceedings. Where there was an opportunity to place evidence before the court at an earlier opportunity and the applicant failed to do so, a negative view will be adopted.[2] This is not the position in the present case. The circumstances changed after the applicant filed his replying affidavit when the first respondent reported the loss of the financial records of the second respondent. In the circumstances, I am inclined toward the admission of the supplementary replying affidavit, and the application is permitted to file the supplementary replying affidavit.
- [8] I move to the second issue, whether the first respondent has accounted to the applicant sufficiently prior to the launch of the application on 21 September 2021. The applicant seeks an order compelling the first respondent to make the second respondent's

accounting records from 2007 to date available to him for inspection, including books of first accounting entry, lease agreements and bank statements. After the applicant's attorneys made numerous requests, an application was launched seeking access. This was met with a response that the first respondent lost the records when they were stolen from her vehicle in 2017. The applicant

was invited to collect records available on a flash drive for the period from 2017 to 2020.

- [9] Considering the versions placed before this court, there is a dispute with regard to the applicant's access to the above records. The applicant requested the record once he became a member of the closed corporation. He did not succeed in obtaining access to records. If the records were kept on the first respondent's laptop and backup drive, that was stolen from her vehicle, the suggestion that the applicant approach the auditors appears to have been intended to send the applicant on a wild goose chase. The applicant was only informed that the records were on the laptop a week after the application was launched. If the deceased had agreed to using an office to hold the records for ease of access, it is not clear why the first respondent did not allow access earlier. That they were on the first respondent's laptop is consistent with the view proffered by the deceased that the applicant could have access when the first respondent was available and that she was not available when he requested access. The first respondent's suggestion that the applicant has only himself to blame for not safeguarding and keeping records as a member is nonsensical and does not explain the position accurately. It reflects poorly on the first respondent, who attended to the administration and kept the accounts on her laptop. This is more so as she is aware that the applicant was not a member throughout the period of the operation of the closed corporation until he was reinstated as a member. Once reinstated the applicant was entitled to access to insight to inform himself about the position of the close corporation. While she has made a portion of the records available, it is not evident what is and is not within her possession. Her version has not been persuasive and stands to be rejected.
- [10] The first respondent maintained that the applicant had access to the accounting records if he was interested and insisted he was not. This does not account for the period that the applicant was not a member. It also does not consider the times the first respondent was not available when the applicant approached the deceased for access, and the first respondent was not available. As soon as the applicant regained his interest as a member, he requested information and did not gain access to the financial records because the deceased indicated the first respondent was unavailable. After the deceased's death, on the first respondent's own version, she was dealing with the loss, and the applicant did not have access. The applicant did not have access to records at the auditors or the premises of the second respondent or estate agency Manzella CC. The applicant gained access after the application was lodged, and this was not access to the complete records, which the first respondent maintains were stolen. Then there is the issue with the leases, the incomplete records. Having regard to the decision of the Supreme Court of Appeal in *Grancy Property Limited v Seena Marena Investment (Pty) Ltd*[3], the issue of adequacy of account is important when it

comes to a debatement. It cannot follow a piecemeal process, there has to be adequate and complete accounting prior to the debatement process. Based on the facts before me, this has not occurred as indicated

above. The applicant is entitled to the documents.

[11] The first respondent indicated she requires payment at an hourly rate to debate the records whilst she has a 10% interest. The first respondent was the person responsible for the administration. This issue of payment would have been addressed at meetings and is not an issue for consideration by this court.

[12] In view of the first respondent being responsible for the administration of the accounts, she is the only person with sufficient information to clarify aspects that may arise regarding the accounts. It is necessary for the first respondent to co-operate in the process of clarifying the accounts in order for any further steps to be taken in the interests of the of the closed corporation and to furnish information as required. When the debatement occurs, the applicant may request the first respondent to participate. This relief was not requested in the main application and I do not make an order for such relief hereunder.

[13] The parties have had an acrimonious relationship to date. Mulcting either party with costs where, on occasion, they have not acted in a most salutary manner will fuel the disputes further. Costs are at the discretion of the court, and in exercising this discretion, the costs reserved before Turner AJ are to be paid on a party and party basis. The applicant is similarly entitled to costs for the heads of argument which were delivered after the application that was set down. The costs follow the outcome in the present application.

[14] For the reasons above, I grant the following order:

1. The applicant is granted leave to file the supplementary replying affidavit attached to his interlocutory application dated 7 July 2022.
2. The first respondent is to deliver copies of the accounting records of the second respondent from 2007 to date, which the first and/or the second respondent or their agents have in their possession, to the offices of the applicant's attorneys within 10 (ten) days from the date of this order, such records to include but are not limited to:

2.1 all books of first accounting entry, including cash books, ledgers, journals, and invoice books up to and including the

financial year ending February 2023;

2.2 all written lease agreements entered into between the second respondent and its tenants, including the leases specified in Annexure "SRA9" to the applicant's supplementary replying affidavit;

2.3 all available contact details of the parties specified in Annexure "SRA9" in paragraph 2.2 above;

2.4 bank statements; and

2.5 the annual financial statements up to and including the financial year ending February 2023.

3. the first respondent is to pay the following costs:

3.1 the costs of the main application dated 6 September 2021;

3.2 the costs of the interlocutory application dated 21 July 2022;

3.3 the costs of the application to compel dated 13 September 2022;

3.4 the costs of the interlocutory application dismissed by Turner, AJ in his order dated 16 March 2023.

SC Mia

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: Adv. CJ Moreno

Instructed by

Mark Anthony Beyl Attorneys

For the Respondent: Adv H Salani

Instructed by

Rossouws Lesie Inc

Heard: 07 August 2023

Delivered: 16 February 2024

[1] [2018] 2 All SA 364 (WCC)

[2] Milne NO v Fabric House (Pty) Ltd

(3) SA 63 N

[3] [2014] JOL 31717 (SCA)

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