

SOUTH AFRICA / JUDGMENT

Gunner v Ferrari and Others (10783/13)

[2013] ZAGPJHC 263 (24 October 2013)

[2013] ZAGPJHC 263**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Monama

CASE / FILE NUMBER

10783/13

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Source record**REPORTABLE****IN THE SOUTH GAUTENG HIGH COURT,****JOHANNESBURG****REPUBLIC OF SOUTH AFRICA****CASE NO. 10783/13****DATE: 24/10/2013****In the matter between:**

QUINTIN GORDON THOMAS GUNNER

.....APPLICANT

and

CLAUDIO

FERRARI.....1ST

RESPONDENT

SIETSE REMCO WALMA VAN DER

MOLEN2ND

RESPONDENT

CLAUDIO FERRARI

N.O.....3RD

RESPONDENT

IPROTECT TRUSTEES (PTY)

LTD.....4TH

RESPONDENT

SIETSE REMCO WALWA VAN DER MOLEN

N.O.....5TH RESPONDENT

BUDGET SHEET METAL (PTY)

LTD6TH

RESPONDENT

JUDGMENT

MONAMA J:

Introduction

[1] This is a claim against the Respondents for specific performance. The Applicant seek the following relief, namely:

1.1 The First, Second and Sixth Respondents sign the necessary documents to appoint the Applicant as a director of the sixth respondent to be registered at CIPC (the Companies and Intellectual Property Commission).

1.2 The First and Second Respondent, alternatively the Sabric Share Trust and the Lolite Trust duly represented by the third and Fourth Respondents (in respect of the Sabric Share Trust) and the Fourth and Fifth Respondents (in respect of the Lolite Share Trust) each transfer 10% (total 20%) of the issued shares in the sixth Respondent to the Applicant.

1.3 The First, Second and Sixth Respondents sign the necessary documentation to appoint the Applicant as a signatory to the bank account of the Sixth Respondent with First National Bank and any other bank account of the Sixth Respondent,

2 In the event of the First, Second and Sixth Respondents failing to comply with the order hereinabove, the sheriff of this court is authorised and directed to sign the necessary steps in the place of the defaulting Respondents.

3 The First and Second Respondents, jointly and severally, the one paying the other to be absolved, shall be liable for the costs of the application on the scale as between attorney and client,

[2] The summary of the relief sought has the following effect on the Respondents. The First, Second and Sixth Respondents must appoint the Applicant as the director of the Sixth Respondent, both the First and Second Respondent each must transfer 10% of the issued shares in the Sixth Respondent and finally that the First and Second Respondents must appoint the Applicant as a signatory to all the bank accounts of the Sixth Respondent. All these claims are based on the Sale Agreement and the Association Agreement. It is only Clause 3.7 of the Sale Agreement (as amended) which will be used in the determination of the dispute between the Applicant and the Respondents.

[3] At the hearing of the matter I was informed that the Applicant is no longer seeking any relief against the Third, Fourth and Fifth Respondents. He abandoned the relief against them because their shareholding in the Sixth Respondent are held in the personal names of the First and Second Respondents.

- [4] The Respondents are vehemently opposing the application. First, they claim that the Sale Agreement relied upon is void or voidable. Secondly, that the relief of specific performance order sought will be inappropriate in the circumstance of this case, and it will cause hardship.

The parties

- [5] The Applicant is a businessman. He is an industrial designer with a degree in Bachelor Technology Industrial Design from the University of Johannesburg.
- [6] The First Respondent is a businessman and director of the Sixth Respondent. His chosen service address is Hoosen Wadiwala Incorporated, Hyde Park Shopping Center, Hyde Park, Johannesburg.
- [7] The Second Respondent is a businessman and director of the Sixth Respondent. His chosen service address is at Hoosen Wadiwala Incorporated, Hyde Park Shopping Center, Hyde Park, Johannesburg.
- [8] The Third Respondent is Mr Claudio Ferrari [the First Respondent] in his representative capacity as trustee for the time being of the Sabric Share Trust, a duly registered trust and having its registered address at 4 Tee Street, Randburg.
- [9] The Fourth Respondent is iProtect Trustees (Pty) Ltd, a private company duly registered and incorporated. It conducts its business as Trust House, at Unit 8 Waterfront Office Park, Randburg. The Fourth Respondent is duly represented by Roberto Jorge Mendoca Velosa, as a trustee for the time being of the Sabric Share Trust and the Iolite Share Trust.
- [10] The Fifth Respondent is Mr Sietse Remco Walma van der Molen [the Second Respondent] in his representative capacity as a trustee for the time being of the Iolite Share Trust, a duly registered trust, having its address, at 33 Arend Road, Randpark Ext 4, Johannesburg.
- [11] The Sixth Respondent is Budget Sheet Metal (Pty) Ltd, (Registration No:2012/213017/07) a private company whose chosen service address is at 3rd Floor, North Block, Hyde Park Shopping Centre, Hyde Park, Johannesburg.

Brief Background

- [12] The Applicant is the common law husband of Ms Maria d' Amico ("the Applicant's Wife"). The Applicant's Wife is a practicing attorney. She has been an attorney of record for some of the Respondent since
1999. She was involved in several legal transactions involving some of their business units. Both the Applicant and his wife were personal friends of the First and Second Respondent and their respective families. They attended parties together and holidayed together. The Applicant's wife has known certain members of the Respondents since their university days at the University of Witwatersrand, Johannesburg.

- [13] Prior to and during July 2011, Budget Sheet was constituted as a close corporation. It was known as Budget Sheet Metal CC. The First and Second Respondents each held 50% member's interest in Budget Sheet Metal CC. Their wives, Sigrid and Ketti, also worked and played a prominent part in the conduct of business of Budget Sheet. The corporation was since converted into a private company.
- [14] On or during August 2011 the Applicant's Wife was instructed by the Respondents to prepare legal documents for the sale of a portion of their membership interests in Budget Sheet to one Mr Gerrit Jooste. This deal did not materialize.
- [15] During July 2012 the Respondents or some of them approached the Applicant and offered him to purchase 20% stake in Budget Sheet Metal CC t. On 6 July 2012, the respondents arranged with the applicant and his wife was present.. The Applicant secretly recorded the proceedings. This meeting was followed by subsequent meeting on 16 July 2012 where the sale was discussed further. The parties failed to agree. Later, before the end of July 2012 the Respondents requested the Applicant and his wife for further meetings. At all material time the Respondents approached the Applicant and the Applicant's wife was in attendance. The parties considered numerous draft agreements which culminated with the conclusion of the Sale and Association Agreements on 23 July
2012. It is noteworthy that all the metings held were requested by the First and Second Respondents together with their wives.
- [16] The Applicant's Wife provided the necessary funds which were used to finance the transactions. She paid the full purchase price of R4.67 million by way of cheques.
- [17] After concluding the Sale and Association Agreements on 23 July 2012, the terms of the agreements were implemented. In particular the following events occurred. The First and Second Respondents signed the necessary CK documents entitling the Applicant to be appointed a 20% member in Budget Sheet Metal CC. On 1 September 2012 the Applicant commenced employment at Budget Sheet. He was employed as a design director. However, it was decided to delay the registration of his member's interest until the completion of the conversion of Budget Sheet Metal CC from a close corporation to a private company. In anticipation of the conversion, the Applicant nominated the Qmaro Investment Trust as his nominee for purposes of the registration of his 20% shareholding in Budget Sheet Metal CC. He was exercising his rights as contained in Clause 3.7. The Respondents had established eight trusts and advised
- the Plaintiff's Wife which trust they wanted to use to hold their share in Budget Sheet Metal CC. The First Respondent undertook
- to attend to the formal appointment of the Applicant as a director of Budget Sheet.
- [18] At the beginning of the first quarter of this year, a meeting was scheduled for 6 March 2013. The purpose of the meeting was to settle the terms of the Memorandum of Incorporation and Shareholders' Agreement. At that meeting the Respondents advised that they did not

want to proceed with the Applicant's acquisition of shares and his appointment as employee and director. This is some eight months after the implementation of some critical aspects of the agreement except the shares issue. They proposed a conversion of his monetary investment into a loan and that the loan be repaid over an agreed period of time.

[19] The Respondents' proposal was rejected by the Applicant. His wife made formal demand on the Respondents for compliance with their contractual obligations to register the 20% shareholding in the Applicant's name, to appoint him as a director of Budget Sheet Metal (Pty) Ltd and to give him the necessary signing powers on its bank account. This demand was ignored because there was no compliance.

[20] On 18 March 2013 the Respondents' new attorney addressed a letter asserting that the agreements were void and or voidable and that the Respondents decided to rescind, cancel or avoid the agreements. This is the first time that the validity of agreements was raised by them.

The Applicant's Case

[21] The Applicant relies on the existence of a valid Sale Agreement (inclusive of the addenda thereto) and the Association Agreement. He paid the agreed purchase price for the member's interest and cession of loans in terms of the Agreement. It is noted that the Respondents acknowledge his complete compliance with his contractual obligations.

The Respondents Defence

[22] The Respondents raised two defenses. These are undue influence and specific performance order.. The Respondents contend that they were unduly influenced by the Applicant's Wife during the drafting and the conclusion of the Sale Agreement. They allege that Clause 3.7 of the Sale Agreement does not reflect their wishes. They contend that they envisaged the situation where the shareholding will be in the name of the Applicant and not the trust. Clause 3.7 of the Sale Agreement provides that:

"It is the intention of the corporation to convert to a proprietary limited company subsequent to the effective date , where the shareholders shall be 40% each to Claudio and Sietse and 20% to the purchaser. The parties may reflect their shareholding in trust and their spouse and seller. Purchaser shall become director of such company, namely there shall be 5 directors appointment."

Although the above mentioned clause has now become the critical part of the litigation between the parties, the case also raises other allied issues including the client-and-attorney relationship inter se, confidential business matters and conflict of interest. The whole issue of representation must be looked at due regard been had to the entire friendly relationship of the parties. In my view nothing really turns on about the alleged. This aspect has will be ventilated in details at PAR 29.

The issue for determination

[23] Notwithstanding prolixity the issue is crisp. The issue is whether the Applicant exerted any undue influence on the respondent or whether the alleged influence by the Applicant's Wife can be extended to the Applicant. Finally whether an order for specific performance will be inappropriate.

Clause 3.7 of the Sale Agreement

[24] The said clause has become pivotal in the issues before me. Clause 3.7 of the Sale Agreement provides that:.

"-we signed the Agreements because we believe that they provide for the applicant alone to become a shareholder and a director of Budget Sheet Metal. We believed that any transfer by him to a trust could only occur with unanimous agreement of all the shareholders. We believed this because the applicant's common law wife Maria d Amico (Maria who is referred to as D' Amico in the applicants' founding affidavit), who drafted this Agreement assured us that this was the position".

The elements of Undue Influence

[25] I now turn to the Respondents first defence. That is the defence of undue influence. It is worthy noting that in deciding whether or not the Respondents have been unduly influenced by the applicant the court has to decide on the evidence presented by the parties. The doctrine of undue influence occurs where:

"-contracts were concluded in response to threats and pressure below the level of metus as traditionally understood by courts"¹

The Respondents must prove all the essentialia of undue influence. They must prove that:

25.1 the Applicant had obtained an influence, over them,

25.2 the Applicant's influence weakened their

powers of resistance and rendered them compliant, and

25.3 that the Applicant used the influence in an unscrupulous manner to persuade them to conclude the contract which is prejudicial and which they would not have concluded but for² the influence.

Throughout the documentation filed of record, the Respondents do not contend anything untoward by the Applicant They have failed to place any evidence before me how the Applicant had power over them which made them compliant and which was used unscrupulous and which is the source of the Sale Agreement. On the contrary there is extensive exposition of events concerning the Plaintiff's Wife.

[26] In their papers they have comprehensively dealt with the professional assignments which were entrusted and executed by the Applicant's wife. These assignment commenced in October 1999 until possibly September 2012. In addition, they have dealt with the respective social dealings which the First and Second Respondents and their families. The parties were

fully aware of one another's complete participation. Yet there is no accusation of the Applicant. Nor any suggestion that he was aware of any influence exerted on the Respondents by the third party.³

[27] In my view, the Respondents have not addressed the crucial essentialia of t undue influence. In *Katzellenbogen v Katzellenbogen and Joseph* it was held that:

*"... contract is one which, but for undue influence... would not have been made. This is the same thing as saying that the plaintiff must have been induced by... or undue influence to enter into the contract".*⁴

On this fact alone the defence stands to fail.

Attorney-and-client relationship inter se

[28] It is trite law that an attorney is not prohibited to contract with his clients.⁵

"-A solicitor has a perfect right to enter into a fair contract with his client, and this court has no disposition to interfere; its duty merely extends to take care that the parties are dealing at arm's length, and that the transaction is itself fair."

The attorney-and client relationship designed to promote trust between them. The trust is critical for due performance of attorney's duties. During the hearing the Respondents referred me to a series of case law and so is the Applicant. The bulk of case law the Respondents relied upon deals with the fiduciary relationship between the attorneys and the clients. The facts of this case are distinguishable as correctly argued by the Applicant. The Respondents' counsel referred me to a passage in *Armitage Trustee v Allison*⁶ there it was held that:

"...Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position, that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger."

The above dictum which is from English Law is correct as it demonstrate the attitude that has to prevail when an attorney and his own client are involved in a commercial transaction.. However our courts have rejected a view expressed in some older cases that a contract is presumed to be induced by exercise of undue influence where an attorney is a party to a contract with a client.

[29] The next aspect of this case which needs some comment is the purpose of affidavits, which is to inform the parties about the case they are to meet. They must allege all the facts necessary to sustain the claim or the defence. The Respondents' affidavit do not support their defence.

The defence of specific performance

[30] The Respondents contend in the alternative that the relationship of trust, confidence and respect between them and the Applicant has irretrievably broken down. The law is clear. The Applicant has a choice. He can claim specific performance or claim payment of damages for the breach. In this case he has chosen to enforce the contract. The right is subject only to the court's discretion. Some one hundred years ago the court held that:

"-Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as possible, a performance of his undertaking in the contract".⁷

The dictum is based on the principle that valid agreements are binding.. The dictum stood the test of time. It is premised on a sound jurisprudential base. Contracts are sacrosanct and should not be breached for unsound or flimsy reasons. In casu the Applicant has performed in terms of the Agreements and has indicated his willingness to continue to do so.

[31] The case law has developed a series of guiding principles where a court may decline to grant an order of specific performance. These include instances where it will be impossible to comply. Where the order will cause unreasonable hardship or will produce injustice or inequitable, or where possible it involves contract for personal service.⁸ The grounds asserted by the respondents are that the order of specific performance will cause hardship, injustice and inequity.

These grounds have to be tested regard been had to the position of the Applicant and the party which is the causa causans of the

stalemate.

[32] I have already found that the Respondents have failed to produce any evidence of undue influence. In contradistinction, they manufactured very flimsy reason in order to resile from both the Sale and the Association Agreements. They are in my view, the people who caused the standoff whilst they hang on the Applicant's contribution. The Applicant has shown his intention to comply with his undertaking. He is prepared, as a shareholder, to do everything possible to advance the interest of the Sixth Respondent.

[33] The court has to evaluate the facts judiciously in order to make an appropriate ruling. Although specific performance based on personal service may be refused it is not the law of the Medes and Persian. It have to be decided on the circumstances of each case. In the case of Immaculator Secondary School v KP Bvuma and Another⁹ the court ordered specific performance because to hold otherwise would have caused the learners grave hardship. The same position was adopted by the court in Nationwide Airlines (Pty) Ltd v Roediger and another decision.¹⁰

[34] The Applicant has put up formidable rebuttal to the alleged hardship, injustice and inequity. Submissions if specific performance order is granted. The Applicant dismissed the argument that the business is small. The business, so the contract, is extensive. As regards the shareholding he contends that he cannot cause undue hardship. The company law

procedure will curb him. He can be outvoted. Even when he is appointed as a director he cannot frustrate the operations because he will be one of the five directors and he will be bound by the expectation that he will have to exercise his fiduciary duties appropriately. This position applies, mutatis mutandis, to his signatory powers. The agreement provides that any two of the five directors.

Conclusion

[35] Taking all the aforesaid consideration I make the following order which is, in my view, fair and just. The order is as follows:

1. The First, Second and Sixth Respondents are ordered to sign the necessary documents to appoint the Applicant as a director of the Sixth Respondent to be registered at CIPC (the Companies and Intellectual Property Commission);
2. The First and Second Respondents are ordered to each transfer 10% (total 20%) of the issued shares in the Sixth Respondent to the Applicant;
3. The First, Second and Sixth Respondents are ordered to sign the necessary documentation to appoint the applicant as a signatory to the bank account of the Sixth Respondent with First National Bank and any other bank account of the Sixth Respondent;
4. In the event of any of the First, Second and Sixth Respondents failing to comply with the order 1-3 hereinabove, the Sheriff of this Court is hereby authorised and directed to sign the necessary documents and take the necessary steps in the place of the defaulting Respondent;
5. The First and Second Respondents are ordered to jointly and severally, the one paying the other to be absolved pay the cost of this application on the scale as between attorney and client and the costs occasioned by the employment of two counsel.

RE MONAMA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant: Adv. A Gautschi SC

Adv. F Strydom

Instructed by: Stewart-Garden Attorneys, Bryanston, Johannesburg

Counsel for the respondents: Adv. A Lamplough

Instructed by: Hoosen Wadiwala Inc, Hyde Park, Johannesburg

1 Boe Bank Bbk v Van Zyl 1999 (3) SA 813 (C) at Par 39.

2 Patel v Grobbelaar 1974

(1) SA 532 (A) at 543, and Preller and Others v Jordaan 1956 (4) SA 483 (A) at 492 G-H.

3 See Marge Property Holdings CC v Nqabeni Swartbooi Jewula 2003 JDR 0057 (E) at Page 23.

4 1947(2) SA 528(W) at 541.

5 Armitage Trustee v Allison (1911) 32 NPD 88 at 104.

6 1911 NPD 88 at 103.

7 Farmers' Co-operation Society (Reg) v Berry 1912 AD 342 at 350.

8 Nationwide Airlines (Pty) Ltd v Roediger and another 2008(1) SA 293 (W).

9 Case No 25786 of 2012 (South Gauteng) Unreported decision).

10 Nationwide Airlines (Pty) Ltd v Roediger and another 2008 (1) SA 293 (W).

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Prepared on 10 October 2026 · Esheria