

SOUTH AFRICA / JUDGMENT

James and Others v Kimostar (Proprietary) Limited (3172/13) [2013] ZAKZPHC 71 (6 September 2013) [2013] ZAKZPHC 71

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mbatha

CASE / FILE NUMBER

3172/13

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IN

THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC

OF SOUTH AFRICA

Case

No: 3172/13

In

the matter between:

WILLIAM
OLIVER NEVILLE JAMES
(ID

NO:

4[...]).....First
Applicant
RONALD
MCDONALD N.O
(ID

NO: 3[...]).....Second
Applicant
RONALD
JAMES GLAISTER N.O
(ID

NO: 3[...]).....Third
Applicant
IVAN
STEVEN COLENBRANDER
N.O.....Fourth
Applicant
and
KIMOSTAR
(PROPRIETARY) LIMITED
REGISTRATION

NO: 2010/018402/07.....Respondent

JUDGMENT

Delivered: 06 September 2013

MBATHA, J

- [1] Before me is an application for the provisional winding up of the Respondent. The application is opposed by those representing the Respondent.
- [2] The Applicants are the Trustees of the Royal Mews Trust, who are the beneficial owners of the commercial property in Pietermaritzburg. The Respondent is Kimostar (PTY) LTD, a company with registered offices situated at Pietermaritzburg, represented by its sole director, Mr Vidyavrata Baijoo.
- [3] The Respondent is opposing the granting of any liquidation order against it.
- [4] On or about the 23rd of December 2010 at Pietermaritzburg, the Applicants duly represented by, William Oliver Neville James and the Respondent duly represented by its sole director, Vidyavrata Baijoo, concluded a lease agreement of the premises situated at 1 Heslop Road, Pietermaritzburg. This lease agreement is commonly referred to as the “main agreement” in the papers. The term of the lease was for a period of five (5) years commencing from the 1st of January 2011. The monthly rental was fixed at R28 000.00 per month excluding VAT and excluding additional charges payable by the Respondent.
- [5] The Respondent defaulted in its obligations under the main lease, which resulted in the conclusion of another agreement. On the 17th of September 2012 the parties entered into the agreement entitled “Agreement Varying a Lease”.
- [6] The material terms of the variation agreement inter alia, state the following:

6.1 It records that the Respondent has defaulted in its obligation under the Main Lease resulting in the Applicant instituting action against it and its surety for recovery of rental and other relief (Clause 1.2);

6.2 The rental payable by the Respondent in respect of the premises is varied for a period of six months from 1 August 2012 to 31 January 2013 (Clause 2);

6.3 The monthly rental payable by the Respondent to the Applicant is reduced to R25 000,00 inclusive of VAT, and excluding the additional charges referred to in paragraph 13.6 above, and such rental is to be paid on or before the 7th day of each month (Clause 3.1);

6.4 The rental referred to in Clause 2.1 of the Variation, and the deferred rental for March and April 2012 is to be settled in full on or before 15 January 2013 (Clause 2.2);

6.5 The service charges in terms of paragraph 14 of the Main Lease must be paid by the Respondent to the Applicant within ten (10) days of receipt by the Respondent of the Applicant's invoice in respect thereof (Clause 2.3);

6.6 The Variation will not in any way constitute a waiver of the Applicant's rights in terms of the Applicant's action,

nor will it constitute a remedy by the Respondent of its breaches in terms of the Main Lease. The Applicant agreed not to exercise its rights to cancel the lease and eject the Respondent provided that the Respondent fulfils all the terms of the Main Lease as amended by the Variation (Clause 4).

- [7] The Applicant alleges that the Respondent despite all the efforts to accommodate it, it still defaulted in its payments in terms of the new varied lease agreement. Furthermore that, at the time of the issuing of this application it was still indebted to it in the amount of R170 537,19.
- [8] The Respondent is opposing this application on the following basis.
- (a) That the parties had been engaged in settlement negotiations as late as the 14th of February 2013;
 - (b) Pursuant to such settlement negotiations, three (3) amounts totalling to a sum of R69 527,34 were paid towards the Applicants' claim and the Applicants has not acknowledged such payment in their application;
 - (c) The payments were made with an understanding that the Applicants will allow the Respondent to continue trading and that the balance of the Respondent's indebtedness would be liquidated out of the Respondent's trading activities;

- (d) The Applicants, without the knowledge of the Respondent launched an application in terms of Section 32 of the Magistrates' Court Act[1], which caused the Respondent's business to be closed, cease trading and prevent the Respondent from having access to the premises by changing the locks of the doors. It found that the actions of the Applicants were dilatory and not bona fide in the circumstances;
- (e) The Respondent further states that this led to loss of profits and has a counterclaim against the Applicants for loss of profit. The counterclaim which far much exceeds the claim of the Applicants.
- [9] It is common cause that the Respondent is in arrears with its rental payments. It is also common cause that the Respondent has failed to perform in terms of the main agreement and in terms of the variation agreement.
- [10] The Respondent avers that there was an oral variation of the lease agreement. I have to determine from the papers if such an oral agreement came into place. I cannot lose sight that I am dealing here with an application for a provisional winding order of the Respondent. The issue to determine is whether the Applicants have made out a prima facie case for the winding up of the Respondent. The question to be considered being – is the Respondent indebted to the Applicant or not and is the Respondent unable to pay its debts? I must also consider the averments made by the Respondent in their answering affidavit.
- [11] The Applicant in a provisional order must make out a prima facie case, in the absence of any evidence to the contrary. I must determine in particular where the matter is opposed like this one if there are no fundamental factual disputes that are raised in the affidavit. One must bear in mind as stated in *Mohamed v Malik*[2] that viva voce evidence can only be allowed in exceptional circumstances.
- [12] The factual dispute must be bona fide and genuine. I was referred to various decisions of our Court by counsel for the Applicant, amongst others, *Brisley v Drotsky*[3] whereby the Court held that a term (an entrenchment clause) in a written contract providing that all amendments to the contract have to comply with specified formalities is binding, still remains in force. Furthermore, the principle as of bona fides, namely, that the entrenchment clause ought not to be enforced because it would be in the circumstances be unreasonable, unfair and in conflict with the principles of bona fides, cannot be successfully invoked. The non-variation clause virtually kills the factual disputes.
- [13] If one looks at the variation agreement, the Respondent acknowledges its indebtedness to the Applicants and that it defaulted with its payments. This is further acknowledged by the Respondent in paragraph 6.2 on page 89 of its representatives' answering affidavit, in that the amount still outstanding is the sum of R163 394,24. This is further confirmed by the exchange of emails between the Director of the Respondent and those representing the Applicants.

[14] I am satisfied that the Respondents' inability to pay its debts has been proved. The director of the Respondent in one of his emails to the Applicants intimated that the company was to be placed under business rescue. There is no such evidence in the papers before me that indicate this. There is nothing that indicates any form of solvency on the part of the Respondent that has been placed before the Court.

[15] the question that arises is whether the Respondent is in fact insolvent. It is not in dispute that the Respondent owns no assets

other than certain stock in trade. There is a notarial bond registered by Business Partners over movables in the premises. The

Respondent has committed an act of insolvency. It has acknowledged in writing through its attorneys its indebtedness and

requested for indulgences to raise funds. It has given undertakings to pay, but at the same time failed to confirm whether these payments can be made or not. Furthermore, the Applicant holds no security for its claim against the Respondent.

[16] The variation agreement expressly states in paragraph 2.2 that in addition to the rental referred to in sub-paragraph 2.1, the deferred rental for March and April 2012 in terms of the lease shall be settled in full on or before the 15th of January 2013. This did not happen. This indicates that the Respondent is hopelessly insolvent.

[17] The Respondent alludes to that it understood that it would be allowed to continue trading irrespective of it not meeting the terms of the varied agreement. The Respondent further stated that the Applicant acted mala fide as the applicants proceeded with the application in the Magistrates' Court, which was later withdrawn, though they were still negotiating with them. The view held by the Respondent is that this has led to a dispute of facts and the matter must be referred to oral evidence.

[18] In Buffalo Freight Systems (PTY) LTD v Crestleigh Trading (PTY) LTD and Another[4] the court endorsed the principle held in Truth Verification Centre CC v PSE Truth Detection CC and Others[5] that a "common sense and robust approach" in relation to the resolution of disputed issues on paper, where a Respondent

contents himself with bald and hollow denials of factual matter confronting him must be adopted. It went further to state that the Court should be prepared to undertake an objective analysis of such disputes when required to do so.

[19] I am not persuaded to accept that the indulgencies afforded to the Respondent by the Applicants, translated into an oral agreement

between the parties. Firstly, the main lease agreement was in writing and it categorically at paragraph 27.3 thereof state that no agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless reduced to in writing and signed by or on behalf of the parties. This is confirmed by the fact that the variation agreement was done in writing. The

version of the Respondent cannot be accepted as there is no indication that the Applicants waived their rights, by granting the Respondent certain indulgencies. The main agreement is clear on this aspect as it states as follows:

“No indulgencies granted by a party shall constitute a waiver of any of that party’s rights under this agreement; accordingly, that party shall not be precluded, as a consequence of having granted such indulgence, from exercising any rights against the other which may have arisen in the past or which may arise in the future”

I find that there are no fundamental factual disputes that need this matter to be referred to oral evidence, as the non-variation clause puts paid to any suggestion of an oral variation.

[20] The Respondent was afforded an opportunity to settle its indebtedness but failed to do so. Every effort was made by the Applicants to accommodate it. Nothing in the exchange of correspondence or in any form suggests that there were other terms entered into, save the variation agreement.

[21] Nowhere in the Respondent’s affidavit that I can find where he states that he has settled his indebtedness to the Applicants. The Respondent is not in a position to settle its debts. The closing of the business premises was communicated by email dated the 31st of January 2013 to the Director of the Respondent. The email categorically stated that provided that everything owing through the

end of January, plus the February rental is paid in full by no later than 16h00 on the 8th of February 2013, they were amenable to permit the Respondent to continue trading through the end of February. This did not happen.

There is no suggestion here that he can trade indefinitely, whilst trying to find cash elsewhere

[22] The Respondent has raised that it has a counterclaim against the Applicants. The Applicants’ counsel submitted that it was not even quantified what losses it suffered. In the light of the state of insolvency of the Respondent it is unlikely that the business was generating any form of income. Though submitted from the bar, which was not disputed by the Respondents’ counsel, in the light that Business Partners have also perfected their notarial bond, it is indicative of the state of insolvency of the Respondent. The Respondent is both factually and commercially insolvent.

[23] I am satisfied that the Applicants have established a prima facie case on a balance of probabilities. I was referred to *Kalil v Decotex (PTY) LTD and Another*[6] by the Respondent. The very same case states categorically that the Court must be satisfied that a prima facie case has been made out; then it can exercise its discretion to grant or refuse the order and that in exceptional circumstances it can hear viva voce evidence on any relevant aspect of the matter. This is not an appropriate matter for a referral to oral evidence. The Applicants have not been wrongfully responsible for the situation in which the Respondent finds itself in.

[24] I therefore find in favour of the Applicants. I make the following order:

- (a) That Kimostar (PTY) Limited (Registration number CK 2010/018402/07) be and is hereby placed under provisional liquidation in the hands of the Master of the KwaZulu-Natal High Court, Pietermaritzburg;
- (b) That the rule nisi be and is hereby issued calling upon the Respondent, and all other interested parties to show case, if any, to this Honourable Court on the 10th of October 2013 at 09h30 why the First Respondent close corporation should not be finally wound-up;
- (c) That this order be served on the Respondent Company at its registered office situated at Ground Floor, Nedbank House, 161 Pietermaritz Street, Pietermaritzburg, KwaZulu-Natal and be published on or before the 07th day of October 2013, once in the Government Gazette and once in the Witness newspaper; and
- (d) That the costs hereof be in the liquidation;

Date of hearing: 23 August 2013

Date of Judgment: 06 September 2013

Counsel for the Applicant: Adv C.G Van der Walt

Instructed by: Tomlison Mnguni James Incorporated

165 Pietermaritz Street

Pietermaritzburg

Counsel for the Respondent: Adv R. Nirghin

Instructed by: Sangham Incorporated

188 Retief Street

[1] Act 32 of 1944, as amended.

[2] 1930 TPD 615

[3] 2002

(4) SA 1 (SCA)

[4] 2011(1) SA 8 (SCA)

[5] 1998

(2) SA 689 (W)

[6]

[1987] ZASCA 156; 1988

(2) ALL SA 159 (A)

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