

SOUTH AFRICA / JUDGMENT

Jansen v Matsimbe and Another (2503/2022) [2022] ZAGPJHC 506 (4 August 2022) [2022] ZAGPJHC 506

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Makume

CASE / FILE NUMBER

2503/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2503/2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

In the matter between: JACOBUS
FRANCOIS JANSEN
Applicant
(Identity number [....])
And
RICHARD
MATSIMBE
First
Respondent
MATSIMBE
GROUP (PTY) LTD
Second
Respondent
(Registration number
2017/393166/07)

JUDGMENT

MAKUME, J:

- [1] On the 2nd February 2022 the Applicant was granted an order ex-parte freezing certain assets of the Respondents pending the institution and finalisation of an action in which the Applicant claims payment of the sum of R22 million from the Respondents. The claim is based on an acknowledgement of debt duly signed by the Respondents in favour of the Applicant
- [2] The Respondents having failed to make payment as agreed the Applicant proceeded by way of an ex-parte application and obtained the order referred above.
- [3] MFC a division of Nedbank filed a notice to intervene and claimed ownership of one of the vehicles being the Porsche Cayenne as a result the rule nisi in respect of the Porsche Cayenne was discharged.
- [4] The Respondents deny being indebted to the Applicant and dispute having signed the Acknowledgment of Debt (AOD).
- [5] It will be useful to set out a chronology of events as they emerge from the correspondence which have a bearing on the issues to be determined. But first what is an anti-dissipation order. Stegman J in the leading case of *Knox D'arcy v Jamieson* 1994 (3) SA 700 (W) said that the purpose of this interdict is to prevent a person (the intended defendant) who can be shown to have assets and who is about to defeat the Plaintiff's claim or to render it hollow, by secreting or dissipating assets before judgment can be

obtained or executed and thereby successfully defeating the ends of justice from doing so.

[6] On the 8th September 2021 and at Pretoria the Applicant and the Respondents concluded a memorandum of Agreement and an Acknowledgment of Debt in terms of which the following was recorded:

6.1 The Respondents acknowledge their indebtedness to the Applicant in the sum of R22 000 000.00 (Twenty-Two Million Rands).

6.2 That the said amount would be paid on the 15th October 2021 into the Applicant's nominated bank account

6.3 As security for the indebtedness the Respondents provide two motor vehicles being the Lamborghini Huracan and a Porsche Cayenne Diesel. It being agreed that in the event of non-payment the Applicant would be entitled to attach the two motor vehicles and be sold by the Applicant to liquidate the debt.

6.4 The Respondents agreed to place the Applicant in possession of the spare keys, change of ownership documents.

[7] In breach of the Agreement the Respondents not only did they not pay the amount owing but also did not tell the Applicant that the Lamborghini Huracan was owned by a Company Mogale Operation, they disposed of the Ferrari 812 on the 20th December 2021 and also the BMW motor vehicle was not owned by the Respondents.

[8] Save for the two motor vehicles stated above the rest of the assets interdicted are still subject of the interim order namely the immovable property situated at portion [...] of Erf [...] B [...] Extension [...], Gauteng, the immovable property situated at Erf [...] Hyde Park Extension [...].

[9] The Respondents' defence is one of a bare denial of having concluded the Acknowledgement of Debt and also that the first Respondent does not know the Applicant.

[10] It is common cause that the Acknowledgement of Debt is the source of the litigation. There is nowhere in his Answering Affidavit where the Respondent disputes his signature on the document. All that the Respondent says at paragraph 30 of his Answering Affidavit is that he disputes the AOD and all the allegations contained therein. He continued at paragraph 31 to say that he denies having provided any security under any AOD.

[11] This bare denial by the first Respondent is without merit firstly the first Respondent has not told this Court how the Applicant got hold of all the information about the Respondents assets and their location both movable and immovable including the luxury motor vehicles. I am persuaded that the first Respondent acting in his personal capacity as well as a representative of the second Respondent concluded the Acknowledgement of Debt.

[12] The Respondents have totally misread and misunderstood the purpose of this anti-dissipation application. In his Answering Affidavit and the Heads filed the Respondent says that the Applicant does not believe in the authenticity of the AOD simply because Applicant has chosen to proceed by way of action proceedings. I fail to understand what significance

or bearing that choice has on the application before me. Secondly the Respondents say that there are too many factual disputes as a result this Court is not in a position to make a decision on the papers without evidence. Once more this may very well relate to the impending action or motion proceedings aimed at recovering payment of the R22 million. The present application only seeks to preserve the

assets pending the outcome of that action.

[13] The Respondents defence keeps on vacillating between a bare denial of indebtedness to constitutional issue of deprivation of Section 25 of the Constitution of the Republic of South Africa. This defence has not been properly raised in accordance with the Uniform Rules 16A and stands to be dismissed. Even if it had been raised it is my view that the Respondent has not placed facts before this Court to demonstrate that their rights to property have been infringed upon. Secondly the Respondents do not allege that the relief which the Applicant seeks amounts to an arbitrary deprivation of their property within the meaning of Section 25 (1) of the Constitution.

[14] Mr Patrick Willem Duvenage deposed to an affidavit in reply in which he confirms that the first Respondent Mr Richard Matsimbe signed the Acknowledgement of Debt in his presence on the 8th September 2021 in Pretoria.

[15] What now remains is whether the Applicant's case meets all the requirements for a final interdict.

PRIMA FACIE RIGHT

[16] The Applicant has established a right which is manifested in the Acknowledgment of Debt even though it is open to doubt by the denial (See: *Setlogelo v Setlogelo* 1914 AD 221).

WELL GROUNDED APREHENSION OF IRREPARABLE INJURY

[17] In paragraph 12 of his Founding Affidavit the Applicant tells this Court that the Respondent provided fraudulent security under the Acknowledgement of Debt in that by the time the Acknowledgement of Debt was signed or shortly thereafter the Respondent disposed of the following encumbered assets:

- a) The Lamborghini Huracan motor vehicle;
- b) Ferrari 812 motor vehicle;
- c) A 2014 Lamborghini Aventador LP 700 (VIN [...]).

[18] In their response the Respondents do not deny that and say there is nothing prohibiting them from so doing and that in fact the Respondents never provided any security under any Acknowledgment of Debt.

- [19] The Respondent despite admitting that they disposed of the above named assets provide no reason why they did so they simply hide behind the sentence that they were “never obliged not to dispose of any assets”
- [20] It is clear to me that if this interim order is not confirmed the Respondent is likely to continue on a trail to dissipate the assets. Mr Richard Matsimbe is also said to being sought by the Sandton Police on charges of fraud in relation to motor vehicles he acquired from a car dealership in Sandton. He is as of now a fugitive from justice, a warrant for his arrest has been issued.

ABSENCE OF ORDINARY REMEDY

- [21] There is evidence already that not only has the Respondents disposed of assets which they had pledged as security but that some of the assets actually never belonged to the Respondents. It is clear that the Respondents acted and negotiated in bad faith and misled the Applicant.
- [22] The first Respondent is on the run from police it is therefore reasonable to conclude that the Respondents are disposing of assets in an attempt to ensure that there are no assets to recover by the time that the Applicant obtains judgment against the Respondents.

BALANCE OF CONCLUSION

- [23] The Applicant has succeeded in demonstrating that the balance of convenience favour the confirmation of the interim order.
- [24] The Respondents have evaded the Applicant for a long time notwithstanding their knowledge of indebtedness instead they went ahead to dispose of some of the assets in a clandestine manner.
- [25] In the result I am persuaded that the interim order should be made final.

ORDER

1. The interim order granted on the 2nd February 2022 is hereby confirmed and made final.
2. The Respondents are ordered to pay the costs of this application on a party and party scale including the costs of Counsel.

Dated at Johannesburg on this 4th day of August 2022

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING

: 30 MAY 2022

DATE OF

JUDGMENT

: 04 AUGUST 2022

FOR APPLICANT

: ADV LOMBARD

INSTRUCTED BY

: MESSRS VAN ZYL JOHNSON INC.

FOR RESPONDENT

: ADV MURERIWA

INSTRUCTED BY

: SE KANYOKA ATTORNEYS

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