

SOUTH AFRICA / JUDGMENT

Jerenic and Another v WKH Landfrebe and Company and Others (23837/2022) [2024] ZAGPJHC 1245 (26 November 2024) [2024] ZAGPJHC 1245

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Aucamp

CASE / FILE NUMBER

23837/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 23837/202255831-2021

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

26

November 2024

In

the matter between:

MIRKO
JERENIC
First
Applicant
PORTION
7 MONTROSE CC
Second
Applicant
and
W
K H LANDFREBE AND COMPANY
First
Respondent
WOLFRAM
KARL HELMUTH LANDGREBE
Second
Respondent
THE
COMPANY INTELLECTUAL
PROPERTY
COMMISSION
Third
Respondent

JUDGMENT

[1] The common cause facts in the present application are:

1.1. The second applicant, Portion 7 Montrose CC, (“Montrose”) is the registered owner of two immoveable properties situated at 2[...] M[...] Street and 2[...] M[...] Street.

1.2. Up and until 17 October 2014, the second respondent, Wolfram Karl Helmuth Landgrebe (“Landgrebe”) occupied the position of sole member of Montrose after which date the entire member’s interest in Montrose was assigned to the first applicant, Mirko Jenric (“Jenric”).

1.3. The businesses and / or offices of both Jenric and Landgrebe were opposite from each other, Landgrebe a Chartered Accountant and providing such services under the name and style of the first respondent, WKH Landgrebe and Company (“the accounting firm”) and Jenric a mechanic.

1.4. At all relevant stages up and until 17 October 2024, the accounting firm was the duly appointed auditor of Montrose and Landgrebe attended to the accounting affairs of Montrose.

[2] Against the aforesaid common cause facts, Jenric complains that the accounting firm and / or Landgrebe, notwithstanding various requests and/or demands, has retained a number of statutory and other documents which are and remain the property of Montrose.

Consequently, the applicants make application for an order compelling the accounting firm and / or Landgrebe to deliver to the applicants the documents listed in the notice of motion.

- [3] The accounting firm and Landgrebe deny that the relief claimed is competent on the grounds that (a) there are irreconcilable disputes of facts on these papers rendering the application incapable of resolution, disputes of fact that were foreseeable, (b) the accounting firm and/or Landgrebe have never been placed in possession of the accounting records of Montrose by the applicants, had nothing to do with the day-to-day activities of Montrose and (c) the accounting firm and / or Landgrebe are not the accountants or bookkeeper of Montrose and as such they do not possess the documents sought.
- [4] A further ground of opposition, not dealt with in the heads of argument submitted on behalf of the accounting firm and Landgrebe but raised in the opposing papers relates to a purported lien exercised by the said respondents in respect of professional services rendered to Montrose and for which payment has not been made. It is this point which I regard as destructive of the first and second respondents' assertion of irreconcilable disputes of fact.
- [5] As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits. In *Cape Town City v South African National Roads Agency Ltd*[1] Binns-Ward and Boqwana J observed that:

"In South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) (2003) (4) BCLR 378) para 24 it was suggested in passing that "denials that are 'so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers' constitute a separate category of 'uncreditworthy denials' from those which do not raise 'a real, genuine or bona fide dispute of fact'." With respect, we doubt whether there is in fact a basis for such a distinction: a denial that is so far-fetched or clearly untenable as to be rejected on the papers cannot provide the evidential basis for a genuine dispute of fact. We read the distinction drawn by Corbett JA in Plascon-Evans supra at 634I – 635C as having been made on a different basis, viz as between the effect of the failure by the respondent who makes a bald denial to an inherently credible allegation by the applicant and fails to apply to cross-examine the applicant, as being insufficient, within the ambit of the general rule, to raise a genuine dispute of fact and, by way of an exception to the general rule, the rejection of the respondent's evidence where its allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. In both of the posited situations, whether within the general rule, or by way of an exception to it, the effect will be the same – the respondent's averments will not be sufficient to bar the applicant from obtaining final relief on the papers. In the current matter the City needed to persuade us to disregard Sanral's denial in terms of the exception to the Plascon-Evans rule."

- [6] It has been held[2] that a court should, in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in the affidavits. This is so because affidavits are settled by legal advisers with varying degrees of

experience, skill and diligence, and a litigant should not pay the price for an adviser's shortcomings. Nevertheless, the courts have recognised reasons to take a stronger line to avoid an injustice.[3] Mere assertions of witnesses do not of themselves need to be believed and testimony which is contrary to all reasonable probabilities or conceded facts (i.e. testimony which no sensible man can believe) goes for nothing, while the evidence of a single witness to a fact, there being nothing to throw discredit on it, cannot be disregarded.

- [7] Landgrebe admits in the one instance (para 13.2) of being the “accounting officer” of Montrose and then later in the answering affidavit (para 16.10) denies being the accountant and/or bookkeeper of the same entity. To the extent that there is a difference between the position of and the obligations of an accounting officer on the one hand and an accountant or bookkeeper

on the other hand, given the history of the matter and the nature of the business of Montrose, I am not convinced that the applies in casu.

- [8] Landgrebe admits that he assisted Montrose with its tax affairs including having registered Montrose's annual tax returns. He goes on to state that:

“32.1 I submit that my obligations towards the First Applicant as its accounting officer, per Section 62 of the Act (as amended), are as follows: -

32.2.1 No later than three months after completion of the close corporation's annual financial statements, I am to review the same and determine whether the same are in agreement with the close corporation's accounting records and that appropriate

accounting policies have been applied in the preparation thereof; and

32.2.2 I am to report to CIPC whether the close corporation's annual statements indicate that its liabilities exceed its assets.

32.2 As mentioned above I have complied with my aforesaid obligations at all times material hereto, when provided with the necessary information with the Applicants and subject to the nature of that information.”

- [9] Landgrebe continues to state under oath that:

“32.4 As appears from annexure “AA3.2” hereto, I have billed the first applicant for payment of its annual CIPC duties, the continued use of my office as its registered

address, the completion and submission of its provisional tax returns, the completion and submission of its annual returns to CIPC

and the completion and submission of its income tax returns.”

- [10] Contrary to the above Landgrebe in other instances of the answering affidavit alleges that (a) “Neither I nor the first respondent have had nothing to do with the so-called “... accounting records ... “ of the second applicant because I'm not the accountant or bookkeeper of the

close corporation” (para 14.5), (b) “I am by no stretch of the imagination, the close corporation’s accountant or bookkeeper and the precise details pertaining to the second applicant’s assets, debts and liabilities ought to all be within Mr Jerenic’s exclusive knowledge and control.” (para 16.10)

[11] Again, in contradiction to the aforesaid, Landgrebe states that:

“I have complied with my obligations as contemplated in Section 62(1) of the Act and have carried out such obligations to the best of my abilities but always subject to the import of such information that has been provided to me by the second applicant from time-to-time regarding to its affairs. In said regard, I re-iterate that I am not the second applicant’s bookkeeper or accountant and rely exclusively on the information given to me by Mr Jerenic, his wife and/or his employees.”

[12] From the aforesaid, it is conceded by Landgrebe that documents had been provided however no detail is provided as to the nature and description of the documents that were indeed provided.

[13] There are various other examples of contradicting statements contained in the answering affidavit, all of which allows me, to in the exercise of my discretion and on the authorities referred to, to reject the version presented by and on behalf of the accounting firm and Landgrebe.

[14] Consequently, I am satisfied that the applicants have made out a case, both in relation to the obligation to deliver the documents as well as the extent of the documents claimed. Section 56 of the Close Corporations Act, Act 69 of 1984 provides that:

“56 Accounting records

- (1) A corporation shall keep in one of the official languages of the Republic such accounting records as are necessary fairly to present the state of affairs and business of the corporation, and to explain the transactions and financial position of the business of the corporation, including-
 - (a) records showing its assets and liabilities, members' contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members;
 - (b) a register of fixed assets showing in respect thereof the respective dates of any acquisition and the cost thereof, depreciation (if any), and where any assets have been revalued, the date of the revaluation and the revalued amount thereof, the respective dates of any disposals and the consideration received in respect thereof: Provided that in the case of a corporation which has been converted from a company in terms of section 27, the existing fixed asset register of the company shall be deemed to be such a register in respect of the corporation, and such particulars therein shall be deemed to apply in respect of it;

- (c) records containing entries from day to day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;
 - (d) records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified;
 - (e) statements of the annual stocktaking, and records to enable the value of stock at the end of the financial year to be determined; and (f) vouchers supporting entries in the accounting records.
- (2) The accounting records relating to-
- (a) contributions by members;
 - (b) loans to and from members; and
 - (c) payments to members, shall contain sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified.
- (3) The accounting records referred to in subsection (1) shall be kept in such a manner as to provide adequate precautions against falsification and to facilitate the discovery of any falsification.
- (4) The accounting records shall be kept at the place or places of business or at the registered office of the corporation and shall, wherever kept, be open at all reasonable times for inspection by any member.
- (5)
- (a) Any corporation which fails to comply with any provision of any of the preceding subsections of this section, and every member thereof who a party to such failure is or who fails to take all reasonable steps to secure compliance by the corporation with any such provision, shall be guilty of an offence.
 - (b) In any proceedings against any member of a corporation in respect of an offence consisting of a failure to take reasonable steps to secure compliance by a corporation with any provision referred to in paragraph (a), it shall be a defence if it is proved that the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that any such provision was complied with, and that such person was in a position to discharge that duty, and that the accused had no reason to believe that such person had in any way failed to discharge that duty.”
- [15] Section 56 makes it clear as to what documents shall be kept by the close corporation in question and what the consequences are to the member or members of the close corporation failing to keep such documents unless the caveat referred to applies.

COSTS

[16] Finally it is with respect submitted that this case is a textbook example of one where the other party (the applicants in this matter) should not be placed in a situation where the conduct of the other party (the first and second respondents) placed the applicants in a situation where they were to be out of pocket as was contemplated in the matters *In re: Alluvial Creak*[4] and *Boost Sports v South African Breweries*,[5] where the following was quoted with approval:

“Now sometime such an order is given because of something in the conduct of the party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intend may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.”

[Emphasis Added]

RELIEF

[17] In the result I make the following order:

17.1. The first and second respondents are directed and ordered to release the following list of documents to the applicants as contemplated in terms of section 56(1) of the Close Corporations Act 69 of 1984 (“the Act”) within 10 days of the order:-

17.1.1. All accounting records as are necessary fairly to present the state of affairs and business of the corporation, and to explain the transactions and financial position of the business of the corporation, including: -

17.1.1.1. records showing its assets and liabilities, members’ contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members;

17.1.1.2. a register of fixed assets showing in respect thereof the respective dates of any acquisition and the costs thereof, depreciation (if any), and where any assets have been revalued, the date of the revaluation and the revalued amount thereof, the respective dates of any disposals and the consideration received in respect thereof;

17.1.1.3. records containing entries from day to day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;

17.1.1.4. records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified;

17.1.1.5. statements of the annual stocktaking, and records to enable the value of the stock at the end of the financial year to be determined; and

17.1.1.6. vouchers supporting entries in the accounting records.

17.1.2. The second applicant's accounting records which shall contain sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified within 10 days of the order relating to: -

17.1.2.1. contributions by members'

17.1.2.2. loans to and from members; and

17.1.2.3. payments to members.

17.1.3. An order that the respondents release within 10 days of the order the following list of documents to the applicants: -

17.1.3.1. complete and signed CK documents of the second applicant lodged with the CIPC;

17.1.3.2. a CK2 original resignation form duly signed by the second respondent and corporation resolution reflecting the second respondent's resignation as member of the second applicant;

17.1.3.3. all written resolutions and resignations as the close corporation's member, secretary, public officer, all of whose resignations shall be accompanied by such documents duly completed as are required by law to be lodged with the registrar of close corporations and/or CIPC in connection with or as a result of such resignations;

17.1.3.4. the original resolution by the second respondents as the member of the close corporation authorising the transfer of the rights and interest into the first applicant's name together with all supporting documents, if any;

17.1.3.5. amended founding statement, if any, signed by the first applicant as to transferee recording the transfer of the member's interest pursuant to the sale agreement;

17.1.3.6. VAT and transfer duty clearance certificate from 17 October 2014 and / or date of transfer of 100% membership to the first applicant;

17.1.3.7. all documents reflecting the effective date of transfer of the member's interests in the second applicant;

17.1.3.8. the financial statements of the second applicant as of 17 October 2014 and/or the effective date of transfer;

17.1.3.9. deed of transfer for the property under deed of transfer T67007/2005 together with all documents related to the ownership of the properties;

17.1.4. a full account of the City of Johannesburg municipal accounts of the second applicant from date of transfer to date with all payment contributions towards the municipality of the two properties registered in the second applicant's name, including a full account of the: -

17.1.4.1. rates, taxes, water, electricity and other services cleared before first applicant took over as sole member; and

17.1.4.2. rates clearance figures at the effective date of transfer;

17.1.4.3. certificates of compliance in respect of the building/s together with the registered and approved building plans of the building/s on the property in the name of the second applicant; and

17.1.4.4. the financial accounting records, audited annual financial statements and annual returns of the second applicant for the annual financial years of 2014 up to 2022 ("the financial period"); and

17.1.5. The first and second respondents and directed and ordered to render a full statement of all accounts, supported by invoices and vouchers, in the name of the second applicant for the period from 17 October 2014 up to date within 10 days of this order;

17.2. Applicants are authorised to supplement its papers filed under the abovementioned case number upon receipt of the documents and information in paragraphs 17.1.1, 17.1.2, 17.2.3 and 17.2.4.

17.3. The first and second respondents, jointly and severally, the one paying the other to be absolved, are directed to pay the first and second applicants' costs of this application, such costs to be taxed on the attorney and client costs.

S. AUCAMP

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on-26 November 2024

HEARD ON:

DATE OF JUDGEMENT:

For the Applicant: Adv M Kohn

Instructed by: JJ Nel Attorneys

For the Respondent: Adv A Louw

Instructed by: JHS Attorneys

- [1] 2015 (6) SA 535 (WCC) at 608F – I
- [2] Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd 2011 (1) SA 8 (SCA) at 14D - F
- [3] Buffalo Freight supra at 14E – H referring to Da Mata v Otto NO 1972
- (3) SA 858 (A) at 869D - E
- [4] 1929 CTD 532 at 535
- [5] 2015
- (5) SA 38 (SCA) at 56 [27]
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