

SOUTH AFRICA / JUDGMENT

Jooste v iGrow Real Estate (Pty) Ltd (16801/2024) [2024] ZAWCHC 360 (11 November 2024) [2024] ZAWCHC 360

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

16801/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 16801/2024

In the matter between:

CHRISLÉ
JOOSTE
Applicant
and
IGROW
REAL ESTATE (PTY) LTD
Respondent
Coram: Justice J
Cloete
Heard: 31 October
2024
Delivered
electronically: 11 November 2024

JUDGMENT

CLOETE J:

- [1] This is an opposed application for the provisional winding-up of the respondent (the main relief for a final winding-up order was abandoned at the commencement of argument). The respondent is a private company conducting business as an estate agency and which at all relevant times was represented by Mr Jacques Fouché, who is also its sole director.
- [2] In the applicant's founding affidavit the grounds advanced in support of the relief sought were that: (a) the applicant is a creditor of the respondent and thus has the necessary locus standi; (b) on 13 June 2024, the applicant, through her attorney, made a formal demand for payment of the sum allegedly due to her in terms of s 345(1) of the Companies Act,[1] which the respondent failed to meet; (c) as a consequence the respondent is deemed unable to pay its debts in terms of s 344(f)

read with s 345(1)(c) of the aforesaid Act; and (d) it is just and equitable that the respondent be wound-up in accordance with s 344(g) thereof.

- [3] As far as the reliance on s 344(g) is concerned, the applicant alleged the respondent was intentionally dissipating its income by distributing it to its shareholders and/or directors without any intention to settle her claims and/or for that matter any other creditors' claims against it, in circumstances where it has no assets.
- [4] Despite the unnecessary length of the applicant's founding papers (212 pages including annexures) the salient allegations made by her were as follows. On 28 February 2018 she concluded a written employment contract with the respondent in terms of which she was appointed as an estate agent earning commission based on a certain structure. This was followed by a written addendum concluded on 18 August 2020, in which she would also perform certain management functions for the respondent and would earn management fees, again in terms of a commission structure. As a direct result of what she referred to as her 'utmost disgust' at the alleged conduct of Mr Fouché, namely that he was utilising investors' funds contrary to the terms of agreements

concluded between these investors and the respondent, she resigned from her employment with effect from 31 July 2023.

- [5] The applicant further alleged that upon termination of her employment she rendered invoices to the respondent 'towards commissions due to me, some of which were not payable as yet... these invoices remain unpaid'. After the respondent had disputed certain of her claims she abandoned the disputed portion, leaving the respondent indebted to her in an amount of R5 088 487.63.
- [6] The applicant referred to an email received from Mr Fouché

on behalf of the respondent dated 2 October 2023, in which, according to her, he ‘indicated that payment of my commission is refused as it wishes to set off certain damages which related entities to the respondent have suffered, allegedly consequential to dealings between these entities and a company of which my husband is the controlling mind’. She annexed that email, which was addressed to both her and her husband, Mr Gerhardt Jooste, together with her response dated 27 October 2023.

- [7] The relevant portion of Mr Fouché’s email loosely translated into English, reads that ‘I also just want to make it very clear to you, that Gerhardt promised me that all your commission will be rolled in as a partial contribution to bear your 25% losses... Gerhardt as you also promised me in many conversations, that you will accept financial responsibility for the 25% losses in the developments. You also promised that you would sell or finance the shares in your building in Durbanville to cover the 25% losses’. Mr Jooste did not respond to this email. Only the applicant did. Her response reads in relevant part (again loosely translated) that ‘I have no knowledge of [those alleged promises] ... and was no party to it. So I deny any promises’. In other words the applicant claimed that she had no knowledge of the agreement upon which the respondent relied as having been concluded between itself and Mr Jooste. Mr Jooste did not file any confirmatory affidavit at that stage.
- [8] In the answering affidavit deposed to by Mr Fouché the following emerged. The applicant and Mr Jooste, who are married in community of property, were placed under final sequestration on 12 April 2016 and remain unrehabilitated insolvents. Prior to the respondent employing the applicant, Mr Jooste took up employment with IGrow Wealth Investments (Pty) Ltd (“IGrow Wealth”), an associated company in the IGrow Group, in November 2016.
- [9] According to Mr Fouché, Mr Jooste represented to him that he was a property developer, ‘specialising in bringing creative property solutions and managing the full development cycle from identifying an opportunity to handing over the keys’. Mr Jooste also professed to have set up a real estate development, investment and management company which, according to him, had built up a property fund in excess of R9 billion over a ten-year period. Mr Jooste holds a law degree and is also an admitted attorney.
- [10] At the time, IGrow Wealth was seeking to explore new property developments and (seemingly relying on the aforesaid representations) appointed Mr Jooste as General Manager: New Development. His employment became permanent on 19 December 2018. At that stage, in addition to his remuneration, his written contract of employment reflected that he would become a 25% joint venture partner in the new property developments managed by him, with either IGrow Property Developments (Pty) Ltd (“IGrow Prop”) or IGrow Wealth being the other 75% joint venture partner.
- [11] Mr Jooste would not be required to pay for his shares, and the percentage split would be calculated with reference to the combined shares held by him and IGrow Prop/IGrow Wealth in the development company, and which would be a separate special purpose vehicle

development company (“SPV”) for each new property development. Given Mr Jooste’s insolvency (and accordingly that of the joint estate), he asked that his 25% share be held in Bergshoop (Pty) Ltd (“Bergshoop”), of which his son was the sole director, or the Bergshoop Property Trust. At all times however, Mr Jooste was the actual joint venture partner.

[12] It was further agreed that the profits/losses incurred by the SPV’s would be combined as opposed to being treated individually in each. According to Mr Fouché, as time passed, it became apparent that Mr Jooste had misrepresented his alleged experience and expertise in relation to property developments. Besides overstating financial profit projections, he was unable to manage development teams, appointed the wrong contractors and professionals, and failed to co-ordinate contractors and members on projects. He was supposed to use his so-called network of suppliers, contractors, development teams and professionals to execute on these property developments and meet the profitable projections that he had forecast for each development. However, he failed dismally in performing these obligations. As a result the losses suffered in respect of the property developments which he managed were huge. In respect of 3 property developments alone, the losses amount to R112 575 115. Purely on the basis of being a joint venture partner, Mr Jooste’s share would be at least R28 million. There were also losses incurred on other developments which are yet to be determined. In addition to the foregoing Mr Jooste also took over the role of general manager of the respondent, and was intimately involved in its management, along with the applicant (in her case, from August 2020).

[13] Mr Fouché also alleged that in his various discussions with Mr Jooste dating back to 2020, he would point out that the developments were showing a loss. However, on each occasion, Mr Jooste would assure him that the losses would be made up by the profits in the remaining developments still to be completed. During these discussions Mr Jooste also assured Mr Fouché that if there were indeed losses, he would make good his personal 25% joint venture share thereof. Since Mr Jooste and the applicant were unrehabilitated insolvents with no assets, it was agreed that his personal share of any losses would be set off against commission earned by the applicant via the respondent and, if necessary, Mr Jooste would sell the shares held by one of his nominee entities which owned a commercial property in Durbanville, and apply the net proceeds of such sale to make up any shortfall. In reaching this oral agreement with Mr Jooste who was acting on behalf of the insolvent joint

estate, Mr Fouché represented IGrow Prop, IGrow Wealth and the respondent as their sole director.

[14] The last commission claim submitted by the applicant was in respect of management fees for the period September to November 2022, whereas the last payment made in respect of estate agent’s commission was in May 2023 in the sum of R129 291. At that stage the quantum of the losses suffered in the developments were not known. However, after the applicant’s departure from the respondent at the end of July 2023, it became apparent that all the property developments managed by Mr Jooste had resulted in a loss.

- [15] Mr Fouché maintained that as at the date of deposing to his answering affidavit, Mr Jooste had never denied the existence of that oral agreement. He pointed out that although the applicant denied being a party thereto, she did not deny that Mr Jooste in fact concluded the agreement. Mr Fouché submitted it was inconceivable that Mr Jooste would not have had the applicant's approval to conclude that oral agreement, given that he would regularly make reference to the applicant's commission as being 'our commission' and issued instructions as to the manner in which prior commissions earned by the applicant should be paid. By way of illustration, on 18 February 2023, Mr Jooste addressed an email to Mr Fouché stating that he and the applicant would rather take up a share in a unit in one of the developments in lieu of their (not the applicant's) commissions. The relevant portion of that email (again loosely translated) reads 'Your feeling was that you would rather have your share of the commission injected for cash flow, but that you are happy if Chrislé and I leave in our part in return for a share in Unit 104'. The applicant also has a legal background. According to Mr Fouché, the applicant and Mr Jooste acted in unison when attending to matters within the IGrow Group (there is also no suggestion on the papers that they have not continued to live as husband and wife). In short therefore, the respondent's defence is that in terms of a set-off agreement, the development losses far exceed any commission claims of the applicant, and accordingly she is not a creditor of the respondent.
- [16] Mr Fouché also attached the applicant's letter of resignation dated 13 June 2023 in which, contrary to her assertions in the founding affidavit, demonstrated that she resigned for personal family reasons and because she and Mr Jooste were finding it difficult to separate their joint involvement in the business of the IGrow Group from their personal time with each other. As the applicant put it in that email (another loose translation) '...unfortunately my and Gerhardt's personal time is taken up only with business discussions'. This supports Mr Fouché's version that the applicant and Mr Jooste worked in unison together and lends credence to the defence put up by the respondent. To this it must be added that the allegations made by the applicant of impropriety on the part of Mr Fouché were demonstrated to be false with reference to correspondence, as well as an affidavit, from two separate attorneys refuting, in the clearest terms, allegations made by the applicant of what had allegedly been conveyed to her attorney by them. The applicant's attorney did not file any confirmatory affidavit, or personally dispute what they stated, and the version of those attorneys must thus be accepted.
- [17] The respondent also raised certain defences of a more technical nature pertaining to the applicant's entitlement to her commission by virtue of her alleged lack of compliance with various statutory and regulatory requirements for estate agents. This was disputed by the applicant in her replying affidavit, with reference also to various annexures. The parties' respective versions on this score show that there is a material dispute of fact incapable of resolution on the papers, and I thus leave it there.

[18] Returning to the respondent's set-off defence, the applicant changed tack in her replying affidavit. According to her she was now – suddenly – able to categorically deny the existence of the oral agreement, as was – equally suddenly – Mr Jooste who filed a confirmatory affidavit to that effect. What is telling is that this was the very first occasion on which they both did so, despite: (a) the applicant's s 345 demand of 13 June 2024 having been sent in the full knowledge of Mr Fouché's reliance on that agreement some 7 ½ months earlier (in his email dated 2 October 2023), and in which demand the applicant did not address this at all; and (b) her self-professed ignorance thereof under oath in her founding affidavit deposed to on 29 July 2024. The irresistible conclusion is that both she and Mr Jooste have been economical with the truth.

[19] The applicant then raised a new ground, relying on s 23(2) of the Insolvency Act,[2] pertaining to disposal of property of an insolvent estate without the consent of its trustee which, she maintained, would thus in any event render the oral agreement relied upon by the respondent invalid. Counsel for the applicant who, it bears emphasis, was briefed to argue the matter at the 11th hour and who had no part in drafting the papers or preparing heads of argument, abandoned any reliance on s 23(2), and again I leave it there. What is important however are the following allegations made by the applicant (and supported by Mr Jooste) at paragraph 53 of the replying affidavit:

'My spouse and I categorically deny the existence of any verbal agreement inter alia stating... the use of my income and commissions generated... to offset the pro rata losses incurred by the SPVs that are directly attributable to the actions and interests of Bergshoop and the Bergshoop Trust, with my spouse acting as their representative shareholder...'

[20] Mr Fouché had never alleged that in concluding the oral agreement Mr Jooste represented either of the aforementioned entities. His version, as previously stated, was that Mr Jooste represented the insolvent joint estate. The applicant's reason for this apparent slip-up with the truth became clear when the respondent was granted leave to file a supplementary affidavit dealing with the new matter raised by the applicant in her replying affidavit. The deponent to the respondent's supplementary affidavit was Mr Johannes Van Vuuren who is the financial manager of the IGrow Group. With reference to objective evidence in the form of communications from Mr Jooste as well as invoices generated by the applicant herself: (a) all invoices for management fees and commissions prior to the termination of the applicant's employment with the respondent on 31 July 2023 were made out, and submitted, by the applicant and Mr Jooste to IGrow Wealth, not the respondent; and (b) IGrow Wealth was instructed on most occasions to make payment of management fees and commissions earned by the applicant to the bank account of Bergshoop Investments as opposed to her personal bank account. Even as late as 15 May 2023, approximately a month before her resignation as employee, she submitted an invoice to IGrow Wealth as opposed to the respondent. On Mr Van Vuuren's calculations, 71% of the applicant's earnings were paid to Bergshoop Investments on the instructions of herself and/or Mr Jooste, this being a company which, according to the applicant, would never have been able to receive those

payments as they would have contravened s 23(2) of the Insolvency Act. The only response to this in the applicant's answering affidavit, which was also allowed, was that '...the manner in which I invest my commission and/or management fees is wholly irrelevant to the matter at hand...'. To my mind this further demonstrates the applicant's capacity to play fast and loose with the true factual position.

[21] In the heads of argument filed on the applicant's behalf, a new point was raised for the first time. This related to s 34(1) of the Basic Conditions of Employment Act,[3] which provides as follows:

'(1) An employer may not make any deductions from an employee's remuneration unless---

- (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
- (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.'

[22] The submission in the applicant's heads of argument was merely that 'it is common cause that the applicant never consented to such deduction in writing, in particular unliquidated claims for damages suffered by entities which are unrelated to the applicant'. Reliance on s 34(1) was not foreshadowed in any of the affidavits filed by the parties, since it was not a basis advanced by the applicant to avoid the oral agreement relied upon at any time from 2 October 2023 until filing of her heads of argument. But in any event, as pointed out by counsel for the respondent, deductions were specifically contemplated in the employment contract

between the applicant and the respondent. Clause 7.5 of that employment contract, which is in writing, provides that '...the employee authorises deductions from her commission in respect of... any other amount payable in terms of an agreement, debt and/or loss, or damage in accordance with section 34 of the Basic Conditions of Employment Act...' (my emphasis).

[23] No reference at all was made by the applicant to s 34(2), but during argument both counsel for the respondent and the court were expected by applicant's counsel to be drawn into an interpretative exercise of the meaning of s 34(1) read with s 34(2), and plied with new authorities to "assist" the court in dealing with the issue. This resulted in the respondent being taken by surprise and in my view amounted to an impermissible attempt on the applicant's part to plug one of the holes in her version. I will thus not deal with this point.

[24] Yet another new point was taken by the applicant for the first time in oral argument. This pertained to s 15(3)(b) of the Matrimonial Property Act[4] which precludes a spouse married in community of property from receiving any money due to the other by way of, amongst others,

earnings, without that other spouse's consent. Again this was not foreshadowed in the applicant's papers and took the

respondent by surprise. It was thus correctly not pursued by counsel for the applicant with any conviction.

[25] In *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd*[5] the court set out the test at provisional winding-up stage as follows:

‘I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants’ claims, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company’s defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company’s disputing these claims are not unreasonable.’

[26] On a conspectus of the affidavit evidence before me I am persuaded that the respondent has met this threshold and moreover that it has been bona fide in raising its opposition to this application. That leaves the issue of costs. Given what is contained in this judgment I am also persuaded that the respondent is entitled to the punitive costs order which it seeks. This application has been an abuse of the court process. I should mention that, in respect of the opposed application for leave to admit the respondent’s supplementary affidavit, and consequentially the applicant’s answering affidavit thereto, I ordered that costs be costs in the cause. In respect of the applicant’s rule 47 application (i.e. security

for costs), the applicant refused to accede to the respondent’s request, as a consequence of which the respondent was compelled to launch a formal application. It was only thereafter that the applicant provided security. In these circumstances there is no

reason why the costs of the rule 47 application should not follow the result.

[27] The following order is made:

1. The application is dismissed.
2. The applicant shall pay the respondent’s costs on the scale as between attorney and client, including those incurred in respect

of the respondent's rule 47 application and any reserved costs

orders.

J I CLOETE

For Applicant: Adv C Fehr

Instructed by: Van Wyk Van Heerden Attorneys, Mr W Van Heerden

For Respondent: Adv T Crookes

Instructed by: Abrahams & Gross Inc., Mr B De Sousa

[1] No 61 of 1973 read with Item 9 of Schedule 5 of the Companies Act 71 of 2008.

[2] No 24 of 1936.

[3] No 75 of 1997.

[4] No 88 of 1984.

[5] 1998 (2) SA 208 (C) at 219E-G.

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