

SOUTH AFRICA / JUDGMENT

Jordaan v Rajcic (2023/034165) [2024] ZAGPJHC 525 (31 May 2024) [2024] ZAGPJHC 525

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moshoana

CASE / FILE NUMBER

2023/034165

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2023/034165

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: NO

In

the matter between:

ALLAN
RICHARD
JORDAAN
Applicant
and
PREDRAG
RAJCIC
First Respondent

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 31 May 2024.

Summary:

Claim against the promoter of a company to be formed for a breach of terms of a pre-incorporation contract. In terms of the pre-incorporation contract, the promoter agreed to, within 90 days of fulfilment of the last suspensive condition provide the plaintiff seller with a bank guarantee for the purchase price. The promoter is in breach and the plaintiff is entitled to a specific performance remedy. The promoter agreed to rent and pay the associated costs. He failed to pay despite having enjoyed occupation and use. The promoter is liable to pay for the undisturbed possession and the usage enjoyed costs incurred. Held: (1) The relief sought is granted. Held: (2) The respondent is to pay costs on party and party scale B.

JUDGMENT

Moshoana, J

Introduction

- [1] The present application is launched by Mr Allan Richard Jordaan (Mr Jordaan) who seeks to enforce the terms of a written agreement concluded between himself and the respondent, Mr Predrag Rajcic (Mr Rajcic), a promoter of an unincorporated entity. The fact that the parties concluded an agreement of sale of an immovable property for the purchase sum of R5 000 000.00 is common cause. The agreed sum was to be secured by a bank guarantee from a recognisable financial institution acceptable to Mr Jordaan to be delivered by Mr Rajcic within 90 days of the fulfilment of the last suspensive condition.

- [2] It is common cause that the last suspensive condition was fulfilled and the 90 day period had elapsed without Mr Rajcic delivering the bank guarantee. Owing to that failure, the present application was launched and it was belatedly duly opposed.

Background

facts pertinent to the application

- [3] On 16 January 2017, Mr Jordaan and Mr Rajcic concluded a written agreement of sale of an immovable property, to wit; ERF [...] P[...] Johannesburg, which is situated at [...] E[...] Avenue, P[...], Sandton, Johannesburg. Pertinent to the present dispute, both parties agreed that the purchase price of R5 000 000.00 shall be secured by a bank guarantee which was to be delivered on fulfilment of the last suspensive condition. The parties agreed that the sale agreement was to be subjected to suspensive conditions. The last suspensive condition, which is of particular relevance in this application was the successful rezoning of the property by Mr Rajcic at his own costs.
- [4] The rezoning of the property happened on 1 September 2021. Prior thereto, parties concluded an addendum in terms of which Mr Rajcic agreed to pay to Mr Jordaan a monthly rental of R18 000.00. The addendum was concluded on 9 February
2018. The relevant clauses of the addendum provided that effective from 1 March 2018, Mr Rajcic shall pay rental of the agreed amount which shall be due in advance and payable on the third business day of each month as well as for the costs of water, electricity and armed response.
- [5] Mr Rajcic in breach of the terms of the addendum failed to pay the monthly rental and fell into arrears. Rental of 26 months totalling R468 000.00 was due and payable. In terms of the addendum, Mr Rajcic in addition, agreed to be liable for the costs related to water, electricity and armed responses. Mr Rajcic failed to pay those costs when they fell due as agreed. The amount owing and payable accumulated to R64 798.49.
- [6] It was common cause that Mr Rajcic concluded these written instruments referred to earlier in his capacity as a duly authorised

representative of a company to be formed. As at 3 April 2023, when Mr Jordaan instituted the present application, the NEWCO[1] was not formed. Mr Jordaan contends that on the strength of section 21(2)(a) of the Companies Act ("CA"),[2] Mr Rajcic is jointly and severally liable for the liabilities created in the sale agreement and the addendum.

- [7] On 31 January 2022, Mr Jordaan's attorneys electronically dispatched a letter of demand to the attorneys of Mr Rajcic, demanding compliance with the agreed terms and payments of the amount due and payable. Owing to the failure to meet the demand, the present motion was launched seeking the following reliefs:

- a. Ordering and directing the Respondent (Mr Rajcic) to forthwith deliver to the Applicant (Mr Jordaan) a bank guarantee/s in the amount of R5 000 000.00(Five Million Rands) from a recognised institution;
 - b. Ordering and directing the Respondent to make payment to the Applicant in the amount of R639 515.29;
 - c. Costs of this application.
- [8] As pointed out above, the application is duly opposed by Mr Rajcic. On 11 February 2021, in a written correspondence, the attorneys acting on behalf of Rajcic, acknowledged the agreement of sale, as well as the addendum. Additionally, the arrears at that time were acknowledged and an offer to defray those arrears at the time through instalments was made.

Analysis

- [9] Mr Rajcic is devoid of any defence against the claim of Mr Jordaan. Motion proceedings are perfectly suitable for this claim. All his defences are highly technical. It so happened that Mr Jordaan annexed a copy of the agreement of sale purely because he could not locate the signed agreement at the time. Despite having acknowledged the agreements on 11 February 2021, Mr Rajcic opportunistically sought to challenge the validity of the agreement on the basis that the copy annexed to the founding affidavit offends the provisions of section 2(1) of the Alienation of Land Act[3] in that the annexed copy was unsigned. This was persisted with despite Mr Jordaan annexing a copy of the signed copy in the

replying affidavit. To this clear innocuous overture, Mr Rajcic argues that a new case is made in reply as opposed to the founding

affidavit. There is no merit in this argument.

- [10] Mr Rajcic knows very well that the agreement was indeed signed. The addendum which was signed on 9 February 2018, specifically records the following:

“ADDENDUM TO THE DEED OF SALE CONCLUDED BETWEEN ALLAN RICHARD JORDAAN (SELLER) AND PREDRAG RAJCIC (THE PURCHASER, ACTING ON BEHALF OF A COMPANY TO BE FORMED) (COLLECTIVELY REFERRED TO HEREIN AS “THE PARTIES”) IN RESPECT OF ERF 655 PARKMORE, SANDTON (HEREINAFTER REFERRED TO AS “THE PROPERTY”) SIGNED ON THE 16TH OF JANUARY 2017”. [Own emphasis.]

- [11] Based on the caveat subscriptor rule, when Mr Rajcic signed the addendum on 9 February 2018, he also accepted that the sale agreement was already signed on 16 January

2017. Accordingly, the belated technical defence must be rejected outright.

[12] This Court reaches a conclusion that all the other technical defences raised by Mr Rajcic are not only opportunistically raised but are invalid in law. During argument, Mr Carstens, counsel for Mr Rajcic, submitted that Mr Jordaan failed to make a case in the founding affidavit. This Court, with considerable regret, is unable to agree with this fanciful submission. Mr Jordaan did make his case in the founding affidavit. Both agreements he seeks to rely on were alleged together with their terms and the breach thereof.

[13] Both agreements do indicate that Mr Rajcic was acting on behalf of a NEWCO. With regard to the addendum, this Court takes a view that he personally enjoyed beneficial occupation and usage. Differently put, a NEWCO was incapable of taking occupation, using water, electricity and armed responses as it did not exist and never existed as at the commencement of this litigation. This Court shall accept that the liabilities attracted in the sale agreement, particularly the one to deliver a bank guarantee/s is the liability of the NEWCO. However, when the 90 days expired, the NEWCO was not formed. The veritable question becomes that of who breached that undertaking?

[14] In terms of the sale agreement, the purchaser is defined as a company to be formed at that time represented by Mr Rajcic. In his representative capacity, Mr Rajcic agreed that the purchase price will be secured by a bank guarantee/s from a recognised financial institution acceptable to the sellers (or such other undertaking acceptable to the sellers), to be delivered within 90 (ninety) business days of fulfilment of the last suspensive condition. It is common cause that Mr Rajcic is the one who ensured the fulfilment of the last condition since the NEWCO was not founded at that time. Applying the literal, contextual and purposive approach, it must follow that Mr Rajcic and not the NEWCO was obligated to deliver the bank guarantee within the stated period. Absent from clause 5.3 of the sale agreement are words to the following effect; “will be secured by the NEWCO” and “to be delivered by the NEWCO”.

[15] Therefore a sensible and business-like interpretation of that clause, taking into account all the prevailing circumstances is that it was within the contemplation of both parties that Mr Rajcic shall (a) secure the bank guarantee/s and (b) deliver that within 90 days of the fulfilment of the last suspensive condition. Any other interpretation of this clause to the contrary would lead to absurdity. It is indeed an absurdity that the parties could fix a date and also live with the contemplation that the NEWCO may, as it did, be incorporated after two years of the fulfilment. There are possibly two reasons why the 90-day period was fixed and

those are (1) within 90 days the NEWCO will be incorporated; (2) Mr Rajcic will carry out the obligation the same way he carried out the rezoning at his own costs.

[16] In *Jones v Burlington Industries Inc (Jones)*,^[4] the following was said:

“The liability of the promoter for a contract will depend upon the terms of the contract and the intent of the parties. There is a strong inference that a person intends to make a contract with an existing entity, rather

than the to-be-formed corporation. It is frequently desirable as a practical matter to obtain options, enter into contracts for the purchase of land, buildings, machines and materials, and for the performance of services prior to the incorporation of the business unit for whose benefit such transactions are to be consummated. It is settled by the authorities that a promoter, though he may assume to act on behalf of the projected corporation and not for

himself, will be personally liable on his contract unless the other party agreed to look to some other person or fund for payment...” [Own emphasis.]

- [17] Clearly the position posited by Jones coincides with the interpretation provided above. This Court agrees that the question of liability is dependent on the terms of the agreement. This Court concludes that by failing to comply with the undertakings, Rajcic personally breached the sale agreement. Since Mr Jordaan has not elected to cancel the agreement, then Mr Rajcic must be held to his contractual undertakings.
- [18] Mr Jordaan pleaded that the liability of Mr Rajcic arises from the provisions of section 21(1) and 21(2)(a) of the CA. This Court does not believe that to be necessarily the case on the facts of this case. Mr Rajcic barely denied this pleaded case. As already found, the liability of Mr Rajcic arises squarely from clause 5.3 of the sale agreement when textually, contextually and purposively interpreted.
- [19] Howbeit, section 21(1) of the CA authorises a person to enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of the CA but does not yet exist at the time. There can be no doubt that Mr Rajcic presented himself in the transactions involved herein, as such a person. In terms of section 21(2)(a) of the CA, such a person is jointly and severally liable for the liabilities provided for in the pre incorporation contract while so acting, if the contemplated entity is not subsequently incorporated.
- [20] In contractual parlance, joint and several liability arises when two or more persons jointly promise in the same contract to do the same thing, but also separately promise to do the same thing. In this instance, it is clear that Mr Rajcic solely promised to secure the undertaking and to deliver it to Mr Jordaan. Clearly, the intent of the parties at the time of contract is that Rajcic will perform.[5]
- [21] In the circumstances of this matter, Mr Rajcic solely promised to secure a bank guarantee and deliver it to Mr Jordaan. Regard being had to the time fixed for performance, it could not have been contemplated by the parties that this fixed period will be postponed in perpetuity until the NEWCO is formed.

- [22] As pointed out, Mr Rajcic offered a bare denial on the liability issue. In terms of the relevant section Mr Rajcic would escape liability, if the NEWCO is incorporated. As such he bore the evidentiary burden to allege and prove that the NEWCO was formed and agreed to take liability and discharged him. No allegations were made in his answering papers nor does he begin to make a case to discharge his evidentiary burden.
- [23] On 14 February 2024, Mr Rajcic launched an application seeking to be granted leave to file a supplementary affidavit. With no leave being granted, Mr Rajcic, impermissibly annexed the said supplementary affidavit to the application for leave to supplement. Although this affidavit was not formally permitted, Mr Carstens in the written submissions sought to rely on facts emanating from such an affidavit. This he cannot do. Of significance, he submitted that on 15 November 2023, some two years after the fulfilment of the last suspensive condition, an entity known as Cliratorque (Pty) Ltd (Cliratorque) was formed and it ratified the sale agreement and the addendum on 5 December 2023.
- [24] Predicated on facts that are not properly placed before Court an argument was developed that according to section 21(6)(a) and (b) of the CA, the enforceability is against Cliratorque and the liability of Mr Rajcic was discharged. Since no proper case was made, this Court is simply not going to consider these facts. This being motion proceedings, a party stands and falls by the allegations made in its papers. Traditionally, in motion proceedings, three sets of affidavits are contemplated. Inasmuch as it is expected of the applicant to make out its case in the founding papers, it is expected of a respondent to make its case in the opposing affidavit.
- [25] As a passing comment, if indeed Cliratorque has accepted liability, Rajcic will look upon it for indemnity regarding to compliance and payment as a consequence of the ratified instruments. Should Cliratorque reject the indemnity, Rajcic may avail himself to the provisions of section 21(7) of the CA.
- [26] In summary, there exists valid and enforceable agreements. In terms of the sale agreement, Mr Rajcic was obliged to secure and deliver bank guarantees acceptable to Mr Jordaan. Having failed to secure and deliver the bank guarantee within 90 days of the fulfilment of the last suspensive condition, Mr Rajcic was in breach. Having not elected to cancel the agreement, on the principle of pacta sunt servanda, Mr Jordaan is entitled to performance in specific terms.
- [27] Mr Rajcic is liable to pay an amount of R639 515.29. Other than a badly pleaded attempted set off,[6] Mr Rajcic has failed to put up any proper defence to the costs clearly incurred. He barely denied indebtedness but does not deny

beneficial occupation and usage of water, electricity and armed responses. These costs he agreed to bear in the addendum agreement.

- [28] For all the above reasons, I make the following order:

Order

1. Mr Rajcic is directed to forthwith deliver to Mr Jordaan, as agreed, a bank guarantee in the amount of R5 000 000.00 (Five Million Rands) from a recognised financial institution.
2. Mr Rajcic is ordered to pay to Mr Jordaan an amount of R639 515.29 together with interest a tempore morae.
3. Mr Rajcic is to pay the costs of Mr Jordaan on a party and party scale to be taxed or settled at scale B.

GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:

Mr Johan Scheepers

Instructed by:

Van Deventer Inc, Sandton

For Respondent:

Mr W Carstens

Instructed by:

Richard Meaden & Assoc Inc, Bedford

Date of the hearing:

20 May 2024

Date of

judgment:

31 MAY 2024

- [1] New company to be formed.
- [2] Act 71 of 2008
- [3] Act 68 of 1981.
- [4] 196 Ga. App 834 (1990). 397 S.E.2d 174.

- [5] See *Company Stores Development Corp v Pottery Warehouse (Company Stores)* 733 S.W.2d 886 (Tenn. App 1987).
- [6] At para 2.11 of the opposing affidavit Rajcic testified that, “[i]n reconciling these attendances on my part with that claimed by the Applicant, clearly my claims attributed to the above densification rezoning process substantially outweigh that of the Applicant, thus culminating in the Applicant indeed being indebted to me”. This contention clearly ignores clause 6.1.3 of the sale agreement which categorically states that the rezoning is at own cost.
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