

SOUTH AFRICA / JUDGMENT

Jurgens Campworld (Pty) Ltd v Prestige Campworld (Pty) Ltd (6811/2020) [2020] ZAGPPHC 659 (5 June 2020)

[2020] ZAGPPHC 659

COURT

North Gauteng High Court, Pretoria

BEFORE

M Mbongwe

CASE / FILE NUMBER

6811/2020

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

05/06/20

CASE NO: 6811/2020

In the matter between:

JURGENS CAMPWORLD (PTY)

LTD

Applicant

And

PRESTIGE CAMPWORLD (PTY)

LTD

Respondent

JUDGEMENT

MBONGWE AJ:

SUMMARY

- [1] The applicant initially sought urgent vindicatory relief in the Urgent Court, but the application was dismissed with costs on the 18 February 2020 for want of urgency. There has since been a full exchange of affidavits and the applicant still seeks an order for the return of caravans it supplied to the respondent in terms of alleged two agreements the parties had allegedly entered into during June 2019; namely, a sales agreement and an oral consignment agreement. The respondent denies the existence of a sales agreement and the receipt of caravans thereunder. The applicant has accepted the stance taken by the respondent and pursues its claim on the basis of the consignment agreement. The respondent admits being in possession of certain identified caravans it received from the applicant in terms of an oral consignment agreement. The respondent disputes the validity of the applicant's authority to cancel the agreement and claim the return of the caravans. The owner of the respondent, who is also a co-shareholder in the applicant, seeks to invoke the ORYX Mechanism to displace a third party to whom the original co-shareholder sold its shares in the applicant.

COMMON CAUSE FACTS

- [2] It is common cause between the parties that the respondent is in possession of certain identified caravans it received from the applicant in terms of a consignment agreement entered into during June 2019 for the purpose of displaying, marketing and selling same to its customers. It is also common cause that the applicant retains ownership of the caravans until the respondent had sold them at a price equal to or above the applicant's ruling price and paid the applicant for each caravan sold.
- [3] As a result of a debt in excess of R28 million owed by the respondent to the applicant, the latter sought to cancel the agreement and claim the return of all unsold caravans in the possession of the respondent. The latter's failure to comply resulted in these proceedings.

BACKGROUND FACTS

- [4] For clarity it is necessary to set out the composition of the applicant at this early stage. The deponents to the founding affidavit and representing the applicant is Mr P.J. Malan (Malan) and to the answering affidavit and representing the respondent is A.L Crafford (Crafford). Both Malan and Crafford have each a 50% shareholding in the applicant through their respective holding investment companies; Chios Investments Holding (PTY) LTD and Diamondis Investments Holding (Pty) Ltd, respectively.

- [5] A third major player in the business dealings between the parties worth mentioning is a Mr P. Kyriacou who is a director of the applicant, a director of Diamondis and, curiously, a representative of the respondent in the conclusion of the agreements with the applicant. In addition to Malan and Kyriacou, the applicant had two more directors, J. A. Joubert and B. Wilson; thus making it four the total number of the applicant's directors.

DEFENCES RAISED BY THE RESPONDENT

[6] INVALID TERMINATION OF AGREEMENT

6.1 The respondent disputes the applicant's right to terminate the oral consignment agreement and contends that the agreement places authority on it to remain in possession of the caravans for the purpose of displaying, marketing and selling them, whereupon to settle the applicant's invoice in respect of each caravan sold.

6.2 The respondent disputes the lawfulness of the meeting of the applicant's shareholders on the 17 January 2020 as well as the validity of the resolution taken therein appointing Malan as a director of the applicant representing Born Free. The respondent contends that Malan ceased to be a director of the applicant on the 13 February 2019 when the shareholder he represented as a director in the applicant ceded its shareholding to a third party, Born Free, contrary to an existing pre-emptive right in favour of the respondent's owner and only co-shareholder in the applicant.

6.3 The respondent disputes the validity the resolution taken in a meeting of the directors of the applicant. In this regard the respondent contends that the participation and voting of Malan in that meeting rendered the resolutions taken therein invalid and of no force and effect.

THE RIGHT OF PRE- EMPTION

- [7] In addition to the above defences, the respondent contends that it had, following the cession of Chios's shares to Born Free, exercised its right of pre-emption by declaring its intent to step into the shoes of Born Free, as it is entitled to do. ceased to be a director on the 13th February 2019. This date is when Malan ceded the shares of his investment company, Chios, which held a 50/50% shareholding with the owner of the respondent. Malan had ceded those shares in contravention of a clause in the applicant's MOI lending the

right of pre - emption to Diamondis, a co- shareholder in the applicant and owner of the respondent. Malan's directorship was based on him representing Chios in the board of the applicant. This situation is dealt later in this judgement.

APPLICANT'S CONTENTIONS

- [8] The applicant does not deny the allegations made by the respondent with regard to the respondent's possession of the caravans, but contends that as the owner of the caravans it is entitled, as a result of respondent's debt to it in an amount in excess of R28m the failure/ inability to settle the debt, to terminate the agreement and claim the return of unsold caravans in the possession of the respondent. In respect of the respondent's dispute of the validity of the resolution leading to the cancellation of the consignment agreement, the

applicant contends that the resolution (Annexure FA1), was lawfully taken by a majority of the directors of the applicant and, consequently, valid.

DISPUTED VALIDITY OF THE RESOLUTION OF 17/ 01/ 2020

- [9] In countering the respondent's dispute with Malan's directorship and eligibility to participate in the meeting of the directors of the applicant on the 5th February 2020, the applicant alleges that Malan was properly appointed a director of the applicant in a meeting of the 17th January 2020. Details of this meeting and resolution taken therein appear on Annexure "OP2" to the respondent's answering affidavit. This issue is dealt with later in this judgement.

FINDINGS

- [10] For convenience, the consideration and findings will be dealt with in the sequence of the issues and contentions of the parties set out in paragraphs [6] to [9], supra.
- [11] The respondent's defence that the applicant was not entitled to claim the return of the caravans in its possession on the basis of a clause in the consignment agreement that entitles the respondent to display, market and sell the caravans needs attention. Firstly, for the applicant to succeed in its claim for the return of the caravans, it needs to establish that it

is the owner of the caravans and that the caravans are in the possession of the respondent (see *GOUDINI CHROME (PTY) LTD v MMC CONTRACTS (PTY) LTD* [1992] ZASCA 208; 1993 (1) SA 77). Both these facts are common cause in this case or have not been denied by the respondent. Secondly, a valid cancellation of the consignment agreement necessarily results in the caravans having to be returned to the owner thereof. The applicable legal principle in this regard was laid down thus: "The general rule is that a principal may freely terminate the authority he has conferred on his agent....even if it is asserted in the mandate establishing the authority that the authority is not to be

revoked."(See *STUPEL & BERMAN INC v RODEL FINANCIAL SERVICES (PTY) LTD* 2015 (3) SA 36 (SCA) par

- [17] and *CHETTY v NAIDOO* 1974 (3) SA 13 (A). The respondent's contention, therefore, stands to be dismissed.
- [12] As a result of the large debt owed to it by the respondent, the applicant's directors held a round robin meeting on the 5th February 2020 in which a resolution was taken to terminate the agreement with the respondent and to claim the return of all unsold caravans in the respondent's possession. The resolution further appointed Malan to instruct attorneys and to sign all necessary documents in pursuit of the recovery of the caravans from the respondent. The resolution was signed by three of the four directors of the applicant, including Malan.

[13] The meeting of 5th February 2020 was preceded by a meeting of the 17th January 2020 in which a resolution was taken to appoint Malan as an executive director of the applicant representing Born Free, the successor and replacement of Chios. The latter was the erstwhile co – shareholder in the applicant. The relevant document annexure [OP2] to the respondent’s answering affidavit contains, inter alia, the following:

“Shareholders entitled to vote:

1. Born Free Investments 480 (Pty) Ltd with registration.....represented by Pieter Jacobus Malan with Identity Number.....(percentage shareholding 50%);
2. Diamondis Investment Holdings(Pty) Ltd with registration.....herein represented by Pavlos Kyriacou with Identity number.....(percentage shareholding 50%).

It is resolved that:

1. Andries Gerhardus Truter with Identity Number.....will resign as an executive director of the Company from signature date hereof; and
2. Pieter Jacobus Malan with Identity Number.....is appointed an executive director of the Company from signature date hereof.

Provision is made at the bottom the said document for signatures by Malan on behalf of Born Free Investment 480 (Pty) Ltd; Shareholder and P. Kyriacou on behalf of Diamondis Investment Holding (Pty) Ltd; Shareholder. The document is however signed by Malan only

[14] It seems that the meeting of the 17th January 2020 was a shareholders’ meeting. This from the relevant RESOLUTION document, Annexure “OP2”

to the answering affidavit. This document also shows the Shareholders entitled to vote as : 1. Born Free (percentage shareholding 50%) and,

2. Diamondis (percentage shareholding 50%). At the bottom of the page Malan signed ‘On behalf of Born Free (Shareholder)’. While provision is made beside Malan’s signature for Kyriacou to sign ‘On behalf of Diamondis

(Shareholder)’, his signature is absent. From this content of the document it apparent that Kyriacou was still the director of the applicant representing Diamondi while Malan, who previously represented Chios as a director of the applicant, was to be appointed in that meeting as an executive director of the applicant now representing Chios’s successor, Born Free. This meeting was originally scheduled for the 20th December 2019, but was postponed to the 15th January 2020 when it was again stood down until the 20th January 2020. However, from the date of the resolution that was taken, the meeting took place on the 17th January 2020, that is, two days after postponement and three days earlier than its scheduled date.

- [15] It is clear from the contents of “OP2” that the purpose of the meeting was the appointment of Malan as a director of the applicant representing Born Free. This is proof that Malan was very much alive to the fact that he had ceased to be a director of the applicant on the 13 February 2019 when Chios ceded its shares to Born Free. Despite that knowledge Malan proceeded to hold the meeting purportedly appointing himself a director of the applicant. I find that the meeting was of no consequence, his self - appointment as a director a nullity and the purported resolution taken invalid.
- [16] The meeting of the 5th February 2020 was, on the face of the document (Annexure “FA1”) to the founding affidavit, an ordinary meeting of the directors of the applicant. Four people are named as directors of the applicant entitled to vote. One of the named people is Malan. This was the meeting in which the resolution to terminate the consignment agreement with the respondent and claim the return of unsold caravans in its possession was taken. A further resolution taken was the authorisation of Malan to institute these proceedings and to sign all necessary documents relating thereto. The resolution was taken by three directors, including Malan. As already determined in the previous paragraph, Malan was not a lawfully appointed a director of the applicant and consequently not entitled to vote in the meeting of the 5th February 2020 either.
- [17] The question which now arises is what effect(s) the participation and voting of Malan in the meeting of the 5th February 2020 had on the resolutions taken therein. It cannot be questioned that the resolution was taken by a majority of the directors even without the purported vote of Malan being counted. The directors of a company have a fiduciary duty to act diligently and mentally independent of one another in making and taking decisions in the interest of the company. Against this

background

there is no reason to believe that each of the other two directors who voted, particularly for the adoption of resolution 1 (a) and (b), sought to protect the interests of the applicant. The mere participation and voting by Malan rendered the resolutions invalid.

- [18] Further, resolution 2, which authorises Malan to “sign all documents and perform all acts on behalf of the company that may be required with regards to this application and legal processes brought against Prestige Campworld (Pty) Ltd”, is invalid in light of the finding that Malan was not a director and could not, therefore, legally be authorised to act as or assigned the responsibilities of a director of the applicant. The Companies Act itself unambiguously provides that a company acts through its director(s).
- [19] It is noted that the respondent had, by a notice in terms of Rule 7(1) of the Rules of this Court dated 19th February 2020, disputed the authority of Malan to institute these proceedings. In response, an affidavit deposed to by Malan was filed wherein reference is made to and reliance placed on the resolution of the 5th February 2020 for the purported authority of Malan. In addition, a further resolution taken on 25th February 2020 is attached

confirming the authorisation of Malan to act on behalf on the applicant in these proceedings. This resolution is of no consequence and invalid for the same reasons given above. I accordingly find that Malan had no lawful and valid authority to institute these proceedings on behalf of the applicant.

THE ORYX MECHANISM

[20] The respondent's contention that Malan's cession of Chios's shareholding in the applicant to Born Free in disregard of the express provisions of clause 21 of the applicant's MOI, which afforded the co-shareholder, Diamondis (owner of the respondent) the right of pre

- emption to acquire those shares entitles Diamondis, to step into the shoes of Born Free is well founded. The awareness of Born Free of Diamondi's right cements the respondent's contention. The applicable legal position is that where a seller concludes a contract with a third party contrary to a pre-emptive right and the third party being aware of the existence of such right, the holder of the right can step into the shoes of the third party purchaser by a unilateral declaration of intent. The effect is that the contract of sale is then deemed to have been concluded between the seller and the

holder of the pre-emptive right [see *MOKONE v TASSOS PROPERTIES & ANOTHER* 2017 (5) SA 457 (CC) at 472]. Diamondis has declared its intent to step into the shoes of Born Free in a letter from its attorneys to Malan (Chios and Born Free) dated 20 February 2020, despite admittedly not knowing the details of the sale agreement between Chios and Born Free.

[21] In the end, I find that the overwhelming wrongful actions of Mr Malan warrant a dismissal of this application.

[22] In the result the following order is made:

ORDER

1. The application is dismissed with costs which shall include the costs consequent on the employment of two counsel.

M. MBONGWE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA.

APPEARANCES :

For the applicant

: Adv. B.C. Stoop SC

With Adv. J.J. Nel

For the respondent

: Adv. P.G. Cilliers SC

with Adv. J.H. Sullivan

Date of hearing

: 18 March 2020

Date of judgement

: 5 June 2020

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Prepared on 10 October 2026 · Esheria