

SOUTH AFRICA / JUDGMENT

Keyter N.O. v Louw and Another (3606/2014) [2016] ZAECHGC 23 (26 April 2016) [2016] ZAECHGC 23

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe

CASE / FILE NUMBER

3606/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH
COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)
CASE
NO.: 3606/2014
In

the matter between:

LEON
KEYTER N.O.
In
his capacity as executor of the Estate
Late
Kenneth James
Zacharellis
Applicant
And
JACOBUS MARTHINUS LOUW
In his capacity as Liquidator in the Partnership
Of the Late Kenneth James Zacharellis and the
Second
Respondent
First Respondent
A
E
KINGSLEY
Second Respondent

JUDGMENT**BESHE J:**

- [1] The deceased one Mr Kenneth James Zacharellis and Ms Albertha Elizabeth Kingsley who is the second respondent in this matter entered into a partnership in November 2004. In terms of this partnership, a property situated at 7 Whites Road, Grahamstown, was registered into the partners' names in equal shares. The partnership operated a guest house from the abovementioned premises (the property). Ms Kingsley and Mr Zacharellis were also involved in an intimate personal relationship which later soured and ultimately came to an end. Disputes also arose between the parties regarding, inter alia, the partnership. The parties entered into a settlement agreement regarding their dispute. The settlement was made an order of the court on the 24 January 2012. The salient features of this order were, inter alia, the dissolution of the partnership in question and the appointment of the first respondent, Mr Jacobus Marthinus Abraham Louw, as the liquidator of the partnership.
- [2] Unfortunately on the 17 May 2013, before the liquidation of the partnership could be finalised, Mr Zacharellis passed away.
- [3] The applicant, Mr Leon Keyter, in his capacity as the executor of Mr Zacharellis's estate, approaches this court for an order reviewing and setting aside first respondent's decision to reject certain claims that were submitted to first respondent on behalf of estate of late Kenneth James Zacharellis against the partnership. In the circumstances the following order is sought by the applicant:
1. That the decisions by the First Respondent to reject claims 2, 4 and 19 submitted on behalf of the estate late Kenneth James Zacharellis against the Partnership be reviewed and set aside;
 2. That, pursuant to the relief in (1) being granted, the decisions be substituted with an order that the aforesaid claims, vis, 2, 4 and 19, be admitted in the reconciliation statement;
 3. That the First Respondent lodges an amended reconciliation statement of the claims to the Applicant and Second Respondent within thirty days from date of this order;
 4. That the transfer proceedings in relation to the property situated at 7 Whites Road be stayed pending the submission of the reconciliation statement and the resolution of the disputes arising from the Applicant's claims in favour of Estate Late Kenneth James Zacharellis as against the First Respondent in his capacity as liquidator of the Partnership between the late Kenneth James Zacharellis and the Second Respondent;
 5. That the Applicant be given leave to supplement its founding papers upon receipt of the First Respondent's reasons for the decisions to reject the claims dealt with in the founding affidavit herein with such supplementation to take place within twenty days of receipt of such reasons;

6. That the costs of the application be paid from the partnership funds on an unopposed basis;
7. That the Respondents pay the costs of their opposition, if any, to the Application.
8. Further and/or alternative relief.

[4] Applicant's case as it appears from founding affidavit is briefly that:

Deceased funded substantial renovations, alterations and extensions to the property from his personal funds to enable the partnership to increase the operations of the guest house known as The White House Guest House. As time went on, disputes arose between the deceased and the second respondent. This dispute was resolved by means of a settlement agreement which was made an order of the court referred to above. Applicant proceeds to list what he refers to as "indications of first respondent's improper actions and bias towards second respondent". According to the applicant, it is the lack of financial control by the first respondent as liquidator of the partnership and / or second respondent and her Close Corporation – the White House Guest House CC, which led to the liquidation of the Close Corporation. (The Close Corporation was liquidated on the 29 November 2012).

[5] Applicant proceeds to deal with the claims that were rejected by first respondent, being claims 2, 4 and 19. The 2nd claim according to applicant, relates to funds utilized by the deceased from his own funds to pay various expenses which included

bond instalments in respect of the property of the Guest House partnership between January 2005 to October 2006. The total amount

claimed in this period is R183 819.33.

[6] The 4th claim is premised on the following allegations:

The deceased, through the Zacharellis Hotel Enterprises CC, contributed R774 167.00 from personal funds for renovations, extensions and alterations to the partnership property.

[7] Claim 19th which is for R730 000.00 for amounts which it is alleged deceased advanced to the partnership from own funds to pay for renovations, alterations and extensions.

[8] Even though first respondent filed a notice of his intention to abide by the decision of the court, he nevertheless filed an affidavit to "correct certain allegations in the founding affidavit deposed to by the applicant". He proceeds to do so. He also denied having acted unreasonably, being biased towards any party or acting in bad faith as alleged by the applicant; explaining why the claims in question were rejected.

[9] Second respondent on the other hand filed an answering affidavit and is opposed to the granting of the orders sought by the applicant. Apart from attacking the merits of the application, she raises a number of points in limine. The first point she takes is the unreasonable delay in bringing this application and applicant's failure to explain the delay and seek condonation for the delay. She alleges that first respondent's impugned decision was communicated to the parties in February 2014. Applicant only advised the first

respondent of the intention to object first respondent's decision to a review in June of 2014. With the application having been served on her on 4 September 2014 and on first respondent on the 10 October 2014, first respondent articulates how this delay has caused considerable prejudice to her.

- [10] The second point in limine relates to the right to appeal and review having been excluded by the parties. Paragraph 5 of the settlement agreement entered into between the parties and made an order of the court as aforementioned states:

"5. The liquidator shall:

5.1

5.2

5.3

5.4 thereafter reject or admit each claim or portion thereof and his decision. In such regard shall be final and binding, and not open to question, appeal or review by any party."

The second respondent acknowledges that in circumstances where an appeal or a review have been excluded, a review may be brought in very exceptional circumstances where for example there is an irregularity which is of such an exceptionally gross nature as to warrant the court's intervention. It is contended by the second respondent that applicant has failed to describe or establish any evidence of any irregularity, let alone a gross irregularity.

- [11] Applicant denies that the delay in bringing the application was unreasonable. He states that the application "was brought after careful consideration of voluminous documents over many years and of various persons as well as entities and most certainly within a reasonable time".
- [12] Even though second respondent has shown that she has been prejudiced by the delay in bringing the application, I am of the view that the application has adequately explained the delay, having provided the court of a time line of what steps were taken and at what stages. In my view the delay was not unreasonable in the circumstances.
- [13] The second point in limine relates to the right of the parties to appeal and review having been excluded. It is trite that courts will give effect to contracts freely entered into by the parties. It has not been suggested that the agreement is contrary to public policy or contra bonus mores. The parties clearly intended and agreed to dispense with their right to appeal and review. It is trite that the intention of the parties to a contract must be respected. There is no suggestion that the parties were not an equal footing or that one of the parties was compelled by any circumstance/s to accept the terms of the agreement to exclude the right to appeal or review of the liquidator's decision. There is no suggestion that one of the parties was powerless or had less power and therefore bound to agree to this term of the agreement. In *Brisley v Drotsky*[1] the following was pointed out in regard to the sanctity of contracts between the parties:

“[93] I share the misgivings the joint judgment expresses about over-hasty or unreflective importation into the field of contract law of the concept of “boni mores”. The “legal convictions of the community” – a concept open to misinterpretation and misapplication – is better replaced, as the Constitutional Court itself has suggested, by the “appropriate norms of the objective value system embodied in the Constitution”. What is evident is that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.

[94] On the contrary, the Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom.”

[14] This is a suggestion that the deceased did not appreciate or understand the effect / implication of this clause. I do not understand why it could have been so. The clause appears to be clear and straightforward. It is not complicated. The language used is simple and clear. The deceased seems to have been a prominent business man having been involved in a number of businesses. It

appears to be common cause that both parties to the settlement agreement namely the deceased and the second respondent were legally

represented at the time. There can be no merit in the assertion that deceased did not understand the implications of clause 5.4.

[15] Having said and having accepted that a court will not lightly intervene in the face of a finality clause or agreement, I however

accept that it is permissible for a court to intervene in exceptional circumstances. In circumstances where to allow the impugned decision / action will result in a gross injustice, or where there is clear evidence of gross misconduct on the part of the decision maker, in this case the liquidator. See *Lufuno Mphaphuli & Associates (Pty) LTD v Andrews and Another*[2].

[16] In the *Lufuno* matter supra the court was concerned with an arbitration agreement which contained a clause to the effect that the final award made by the arbitrator

will be final and binding on the parties. One of the parties, the appellant, sought to review the award of the arbitrator. Review in this case is limited to the ground of procedural irregularities as set out in Section 33 (1) of the Arbitration Act[3]. Although in the matter before me we are not concerned with an arbitration award, in my opinion, grounds along the line of those set out in Section 33

(1) of the Arbitration Act will be sufficient to trigger or warrant interference by court even though the parties had agreed to a finality clause.

[17] In the present matter, applicant asserts that the first respondent failed and neglected to apply his mind to the facts in respect of the claims that he rejected. As part of the background facts, applicant alleges certain facts which he contends were an indication of first respondent's improper actions and bias towards the second respondent. This, he asserts, was manifest in inter alia first respondent's failure to open a separate liquidation bank account, allowing the second respondent to continue operating the guest house etc. The above mentioned are some of the allegations first respondent sought to correct in his affidavit, and specifically

denies having been biased towards or in favour of the second respondent or any of the parties. I also did not understand this to

be one of the grounds upon which the liquidator's impugned decisions are sought to be reviewed.

[18] It was argued on behalf of the second respondent that applicant has failed to prove gross misconduct on the part of the first respondent which would warrant the court's intervention. I am inclined to agree with the second respondent in this regard. The applicant has not shown that first respondent is guilty of committing gross irregularities or the existence of exceptional circumstances that warrant this court's disregard of the agreement between the parties to exclude the right to appeal or review of first respondent's decision.

[19] In my view, it is not sufficient to allege only that first respondent neglected to apply his mind to the matter. The parties are bound by their agreement to exclude a review of the liquidator's decision. For these reasons, the point in limine raised by the second respondent in this regard is upheld. There is no need to consider the merits of the application in the circumstances.

[20] In the result the application is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Adv: AG Dugmore

Instructed by : LEON KEYTER ATTORNEYS

87 High Street

Grahamstown

Tel.: 046 -622 9401

Ref.: Mr Keyter

For the Respondents : Adv: JS Kayser

Instructed by : NOLTE SMIT INCORPORATED

115 High Street

Tel.: 046 – 622 7209

Ref.: A Moodley

Date Heard : 29 October 2015

Date Reserved : 29 October 2015

Date Delivered : 26 April 2016

[1] 2002 (12) BCLR 1229 SCA 1257 [93] B-C, 94

[2]

[2007] ZASCA 143; 2008 (2) SA 448 SCA at 455 [22] where Ponnann JA had this to say: Whenever two parties agree to refer a matter to a third for a decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. It has not been suggested that Andrew's decision was not arrived at honestly and in good faith. Nor was such a case made out on the papers. Here as well therefore, Lufuno must fail.

[3] 42 of 1965. Those grounds are: Setting aside of award (1) Where— (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

[3] 42 of 1965. Those grounds are: Setting aside of award

(1) Where—

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2016/23.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/keyter-no-v-louw-and-others-unknown-topic-aecghc-2016>

Prepared on 10 October 2026 · Esheria