

SOUTH AFRICA / JUDGMENT

Kretzmer v Glezerson (11682/13) [2013] ZAGPJHC 185 (5 June 2013)

[2013] ZAGPJHC 185

COURT

South Gauteng High Court, Johannesburg

BEFORE

P L Carstensen

CASE / FILE NUMBER

11682/13

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REPUBLIC
OF SOUTH AFRICA
SOUTH GAUTENG HIGH
COURT
JOHANNESBURG
CASE NO: 11682/13

In the matter between: KRETZMER, BASIL
 Applicant
 and
 GLEZERSON, GEOFFREY
 Respondent

JUDGMENT

CARSTENSEN AJ:

1. In this matter, the Applicant seeks payment of the sum of R236 000.00, interest and costs on the basis that the Applicant and Respondent entered into a written agreement of the sale of members interest and claims in their personal capacities, on the 2nd of December 2011. The conclusion and terms of the agreement are common cause.
2. In terms of the agreement, the purchase price was payable in monthly instalments and it is not disputed that the Respondent has paid an amount of R184 000.00 and that as at the 1st of March 2013, an amount of R236 000.00 is in arrears.
3. Neither the Respondent nor the Applicant wish to cancel the agreement.

4. The Respondent, however, disputes being obliged to make outstanding payments in terms of the agreement for two reasons which are inter-related.

4.1. Firstly, in paragraph 10 of his affidavit, he relies on a misrepresentation by the Applicant which resulted in the overstating of the value of the debtors' book.

4.2. Secondly, as a consequence of the misrepresentation, he states that he concluded an oral agreement with the deponent to the founding affidavit in terms of which, he says, it was agreed that he would make payment of the amount of R20 000.00 for three months and would only make further payments upon the company being in a profitable financial position. However, due to the fact that the company has not shown any actual profit, he is not required to make further payments in terms of the agreement.

5. On the basis of the test set out in *Plascon Evans Paints v Van Riebeeks Paints*,

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 to 635, I must determine the dispute as to the facts stated by the Respondent together with the admitted facts in the Applicant's affidavit, subject to what is set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*, 1957 (4) SA 234 (C) at 235 E – J, that the dispute which is raised by the Respondent must be real, genuine, or bona fide.

6. Consequently, it is necessary to determine whether the dispute is bona fide or whether the allegations raised by the Respondent are vague, insubstantial or consequently insufficient to raise the kind of dispute that ought to be referred to trial or evidence. *King Williamstown Transitional Local Council v Border Alliance Taxi Association*, 2002 (4) SA 152 (E) at 156 I and *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 T at 1163.

7. The first aspect thereof is the question of the effect of the oral agreement alleged by the Respondent.

7.1. I am of the view that the Respondent is not entitled to rely on any oral agreement for the reason that the written agreement between the parties contains two clauses which would preclude same.

7.2. Firstly: "no alternation, variation, novation or cancellation by agreement of, addition or amendment to, or deletion from the agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties thereto";.

7.3. Secondly, "No indulgence, extension of time, relaxation of time or latitude which any party (the grantor) may show, grant or allow to any other party (the grantee) shall constitute a waiver by the grantor of any of his rights and the grantor shall not thereby be prejudiced or estopped from exercising any of his rights against the grantee which may have then already risen or which may thereafter arise".

7.4. Consequently, insofar as the oral agreement is an addition or variation or alteration of clause 5.1, the clause which provides the manner and timing of the payment of the purchase price instalments, such agreement cannot be relied upon by the Respondent as it was not reduced to writing or signed by the parties.

7.5. Insofar as the oral agreement constitutes an indulgence, extension time, relaxation or latitude, that again does not assist the Respondent as the clause expressly states that: "... same shall not constitute a waiver by the grantor of his rights, nor shall the grantor be prejudiced thereby, nor estopped from exercising any of his rights".

8. I do not agree with Mr Riley who contends that during the existence of the indulgence, the Applicant is precluded or estopped from exercising his rights in terms of the agreement.
9. Consequently, the parties are not bound by the terms of the oral agreement, whether it exists or not. Thus, this does not constitute a bona fide dispute.
10. The question then is whether the Respondent has sufficiently raised the issue of a fraudulent misrepresentation regarding to the overstating of the value of the debtors books.
11. The sequence of events provides a resolution and answer to this issue.
12. The Respondent states that the fact that the value of the debtors books had been overstated wrongfully, came to his attention in January 2012.

13. I am unable to accept that the Respondent's defence is bona fide for the following reasons:

13.1. Firstly, despite his contention that he became aware that a fraud had been committed against him, he continued making payments until the 1st of September 2012, thus 8 months after he discovered the fraud.

13.2. Secondly, on the 11th of September an e-mail was addressed to him recording that "Molly agreed to reduce the instalments to R20 000.00 for the months of April, May and June 2012 on the basis that the outstanding amounts of R22 000.00 in respect of those months would be paid in July 2012". The Respondent on receipt of this e-mail and, on his version, having been aware that a fraud has been committed by the Applicant some months before, does not respond or contradict the statement contained in the e-mail.

13.3. On the 6th of November, some two months later, a formal letter of demand is addressed to the Respondent. Either one must again accept that there was no response to this letter and no contradiction of the terms and no attempt by the Respondent to raise the fraud as a defence, or, one must accept that the Respondent's e-mail sent to Michael Bloom on the 12th of November, is such a response.

13.4. Neither situation is of any assistance to the Respondent as in that e-mail, whilst recording that the debtors book was overstated, he states that there was a fraud and theft by the lady in charge of debtors, what he in fact records is: "Following the departure of the previous debtor's manager and further investigation into the debtors book, the debtors figure of R11.6 million was

overstated by a little over R3 million which represents 26% of the debtors book. There was a fraud and theft from the lady in charge of the debtors book, whom we have now gotten rid of. Keeping in mind that 26% is a material amount and had I known this at the time, I would of probably done things differently”.

13.5. In argument, Mr Riley contended that this quotation refers to two frauds:

13.5.1. firstly, a fraud by the lady in charge of the debtors book; and

13.5.2. secondly, a fraud of the overstatement of the debtors book, i.e. by the Applicant.

13.6. I cannot agree. Clearly the Respondent blames the lady in charge of the debtors book for the fraud and draws the attention to Michael Bloom that this resulted in a difference of 26%. Nowhere in this letter is the Applicant blamed, or even referred to.

13.7. In addition, the Respondent attaches to its papers a charge sheet against the lady in charge of the debtors, namely Mrs Domingo. Nowhere in that charge sheet is there any reference to the Applicant's complicity or to the fact that the Applicant was assisted in the fraud by Mrs Domingo. That charge sheet is dated the 28th of May 2012, consequently some four months after the fraud was supposedly discovered by the Respondent.

13.8. In any event, in response to the Respondent's letter of the 12th of November 2012, Michael Bloom of Fluxmans responds and requests the Respondent to advise “the monthly amount which you are able to pay and I will then discuss with Molly”.

13.9. Again, the Respondent in his response of the 15th of November 2012, does not refer:

13.9.1. either to an oral agreement; or

13.9.2. to the fraud by the Applicant, but rather to the fact that the company is making losses.

13.10. In addition, one must take into account that the Respondent states that he cannot resile from the agreement due to the suretyships which he has signed, which total some R15 million. However, this also does not assist the Respondent as these suretyships were only signed during June 2012, consequently some 6 months after he apparently discovered the fraud.

13.11. In truth, there is no reference to any fraud by the Applicant until the filing of the answering affidavit. Even in that affidavit, on a proper reading of paragraph 10, the Respondent's contention is not that he is entitled to reduction of the purchase price as a consequence of the fraud, but rather that he is entitled to a reduction of the purchase price as a consequence of the oral agreement. Although he does state that the oral agreement was concluded as a consequence of the fraud. This, I have difficulty in accepting because the oral agreement was concluded some two months after he discovered the fraud.

14. In the premises, I do not believe that the allegations contained in the answering affidavit are sufficient to generate a genuine or real or bona fide dispute of fact as required by the authorities.

15. Save for these two points, the remaining allegations by the Applicant are admitted. In the premises, I am of the view that the Applicant is entitled to the judgement he seeks.
16. Consequently, it is ordered:
- 16.1. that the Respondent make payment to the Applicant of the sum of R236 0000.00;
- 16.2. that the Respondent pay interest on the aforesaid amount at the rate of 15.5% per annum from the 7th of November 2012 to date of payment;
- 16.3. that the Respondent is ordered to pay the Applicant's costs of this application.

P L CARSTENSEN

ACTING JUDGE OF THE

HIGH COURT

HEARD: 31 MAY 2013

DELIVERED: 5 JUNE 2013

COUNSEL FOR APPLICANT: N. SEGAL

INSTRUCTED BY: KAMPEL KAUFMAN ATTORNEYS

COUNSEL FOR RESPONDENT: N. RILEY

INSTRUCTED BY: MICHAEL SALTZ ATTORNEYS

(jmt.3.6.13)

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