

SOUTH AFRICA / JUDGMENT

Kwan v Kaplan NO and Others (38097/2011) [2012] ZAGPJHC 36 (16 February 2012)

[2012] ZAGPJHC 36

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

38097/2011

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IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO 38097/2011

DATE:16/03/2012

In the matter between

BETTINA FIONA KWAN.....APPLICANT

and

HARRY KAPLAN NO.....FIRST RESPONDENT

KEN TI WONG.....SECOND RESPONDENT

THE MASTER OF THE HIGH COURT.....THIRD RESPONDENT

Liquidator of solvent dissolved partnership – powers and obligations in terms of court order appointing him – applicant seeking declarator concerning exact nature of such obligations – interpretation of court order appointing liquidator - purpose in appointing and empowering a liquidator to ensure the proper and effective liquidation of the dissolved partnership, having regard to its own peculiar circumstances – practicality of extensions sought by applicant – absence of – no dispute shown - declarator refused.

Liquidator – opposition to application – whether justified in circumstances of this case.

Costs – punitive costs – application ill-conceived – ulterior motive in bringing application – court’s disapproval of conduct of applicant – punitive costs ordered.

J U D G M E N T

VAN OOSTEN J:

[1] In this application the applicant seeks a declarator concerning the obligations of the first respondent who was appointed by this court (Watt-Pringle AJ) as receiver and liquidator of the dissolved partnership that had existed between the applicant and the second respondent. The order appointing him gave the liquidator certain powers. Both the second and third respondents oppose the application. The third respondent, for the reason I will presently deal with, no longer has an interest in the matter. As the adjudication of the application requires a proper interpretation of the order of Watt-Pringle AJ (the order) it is convenient, at this stage, to set it out in full:

Appointing Harry Kaplan as the liquidator and the receiver (“the receiver”) of the dissolved partnership of the applicant and the respondent and for the purposes of dividing the net value of the dissolved partnership of the applicant and the respondent relative to the right attaching to a bookmaker’s licence. The receiver shall have those powers, duties and obligations as if he were a final trustee of an insolvent partnership under and in terms of the provisions of the insolvency Act No. 24 of 1936 (as amended) and which will inter alia include the following powers:-

2.1 to institute legal proceedings against any party for the delivery to him of any assets, deeds or documents which may vest in the partnership; and

2.2 to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the purpose of obtaining delivery of any assets, deeds or documents which may vest in the partnership and/or to claim any such other or alternative relief as may be required to enable him to execute his office as receiver;

2.3 to dispose of the assets of whatever nature, movable or immovable, corporeal or incorporeal forming part of the partnership by public auction and on terms and conditions that he may impose, or in such other manner as he deems fit under such terms and conditions as he may deem fit; and

2.4 to sign and execute any agreements and/or documents that may be necessary to effect transfer of any of the assets, movable or immovable or the partnership to whomsoever may acquire same from the partnership;

2.5 to undertake all investigations necessary and in particular to obtain from the applicant and the respondent all information with regard to assets

comprising the partnership; and

2.6 to demand and to obtain information regarding the financial affairs of the partnership from bank managers and/or managers of any financial institution; and

2.7 to inspect books of account in respect of the partnership; and

2.8 to make physical inspection of assets and take inventories relative to the partnership; and

2.9 to question the applicant and the respondent and obtain all explanations deemed necessary by him for the purpose of making the division of the net value of the partnership and for the purpose of establishing what personal claims they have against the partnership; and

2.10 to pay the costs (on attorney and own client scale in the case of attorneys and advocates) of those persons and/or entities

contemplated in 2.1., 2.2

and 2.3; and

2.11 to open and conduct a separate trust account at any financial institution and to be designated for the benefit of the partnership;

and

2.12 to retain in trust, after deduction of all costs, any amount which shall accrue to either the applicant and/or the respondent and to pay such amounts as

directed by the applicant and/or the respondent.

The receiver shall be entitled to recover and to receive his disbursements and fees on the scale as envisaged in the Insolvency

Act no 24 of 1936 (as amended) to form part of the winding-up of the partnership; All costs, including fees and disbursements arising from the realisation of all the assets of the dissolved partnership shall form part of the winding-up of the said partnership. Costs in the winding up in partnership (sic).

[2] A brief background to the application is the following. In 2006 the applicant and the respondent, who is the brother of the

applicant's husband, established a partnership for the sole purpose of conducting the business of a licensed bookmaker. Although

the bookmaker's licence was obtained, the partnership never commenced business. It was dissolved by agreement on 19 August 2010. It was at all times solvent. The parties were unable to reach an agreement on the liquidation of the partnership and the relationship between them deteriorated and indeed became acrimonious (or, as it was perhaps more aptly put by the applicant, they were "at daggers drawn"). The second respondent launched an application to this court for the appointment of the first respondent as liquidator of the dissolved partnership which although opposed by the applicant, was successful (except for the punitive costs order sought against the applicant), resulting in the issuing of the order I have referred to.

[3] The first respondent, to whom I shall henceforth refer to as the liquidator, duly commenced with the liquidation of the partnership

asset. The only asset of the partnership was the bookmaker's licence which was sold at a public auction for R2,7m. In August 2010 the liquidator prepared and submitted a provisional first liquidation and distribution account. The account, in summary, reflects the proceeds derived from the sale of the bookmaker's licence, two claims lodged against the estate, one in respect of rentals claimed by the second respondent in the sum of R197 640-00 and the other by the Gauteng Gambling Board, and then further items relating to costs, expenses and the liquidator's remuneration. The applicant disputes the second respondent's claim in respect of rental and the second respondent has instituted an action in this court for the recovery thereof which is still in its initial stages and thus pending. On 6 October 2011 the applicant launched the present application in which the following relief is sought:

Declaring that the words contained in paragraph 2 of the court order dated 24 February 2011 in case no 2010/43535, namely: "The receiver shall have those powers, duties and obligations as if he were a final trustee of an insolvent partnership under and in terms of the provisions of the Insolvency Act No 24 of 1936....." have the meaning and effect that, for the purposes of liquidating the dissolved partnership of the applicant and the second respondent, the first respondent is vested with the same powers, duties and obligations that:

Vest in a final trustee of an insolvent partnership under and in terms of the Insolvency Act; and that The applicant and the second respondent could themselves have conferred upon a receiver by agreement had they been able to reach agreement in respect thereof.

Directing:

The first respondent to open a book wherein he shall enter a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the dissolved partnership estate, as contemplated by section 71(1) of the Insolvency Act; The applicant and the second respondent to formulate their respective claims under oath in a manner contemplated by section 44(4) of the Insolvency Act; The first respondent to examine the applicant's and the second respondent's claims in accordance with the provisions of section 45 of the Insolvency Act; The first respondent to frame his liquidation account in accordance with the provisions of section 92 of the Insolvency Act; The first respondent to verify his liquidation and distribution account in accordance with the provisions of section 107 of the Insolvency Act. The first respondent to submit his liquidation and distribution account to the Master in accordance with the provisions of section 91 of the Insolvency Act.

That such respondent/s who oppose this application be ordered to pay the applicant's costs.

[4] For the sake of completeness it is necessary to refer to certain relief that was subsequent to the launching of the application,

abandoned by the applicant. The relief sought in prayer 2.6 of the notice of motion, although heavily relied upon in the correspondence

by the applicant's attorneys, was wisely abandoned in the applicant's replying affidavit, which counsel for the applicant

informed me was based on the recent judgment of the Supreme Court of Appeal in *Morar NO v Akoo* 2011 (6) SA 311 (SCA). Another perceived issue raised in the papers by the applicant, was the liquidator's entitlement to remuneration, provided for in paragraph 3 of the order. The applicant alleged that the liquidator had prior to his appointment, bound himself to a lesser scale of remuneration of 5% of the gross value of the dissolved partnership. The applicant served a notice of intention to amend the notice of motion, thereby seeking a variation of paragraph 3 of the order, to reflect the lower scale of remuneration. The amendment, yet again wisely, was likewise abandoned three days prior to the hearing of this application.

[5] This brings me to the opposing contentions of the parties concerning the proper interpretation to be afforded to the order. The difficulty, and I put it no higher, experienced by the applicant concerns the introductory portion of paragraph 2 of the order and in particular the words "as if he were a final trustee of an insolvent partnership under and in terms of the provisions of the Insolvency Act no 24 of 1936 (as amended)" Whether the applicant's difficulty has been shown to constitute the subject matter of a dispute will be considered later. Those words, so the applicant contends, mean that the liquidator has "the same" powers, duties and obligations to those of a trustee of an insolvent estate or partnership in terms of the Insolvency Act, while the applicant prefers an interpretation that would afford "similar" powers, duties and obligations to the liquidator. Semantics aside, the opposing contentions are but two sides of the same coin. Both contentions moreover lead to artificial and untenable arguments in complete ignorance of the ultimate intention expressed in clear terms in the order which was for the liquidator to affect a division between the erstwhile partners of the net value of the dissolved (solvent) partnership, relative to the right attaching to the bookmaker's licence.

[6] In argument before me, the applicant's edifice founded on her proposed construction of the order, soon revealed structural

defects and it eventually crumbled down. Counsel for the respondents, much to their relief, latched onto the *prima facie* views having crossed the floor from the bench to counsel for the applicant, and they no longer pursued the interpretation contended for in their heads of argument. It is trite that the basic principles applicable to construing documents also apply to the construction of a court's judgment or order (see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) 303D). Once a court has duly pronounced a final judgment or order, it becomes *functus officio*, and has no authority to correct, alter or supplement it, save in certain exceptional circumstances, one of which is that "the

court may clarify its judgment or order, if on proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise

uncertain, so as to give effect to its true intention, provided it does not thereby alter the ‘sense and substance’ of the judgment or order...” (Firestone p 307A). The applicant clearly relies on this exception in seeking the declarator. The question for determination in the present matter accordingly is whether the order, given its true intention, is uncertain to such an extent that it requires the express powers mentioned in the order, to be extended to include those enumerated in paragraph 2 of the notice of motion. What strikes one immediately is the curious phrasing of prayer 2: an order is sought “directing” the liquidator to perform the obligations thereafter set out. I do not think this is proper but in the view I take of the matter, no further comments are necessary. It is necessary to also refer to a draft order which, during argument, was handed up by counsel for the applicant. The draft order attempts to narrow down the generality of the directions sought in prayer 2 of the notice of motion by way of excising and pasting portions of the sections of the Insolvency Act referred to in prayer 2. I will revert to the draft order in my discussion of the relief sought by the applicant.

[7] I have already touched on the intention as expressed in the order (see: *Coopers and Lybrand and Others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) 767E-768E). The purpose in appointing and empowering a liquidator is to ensure the proper and effective liquidation of the dissolved partnership, having regard to its own peculiar circumstances. To that end the liquidator is given powers in regard to which certain duties and obligations are imposed. Some of those, preceded by the words “inter alia”, are spelled out in the order. The applicant, in essence, seeks by way of a declarator to have a number of additional obligations, derived from the Insolvency Act, imposed. The question accordingly is whether those additional obligations are necessary for the liquidator to properly and effectively liquidate the dissolved partnership. Applying this principle I turn now to an examination of the additional obligations in their diluted form in the draft order.

[8] Firstly, prayer 2.1. The implementation of prayer 2.1 in its diluted form would require the liquidator to open a book wherein he shall enter as soon as possible a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the dissolved partnership estate. This obligation is not only superfluous: it also has long been overtaken by the steps that have already been taken in the liquidation and would accordingly not have any practical application. The powers given to the liquidator in the order include the obligation to make physical inspection of the assets and take inventories relative to the partnership. The partnership, it is common cause, has never traded, which brings into question the applicant’s insistence on the liquidator receiving books, accounts and other documents. But, as I have mentioned, these aspects have in any event already been taken care of in the liquidator’s provisional first liquidation and distribution account. Not surprisingly, counsel for the applicant was unable firstly, to suggest what other items the liquidator could be expected, even stretching one’s imagination to the extreme, to receive and enter into a book and secondly, what the relevance or practicality of this requirement

would be accepting that the liquidation of the dissolved partnership, at least as for the liquidator's involvement, is in its final stages. I can find no justification at all for imposing this obligation, at this stage, on the liquidator.

- [9] Prayer 2.2 suffers the same fate. In the draft order this proposed obligation cascades into several sub-obligations. Those are formulated as follows: the liquidator would be required to receive, and the applicant and the second respondent are for that purpose to deliver to the liquidator, within 10 days of the granting of the order, affidavits, together with any supporting documents upon which they rely, in which they formulate their respective claims against the dissolved partnership estate and in those affidavits they must then set out the facts upon which the deponent relies for knowledge of the claim, the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the dissolved partnership was dissolved, if they hold security therefore, the nature and particulars of that security and the amount at which he or she values the security. After all these cumbersome requirements have been complied with, the liquidator would be required to examine the claims so submitted within 10 days of submission thereof and to advise the parties of his views in respect of the claims, within the aforesaid period. But, there it does not end: if either of the ex-partners dispute the views of the liquidator in respect of a claim, such party is to institute fresh proceedings or to continue with such proceedings as already instituted, as he/she may be advised, within 20 days of the first respondent advising the parties of his views. The fallacy of the proposed obligation is revealed once the facts of this matter are considered. The second respondent's claim in respect of rental is already the subject matter of a pending action. There is no suggestion whatsoever of any other claims against the partnership save for those referred to in the provisional liquidation and distribution account. When this insurmountable obstacle was pointed out to counsel for the applicant,

he submitted that the requirement of affidavits having to be filed, even ex post facto would possibly fabricate this benefit: it might provide useful material for purposes of cross-examination at the trial of the action which has already been instituted by the second respondent. I do not consider the contention worthy of any comment. It is rejected.

- [10] The next and final, proposed obligation concerns the form of the liquidator's liquidation and distribution account. The applicant has succeeded in further burdening the administrative obligations in proposing the addition of a number of additional

requirements. Those are: to contain an accurate record of all moneys received and of all moneys disbursed by the liquidator, the record of each such receipt and disbursement to set forth the amount and date thereof as well as sufficient particulars to explain its nature; the liquidation account to be accompanied by the liquidator's bank statement and any vouchers in support of the record of receipts and disbursements. And further, to round it off, it would further be required of the liquidator to sign the account, and to verify under oath that the account is full and a true account of his administration of the dissolved partnership up to the date of the account and that, insofar as he is aware, all the assets of the dissolved partnership have been disclosed in the

account. The proposed obligation, as are all the others, is simply aimed at procuring slavish adherence to statutory requirements enacted for an entirely different purpose, and would, if anything, result in nothing more than an exercise in futility. Counsel for the applicant was unable to raise any objection against the provisional first liquidation and distribution account. Nor was counsel able to suggest, again by the wildest stretch of imagination, how this obligation could have contributed to the effectiveness of the liquidation of the partnership. The liquidator has confirmed his willingness to, if required to do so, sign and attest the final liquidation and distribution account. I merely need to add that the arguments advanced evidently overlooked the plain facts of this matter and in particular that only the net proceeds of the sale of the single asset of the partnership, fall to be distributed.

[11] I am satisfied that the application is ill-conceived. No dispute exists concerning the applicant's perceived difficulties. The relief sought by the applicant will not be of any practical relevance in the circumstances of this case (see for example *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T) 429F). Counsel for the applicant submitted as reason for launching the application, that the applicant was merely protecting herself against any possible bias or hostility towards her on the part of the liquidator. Those fears, so the argument went, are reasonable. It is necessary to examine the applicant's version in this regard by referring to the allegations relied upon by her counsel. In the founding affidavit the applicant states: "In determining Chie's (the second respondent's) application (for the appointment of the liquidator) the Court did however provide a safeguard against any possible bias or hostility towards me on the part of Kaplan (the liquidator)". The applicant further states: "This manner of liquidating the dissolved partnership (with reference to prayer 2 of the notice of motion) avails Chie and me of the various checks and balances provided for in the Insolvency Act, so as to afford us both an equal and fair measure of protection against any possible form of potential obduracy". Nothing in support of these imputations exists. The file in the application for the appointment of the liquidator was made available to me at the hearing of this matter for perusal. In that application nothing is stated by the applicant concerning the fears she has now expressed. The conclusion that measures were included in the order to safeguard the applicant's perceived fears, is without foundation. Nor has anything been advanced by counsel for the applicant to justify the harbouring of any such fears at any stage and in particular now, having regard to the liquidation which has reached its final stages. One further disturbing feature of the applicants' wild unsubstantiated allegations concerning the liquidator requires comment: some unhappiness appears to exist, which echoed in her counsel's argument that the bookmaker's licence could have been sold for a higher price. This clearly was aimed as a side-blow out of the dark towards the liquidator. It yet again lacks any substance. In the appointment application the applicant estimated the value of the bookmaker's licence "in the region of R1.25m to R2.5m". It was sold by way of public auction, at which the applicant was present, for R2,7m. The applicant has not alleged any untoward conduct by or on behalf of the liquidator in the sale of the bookmaker's licence nor has she for that matter, taken any steps to set the auction aside. The applicant's

allegations of impropriety, albeit by implication, are plainly untenable and fall to be rejected.

[12] For all the above reasons the application cannot succeed.

[13] This brings me to the costs of this application. Counsel for the second respondent asked for a punitive costs order. In the exercise of my discretion I consider a punitive costs order to be justified. The applicant has clearly launched this application for an ulterior motive. I do not consider it necessary to speculate as to what such motive could have been. Nothing of substance was advanced in support of the application. The respondents were severely criticised for having entered the fray. Counsel for the applicant could not fathom the reason for the liquidator in fact opposing the application as opposed to simply abiding the decision of this Court. I am unable to agree. The obligations of the liquidator were at stake and he was entitled to become involved in the application thereby avoiding unreasonable costly red tape obligations being imposed on him. The liquidator's assistance in and contribution to this matter, in my view, was not only necessary but also valuable. As for the second respondent, his involvement was likewise necessary as it became clear, right from the outset, that the applicant in launching this application was not doing so in the interests of the proper and effective liquidation of the partnership. Counsel for the applicant made much of the applicant's prayer for costs to be paid only in the event of opposition. I do not think this has any bearing on the issue. The applicant had no justification for assuming that the second respondent would simply return his dagger to the sheath. Had it been the applicant's intention of swiftly obtaining the order without opposition, in the unopposed motion court, as has been put forward by her counsel, such perception was clearly misplaced. The application was misconceived right from the outset; it resulted in the expenditure of unnecessary costs and it must have become apparent to the applicant's legal team, as the matter progressed, and the impropriety of prayer 2.6 realised, that it was doomed to failure. In these circumstances there are no good reasons why the second respondent should be out of pocket concerning the costs of this application. A punitive costs order, moreover, would further serve as a mark of this Court's disapproval of the conduct of the applicant.

[13] In the result the following order will issue:

The application is dismissed.

The applicant is ordered to pay the costs of the first respondent on the scale as between party and party, as well as the costs of the second respondent on the scale as between attorney and client, such costs to be deducted and paid from the award due to the applicant upon final distribution and payment of the partnership awards by the liquidator.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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