

SOUTH AFRICA / JUDGMENT

Leigh v Rasleigh Properties (38090/2012) [2013] ZAGPJHC 391 (6 December 2013)

[2013] ZAGPJHC 391**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

38090/2012

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REPUBLIC
OF SOUTH AFRICA
IN THE SOUTH GAUTENG
HIGH COURT
JOHANNESBURG
CASE NO: 38090/2012

In the matter between: STEPHEN
 LEIGH
 Applicant
 and
 RASLEIGH
 PROPERTIES
 Respondent

JUDGMENT**KATHREE-SETILOANE J:**

- [1] The Applicant, Mr Stephen Leigh seeks a final winding up against the Respondent, Rasleigh Properties CC, which conducts business as an owner of immovable property and a property developer. The Applicant's father, Mr Roy Leigh ("Roy Leigh") is the managing member of the Respondent. Roy Leigh holds a 50 per cent members interest in the Respondent. The remaining interest in the Respondent is held by Mr Andre Erasmus ("Erasmus").

- [2] The provisional winding up order was made by Jordaan AJ on 23 May 2013. Jordaan AJ concluded that the balance of probabilities overwhelmingly favoured the Applicant, but did not provide reasons for arriving at that conclusion. For a final order to be granted, the Court must be satisfied that there is a balance of probabilities in favour of the Applicant. Only Roy Leigh, opposes the final order sought by the Applicant. In doing so he has, on behalf of the Respondent, filed a further affidavit to which is annexed a “CK2” form which is purportedly signed by himself, the Applicant, Erasmus and Bruce Rice, the accountant. The “CK2” document purportedly shows that the Applicant’s effective date of membership in the Respondent was to be 28 February 2011.
- [3] The “CK2” form is of particular significance to this dispute, because the Respondent contends that the amount of R3 371 600, 00, which it owes to the Applicant is not due and payable because the amounts advanced by the Applicant to the Respondent were pursuant to an oral agreement that the Applicant would become an investor and a member of the Respondent, on the basis that the Applicant’s membership interest in the Respondent would be determined from time to time by the amount owing to the Applicant. The Respondent accordingly contends that the Applicant is precluded by the terms of the membership agreement from claiming payment of his loan account.
- [4] The Applicant contends that the Respondent’s version is irreconcilable with correspondence between the Applicant and the Respondent and/or his father, Roy Leigh who deposed to the Respondent’s answering and supplementary affidavits, in particular the Annexures listed below:
- (a) Annexure “SL3”, which is an email from Roy Leigh to the Applicant, dated 5 July 2011, in which the Applicant is requested to make a further loan of R500 000, 00 to the Respondent, and advised that he will receive R2000 000, 00 against registration of the Rivonia property. Significantly, there is no mention made, in this email, of the alleged investment as a member of the Respondent or of any membership interest in the Respondent that would accrue to the Applicant or of any decision made that the debt due to the Applicant will be repaid. In addition, there is no mention that such debt will be repaid pro-rata to the repayment of the other loan accounts.
- (b) Annexure “SL4” which is the email response of the Applicant to Annexure “SL3”, dated 5 July 2011, in which the Applicant states that he is not prepared to advance a further R500 000, 00 because the R3170 000, 00 already owed to him is not going to be paid to him by the end of the year. Again, there is no mention made of any of the conditions for repayment contended for by the Respondent. Nor does the Respondent respond to this letter to say that the amount of R3170 000, 00 is not repayable because of such conditions applying to the Applicant’s loan account.

- (c) Annexure “SL5”, which is an email, dated 5 July 2011, from Roy Leigh to the Applicant in which he makes an offer to pay the Applicant the whole amount received from the sale of the Rivonia property, if he advanced a further R150 000,00 to the Respondent. Again there is no reference to the conditions for repayment contended for by the Respondent, and the offer is irreconcilable with the Respondent’s version.
- (d) Annexure “SL7”, which is an email from Roy Leigh to the Applicant, dated 27 January 2012, in which he proposed that the advances to be made by the Applicant will be in the role of bridging finance, that the Applicant will receive 2.5 per cent interest per month, and that the full amount advanced would be paid against registration of transfer pursuant to guarantees held by the attorneys attending to the transfer of the properties. This proposal, in my view, is also patently irreconcilable with the version contended for by the Respondent. I agree with the contention of the Applicant that if an agreement, as alleged by Mr Roy Leigh on behalf of the Respondent, was in place at the time, then there would have been no need for Roy Leigh to make the proposals, which he made in Annexure “SL7”.
- (e) Annexure “SL9” which is an email, dated 18 July 2012, from the Applicant to Roy Leigh and Erasmus in which the Applicant demands repayment of the full amount of the loans, which he made to the Respondent. The Applicant states in this letter that if the Respondent or its members are unable to repay the full amount as demanded, they must sign over their shares and loan accounts in the Respondent to the Applicant. This is coupled with an offer to return the shares and loan accounts once the monies owed are repaid in full. This letter is again irreconcilable with the version of the Respondent. It is also notable that the Respondent does not respond to this demand stating that the loans are not repayable because of the conditions to which the loan account are allegedly subject.
- (f) Annexure “SL10” which is Roy Leigh’s response to annexure “SL9”, dated 18 July 2012, in which Roy Leigh refers to an invitation to participate in the Respondent so that the Applicant could share in a good investment. As contended for by the Applicant, the letter refers only to an invitation to participate in the Respondent, and does not constitute proof that an agreement to this effect was “firmly” concluded.
- (g) Annexure “RL5” which is an email from the Applicant to his father, dated 30 July 2012, in which the Applicant refers his father to a conversation which they had, in which the Applicant asked his father whether he considered the money which he had lent him as “a way of helping him out”, or whether he wanted the Applicant to be part of the Respondent. The Applicant’s father replied by saying that he considered the loans “as a way of helping him out”, and the Applicant then said that, in that case, he did not want any part of the Respondent and merely wanted to be repaid the loan. It was then agreed that the Applicant would be repaid the first amounts of any property sales including the Rivonia and Kayalami properties, until the debt had been repaid in full. Significantly, Roy Leigh did not attempt to set the record straight by responding that this was, in fact, not the case.

[5] The Respondent, however, contends that Annexure “RL4”, which is a purported minute of a shareholders’ meeting which was held on 22 February 2011, supports its version. The Respondent alleges that the meeting was requested by the Applicant in order to summarise (at that point in time), the extent of the membership in the Respondent to which the Applicant, Roy Leigh and Erasmus were entitled; the extent of the loan accounts in the Respondent relating to each of the parties; and to discuss the question of interest relating to the loan accounts. It furthermore alleges that the oral agreement, in terms of which the Applicant was obliged to take up membership in the Respondent, and that his membership interest in the Respondent would be determined from time to time by the amount owing to him, was confirmed. The Respondent contends further that the Applicant prepared Annexure “RL4”, and then forwarded it to both himself and Erasmus. In addition, the Respondent points out, in a supplementary affidavit with reference to Annexure “D” thereto (which is supposed to be a copy of “Annexure “RL4”),

that the Applicant’s initials are appended to the foot of the first page, of the minute.

[6] The Applicant, however, denies that:

- (i) he ever attended the alleged meeting of shareholders either on 22 February 2011 or at all;
- (ii) he prepared the said minute; and
- (iii) he signed or initialled the minute.

He does, however, accept that the initials on the first page of Annexure “RL4” do look like his. He points out, in this regard, that his attorney, on his instructions, obtained the original of Annexure “RL4” from the Respondent’s attorneys and the additional signatures/initials of Erasmus and Roy Leigh that appear on Annexures “RL4” and “D” do not appear on the original. He also points out that the initials that look like his, do not appear on the second page of Annexures “D” and “RL4”, although they appear on the second page of the original.

[7] On perusal of the original of Annexures “RL4” and “D”, which is Annexure “S1” to the Applicant’s reply to the Respondent’s supplementary affidavit, it is indeed correct that although an initial, which looks like that of the Applicant, is appended to the first page of Annexures “SL4” and “D”, this initial does not appear on the second page of either of these annexures. The additional initials of Erasmus and Roy Leigh also do not appear on the original of Annexures “RL4” and “D”, respectively. Nor for that matter does the heading “Minutes of RasLeigh Shareholders meeting of 22 February 2011” which appears on the original, appear on either Annexures “RL4”

or “D”. In addition, the date “22 February 2011” which is written in manuscript on the second page of the original does not appear on either Annexures “RL4” or “D”.

[8] These glaring discrepancies between the original minute, and the copies which appear at Annexures “RL4” and “D” respectively, certainly bring the authenticity and legitimacy of the alleged minute into question. Which version is the true version? Why the discrepancies? In the absence of an explanation from Roy Leigh as to:

(i) the reason for the discrepancies between the original minute, and the versions attached to the Respondent’s answering and

supplementary affidavits;

(ii) whether he was present when the Applicant initialled the minute;

(iii) when and where the said initials were attached;

I consider the alleged meeting and the minute (Annexures “RL4” and “D”) to be a fabrication, and accordingly reject the Respondent’s version on this score. I reject the Respondent’s version in respect of Annexure “RL4” for the further reason that although Annexure “RL4” predates annexures “SL3”, “SL4”, “SL5”, “SL7”, “SL9”, “SL10” and “SL11” as referred to above, it is irreconcilable with such correspondence, as these annexures make it abundantly clear that the “agreement” contended for by the Respondent was simply never concluded between the Respondent and the Applicant. Accordingly, I remain fortified in my view that the Respondent’s version, that the amounts advanced by the Applicant to the Respondent are not due and payable because they were pursuant to an oral agreement as contended for, is irreconcilable with the correspondence between the Applicant and the Respondent and/or his father, Roy Leigh.

[9] As alluded to above, however, the Respondent has filed an additional affidavit resisting the final winding-up order. The only new point raised in the additional affidavit filed on behalf of the Respondent is the Amended Founding Statement or CK2 form of the Respondent, which the Respondent alleges was found after the provisional order was granted. The purported CK2 form indicates that the Applicant’s effective date of membership in the Respondent was to be 28 February

2011. The contention thus advanced by the Respondent is that its version that the Applicant would become involved as an investor and member of the Respondent, must be accepted by the Court as true, and that the Applicant’s version that he was merely a creditor who could demand immediate repayment must be rejected as being false.

[10] The Respondent, however, provides no explanation in the additional affidavit, filed on its behalf, why no mention was made of the CK2 form in its answering affidavit and its supplementary affidavits. As contended for by the Applicant, even if the CK2 form could not be found, the deponent to these affidavits must have been made aware of its existence, and should have referred to it in the affidavits. Roy Leigh, who deposed to the additional affidavit, on behalf of the Respondent, merely alleges that the CK2 form was signed by him, Erasmus and the Applicant. He does not say that the CK2 form was signed by the Applicant in his presence, and to the extent that the CK2 form may have been signed in the presence of someone other than himself, no affidavit from such person is annexed to the

Respondent's additional affidavit.

- [11] The Applicant denies that the signature on the form is his. He contends that it is apparent, even to a layman, on comparison of the signature on the CK2 form (which purports to be that of the Applicant) to that of his on the four affidavits before court, that the signature on the CK2 form differs drastically from his signature as appears on the four separate affidavits. The Respondent, however, contends that I am disallowed from carrying out such an exercise in motion proceedings, and must therefore find on the strength of the CK2 document (which it submits is conclusive proof of the agreement contended for) that the application is disputed by the Respondent on bona fide and reasonable grounds, thus warranting its dismissal.
- [12] In *S v Boesak* [2000] ZASCA 112; 2000 (3) SA 381 (SCA) at paras 56-58, the Supreme Court of Appeal held that the rule that a court is allowed to compare the handwriting of a person with other genuine specimens of his signature is acknowledged in our law, as in several other legal systems, but must be exercised with caution. The Supreme Court of Appeal went on to hold that even in cases where expert witnesses testify, it is the Judge who bears the final responsibility of making a final judgment.
- [13] Turning then to the exercise of comparing the Applicant's purported signature on the CK2 form (the original which I requested), and his signature as appears from the four separate affidavits filed of record, I consider the signature on the CK2 to differ substantially from the Applicant's signature as appears from his four affidavits. There is thus merit in the Applicant's contention that the signature which purports to be his on the CK2 form is a forgery, as this prima facie appears to me to be so, as there is nothing on the papers before court to gainsay this. I accordingly consider the signature on the CK2 form not to be that of the Applicant, and therefore reject the Respondent's version for this reason as well.
- [14] Furthermore, on the Respondent's own version it has taken no steps to implement the so called oral agreement allegedly concluded with the Applicant. In addition, it is apparent from the papers that the Respondent does not have a loan account in its books for the Applicant. It is furthermore clear on the Respondent's own version that the liabilities of the Respondent are R18 127,124, 00 which far exceeds its assets. In addition, the amount of R1.8 million reflected as an asset is probably irrecoverable as the debtor is unemployed and the property is bonded beyond its value. The properties in Kayalami and Khamanga have been on the market for a considerable period of time, and no offers to purchase them have been received by the Respondent. Their respective values also appear to be overstated. It is also not in dispute that the Respondent had undertaken to pay the Applicant R 2 million against the registration of the Rivonia property. It is common cause that the property has been sold and the transfer registered, yet the Applicant has received no portion of the proceeds of the sale, despite the undertaking referred to above. I am satisfied that the Respondent is unable to repay the debt that it acknowledges is due to the Applicant, as it is insolvent. Accordingly, I am satisfied on a consideration of all the affidavits that the balance of probabilities favours the Applicant, and that a proper case has been made for the provisional order to be made

final.

[15] In the result, I make the following order:

- (a) The Respondent is to be wound up in the hands of the Master of the High Court.
- (b) The costs of the application, which include the costs consequent upon the employment of senior counsel, are to be costs in the winding-up of the Respondent.

F KATHREE-SETILOANE

JUDGE OF THE SOUTH GAUTENG HIGH COURT

Counsel for the Applicant: JF Roos SC

Instructed by: JJS Manton Attorneys

Counsel for the Respondent: AD Wilson

Instructed by: Spencer and Associates

Date of Judgment: 6 December 2013

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