

SOUTH AFRICA / JUDGMENT

Linde v Premax Trading 35 CC (66175/2014) [2016] ZAGPPHC 524 (6 July 2016) [2016] ZAGPPHC 524

COURT

North Gauteng High Court, Pretoria

BEFORE

SA Thobane

CASE / FILE NUMBER

66175/2014

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 66175/2014
6/7/2016

Reportable: No
Of
interest to other judges: No
Revised
DAVILINA
MARIA
LINDE PLAINTIFF
AND
PREMAX
TRADING 35
CC DEFENDANT

JUDGMENT

THOBANE AJ,

INTRODUCTION

- [1] The issue that the parties want the court to resolve is a very limited one, namely, whether the suspensive conditions in clause 5 of the agreement have been fulfilled actually or whether there was fictional fulfillment thereof. The defendant, a jurisdiction person, on one hand, was represented by Mr. Rossouw, who is a sole member thereof and who confirmed that he understood the implications around appearing in person on behalf of the Close Corporation. On the other hand the plaintiff was represented by counsel.
- [2] At the commencement of proceedings the parties advised that by agreement between them, the issues were to be separated and that the limited issue, stated above, was to be decided first. The parties further indicated that it would be convenient for both of them as well as the court if the matter was to proceed as agreed. A separation of issues was accordingly ordered in terms of rule 33(4) of the Uniform Rules of Court.

THE AGREEMENT

- [3] On 18 September 2011 the parties entered into a written agreement of sale/purchase of a business known as Adega Nelspruit, as a going concern. The plaintiff was the purchaser and the defendant the seller. The material and relevant terms of the agreement were as follows;

"4. Purchase Price

3.1. The purchase price for the said business shall be the sum of R1 200 000-00 (in words: ONE MILLION TWO HUNDRED THOUSAND RAND) for the sale of the assets, fixtures and fittings, goodwill.

3.2. The purchase price payable in terms of the agreement shall be paid in accordance with the provisions of clause 4 hereof

4. PAYMENT

The purchase consideration is to be secured and be said to be paid by the PURCHASER in the following manner:

The PURCHASER shall pay a deposit of R47 000-00 (FORTY SEVEN THOUSAND RAND) on acceptance of this offer, and will be paid to the agent of which amount will be held in trust you the agents attorney (ERASMUS ATTORNEYS) Erasmus Attorneys Trust, ABSA Horizon, Account number, please quote Ref: Adega, Nelspruit

The PURCHASER shall, subject to the fulfillment of the suspensive conditions, pay to the SELLER the sum of R600 000-00 (SIX HUNDRED THOUSAND RAND) directly to the SELLER. The balance of R553 000-00 (FIVE HUNDRED AND FIFTY THREE THOUSAND RAND) will be arranged by both parties and paid directly to the SELLER..... "

5. SUSPENSIVE CONDITIONS 5.1. That a lease of the premises be granted to the PURCHASER for a minimum period of 3 years on the same or similar terms and conditions as the existing lease between the SELLER and the LESSOR of the premises. This must be done prior to the effective date. 5.2. The sale is further subject to the PURCHASER being approved by the FRANCHISOR and entering into a new Franchise Agreement. 5.3. This sale is further subject to the agreement and settlement of the, /DC (INDUSTRIAL DEVELOPMENT CORPORATION) Business loan.

The sale is subject to the fulfillment of these suspensive conditions in Par 5 and if any condition is not met the sale becomes null and void and all payments as per Par 4 must be refunded in full to the PURCHASER within 48 hours."

[4] Following conclusion of the agreement, the plaintiff made the following payments;

- 4.1. R47 000-00 on 19 September 2011;
- 4.2. R 102 600-00 on 2 November 2011;
- 4.3. R456 000-00 on 14 November 2011;
- 4.4. R 145 600-00 on 14 November 2011.

THE PLEADED CASES

- [5] The plaintiff's claim against the defendant is that the suspensive condition was never fulfilled and as a consequence she contends that it is null and void, as stated in 3 supra, entitling the plaintiff to a full refund of the payments made as set out in 4 above. The plaintiff further pleaded that in anticipation of fulfillment of the suspensive condition, she took control of the business and incurred expenses on behalf of the business. The

plaintiff further pleaded in the alternative that having taken possession of the business in the bona fide but mistaken belief that the agreement was valid as stated above, she incurred expenses for which she seeks to be reimbursed.

- [6] The terms of the agreement are undisputed. The defendant contends that although there is a stipulated effective date, a new date was agreed upon and that although such an "amendment" was not reduced to writing as provided for in the agreement, it was nevertheless the intention of the parties that the effective date be amended. This error, of not reducing the amendment to writing, is described by the defendant as "bona fide and mutual".

[7] The defendant further raises a plethora of defenses to the claim which can be summarized as follows;

7.1. that clauses 5.1, 14.1 and 28.2 of the agreement are to be interpreted to mean that the lessor of the premises had to agree in principle that it would conclude a lease agreement with the new business owner on the same terms and conditions as the existing lease between it and the defendant, for a period of three years, prior to the effective date, alternatively;

7.2. that the written agreement did not correctly reflect the common intention of the parties, namely, that the lessor of the premises had to agree in principle that it would conclude a lease agreement with the new business owner with the same terms and conditions as the existing lease between it and and the defendant, for a period of three years, prior to the effective date;

7.3. that the incorrect wording of clause 5.1. (of the agreement), was occasioned by a common error of the parties who signed the written agreement in the bona fide but mistaken belief that it recored the true agreement between the parties thereto;

7.4. as a consequence, the defendant is seeking rectification, the effect of which would be that clause 5.1. was not to operate as a suspensive condition of the agreement, but as a term thereof and that a breach thereof would render the sale voidable at the option of the innocent party.

7.5. that the suspensive condition in clause 5.1. (of the agreement), was complied with, until it was cancelled by the defendant on the 29th June 2012, alternatively;

7.6. that the suspensive condition was included in the agreement for the sole benefit of the plaintiff, who had the option to waive it and did in fact waive it by inter alia paying certain monies, taking occupation and giving effect to some of the terms of the agreement;

7.7. that the agreement was dependent on the plaintiff procuring a controlling interest in a close corporation or company and that the plaintiff failed, neglected and/or refused to procure such controlling interest or to inform the lessor of same, thus the non-fulfillment of the suspensive condition, and finally;

7.8. that there was fictional compliance with the suspensive condition as a result of which the agreement came into operation until the date of cancellation.

7.9. in the alternative, that there was compliance with the suspensive condition, in the event it is found that it was a suspensive condition, until the agreement was cancelled;

7.10. further alternatively, that if it is found that clause 5.1. operated as a suspensive condition, and that the interpretation pleaded by the defendant is incorrect, that the agreements accord with the common intention of the parties, then the defendant pleads that:

7.10.1. clause 5.1 was included in the agreement for the sole benefit of the plaintiff,

7.10.2. the plaintiff always had the option to waive compliance with the clause,

7.10.3. the plaintiff did in fact waive compliance with the clause in that she;

7.10.3.1. Paid the amounts pleaded,

7.10.3.2. Took occupation and control of the business,

7.10.3.3. Gave effect to the terms of the written agreement between the parties.

[8] The parties indicated that they each had one witness to lead. They further agreed that in light of the plea of fictional fulfillment, the defendant had the duty to begin.

DEFENDANT'S EVIDENCE

[9] Frederick Jacobus Rossouw confirmed in the main the details of the written agreement. He stated that following conclusion of the agreement, he had advised the plaintiff that he stood surety with regard to the lease and therefore that he stood exposed and at risk should there not be compliance. According to him there was never an intention on the part of the plaintiff to comply with the suspensive condition. This is so because, inter alia, around 13 March 2012, the plaintiff removed credit card machines and installed new ones. It was partly why he decided to cancel the agreement and to then repossess the business. According to him, the intention of the plaintiff was to hijack the business and to not pay a reasonable consideration for it. To further prove that the plaintiff had no intention to honor the agreement, so he testified, she did not want to participate fully in the training, insisting from time to time that special arrangements be made to accommodate her. With regard to the suspensive condition in his view, there was compliance therewith. Significantly according

to him, there was an agreement to grant a lease to the plaintiff, this condition was therefore fulfilled. Secondly, the franchise

agreement was signed prior to the plaintiff taking over the business. Thirdly, an ICD loan offer was made and accepted. The suspensive

conditions, he went further, were fulfilled even though obstacles were placed on the way by the plaintiff. He concluded his testimony

by stating that if it were to be found that the suspensive conditions were not fulfilled then it would be so owing to the company not being formed. The blame for the non-formation of a company lay squarely at the door of the plaintiff.

[10] During cross examination, Mr Rossouw conceded that the agreement was never amended formally even though the agreement provided that it should be so. He confirmed that the payments that were made by the plaintiff were made as directed by him. He confirmed further that the broker failed to pay IDC as expected of him. Significantly, he confirmed that the agreement was cancelled before settlement of the loan. When it was put to him that there was no agreement due to the non-fulfillment of the suspensive condition, his reply was that the plaintiff had moved to Nelspruit in anticipation of taking over the business. This, so he testified, was indicative of the fact that there was an agreement in place. He readily conceded that there was no lease agreement between the landlord and the plaintiff as at the

effective date. This was due to the fact that a company had not been formed as expected. He was therefore forced to stand surety.

PLAINTIFF'S EVIDENCE

- [11] Davilina Maria Linde confirmed the contents of the agreement between herself and the defendant. She further confirmed that there was no lease agreement entered into between herself and the landlord. There was a person allocated to register a company however the attempts were frustrated when the process was tainted by fraud. She denied that she frustrated the agreement as alleged by Rossouw. She further denied that there was collusion between her and the broker. She only met the broker when the agreement was signed. Thereafter communication was only telephonic. Even then he avoided taking her calls. Eventually, the defendant cancelled the agreement on the 1st July 2012.
- [12] During cross examination she denied that she was ever contacted by a Renee in connection with the contract. The cross examination revolved around issues that were not relevant for purposes of determining whether or not there had been fulfillment of the suspensive condition. The cross examination was about rental, non-disclosure of bank statements, failure to answer emails, move of bank account to another banking institution as well as training of the plaintiff.

ARGUMENT

- [13] The defendant argued that although in his view Ms Linde had good intentions of buying the business initially, she soon changed her mind when she realised that things were not going her way. He tried to assist her and got her then girlfriend involved. The plaintiff however always had excuses. This forced him to obtain legal advice on the basis of which he proceeded to sign as surety. He was

forced to go the legal route when it became clear to him that if he did not pay some money to IDC, he would become personally liable for payment of exorbitant penalties. He urged the court to understand that the business broker did not co-operate with him. Finally, he submitted that whereas not all the conditions were not complied with, in particular 5.1., this did not mean that there was no agreement.

- [14] It was argued on behalf of the plaintiff that two suspensive conditions in particular were not fulfilled. Firstly, IDC was paid only after the agreement had been cancelled by the defendant. Secondly, the agreement provided that the lease agreement was to be concluded prior the effective date. This was however not done. It was further argued that the agreement stipulated that deviation from the agreement was to be in writing in terms of paragraph 30 of the agreement and that no written deviation was recorded in casu. To the extent that the defendant relied on fictional fulfillment, it was submitted that the defendant bore the onus to prove same. It was further submitted that in this regard the defendant had failed to discharge such onus. Instead blame was placed at the door of the business broker who was not even part of these proceedings. Further, that the defendant, on the alternative

argument, had failed to prove the waiver let alone that it was unequivocal. Neither was deliberateness proven.

THE LAW

[15] The doctrine of fictional fulfillment of a term of a contract is discussed in detail in *Lekup Prop Co No 4 (Pty) Ltd v Wright* (2012 (5) SA 246 (SCA)). Innes CJ captures the position as follows on page 591;

"By our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfillment, be bound by an obligation, and who has designedly prevented its fulfillment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part."

[16] In *Gowan v Bowern* 1924 AD 550, Wessels JA said the following on page 571;

"The Court must hold that if a contract is made subject to a casual condition then if the person in whose interest it is that it should not be fulfilled deliberately does some act by which he hinders the accomplishment of the condition, he is liable as if the condition had been fulfilled. But a party cannot be said to frustrate a condition unless he actively does something by which he hinders its performance. There must be an intention on his part to prevent his obligation coming into force.

There is nothing to prevent his folding his arms and allowing events to take their course. Paul, in D.45.1. 85.7, uses the word *curaverit*, and Cujacius also uses this term in dealing with the promissor's liability. *Curare ut* or *ne* here signifies to bring actively about a certain set of circumstances . . . The only culpa for which a promissor *sub conditione* is liable is some deliberate act, some act done with the intention of causing the condition to fail or, perhaps, also a deliberate omission where there is a duty to do something, by which he frustrates the happening of the condition in his own interest in order to enrich or benefit himself."

[17] In *Ferndale Investments (Pty) Ltd v DICK Trust (Pty) Ltd* 1968 (1) SA 392 (A) at 395A-C the following is said:

"If it is the fault of the person in whose favour the condition is inserted that the condition cannot be fulfilled, or if he intended to prevent the condition from being fulfilled, the law considers the condition to have been fulfilled as against him. The nature of the contract is always an important element. In some cases the person benefitted by the non-performance of the condition can sit still and do nothing to assist in its fulfillment; in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfillment of the condition in order to escape the consequences of the contract the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith."

[18] In *Scott & another v Poupard & another* 1971 (2) SA 373 (A) at 378H Holmes JA, writing for the majority, said that the principle underlying the doctrine of fictional fulfillment may be stated thus:

"Where a party to a contract, in breach of his duty, prevents the fulfillment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."

[19] From the above principles it is clear that in order to successfully invoke the doctrine of fictional fulfillment, the defendant bore the onus of proving that the plaintiff, by deliberate commission or omission, prevented fulfillment of the suspensive conditions contained in clause 5 of the agreement, with the intention of avoiding her obligations under the agreement. Further that mere negligence on the part of the plaintiff would not suffice.

ANALYSIS

[20] The testimony of Rossouw was to the effect that no lease agreement was concluded between the plaintiff and the lessor prior the effective date, which was, in terms of clause 5.1, supposed to be for a minimum period of 3 years or would have followed similar

terms and conditions of the then existing lease agreement. His evidence was that he was responsible for the payment of rental as he had signed as surety. It is clear that on his evidence, this condition was not fulfilled. If one were to apply the doctrine of fictional fulfillment to this clause, the onus rested on the defendant to show that the plaintiff intentionally or deliberately frustrated compliance. Evidence adduced however points to the fact that there was agreement that there needed to be a corporate entity formed before a lease agreement could be concluded. This did not materialize in that, as testified to by the plaintiff, the process of registering a company was tainted by fraud. There was never a challenge to her testimony. I further did not understand Rossouw to be arguing that failure to register the company was a deliberate act on the part of the plaintiff aimed at frustrating or preventing the fulfillment of the suspensive conditions. Even less, that the plaintiff was negligent. The person who was tasked with registration of the corporate entity had been allocated to her by the defendant, hence it can not be correct to submit that there was collusion to prevent or frustrate fulfillment of the suspensive conditions.

[21] The defendant seems to emphasize the fact that the plaintiff relocated temporarily to Nelspruit and that she took control of the business as an indication of the fact that there was fulfillment of the suspensive condition. This approach is over simplistic. The agreement provides that a lease agreement must be concluded prior the effective date. All the parties to the agreement are ad idem that this never materialized. For purposes of demonstrating that the plaintiff deliberately or intentionally worked against fulfillment of the suspensive conditions, the defendant bore the onus of proving, in light of the plaintiff's relocation, that it was all a hoax. The defendant testified, in contrast, that he believed that the plaintiff wanted to comply with the agreement but changed her mind when she realized that things were not going her way. While this as a stand alone reason does not point to a deliberate frustration, what compounds matters is testimony by the defendant to the effect that in his view the plaintiff always intended to "hi-jack the business and not pay a reasonable

consideration for it". All considered, I do not believe that the plaintiff's conduct, in so far as clause 5.1 is concerned, evidences an intention not to comply with the suspensive conditions encapsulated in clause 5.1.

[22] The defendant's aforementioned emphasis seems to veer toward a defense of waiver, which was pleaded by him. The defendant's contention is that the plaintiff;

23.1. Paid all the amounts;

23.2. Took occupation of the business;

23.3. Gave effect to the terms of the agreement.

From this, the defendant wants this court to conclude that the plaintiff, through the above actions, waived compliance with the suspensive conditions. Much more is however required to be shown for the defense of waiver to succeed. Defendant must show that the conduct in question, as aforementioned, is clear and unequivocal and can bear no other reasonable interpretation than that it constitutes a waiver. Secondly, our courts have found that where the conduct is vague or ambiguous, an interpretation against finding that rights have been waived, will be adopted. Innes CJ in *Laws v Rutherford* 1924 (AD) 261 put it thus;

"(t)he onus is strictly on the appellant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

The party alleging a waiver of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly had abandoned it. See also *Feinstein v Niggli and Another* 1981 (2) SA 684 (AD) at 698 F - G.) On the facts of this case, express abandonment of rights can be excluded as it was not alleged. I am further of the view that the conduct of the plaintiff is not plainly consistent with the intention to forego compliance with the suspensive conditions. I say this because the plaintiff intended to enter into a lease agreement, however her efforts were frustrated by the fact that the landlord would not contract with a natural person. A juristic person needed to be a party to the lease. She then undertook a process of registering a corporate entity, which exercise was also beset by problems. From this, one can not conclude that the conduct of the plaintiff is consistent with that of a person who is waiving compliance. Secondly, the plaintiff had made all the required payments as directed by the agreement. There is therefore nothing that can be deduced with regard to clause 5.3 in that, having made payment as directed she was not responsible for nonpayment of IDC. It therefore can not be correct that in paying money to the broker, which money was to be passed over to IDC, but was not, she waived compliance with the condition that the money be paid to IDC.

[23] The second suspensive condition worth scrutiny is encapsulated in clause 5.3. Which reads as follows;

"This sale is further subject to the agreement and settlement of the IDC (INDUSTRIAL DEVELOPMENT CORPORATION) Business loan."

[24] The agreement was concluded on 18 September 2011. It provided for the effective date of 1 November 2011. It is common cause that there was a huge delay in the payment of money to the IDC. Rossouw conceded during cross examination that it is the broker, Global Business Brokers SA who had been entrusted with the sum of R456 000-00, that failed to make payment to IDC. The defendant's pleaded case is that on 29 June 2012, the agreement, which had come into operation, was cancelled by him. While this differs to his testimony to the effect that the agreement was cancelled in April 2012, this contradiction is insignificant in that it was only in 2013, that payment was made to IDC. Whether cancellation took place in April 2012 or June 2012, what is significant is that payment was

made after the agreement had been cancelled by the defendant. From the above it is clear that the suspensive condition in clause 5.3, was not complied with as stipulated and in fact could not have been complied with after cancellation of the agreement by the defendant.

[25] I am accordingly of the view that the defendant has failed to discharge the onus resting on him, based on the doctrine of fictional fulfillment or even the defense of waiver. It follows that both defenses are bad in law and must fail.

[26] In the result the following orders are made;

26.1. It is declared that the suspensive conditions in clauses 5.1 and 5.3 of the agreement entered into between the plaintiff and the defendant were not fulfilled;

26.2. The defendant is ordered to pay the costs.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

HEARD

: 19/04/2016

JUDGMENT

: 06/07/2016

ON BEHALF OF THE PLAINTIFF : ADV. G.J. SCHEEPERS

ON BEHALF OF THE DEFENDANT : MR. F.J.A ROSSOUW (IN PERSON)

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