

SOUTH AFRICA / JUDGMENT

Pohl v Weyer (4226/15) [2016] ZAECPEHC 21 (10 May 2016)

[2016] ZAECPEHC 21

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

O Van Papendorp

CASE / FILE NUMBER

4226/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE HIGH COURT, PORT ELIZABETH)

CASE NO. 4226/15

In

the matter between:

MAGDALENA

POHL

APPLICANT

And

BRENDA

JOY

WEYER

RESPONDENT

JUDGMENT

VAN PAPENDORP A J

1. The Applicant filed an application wherein she seeks the following orders:

1.1.1 An order confirming the termination of the Respondent's right to perform radiography services from the Cath Lab at Life St George's Hospital and to vacate such be no later than 20 November 2015;

1.1.2 An order declaring that the Respondent no longer has the right to perform radiography services from the Cath Lab at Life St George's Hospital and is ordered to vacate same and/or cease providing such services therefrom by 30 November 2015, alternatively, should this period have passed by date of judgment, within five (5) days from date of the order; and

1.1.3 That the Respondent is ordered to pay the costs of this application.

2. The Respondent opposes the application and requests me to refer the matter for oral evidence, alternatively to dismiss the application with costs as she disputes the validity of the termination of her contractual arrangement with the Applicant.

3. The following facts are common cause:

3.1 The Applicant and the Respondent are qualified radiographers

3.2 The Applicant and Respondent practiced as such from the Cath Lab at St George's Hospital, [4... P. D.], Central, Port Elizabeth;

3.3 The nature of the parties working relationship evolved to that of a joint commercial venture;

3.4 The Applicant gave the Respondent written notice of termination of the contractual arrangement between herself and the Respondent on the 18th of August 2015 and required her to vacate the Cath Lab by no later than 30 November 2015;

3.5 The Applicant and Respondent first made contact with each other during July 2009 in connection with work at the Cath Lab St Georges Hospital; and

3.6 Both the Applicant and the Respondent have complied with the internal prescribed requirements by St Georges hospital to practise as registered health care workers at the Cath Lab.

4. The Applicant obtained the exclusive rights to provide radiography services at the Cath Lab at St George's Hospital as per Memorandum of Agreement signed by the Applicant and a duly authorised representative of Life St Georges on the 19 June and 22 June 2009 respectively (see annexure marked "MP2").

5. The material terms of this agreement are that:

5.1 The radiographer (herein after referred to as the Applicant) warrants that she has obtained and will continue to maintain full and unconditional registration as a radiographer with the Health Professions Council of South African and The Society of Radiographers of S.A;

5.2 The Applicant shall at all times staff her practice with properly qualified, competent and experienced professional;

5.3 The Applicant shall ensure that a radiographer is available on call 24 hours a day including weekends and public holidays and undertakes to prepare a monthly roster in this regard;

5.4 The Applicant shall ensure that the services provided by her practice are carried out in accordance with the policies, procedures and service standards required by Life SGH. Such policies, procedures and service standards shall be reviewed by Life SGH on an ongoing basis and should any change or improvement be reasonably requested, the Radiographer shall ensure that such request is promptly carried out.

5.5 The Applicant may not cede, delegate or assign any of her rights or obligations under this agreement to a third party;

5.6 Life SGH agrees that the Applicant shall, for the duration of this agreement, have the sole and exclusive right to provide radiography services in the Cath Lab at Life St George's Hospital; and

5.7 The agreement may be terminated by either party on three months written notice to the other party.

6. The crux of the Respondent's opposition lies in par. 14 of her opposing affidavit wherein she states that:

"The only "contractual arrangement" that the applicant and I have would be the arrangement as I have set out above. My working arrangements, tenure, conditions and so on are all arranged with the hospital itself, and not in any manner with the Applicant. It is noteworthy that the Applicant does not attach any written agreement as to such "contractual arrangement" to her application, or even furnishes an explanation as to any such alleged verbal agreement."

7. It is trite law that a litigant is bound by his or her opposing papers. Counsel for the respondent addressed the court now on the existence of a joint venture in the form of a partnership between the parties and argued that the Applicant cannot unilaterally terminate the agreement. This argument is however completely outside the scope of the Respondent's opposing papers, wherein she expressly stated in par. 5

"I respectfully submit that it is important to note that we practice as such as completely separate practises, with separate practise

numbers".

8. It is clear that the Respondent herself expressly disavows that she practised in partnership with the Applicant. Accordingly, any departure from the true nature of this agreement by the requested oral evidence is of no consequence and effect as it was clearly not the intention of the two parties hereto when they entered into the oral contractual agreement.
9. In terms of the oral agreement between the Applicant and the Respondent, the parties agreed that the Respondent will render radiography services at the Cath Lab St George's Hospital on the basis that the working hours required by St George's hospital, as well as the income derived therefrom will be shared equally by herself and the Respondent. Up until the stage when the Respondent acquired her own practise number whether it be January or March 2010, the Respondent practised under the practise number of the Applicant. All income generated were paid into the Applicant's account and she then paid the Respondent for her services render according to the agreement.
10. Did the parties, despite them not exactly agreeing to form a partnership, in actual fact practiced under a partnership agreement? It would appear from the facts that the Respondent was initially employed by the Applicant to render services at the Cath Lab Life St George's hospital and would receive as payment half of the income derived as they agreed to work equal working hours. The question then arises whether the parties then practiced in partnership from the stage when the Respondent obtained her own practice number by virtue of the fact that the Applicant and Respondent in essence shared equal working hours?
11. The basic essentialia of a partnership has been state in *Joubert v Tarry & Co* 1915 TPD 277 at 280-1 as follows:

"First that each of the partners brings something into the partnership, or bind himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the objet should be to make a profit. Finally the contract between the parties should be a legitimate contract...Where all these four essentials are present, in the absence of something showing that the contract between the parties I not an agreement of partnership, the court must come to the conclusion that it is a partnership."
12. In *Grütter v Lombard* (2007) SCA 2 (RSA) at par.5 the court stated that these characteristics of a partnership has been summarised in *Pezzutto v Dreyer* [1992] ZASCA 46; 1992 (3) SA 379 (A) at 390D-E as follows:

"In essence...a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit."
13. As from the period when the Respondent obtained her own practice number, she practiced for her own account and rendered separate bills to her patients. The parties initially only shared the expenditure of the bookkeeper, but subsequently this arrangement terminated. The nature of the relationship disclosed none of the features of a partnership. Each of the

parties pursued her own practice, independently of the other, each with her own clients, each bearing her own expenses and each reaping the rewards of her own endeavours to the exclusion of the other. The parties merely agreed to share the working hours at Life St George's Hospital equally in order to render a twenty four seven service as required in the written agreement that the Applicant entered with the Life St George's Hospital.

14. The Respondent subsequently, with the permission of the Applicant only, engaged into rendering services at other entities when the work load decreased substantially. Any income derived through this was for the Respondent's own benefit and account, which serves to confirm that there was no partnership in existence between the Applicant and Respondent as this venture was not for the joint benefit and profit of both of them.
15. The fact that the Respondent was allowed to render work outside the scope of services at Life St George's Hospital Cath Lab further support the finding that the parties were not engaged in a partnership agreement, as the Applicant was expressly excluded from rendering such services. This clearly indicates that the Respondent did not derive her authority to practise at the Cath Lab from the St George's hospital herself, as they would clearly have imposed a similar exclusion upon her. It also supports the finding that there was no partnership agreement in place, as the Respondent would have been bound by the terms of the written agreement which the Applicant had with St George's Hospital for her tenure of the Cath Lab.
16. Faced with the existence of the written agreement between the Applicant and Life St George's hospital, the Respondent alleges that her tenure of the Cath Lab does not rest on the contractual arrangement that she entered with the Applicant. The respondent avers as per par. 13 of her opposing papers that she has an independent working arrangement with the hospital and that her tenure does not depend on her contractual arrangement with the Applicant, hence the Applicant cannot terminate her working arrangement with the hospital.
17. In order to support this contention the Respondent refers to a conversation that she had with an ex-employee of Life St George's hospital, a Mr Andre Bothma in par. 13 of her opposing paper. The information stated in paragraph 13 is however hearsay evidence and I have to disregard it for the purposes of this application as it is not supported by any confirmatory affidavit of this Mr Bothma.
18. The Respondent further attacks the validity of the exclusive agreement entered into between the Applicant and the Life St George's Hospital in June 2009 on the basis that the Applicant failed to attach the authority of the person who entered into the agreement with her on behalf of St George's hospital. This objection is unfounded as the Respondent is not disputing the validity of the agreement between the Applicant and Life St George's Hospital itself.

19. The Respondent submitted that in the event where I found that the agreement between the Applicant and St George's Hospital was in existence, she would not be bound by it, as either the Hospital and/or the Applicant had the duty to inform her of this agreement.
20. If one has due regard to the nature of the verbal agreement between the Applicant and the Respondent, which was in the nature of a joint venture agreement, whereby the Respondent agreed to provide radiographer services for her own account and under her own practice number at request of the Applicant, no duty to inform the Respondent of this exclusive agreement of tenure of the Cath Lab rests on either the Applicant nor the hospital. Neither the Applicant nor Life St George's hospital can be held to ransom because the Respondent herself did not secure her position as she alleges, and she did not enquire into the de facto position herself.
21. The Respondent further challenges the agreement between the hospital and the Applicant on the basis that it does not make provision for termination of services by the Applicant of which ever radiographer she enlists to assist her at the Cath Lab. Her submission in this regard is ill-advised as the hospital is not a party to any contractual agreement that she enters into with any radiographer at all.
22. Mr Dyke, on behalf of the Respondent, argued that there is a real dispute of fact on the papers which cannot be determined in these proceedings. He further submitted that the present case does not lend itself to the robust approach that was applied in the Plascon Evans case and accordingly, the matter should be referred to oral evidence pertaining to the nature of the legal relationship between the Applicant and the Respondent.
23. The general rule regarding the approach to evidence on affidavits is that as stated in Stellenbosh Farmers' Winery Ltd v Stellevale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 and as set out in Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 634 (AD) at H – I :

"It is correct that, where in proceedings on Notice of Motion disputes of fact have arisen on the Affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondents justify such an order. The power of the court to give such final relief from the papers before it is, however, not confined to such a situation. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact. (See in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto N.O. 1972 (3) SA 858 (A) at 882D-H). If in such a case the Respondent has to availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the final relief which he seeks....Moreover, there may be exceptions to this general rule, as, for example where the allegations or denials of the Respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...."

24. In Administrator, Transvaal & Others v Theletsane and Others

- [1990] ZASCA 156; 1991 (2) SA 192 (A) at 204G-205D it was emphasised that our courts are enjoined to adopt a robust common sense approach to disputes of fact on affidavit. Where a court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the final relief sought (see *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011
- (1) SA 8 (SCA) at 14 E-H and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* supra at 634-5).
25. The question arises whether there is indeed a real, genuine or bona fide dispute of fact which cannot be determined on the affidavits which calls for oral evidence to be lead.
26. In her answering affidavit the Respondent did not challenge the nature of the relationship between her and the Applicant as a ground for asserting that the Applicant was not entitled to terminate her agreement with her, and effectively terminate her tenure as radiographer at the Cath lab. Counsel for the Respondent however attempted to do so. The essence of the Respondent's opposition lies therein that she alleges that she derives her tenure of the Cath Lab from the Life St Georges Hospital itself.
27. In view of the Applicant's factual averment as to the existence of her written agreement with the St George's Hospital, the fact that no partnership agreement came into existence between the parties is inherently probable. The Respondent admitted as much in her opposing papers. I may proceed on the basis of the correctness thereof and include this fact among those upon which I have to determine whether the Applicant is entitled to the final relief which she seeks.
28. It is however, not in dispute that the Applicant and Respondent did not expressly agree on the period of notice that the Applicant must give the Respondent, should she wish to terminate the Respondent's services as radiographer to the Cath Lab. The Respondent disputes that a tacit term exists that should the Applicant wish to terminate her contract with the Respondent, all she has to do is give her three month notice.
29. In *Wilkens v Voges* [1994] ZASCA 53; 1994
- (3) SA 130 (A) at 136I Nienaber JA stated:
- "A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they thought about it – which they did not do because they overlooked the present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind."*
30. In *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D Van Winsen JA stated:

“A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon.”

31. In *Alfred Mcalpine and Sons (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at Corbett AR referred to the well known case of *Reigate v Union Manufacturing Co.* 118 L.T. 479 at p. 483 where Scrutton L. J. stated that:

“You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: ‘What will happen in such a case?’ they would have both replied: ‘Of course, so-and-so. We did not trouble to say that; it is too clear.’”

32. It is inconceivable that any party entering into a contractual agreement as the parties before court did, did not tacitly intend for the Applicant to have an equal right to terminate the contract with the Respondent on due notice. In par. 27 of her Opposing affidavit, the Respondent concedes that

“..while it stands to be conceded rather obviously that the arrangement between the Applicant and myself can conceivably be terminated, the right to so terminate my practice would vest with the hospital, and even in that event (and specifically where such process is so clearly driven by the Applicant) such termination would not turn only on a reasonable period for such notice, but also on a myriad of other logistical and professional concerns...:.

33. The question which I now have to determine is how much notice the Applicant would have to give to the Respondent to terminate their joint venture agreement.

34. In *Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd* 1985

- (4) SA 809 (A) at 827G-I Smalberger AJA stated that:

“They cannot be held permanently bound when all they contracted for was a temporary arrangement. Furthermore, when parties bind themselves to an agreement which requires them to work closely together and to have mutual trust and confidence in each other, of which the agreement under consideration is an example, it is reasonable to infer that they did not intend to bind themselves

indefinitely, but rather contemplated termination by either party on reasonable notice. Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely.”

35. In the circumstances surrounding the conclusion of the joint venture agreement and having specific regard to the express agreement that the Respondent may terminate the agreement with three month notice, it speaks for itself that a three month period to either side would be reasonable under the circumstances.

36. The Respondent further argues that the Applicant does not have any grounds upon which to terminate their joint venture agreement. It is clear from the affidavits that neither party agreed upon the terms upon which the joint venture agreement between them can be terminated. Logic tells that it can be done for a variety of reasons, one being that the Respondent services is no longer required because of a breakdown of the relationship between the parties.
37. The Respondent argued that the Applicant failed to establish a breakdown of their working relationship. It is not in dispute that the parties attempted to settle the disputes between them, prior to the Applicant's decision to terminate the joint venture agreement with the Respondent, despite the Respondent's averments that there is no breakdown of the working relationship between herself and the Applicant.
38. In par. 35 of her opposing affidavit the Respondent stated that:

"He suggested that the "problem" could be avoided by the Applicant subcontracting me, in which event my position would be secure. I was absolutely taken aback by this turn of events, and I immediately asked the Applicant why my name was not on that contract as she assured me before I relocated, and she merely answered by saying that "they must have forgotten".

I was most upset. I refused to be 'subcontracted'. I left that meeting perturbed and feeling betrayed by the Applicant."

39. Having regard to the various letters and attempts to settle the differences between the parties and the subsequent failure to do so, which is attached to the Applicant's founding affidavit, it is clear that the relations between the two parties soured to the extent that any continued working relationship has become strained and almost impossible. On these grounds alone, the Applicant would be entitled to have terminated the joint venture agreement as she did.
40. For all the aforesaid reasons I have concluded that the Applicant was well within her rights to terminate the agreement.
41. ORDER:

Accordingly the following order is made:

- (a) The termination of the joint venture agreement, and concomitant termination of the Respondent's right to continue performing radiography services from the Cath Lab at Life St George's Hospital after 30 November 2015, is hereby confirmed.
- (b) The Respondent shall vacate the Cath Lab premises by no later than five days of this order.
- (c) The Respondent is to pay the costs of this application.

O VAN PAPENDORP

ACTING JUDGE OF THE HIGH COURT

Appearances

Applicant:

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PORT ELIZABETH

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28 April 2016

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