

SOUTH AFRICA / JUDGMENT

Pollock NO and Others v Camara and Another (2395/2010) [2013] ZANWHC 35 (18 April 2013)

[2013] ZANWHC 35

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

2395/2010

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NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2395/2010

In the matter between:

RICHARD KEAY N.O. POLLOCK1ST APPLICANT

CORNELIA MARIA N.O. CLOETE2ND APPLICANT

JOHANNA NINI N.O. MAHANYELE3RD APPLICANT

and

JOAO GREGORIO CALVALEIRO CAMARA1ST RESPONDENT

JUAN RAFAEL FERREIRA LOPEZ2ND RESPONDENT

J U D G M E N T

LEEUEW JP:

Introduction

[1] The applicants approached the Court seeking an order in the following terms:

“1. Declaring that the agreement dated 17 July 2008 between Instabrite (Pty) Ltd and Respondents on behalf of a close corporation to be formed and attached to the founding affidavit as annexure “G”, has lapsed and is of no force and effect, alternatively declaring the said agreement to be cancelled, further alternatively cancelling the said agreement;

2. Directing Respondents to disclose to Applicants' attorney within 3 days of the service of this Order the location of all the assets listed in annexure "K" to the founding affidavit;
3. Directing Respondents to return the assets listed in the said annexure "K" to Applicants within 7 days of the service of this Order;
4. Failing compliance by Respondents with paragraph 3 above, authorising, empowering and directing the Sheriff of the High Court to attach the assets listed in annexure "K" and return them to Applicants;
5. Directing that the costs of this application be borne and paid for by Respondents jointly and/or severally, the one paying the other to be absolved;
6. Granting Applicants such further and/or alternative relief as this Honourable Court deems meet."

Factual

Background

- [2] The applicants are joint and final liquidators of Instabrite (Pty) Ltd, a company in liquidation (Instabrite), appointed on the 5th December 2008 by the Master of the High Court, Johannesburg.
- [3] Prior to its liquidation, Instabrite had carried on business and occupied the premises at Shop 1, Ground Floor, Max Burman in Rustenburg (the premises) which property, as at the date of liquidation, was leased by Instabrite from Class A Trading 515 (Pty) Ltd Limited (Class A) per agreement dated 3rd September 2006. The lease agreement was for a period of five (5) years commencing from the 1st October 2006 to the 30th September 2011. In addition to the lease agreement, Class A also sold to Instabrite certain equipment and stock situate in the premises at the time. The property, listed in Annexure "K", consisted of take-away and butchery equipment, ovens, toasters, telephones, alarm system, meat and cheese slicers, all fridges, cold rooms, shelving, computers, desks, point of sale and scanners (equipment).
- [4] The terms of the sale agreement were amongst others that the equipment and stock amounted to R435,000-00 with the value of the stock being R50,000-00 and that of the equipment R385,000-00. However, one of the terms of the written sale agreement was that Instabrite would retain possession of the aforesaid equipment, and that ownership thereof would remain vested in Class A until payment of the total purchase price of R435, 000-00, when ownership of the stock and equipment will pass to Instabrite.
- [5] Whilst the sale agreement between Instabrite and Class A was still subsisting, on the 17th July 2008, Instabrite sold its business together with the equipment to the respondents as a going concern including all the fixed assets on the premises despite the fact that Instabrite had not paid any portion of the purchase price for the stock and equipment to Class A.

- [6] The terms of the written instalment sale agreement (instalment sale agreement) between Instabrite and the respondents, who at the time acted on behalf of a close corporation which was still to be formed, provided, amongst others, that the purchase price was for a sum of R1650 000-00, payable in terms, by an initial deposit of an amount of R1,250 000-00 and the balance of R400 000-00 payable in monthly instalments of R25,000-00. The first instalment was due and payable

on the 7th September 2008 with the subsequent instalments payable on the seventh day of each subsequent month thereafter.

- [7] A further condition of the instalment sale agreement was that ownership and goodwill of the business would not pass to or vest in or become the property of the respondents but remained vested in Instabrite until the total purchase price in terms of the instalment sale agreement shall have been paid in full to Instabrite. Furthermore, the respondents were not entitled to remove any of the assets from the business premises without Instabrite's written consent.
- [8] The respondents took possession of the business on the 21st July 2008. The close corporation was not formed as anticipated. Nevertheless, the respondents continued to trade at the premises under the name and style of "Scafs Hyper Meat and Chicken". It is common cause between the parties that the respondents, in view of the non-establishment of the close corporation, considered themselves as purchasers of the business in their personal capacities in terms of the instalment sale agreement.
- [9] The applicants allege that they were advised by Mr George Prokas that negotiations took place between him on behalf of Class A and the respondents concerning the respondents' lease of the premises and the sale of the assets to them, and that they agreed on a lease of the premises and payment of rental to Class A on terms not less favourable than those agreed upon by Class A and Instabrite. The respondents averred with regard to the lease of the premises, that they had leased the property from Class A represented by Mr George Prokas (Prokas) but subsequently moved the business including the equipment, to other premises when they could not keep up with the rental payments claimed by Prokas. The respondents do not dispute that they vacated the premises and removed the assets (including the equipment) during early June 2009 after the liquidation of Instabrite in November 2008 and the appointment of the applicants as liquidators on the 5th December 2008.
- [10] The applicants further allege that they were advised by Mr Ian Eadie (Eadie) a director of Instabrite, that the respondents did not pay the full purchase price payable for the equipment in terms of the instalment sale agreement in that the respondents only paid an amount of R1 250 000-00 as deposit and two instalments of R25,000-00 and that as at the date of liquidation of Instabrite, a balance of R370 000-00 was still owing. This information was verified from the perusal of Instabrites' records. The

respondents dispute that the balance owing is as stated by the applicants but nevertheless state that they paid an amount of R1,

325 000-00 to Instabrite for the equipment and business and that payment was made to Eadie who disappeared and could not be located. As a result the respondents could not effect any further payments to Instabrite. This confirms that the respondents have not paid the full purchase price in terms of the instalment sale agreement. I must here pause and remark that the dispute with regard to the amount owing is not an issue to be resolved by this Court at this stage. Suffice to state that in the letter from the respondents' attorneys addressed to the applicants' attorneys on the 1st July 2009, it is admitted that the respondents are prepared to pay the outstanding balance owing for the equipment.

[11] On the 9th February 2009, the first applicant had a meeting with the respondents where he advised them (the respondents) that the instalment sale agreement was cancelled and invited the respondents to negotiate a fresh agreement in terms of which the respondents might purchase the equipment. The respondents did not revert to the applicants with any proposal after the meeting of the 9th February 2009.

[12] Subsequently, the applicants approached Prokas, who acted on behalf of Class A, with regard to the sale of the equipment originally sold by Class A to Instabrite as well as other assets sold by other creditors to Instabrite which were subject to the instalment sale agreements and were in the possession of Instabrite as at the date of liquidation.

On the 16th March 2009, Class A offered to purchase all assets of Instabrite including the equipment in the respondents' possession, which offer was

accepted by the applicants per letter dated 19th March 2009. According to the applicants, prior to the offer, Class A had duly proved its claim in the estate of Instabrite, and its offer to purchase the equipment was duly approved and accepted by all secured creditors.

[13] On the 4th June 2009, the applicants' attorneys informed the respondents about the agreement entered into with Class A regarding the sale of the equipment and demanded the restoration of the equipment to the applicants, the reason being that the respondents did not own the equipment and that their continued retention of the assets was unlawful. The request was rejected by the respondents.

[14] It is submitted by the applicants and their counsel that:

14.1. the applicants were entitled to cancel the instalment sale agreement in view of the fact that the respondents had not paid the full purchase price;

14.2. the respondents should restore the equipment to the applicants and exercise their right as concurrent creditors against the insolvent estate of Instabrite, when they can appropriately raise the defences whilst pursuing whatever claim for damages they may have against the estate of Instabrite;

14.3. Class A is a secured creditor in terms of Section 84 of the Insolvency Act No.24 of 1976 as Amended (Insolvency Act) and further that the ownership of the equipment remains vested in the applicants as liquidators of Instabrite;

[15] The respondents refused to restore the assets to the applicants on the following grounds:

15.1 The agreement is void ab initio alternatively voidable in that:

Eadie of Instabrite made a false representation that Instabrite owned the fixed assets and the equipment and also that the business did not have debts or liabilities, which warranties were incorporated in the instalment sale agreement and which misrepresentation induced the respondents to enter into the agreement with Instabrite, and which agreement they would never have entered into had the true position been disclosed to them by Eadie;

the right to claim the equipment is vested in Class A and not the applicants because Instabrite is not the owner of the equipment.

15.2 that in consequence, the fraudulent conduct of Eadie on behalf of Instabrite which rendered the agreement void ab initio or voidable at the instance of the respondents, obliged each party to return the benefits obtained in terms of the said instalment sale agreement;

15.3 that the applicants have unlawfully cancelled the agreement, this repudiating the contract without themselves tendering to repay the portion of the purchase price already paid to Instabrite by the respondents.

[16] The issues to be decided are:

whether the contract between Instabrite and the respondents is void ab initio?

whether the applicants are entitled to the restoration of the equipment?

[17] Does the fact that Instabrite is not the owner of the equipment render the instalment sale agreement between Instabrite and the respondents void ab initio?

17.1. The fact that Instabrite was not the owner of the equipment when it sold it to the respondents, does not render the instalment sale agreement between Instabrite and the respondents void ab initio. See *Fryer's (Pty) Ltd 1957 (3) SA 571 (AD)* at 581 A-B (and the authorities therein referred to), where the court held the view that "there can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased." See also *Ensor v Kader 1960 (3) SA 458 (W)*

17.2. Respondents further submit that the instalment sale agreement between Instabrite and them is null and void ab initio in view of the fact that Instabrite misrepresented to them that it owned the equipment, which representation was false and had as such breached some of the terms of the contract wherein Instabrite gave a warranty that: "AS AT EFFECTIVE DATE, the fixed assets will be the sole property of the SELLER, will have been fully paid for and will not be subject to any suspensive sale agreement, liens or rights retention."

17.3. Counsel for the applicants argued that the respondents cannot rely on any misleading representations which have not been set out in the instalment sale agreement because Clause 18.2 thereof provides that:

“No representation, warranties, promises or inducements have been given or made by the Seller to the Purchaser as set out herein.”

17.4. It is further argued on behalf of the applicants that the respondents would not be entitled to cancel the agreement on the ground of breach of warranties because they did not make an election to “either keep the contract intact or to cancel the

contract on the strength of breach of warranties.” Furthermore, that had the respondents given reasonable notice to Instabrite for the transfer of ownership, and once Instabrite was in mora to transfer ownership, the respondents would in the circumstances have been entitled to cancel the contract. Counsel relies on Christie: The Law of Contract of South Africa 3rd Edition at pages 318 et seq and 552 et seq.

17.5. A fraudulent misrepresentation, which has induced a party to enter into a contract, entitles a party to rescind the contract if it can be established that the representation relates to a matter of present or past fact. See *Feinstein v Niggli and Another* 1981 (2) SA 684 (A). In the present case, Instabrite did falsely represent to the respondents, and even went to the extent of making warranties that it owned the assets and that the business was not owing or subject to any lien, which was in fact not true.

17.6. Fraudulent misrepresentation entitles the seller to claim rescission of the contract and damages. In consequence, where the misrepresentation results in a fundamental mistake, the contract is void ab initio and the Restitutio in integrum rule applies. See *Brink v Humpries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) and *Feinstein v Niggli and Another* supra at 700F to H, where the Court held the view, per Trollop JA, that “the object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations. Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise, although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent (see Actionable Misrepresentation (supra at para 294 and note 4 thereto); *Marks Ltd v Laughton* 1920 AD 12 at 21; *Harper v Webster* 1956 (2) SA 495 (FC) at 502B-D; *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31G-32A).” See also *Germie Motors (Pty) Ltd v Ericksen* 1985 (2) SA 389 (CPD) at 393 A-G.

17.7. In *Harper v Webster* supra at 499H, it was held that a person who has been fraudulently induced to enter into a contract and seeks restitution of what he was induced to part with in the process, must himself make restitution except where circumstances do not allow restitution where for instance, the thing has been destroyed. In such a case, compensation in money can be awarded. Compare also *Ornelas v Andrew's* case and Another 1980 (1) SA 378 (W) at 387.

17.8. The respondents raised the defence of breach of warranties with a view to having the instalment sale agreement declared null and void. The respondents have repudiated the agreement and are claiming a refund of the moneys paid to Instabrite and that they will restore the equipment to the applicants only if the applicants tender payment of the money paid to Instabrite.

[18] Are the applicants entitled to the restoration of the equipment?

18.1. The question to be decided is whether respondents can be ordered to restore the equipment to the applicants without the applicants tendering payment of the money paid by the respondents in terms of the instalment sale agreement, and also whether the winding-up of Instabrite terminates the right of the respondents to recover the money paid pursuant to the repudiation of the contract of sale.

18.2. The respondents further submit that if the Court finds that the instalment sale agreement was not void ab initio by virtue of the fact that Instabrite was not the owner of the equipment, they, in the alternative elect to rescind the agreement and consequently wish to recover the money paid for the equipment before they can restore the goods to the applicants. They further submit that they would not have entered into the agreement had they known the truth about the ownership of the equipment as well as the fact that Instabrite was still owing the equipment sold.

18.3. In *Brink v Humphries & Jewel* supra at p.421 par.[2] F-H, Cloete JA held that: "The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory,

whether intentionally or not. Where such misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth".

18.4. The Companies Act 1973 (Act No. 61 of 1973) (the Old Companies Act), was amended with effect from the 1st May 2011 by the Companies Act 2008 (Act No.71 of 2008) (the New Companies Act). However, in terms of Section 224(3) the New Companies Act, the repeal of the Old Companies Act does not affect the transitional arrangements which are set out in Schedule 5 of the new Act.

18.5. Item 9 of Schedule 5 of the New Companies Act deals amongst others, with the continued application of the Old Companies Act to the winding-up and liquidation of companies. Subitem

- (1) provides that: “Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems
- (2) and (3).” It is not necessary to refer to subitems (2) and (3) since they are not relevant for the purpose of deciding this case.

18.6. Section 339 of the Old Companies Act provides for the applicability of the Law of Insolvency in the winding-up of companies in liquidation as follows:

“In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.”

18.7. Section 342(1) and (2) of the Old Companies Act provides that:

“Application of assets and costs of winding-up

In every winding-up of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding-up and, subject to the provisions of section 435(1)(b), the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum of articles otherwise provide, shall be distributed among the members according to their rights and interests in the company.

The provisions of the law relating to insolvency in respect of contributions by creditors towards any costs shall apply to every winding-up of a company.”

18.8. A liquidator has a duty to recoup assets of the insolvent company and realise the assets and apply the proceeds in satisfaction of the costs of the winding-up. The residue, if any, shall be distributed to the creditors in the order of preference as prescribed by Sections 99 to 104 of the Insolvency Act. See Section 391 of the Old Companies Act provides that:

“A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.”

18.9. Property or assets of a company in liquidation or an insolvent estate, are inclusive of a business sold or acquired “as

a going concern” which concept means a collection of corporeal and incorporeal property. See *Kerbyn 178 (Pty) v Van den Heever and Others NNO 2000 (4) SA 804 (W)* at 816 and *Cooper NO v First National Bank of SA Ltd [2004] 4 All SA 597 (A)* at p.602 par.[22].

18.10. The effect of liquidation is therefore that a concursus creditorium is established, meaning that all creditors are entitled to receive whatever dividend will ultimately be awarded to its concurrent creditors in terms of the law. Each claim must be dealt with as it existed at the time of liquidation. It will therefore be inappropriate for a liquidator to deal separately with a creditor's claim without considering the claims of other preferential creditors. See *Administrator, Natal v Magill, Grant & Nel* 1969 (1) SA 660 (AD).

18.11. Where a purchaser has been deceived into entering into a contract and ownership of the property has not passed to him, "the purchaser's claim for the purchase price is unsecured and non-preferent and falls to be satisfied out of the free residue of the estate in the manner laid down by Sections 96 to 103 of the Insolvency Act." See *Cornerlissen, NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (AD) at 187D-E.

18.12. Because of the rule of restitution in intergrum, the respondents, in terms of Common law, would be entitled to restore the equipment to Instabrite and in return Instabrite would have to reimburse or restore what it has received from the respondents. This would have the effect of the creditor losing the security afforded to him by the law. However, in terms of Section 47 of the Insolvency Act, where the property is delivered to a trustee of an insolvent estate at the request of the trustee, such security is not lost provided the creditor notifies the trustee in writing of his rights and in due course proves his claim against the estate. In the present case the respondents removed the equipment from the premises when Instabrite was already in liquidation and after having been made aware by the applicants that they were the

appointed liquidators of Instabrite. The respondents' conduct was in the circumstances, unlawful.

[19] The applicants raised a further submission that the property should be restored to Instabrite on the basis of Section 84(1) of the Insolvency Act.

19.1. In terms of this Section, property sold and delivered to a debtor prior to liquidation of a company, and where the sale is under an instalment sale transaction, such property shall be regarded, on the sequestration of the debtor's estate, as creating in favour of the creditor, a hypothec over that property which is secured in respect of the amount still due to him under the transaction. The trustee or liquidator of the debtor's insolvent estate shall, if required to do so by the creditor, deliver the property to the liquidator, and thereupon the creditor shall be deemed to be holding the property as security for his claim and the provisions of section 83 shall apply. See *A-Team Drankwinkel Bk en Ander v Botha en 'n Ander* NNO 1994 (1) SA at 1 (A) and *Potgieter NO v Daewood Heavy Industries* [2003] 1 All SA 135 (SCA) at par.[9] to [12].

19.2. Section 84(1) of the Insolvency Act creates a legal hypothec in favour of a creditor over the debtor's estate. In that way, the creditor will have a real right which is stronger than a personal right. See *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) at paragraphs [21] to [23].

19.3. Furthermore, in terms of Section 85(1) of the Insolvency Act, a hypothec in terms of Section 84(1) of the Insolvency Act confers to a creditor a preferential right against an insolvent estate. The effect of Section 84(1) read with Section 83(6) of the Insolvency Act does not restore ownership to the creditor but only creates a hypothec which confers to the creditor a preferential claim or right against an insolvent estate.

19.4. Ownership of the goods passes to the liquidator or trustee of the purchasers' insolvent estate because an owner cannot have a hypothec over his own property. See *Ukubona 2000 Electrical CC v City Power Johannesburg (Pty) Ltd* 2004 (6) SA 323 (SCA) at paras [15] to [19]. In par.[18] of this judgment Patel AJA held the view that "... the legislative intent in s84(1) was to allow only a creditor/seller who is the owner of the merx to be secured for the amount due to him which is achieved by replacing his ownership with a hypothec." Instabrite can therefor not rely on Section 84(1) as against the respondents in view of the fact that Instabrite does not own the property.

19.5. It is also important to note that Prokas, on behalf of Class A, filed a confirmatory affidavit wherein he states amongst others, that he is a sole director of Class A and further that "... to the extent it might be contended that Class A ought to have been joined as a party in these proceedings, Class A has knowledge of these proceedings, supports this application and does not seek to be joined as a party herein." It is not clear as to what the intention of Class A is with regard to its right to invoke Section 84(1) of the Insolvency Act. I must also here pause and observe that the respondents allege that they had entered into a lease agreement with Prokas of Class A in respect of the premises which fact is confirmed by the applicants and further that Prokas informed the applicants that he had negotiations with the respondents on the lease and sale of the assets with them. It would seem that Class A was aware of the sale of the equipment to the respondents. The claim of Class A against the insolvent estate of Instabrite as a preferential creditor in terms of Section 84(1) of the Insolvency Act, is not before me for adjudication. The respondents raised a disquiet about Prokas purchasing the equipment from applicants questioning the fact that if Class A was indeed the owner of the equipment and also claim that Instabrite had not paid anything towards the purchase thereof, how would Class A buy its own property from the applicants?

19.6. The conduct of Prokas and Class A raises questions about ingenuity of the contract of sale entered into between Class A and Instabrite, especially that presently Class A is being treated as a preferential creditor against the insolvent estate of Instabrite.

However, I have not been called upon to determine the status of Class A as a preferential creditor. This is an issue that has to be taken up by the respondents at an appropriate forum.

19.7. I need not deal with the other issues raised by the parties' Counsel in their submissions.

19.8. I accordingly find that the applicants were entitled to cancel the instalment sale agreement entered into between Instabrite and the respondents and further find, for the reasons mentioned above, that the continuous possession of the equipment by the respondents is unlawful. I am of the view that the costs must follow the result.

[20] The following order is made:

Order

The written instalment sale agreement dated 17 July 2008 between Instabrite (Pty) Ltd (in liquidation) and the respondents on behalf of a close corporation to be formed is declared cancelled.

The respondents are directed to disclose to the applicants' attorneys within three (3) days of this order the location of all the assets listed in Annexure "K" of the founding affidavit.

The respondents are directed to return the assets listed in the said Annexure "K" to the applicants within seven (7) days of service of this order.

Failure by the respondents to comply with paragraph 3 of this order authorises and empowers the Sheriff of the High Court to attach the assets listed in Annexure "K" and return same to the applicants.

Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

M M LEEUW

JUDGE PRESIDENT

OF THE NW HIGH COURT

APPEARANCES:

DATE OF HEARING: 28 FEBRUARY 2013

DATE OF JUDGMENT: 18 APRIL 2013

ADVOCATE FOR THE APPLICANTS: ADV PISTOR SC

ADVOCATE FOR THE RESPONDENTS: ADV MAREE

ATTORNEYS FOR THE APPLICANTS: VAN ROOYEN TLHAPI WESSELS INC.

ATTORNEYS FOR RESPONDENTS: SMIT STANTON ATTORNEYS

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