

SOUTH AFRICA / JUDGMENT

P.R v J.R (M182/2015) [2017] ZANWHC 81 (15 December 2017)

[2017] ZANWHC 81

COURT

North West High Court, Mafikeng

BEFORE

KGOELE

CASE / FILE NUMBER

M182/2015

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NUMBER: M182/2015

In

the matter between:

P
R Applicant
AND
J
R Respondent
CIVIL MATTER
KGOELE J
DATE OF HEARING: 16
November 2017
DATE OF JUDGMENT: 15
December 2017

COUNSEL FOR
APPLICANT:

Adv. Swart
COUNSEL FOR
RESPONDENT: Adv. Esterhuizen

JUDGMENT

- [1] This application emanates from a Deed of settlement entered into between the applicant and the respondent pertaining to the settlement agreement of their Divorce action.
- [2] The content of the settlement agreement and the fact that it was made an Order of the Court is not in dispute. The purpose of the application is to enforce compliance with a specific clause of the Deed of Settlement. The idea behind the agreement reached in the contentious Clause 5.1 of the Deed of Settlement was that the respondent will purchase two businesses known as Strimosas Liquor Store and Molefe's Restaurant and Tavern for the applicant to "Kick Start" a business venture with the condition that she would not require a rehabilitative maintenance Order.
- [3] Pursuant to this agreement, the applicant did, with the consent of the respondent, enter into a lease agreement in respect of each of the two businesses with the owner of the property, Rabiera Bravo CC (Rabiera), who also own the rights to the businesses. The ownership of the so called "businesses" is the contentious issue in this application as it appears that there is a dispute of fact between the parties around this issue which is the matrix of the question whether the respondent paid the purchase price or not.
- [4] The case of the applicant is to the effect that the respondent had not, up to today, paid any purchase price to the owner of the businesses being Rabiera. According to the applicant, it is that failure by the respondent as indicated above which led her to enter into a sale agreement on the 20th July 2014, to purchase the two businesses from Rabiera for the price of R700 000-00 as the initial lease agreement of the same businesses had an option to buy. The agreement of lease with the option to buy stipulated that the amount had to be paid within 10 months from the date of the signature. It is common cause that the applicant ended up securing a loan of R700 000-00 which was paid to Rabiera.
- [5] The respondent opposes the relief claimed against him on the grounds that he did comply with the terms of Clause 5.1 of the Deed of Settlement in that he duly paid the legal owner of the relevant businesses during 2010 to enable the applicant to take over the businesses and the applicant operated same as her own since 2010.
- [6] According to the version of the respondent, an agreement was reached between the respondent and the owner, one Fernandes, who allegedly operated the businesses before the applicant took over the businesses and to whom the respondent allegedly paid over an amount to cancel the existing lease agreement of the businesses which was between him (Fernandes) and Rabiera in order to enable the applicant to commence with the running of the businesses for her own account.
- [7] The respondent also contends that during 2010 he paid an amount of R450 000-00 to Fernandes to enable the applicant to take over the relevant businesses.

[8] The respondent's Counsel argued on behalf of the respondent that serious and material disputes of facts exist on the papers as to whether the respondent complied with the Deed of Settlement or not and for this reason the application stands to be dismissed,

alternatively, to be referred for the hearing of oral evidence.

[9] In the alternative he submitted that, a material dispute of fact exists on the papers regarding inter alia who the true owner of the relevant businesses was, which dispute cannot be resolved on the papers.

[10] The respondent's legal representative submitted that the factual position which should further be accepted as correct is that the applicant did take over the relevant businesses in 2010 and has been operating the businesses and receiving all the income and profits from the businesses for more than 5 years.

[11] He maintained that it is only in exceptional circumstances where the respondent's version will not be accepted, and when considering whether a respondent's version should be rejected, it is both inadvisable and inappropriate to consider the probabilities. He referred to the following cases in support of this proposition.

See: *Prinsloo N.O v Goldex 15 (Pty) Ltd And Another* 2014 (5) SA 297 (SCA); *National Scrap Metal (Cape Town) (Pty) Ltd And Another v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA);

Kernsig 17 (Edms) Bpk v ABSA Bank Bpk [2008] JOL 22877(C).

[12] He added that no exceptional circumstances exist to reject the respondent's version in this matter. Further, that if the respondent's version is accepted, it is clear that the respondent did comply with his obligations in terms of Clause 5.1 of the Deed of Settlement by negotiating and paying the legal owner of the relevant business to enable the applicant to take over the businesses and operate same for her own account since 2010.

[13] He lastly argued that the person from whom the respondent bought the businesses, Fernandes, has deposed to an affidavit confirming that he is the owner, whereas there is no confirmatory affidavit of Rabeira to confirm what the applicant said.

[14] In reply to these submissions the applicant's Counsel submitted that there is no genuine or bona fide dispute of fact and the respondent's version is so far-fetched that the Court is justified in rejecting it merely on the papers. He urged the Court to adopt a robust approach. Further, that the applicant denies any knowledge of the alleged agreement between the respondent and Fernandes pertaining to the purported cancellation of the alleged lease contract and the payment the respondent allegedly made to Fernandes.

[15] Lastly, that the respondent bore the onus of proving that he had complied with the Order of the Divorce Court, and that he has to show that he had indeed paid.

- [16] He urged this Court to carefully look at paragraph 4 and 5 of the answering affidavit of the respondent which, according to him, contradicts what Fernandes says that he is the owner of the businesses.
- [17] The contentious Clause 5.1 provides as follows:-
- “Plaintiff shall purchase the business known as Stimosa Liquor Store and Molefe’s Restaurant and Tavern, situated at 77 Ramokoka Street, Tlhabane West, Rustenburg for the defendant, which business shall become the sole and absolute property for defendant.”*
- [18] It is quite clear that there is a dispute of fact in this matter. Applicant alleges that the owner of the relevant businesses during 2010 was Rabeiro, while the respondent alleges that during 2010 the owner of the businesses was Mr Vitor Paulo Acquair Fernandes (“Fernandes”). Respondent further alleges that, Rabeiro was only the owner of the fixed property rented by the businesses as well as the movable property and liquor license utilized by the businesses to operate. The answer to this dispute will automatically resolve a further dispute that had arisen in this matter as to whether the respondent has bought the businesses or not. Put it differently, whether he complied with the Divorce Court Order.
- [19] It is trite law that a final Order in motion proceedings can only be granted if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavit justify such an Order. See: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; [1984] 2 All SA 366 (A).
- [20] It has since also been held that an applicant must accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the Court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. See: Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] ZASCA 6; [2008] 2 All SA 512 (SCA).
- [21] The provisions of the Deed of Settlement are clear and unambiguous in that the respondent consented to “Purchase” the businesses for the applicant.
- [22] A thorough reading of the respondent’s papers reveals that nowhere does the respondent make out a case that cancellation of the rental agreement between Fernandes and Rabiera was necessary. The respondent’s papers are also noticeably silent regarding the duration and content of the lease agreement between Fernandes and Rabiera. The aforesaid would have been simple had the respondent merely annexed a written agreement of lease concluded between Fernandes and Rabiera as he claims that there was such a lease agreement between the two.
- [23] In addition, the respondent does not indicate to this Court how the alleged payment for the alleged remainder of the rental agreement between Fernandes and Rabiera constitutes a sale agreement. A business can of course only be bought from the owner and the respondent does not seem to seriously and unambiguously dispute the fact that the business belongs to Rabiera and not to Fernandes. The applicant on the other hand acknowledges the

avermments by the respondent that the trading licenses as well as the equipment in the businesses belong to Rabiera.

- [24] A “purchase” in terms of the Dictionary of Legal words and Phrases, Second Edition, Volume 4 (Claasen) presupposes that; it is an agreement by which one of the contracting parties “the Seller” binds himself to the other “the Buyer” to allow the other to have the full use of a thing as owner for a definite sum of money “the Price” which the Purchaser on his own accord promises to pay the Seller. Nowhere in the respondent’s opposing papers does the respondent make out a case for him and or Fernandes being duly authorized to dispose of the business on behalf of Rabiero, neither does he say that he had the rights to dispose of the business by virtue of his ownership of the business.
- [25] From a thorough analysis of the respondents’ papers it appears that the respondent did not purchase the businesses for the applicant and he has also not done so on his own version. I am saying this because it seems that the respondent is neither sure of the exact capacity in which Fernandes was to operate the businesses as the respondent refers to Fernandes in the same affidavit as both the “owner” and “a lessee” of the businesses. Paragraph 5.4 of his answering affidavit says:-

“I negotiated with Fernandes to pay him a termination fee in order to terminate his existing lease with the owner of the premises and obtain the business for the applicant to take over the business from 1 June 2010”. [My Emphasis added].

It is clear that in this paragraph he talks about Fernandes terminating his existing lease (as a lessee) with the owner of the premises. He does not say the owner of the businesses. This is against the backdrop that he says Rabiera was only the owner of the premises not businesses.

- [26] In paragraph 5.7 he says:-

“..... Fernades still had a valid lease of the businesses for two to three years during 2010. I negotiated with Fernades and finally agreed with him that I would pay him an amount of R450 000-00 to enable the applicant to take over the businesses and terminate the current lease” [My Emphasis added]

In this paragraph, he now talks about Fernandes having a lease of the businesses, not the premises as indicated in paragraph 5.4 above. A question that remained unanswered is who was he leasing the “businesses” from?

- [27] It also appears that Fernandes himself is also not sure what he was because he also contradicted himself. In paragraph 3 of his confirmatory affidavit he says that he and his brother Alvaro were the “owners” of the “going concern” known as Stimosa Liquor Store and Molefe’s Restaurant. But paragraph 4 and 5 of the same affidavit is couched as follows:-

“The movable assets of the business as well as the liquor licenses were the property of the landlord, Rabeira Bravo CC. We so called rented the premises and the “business” from the landlord for an agreed period of time. Unfortunately I do not have a copy of the lease agreement entered into between myself and the landlord any more.” [my Emphasis added]

“Our contract to lease the abovementioned businesses was still valid during July 2010 and would have expired only in about 2 or 3 years thereafter.” [My Emphasis added]

[28] Besides contradicting themselves, it is clear that they are using the words “going concern” “business” “businesses” confusingly so without comprehending what they mean. Their factual averments are furthermore confusing, because they, at some stages, want to portray that the business was theirs whereas the movable assets of the business premises as well as the liquor license were that of Rabeira. They also talk about a contract to lease the above mentioned businesses when they are at the same time alleging that they are the owner of a going concern. Another question that remained unanswered is when did transfer pass from Rabeira to Fernandes and again from Fernandes to respondent or applicant. The papers are noticeably silent on this aspect.

[29] This predicament the respondent has created to his version, is exasperated by the fact that there is no such an agreement with Rabeira which was attached and the one Fernandes concluded with the respondent. On the other hand, if one looks at the agreement of lease and the offer to purchase which the applicant and Rabeira concluded as attached to the papers of the applicant, these words are clearly defined and bear the meaning that is usually used in business practices. According to their contracts:-

(a) “Leased premises” means the liquor store on the ground

floor of the building, and with reference to the other agreement, the restaurant shop in the building;

(b) “the business” with reference to the liquor store means the business run at the leased premises known Strimosa

Liquor store, consisting of the “goodwill” and the “moveable” “assets” listed in Annexure “A”, same averments applies to the restaurant business;

(c) In the offer to purchase agreement the word “business”

means Strimosa Liquor Store and Molefe Restaurant Collectively as presently leased and carried on by the Third Party as a going concern as at the effective date and includes the business assets;

(d) “Business assets” is also described as all assets of the

business and used in connection with the business and comprise of:-

- The business names;
- The trade assets;
- The good will;
- The liquor license.

- [30] From the above quoted definitions, and having thoroughly looked at the two agreements, it is quite clear that the seller or lesser in the two agreements who is Rabeiro, is the owner of the premises to the buildings in question including the businesses which were leased or sold as a going concern inclusive of its assets and goodwill. All these factual averments are clearly and unambiguously spelled out and there is no need for one to attach his own interpretation on these documents. In the two agreements there is no confusion as to what was rented and what was sold. The last agreement which is the offer to purchase, confirms the legal proposition that when you sell, you transfer ownership to another person. Clause 11 of this agreement, indicates that the seller will reserve ownership in the businesses and the business assets until such time as the purchase price has been paid in full.
- [31] This, also confirms that you cannot sell something that you are not the owner of. Unfortunately these agreements lent credence to the factual averments of the applicant that Rabiero was the owner of the business. I may hasten to indicate that this last agreement, which appears to have been validly concluded, is labelled "Offer to purchase agreement" and also "sale of Business Agreement". It also comprised of two parts, Part A, which is the sale of the business and Part B, which is the letting and hiring of the premises.
- [32] It therefore goes without saying that the argument by the respondent's legal representation to the effect that if there is no confirmatory affidavit of Rabiera, the version of the applicant cannot be accepted, cannot assist the respondent either because, the agreements attached serve as sufficient proof of the agreements the applicant alleged were completed between her and Rabeira. The need to attach a confirmatory affidavit from Rabiera therefore falls away.
- [33] On the other hand, the confirmatory affidavit which the respondent heavily relies upon creates a confusion as to who the owner was and what was leased to Fernandes. Both the answering affidavit and the confirmatory affidavit constituting the version of the defendants leaves many questions hanging in the air. I fully agree with the applicant's Counsel that there is no real, genuine and bona fide dispute of fact in as far as the issues of who the owner of the business is, and furthermore, whether the applicant purchased the business from the owner. Further that, the respondent himself is confusing his facts in an attempt to create a dispute of facts which dispute is clearly not there.
- [34] The submission that the version of the respondent is clearly far- fetched, is palpably implausible and consists of bald and uncredit- worthy denials to such an extent that that this Court can clearly reject it on the papers is in my view sound. Of importance is the fact that Fernandes does not in his confirmatory affidavit make an allegation that he sold the business to the respondent. The respondent and Fernandes gave a long protracted explanation of what happened between the two of them and both do not say in ordinary simple words that, "Fernandes sold the business to the respondent". The legal representation of the respondent submitted that the paragraphs in the affidavit of Fernandes if wholistically considered

means that he was the owner of the business and he only rented the premises and the license. Unfortunately this is not what has been written in these paragraphs, but his own interpretation of the content of the paragraphs.

[35] On the same breath, if one has regard to the factual averments of the respondent and Fernandes in their affidavit, what happened between them balls down to the following:- Mr Fernades was the occupier of the businesses and the business premises and has concluded a lease agreement with Rabiero. He still had to pay Rabiero a monthly rental which was still in operation for a period of 3 years at that particular time. He and the respondent paid him that amount which they call a cancellation fee. But this unfortunately boils down to the respondent paying to release Fernandes of his rights in terms of the lease for Fernandes having cancelled the lease prematurely or not continued with the lease in terms of the contract or agreement Fernandes concluded with the owner. This does not however mean that the respondent purchased the business from the owner Rabeiro. Unfortunately this Court in this matter is called upon to decide factual disputes based on what the averments of the two parties are on the papers before Court, and not an exercise of interpretation of a contract or contents of the affidavits before Court. But whatever happened between the two of them is best left for them to decide what it was. The moment one start interpreting what the contents of the paragraph means, then we engage ourselves in speculation.

[36] In my view, what happened between them seems to be clearly borne out by the letter the respondent wrote dated 29 October 2013 which was couched as follows:-

“We refer to your letter dated 30 September 2013”

We obtained our file from the archives and it is our instructions that this specific aspect has been finalized between the parties when your client started to operate a business as the current premises. Our instructions are that our client negotiated with the previous owners of the business to cancel their lease whereafter our client assisted your client in entering into a new Lease Agreement with the owners. Our client then bought stock for the business to enable your client to start her own business which she indeed started and which she has been operating for the past few years.

We have instructions to defend any action against our client.” [My own emphasis added]

[37] Unfortunately the Order of Divorce Court does not say the respondent must pay a cancellation fee in order to enable the applicant to occupy or to enter into a new lease agreement with the owner, it says the respondent should “purchase” the two businesses.

[38] The following Order is thus made.

38.1 The respondent is ordered to pay an amount of R700 000-00 to the applicant pursuant to the respondent’s obligation in terms of Clause 5.1 of the Deed of Settlement and the Court Order dated 1 November 2010 under Case No. 34/2010 within three (3) months from the date of service of this Order.

38.2 The respondent is to pay the costs of this application.

A M KGOELE

JUDGE OF THE HIGH COURT.

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