

SOUTH AFRICA / JUDGMENT

Pritchard v Mvubu and Others

(6004/2023)

[2024] ZAFSHC 50 (16 February 2024)

[2024] ZAFSHC 50

COURT

Free State High Court, Bloemfontein

BEFORE

Buys, AJ

CASE / FILE NUMBER

6004/2023

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 6004/2023

In the matter between: - BRINLEY PRITCHARD APPLICANT and ZINGISILE MVUBU FIRST RESPONDENT FREE STATE GAMBLING, LIQUOR AND TOURISM AUTHORITY SECOND RESPONDENT MCINTYRE VAN DER POST INC THIRD RESPONDENT

CORAM:

BUYS, AJ

HEARD ON: 01 FEBRUARY 2024

DELIVERED ON: 16 FEBRUARY 2024

[1] This is the court's judgment in the opposed application in terms of which the applicant seeks the following relief:

"1. It is declared that a valid sale agreement has come into existence on 17 October 2023 in respect of the First Respondent's liquor license registered in the name of ZINGISILE MVUBU under the name Panos Liquor Trading registered on the Erf 2[...], 271 Burgher Street, Philippolis, Kopanong, Xariep with Registration Number: FSG1[...].

2. The First Respondent is ordered and directed to deliver to the Applicant's attorney, within 5(Five) days of this order, the liquor license registered in the name of ZINGISILE MVUBU (under the name Panos Liquor Trading registered on the Erf 2[...], 271 Burgher Street, Philippolis, Kopanong, Xariep with Registration Number: FSG1[...]).
3. Should the First Respondent fail or refuse to deliver the liquor license (registered in the name of ZINGISILE MVUBU under the name Panos Liquor Trading registered on the Erf 2[...], 271 Burgher Street, Philippolis, Kopanong, Xariep with Registration Number: FSG1[...]), then, the Sheriff of this court is authorised and directed to take possession of the said liquor license from the First Respondent, or wherever it is found, and deliver it to the Applicant or his Attorney.
4. The First Respondent is ordered to sign within 5 (Five) days of this order, all documents to effect transfer of the liquor license in the name of the Applicant.
5. Should the First Respondent fail or refuse to sign all documents to effect transfer of the liquor license in the name of the Applicant, the registrar of this Court is authorised to sign all documents to effect transfer of the liquor license in the name of the Applicant.
6. The Third Respondent is order (sic) and directed to provide the Applicant's attorney within 5 (Five) days with its trust account banking details to effect payment of the purchase price.
7. The Second Respondent is ordered and directed not to transfer the abovementioned liquor license (registered in the name of ZINGISILE MVUBU) in the name of any third person, pending the outcome of this case.
8. The First Respondent to pay the costs of this Application.
9. Any of the remaining Respondents, opposing this application, be ordered to pay the costs jointly and severally with the First Respondent the one paying the others to be absolved, or, in such proportion as in the direction of the court."
- [2] The relief sought by the applicant premised from an alleged purchase agreement concluded between the applicant and the first respondent in terms of which the applicant allegedly purchased from the first respondent a liquor license in the name of the first respondent under the name Panos Liquor Trading, registered on the Erf 2[...], 271 Burgher Street, Philippolis, Kopanong, Xariep, with registration number: FSG1[...] ("the liquor license").
- [3] The applicant relies on two letters in support of its contention that a valid purchase agreement between the applicant and the first respondent was concluded, namely:
 - [3.1] Letter dated 16 October 2023, with specific reference to paragraph 3 thereof, wherein the first respondent, through his attorney, declined the applicant's initial offer of R10 000.00 for the liquor license and tendered a counter-offer of R30 000.00 for the purchase of the liquor license.

[3.2] Letter dated 17 October 2023, with specific reference to the portion under the heading “AD PARAGRAPH 3” wherein the applicant’s attorney, on behalf of the applicant, accepted the first respondent’s offer of R30 000.00. However, when the offer was accepted, a request was made on behalf of the applicant that the purchase price of R30 000.00 be kept in the trust account of the first respondent’s attorney until such time the first respondent “has signed all the necessary documents and transfer of ownership has been effected to” the applicant.

[4] I do not intend to deal in detail with the history preceding the alleged purchase agreement. However, for purpose of the relief sought by the applicant, I deem it important to highlight that the counter-offer by the first respondent on 16 October 2023 has its roots in settlement negotiations between the applicant and the first respondent since August 2023 regarding a void agreement of sale of various immovable properties sold to the first respondent by the applicant in August 2015. It is not in dispute that the said agreement of sale was contrary to the provisions of the Alienation of Land Act.[1]

[5] The liquor license is registered on Erf 2[...], being one of the immovable properties sold to the first respondent in August 2015. The counter-offer by the first respondent referred to supra was the result of an offer of R10 000.00 by the applicant on 27 September 2023 to purchase the liquor license from the first respondent. The offer of R10 000.00 was in response by the applicant to a rhetorical question posed on behalf of the first respondent in letter dated 22 September 2023, namely, “what is to happen with the liquor license” when the first respondent

vacates the Erf 2[...].

[6] Relying on the letters dated 16 and 17 October 2023 referred to supra, it is the applicant’s case that a valid written sale agreement was concluded with the “express, implied in alternative tacit terms” that (a) the purchase price of R30 000.00 will be paid immediately to the first respondent’s attorney’s trust account; (b) the first respondent must deliver the liquor license and sign such documents to effect transfer of the liquor license from the first respondent to the applicant; and (c) the applicant will pay the legal costs to effect transfer of the liquor license in the name of the applicant.

[7] On 18 October 2023, the first respondent responded to the applicant’s letter dated 17 October 2023 as follows:

“We have conveyed your client’s offer to purchase the liquor license to our client, however our client has decided to not proceed with the sale of the liquor license as he would rather retain the liquor license and transfer same to a new premises to enable him to continue with his business.”

[8] This response by the first respondent resulted in various correspondence being exchanged between the

attorneys of the applicant and the first respondent. I will deal with the relevant correspondence infra. The applicant is of the view that a valid agreement of sale was concluded on 17 October 2023 between the applicant and the first respondent, and the first respondent is bound to the agreement. According to the applicant, the letter dated 18 October 2023 referred to supra amounts to a repudiation by the first respondent of the agreement of sale.

[9] Over and above the two letters exchanged between the attorneys of the applicant and the respondent on 16, 17 and 18 October 2023 referred to supra, the applicant relies on a letter on behalf of the first respondent dated 19 October 2023 wherein the first respondent, according to the applicant, asked for the applicant's clemency to resile from the contract. The applicant relies specifically on the preamble paragraphs of the said letter preceding numbered paragraph 1. The following extract of the said letter needs mentioning:

"... from the outset, we wish to request that your client take into consideration that the sale of the liquor license will take away the livelihood and any possible income from our client and his family.

Our client did consider selling the license, but was subsequently able to secure a new premises for his business, which is the only option our client now has to put food on the table for his family, after your client has insisted on him vacating the current premises.

It is therefore requested that your client take some compassion in our client's predicament and that he refrains from eliminating any and all means which our client has to sustain any form of income." (emphasis added)

[10] According to the applicant, the above extracts clearly shows that the first respondent had a change of mind after the counter-offer was accepted by the applicant, and the intention of the letter dated 19 October 2023 was an attempt by the first respondent to raise a dispute of fact after receipt of the letter on behalf of applicant, dated 18 October 2023, in reply to the first respondent's rejection letter referred to supra.

[11] During argument, Mr Grewar, on behalf of the applicant repeated the applicant's case referred to supra, and submitted specifically that:

[11.1] The counter-offer made by the respondent in letter dated 16 October 2023 was accepted unconditionally by the applicant in letter dated 17 October 2023. Consequently a written offer and acceptance were made between the applicant and the first respondent, and as a result thereof, a legal binding contract came into existence.

[11.2] The first respondent fabricated a factual dispute, and reliance is placed on the pre-amble paragraphs of the first respondent's letter dated 19 October 2023 referred to supra. Mr Grewar also referred to the second last paragraph of the said letter[2] as an indication of the first respondent's alleged change of mind and attempt to create a factual dispute. Mr Grewar, when referring to the extracts of letter 19 October 2023 referred to supra, submitted that the said paragraphs "reeks" of the first respondent's acknowledgement that there was an agreement between the applicant and the first respondent.

[11.3] The applicant did not make a counter-offer in his letter dated 17 October 2023, but merely “requested” the first respondent to pay the purchase price into the trust account of the first respondent’s attorney pending the transfer of the liquor license into the name of the applicant. Mr Grewar submitted that this “request” could have been rejected or accepted by the applicant, but it had no effect on the applicant’s acceptance of the counter-offer made by the first respondent in letter dated 16 October 2023.

[12] In opposition of the relief sought by the applicant, the first respondent relies on the following grounds:

[12.1] The relief which the applicant moves for is not capable of being granted in motion proceedings and stands to be dismissed because a material bona fide factual dispute exists between the applicant and the first respondent, which the applicant was aware of and foresaw prior to lodging this application.

[12.2] It is denied that an agreement was concluded between the applicant and the first respondent, and consequently is the applicant not entitled to the relief sought in the application.

[13] In support of the first respondent’s above opposition, the first respondent relies on the following:

[13.1] The counter proposal of 16 October 2023 was unconditional in respect of payment of the purchase price and did not record that the purchase price would only be payable to the first respondent in the event the first respondent complied with alternate payment terms which the applicant could unilaterally impose on the first respondent.

[13.2] The applicant was not prepared to accept the unconditional terms which the first respondent had proposed. However on 17 October 2023, the applicant confirmed the purchase price of R30 000.00 for the liquor license, but subject thereto that the purchase price be kept in trust by the first respondent’s attorney and it would only be payable to the first respondent once the first respondent have signed all the necessary documents and transfer of ownership has been effected to the applicant.

[13.3] The decision by the first respondent not to accept the applicant’s counter-offer, as contained in the letter dated 17 October 2023, was the result of the first respondent’s mindfulness of the fact that the transfer of the liquor license must be approved by the second respondent and that such process could take months to complete. Furthermore, the transfer of the liquor license could even be denied by the second respondent. The first respondent was not prepared to wait for payment for an extended period of time and ran the risk of the sale not transpiring due to the second respondent’s refusal to approve the transfer. This decision resulted in the rejection letter dated 18 October 2023 on behalf of the first respondent referred to supra.

[13.4] In response to the applicant's threats in letter dated 18 October 2023, namely, to proceed with an "appropriate application" should the first respondent fail or refuse to deliver the liquor license, the first respondent in letter dated 19 October 2023 foreshadowed a factual dispute and warned the applicant that application proceedings were not appropriate.

[13.5] The first respondent in letter 19 October 2023 supra not only denies that consensus was reached on the payment terms, but furthermore held that the payment terms countered on behalf of the applicant in letter dated 17 October 2023 is a conditional term of the "supposed sale agreement" and forms "part and parcel of the essentialia of such an attend agreement", and the first respondent did not agree to such a term.

[13.6] Another aspect on which the applicant and the first respondent did not have consensus on was whether the applicant would accept liability for the transfer of the costs occasioned by the transfer of the liquor license, should the sale proceed. In letter 19 October 2023 supra, it was specifically held on behalf of the first respondent that the applicant's attorney stated to the attorney of the first

respondent that instructions regarding payment of the costs of the transfer of the liquor license will have to be obtained from the applicant. It is however denied by the applicant in a follow up letter dated 19 October 2023 that the applicant's attorney

indicated that he first had to obtain instructions from the applicant about payment of the transfer costs of the liquor license.

[14] According to Mr van der Merwe, on behalf of the first respondent, the first respondent's opposition is based on two grounds, namely:

[14.1] A material and bona fide factual dispute exists between the applicant and the first respondent, which the applicant was aware of and foresaw prior to the bringing of the application, and for this reason alone, the application should be dismissed with costs.

[14.2] No agreement was concluded between the applicant and the first respondent.

[15] In dealing with the second ground, it was submitted on behalf of the first respondent, with reference to various case law, that:

[15.1] For a contract to have come into existence pursuant to an offer, such offer must have been accepted clearly and unambiguously.

[15.2] The offer should correspond with the terms set out in the offer for the acceptance of an offer to be effective and to lead to the conclusion of a contract.

[15.3] Anything more or less than an unqualified acceptance of the entire offer amounts to a counter-offer and constitutes a rejection of the original offer.

[15.4] With reference to Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office[3] (“Command Protection”) Mr van der Merwe submitted that the conditional acceptance of an offer amounts to a rejection of the offer and not the conclusion of a contract, but rather a counter-offer.

[15.5] Mr van der Merwe also referred me to the matter of Rockbreaker and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd[4] (“Rockbreaker”) where the Supreme Court of Appeal held that if a manuscript insertion embodied a material alteration to the contractual terms and thus constituted a counter-offer that was never accepted in writing, then the contract would be unenforceable. Mr van der Merwe further submitted that the applicant sought to alter the material terms of the first respondent’s counter-offer by adding conditions that the purchase price was to be kept in trust and only paid to the first respondent if the first respondent has signed all required transfer documents and when the transfer of the liquor license eventuates. This condition added by the applicant aims to protect the applicant from loss in the event that the transfer of the liquor license did not materialise.

[16] Mr Grewar submitted during argument that the case law and relevant dictum referred to supra are distinguishable from the facts of the present application. However, no clear submissions have been made indicating how the facts of this application are distinguishable from the said case law. I am in agreement with the principles referred to in the Command Protection and Rockbreaker – matters, and consequently find the principles set out therein to be equally applicable to the facts of this application.

[17] In motion proceedings, the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial.[5]

[18] In determining the application and the evidence presented in the affidavits, a final order will only be granted on notice of motion if the facts, as stated by a respondent, together with the facts alleged by an applicant, that are admitted by the respondent, justify such order.[6]

[19] As a general rule, decisions of fact cannot properly be founded on a consideration of probabilities, unless the court is satisfied that there is no real genuine dispute on the facts in question, or that one party’s allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits.[7] Mr van der Merwe referred me to Fakie NO v CCII Systems (Pty) Ltd[8] in support of his submission that the following dictum stands to be applied in this instance where the first respondent version is supported by aliunde evidence:

“[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.” (emphasis added)

[20] The first respondent denies that a valid agreement came into existence on 17 October 2023 when his unconditional counter-offer of R30 000.00 for the liquor license was accepted by the applicant. The basis for this denial, according to the first respondent, is the conditional acceptance by the applicant of the first respondent's counter-offer, namely for the purchase price to be held in the trust account of first respondent's attorney pending the transfer of the liquor license to the applicant. This conditional acceptance by the applicant, according to the first respondent, amounts to a rejection of the first respondent's counter-offer and not a conclusion of a contract, but rather a counter-offer made by the applicant.[9]

[21] The first respondent's version is supported by the evidence presented in both the founding affidavit and opposing affidavit, and in applying the well-known and established Plascon-Evans rule referred to supra, I cannot find the first respondent's version referred to supra to be fictitious or so far-fetched and clearly untenable to be rejected on the papers alone. With reference to letter dated 19 October 2023 supra, nothing suggests in the preamble thereof that the first respondent acknowledged the existence of a valid agreement. The said portions

referred to by the applicant should not be read and interpreted in isolation, but it should be read and interpreted in context and against what is contained in the letter as a whole. It is evident from the said letter, when considered and interpreted holistically,

that the first respondent not only disputed the validity of the alleged agreement of sale, but also denied that the parties have

reached consensus on the material terms of the alleged agreement.

[22] The first respondent as early as 19 October 2023 forewarned the applicant in writing about the factual dispute insofar as to the conclusion of a valid agreement between the applicant and the first respondent, but regardless of this, the applicant persisted to move this application.

[23] I cannot find on a consideration of probabilities, based on the first respondent's denial, whether a valid agreement between the applicant and the first respondent was concluded. In determining the application and the evidence presented in the affidavits, a foreseeable real and genuine dispute of facts exists, and, for this reason alone, the application should be dismissed. I am furthermore of the view that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits before me.

[24] Accordingly I make the following order:

The application is dismissed with costs.

JJ BUYS, AJ

On behalf of the Applicant: Adv. D.M. Grewar HJ Booysen Attorneys In Bloemfontein
On behalf of the First Respondent: Adv. R. van der Merwe McIntyre van der Post Law Firm Bloemfontein

[1]

Act 68 of 1981.

[2]

“We hope that your client will consider departing from his intent of legal action. If anything, for the sake of the reasons submitted in the first few paragraphs of this letter...”

[2]

“We hope that your client will consider departing from his intent of legal action. If anything,
for the sake of the reasons submitted in the first few paragraphs of this letter...”

[3]

2013

(2) SA 133 (SCA).

[4]

2010

(2) SA 400 (SCA) at page 404F-H.

[5]

Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469C-E and National Credit Regulator v Lewis Stores (Pty) Ltd 2020 (2) SA 390 (SCA) at par 20.

[5]

Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469C-E and National Credit Regulator v Lewis Stores (Pty) Ltd 2020 (2) SA 390 (SCA) at par 20.

[6]

Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 and Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I.

[6]

Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 and Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-I.

[7]

Cape Town City v South Africa National Roads Agency Ltd 2015 (6) SA 535 (WCC) at 608F-I; Administrator, Transvaal v Theletsane

[1990] ZASCA 156; 1991

(2) SA 192 (A) at 197A-B; Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd supra at 634H-635C; Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162 and National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290F.

[8]

[2006] ZASCA 52; 2006

(4) SA 326 (SCA) at para [56].

[9]

See Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office supra and Rockbreaker and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd supra.

[9]

See Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office supra and Rockbreaker and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd supra.

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