

SOUTH AFRICA / JUDGMENT

Quatro Security Services (Pty) Ltd and Others v De Marionette Centre Investments (Pty) Ltd and Others (018984/2024) [2024] ZAGPPHC 1272 (27 November 2024)

[2024] ZAGPPHC 1272

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

018984/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 018984/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 27 November 2024

Signature:

In

the matter between:

QUATRO
SECURITY SERVICES (PTY) LTD
First Applicant
(Registration
No. 2012/107563/07)
QUATRO
PROPERTY CARE (PTY) LTD
Second Applicant (Registration No. 2017/532905/07)
QUATRO
CLEANING SERVICES (PTY) LTD
Third Applicant
(Registration
No. 2012/176420/07)
QUATRO
HORTICULTURAL SERVICES (PTY) LTD
Fourth Applicant
(Registration
No. 2015/226303/07)
And
DE
MARIONETTE CENTRE INVESTMENTS (PTY) LTD
First
Respondent
(Registration
No. 2005/037870/07)
FLORA
CENTRE INVESTMENTS (PTY) LTD
Second Respondent
(Registration
No. 2004/030198/07)
RANGEVIEW
INVESTMENTS (PTY) LTD
Third Respondent
(Registration
No. 2005/037494/07)
TARENTAAL
CENTRE INVESTMENTS (PTY) LTD
Fourth Respondent
(Registration
No. 2005/000028/07)
WATERGLEN
INVESTMENTS (PTY) LTD
Fifth Respondent
(Registration
No. 2005/000076/07)
THE
VILLAGE MALL INVESTMENTS (PTY) LTD
Sixth Respondent
(Registration
No. 2004/030240/07)
WITBANK

HIGHVELD INVESTMENTS (PTY) LTD
Seventh
Respondent
(Registration
No. 2004/013979/07)
CARLETONVILLE
INVESTMENTS (PTY) LTD
Eighth Respondent
(Registration
No. 2005/037661/07)
LIBERTY
MALL INVESTMENTS (PTY) LTD
Ninth Respondent
(Registration
No. 2005/039152/07)
AMBER
SUNRISE PROPERTIES 95 (PTY) LTD
Tenth Respondent
(Registration
No. 2007/021903/07)
BORN
FREE INVESTMENTS 552 (PTY) LTD
Eleventh Respondent
(Registration
No. 2006/011303/07)
PLANET
WAVES 120 (PTY) LTD
Twelfth
Respondent
(Registration
No. 2005/039695/07)

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] The applicants referred to herein collectively and alternatively as “the Quatro Group of companies”, are before court seeking a money judgment in their favour against the respondents, which

judgment

is to be granted jointly and severally, the one paying the others to be absolved, in the following terms:

1.1 Payment of the capital amount of R7 406 703.26 (SEVEN MILLION FOUR HUNDRED AND SIX THOUSAND SEVEN HUNDRED AND THREE RAND AND TWENTY-SIX CENTS);

1.2 Interest on the aforementioned amount calculated at mora from the 1st of March 2024 until final payment.

[2] The application is opposed by the respondents who will be alternatively referred to herein collectively as “the Nova Group of companies”.

B.

BACKGROUND

[3] On 18 July 2023 the parties entered into and concluded a second written Acknowledgement of Debt and undertaking to pay. This second Acknowledgement of Debt and undertaking to pay together with a cession agreement[1] were made an order of Court.

[4] The respondents alleged that this acknowledgement of debt contain certain tacit terms, alternatively they state that the agreement ought to be rectified because it fails to reflect correctly the common intention of the parties as it relates to the last payment which the respondents were obliged to make in terms of the settlement.

[5] The consolidated debt amounted to some R12 million. The respondents complied with the terms of the settlement and effected monthly payments of R6 million. The outstanding payment is R6 million odd Rand plus R400 000.00 for the applicants’ legal costs. This is the outstanding contentious payment in terms of the agreement. This amount was payable on 15 January 2024.

[6] The respondents also furnished security for the fulfilment of the obligations, in the sense that the respondents ceded and transferred to the applicants the right, title and interest in and to the rights which Liberty Mall Investment (Pty) Ltd, registration number 2005/039152/07 ("Liberty Mall" alternatively “Amogela Mall”) (which is the Ninth Respondent in this application) has against the purchaser of its property, namely a shopping mall situated in Welkom in the Free State province.

[7] Liberty Mall is registered in the name of an entity called Mystic Blue Trading 259 (Pty) Ltd. Mystic Blue Trading itself is not before court.

[8] The agreement furthermore provided that should the respondents fail to make payment, the applicants shall be entitled to rely upon an acceleration clause, and the full outstanding amount shall immediately become due and payable, and the applicant shall also be entitled to foreclose on the bond ceded.

[9] Unbeknown to the applicants, a creditor of Mystic Blue Trading had already launched an application for the winding up of Mystic Blue Trading a year or so before the conclusion of the agreement.

- [10] Mr Cornelius Fourie Myburgh is the director of the respondent entities. He was described by Mr Van der Merwe SC as the spirit behind the respondents. He has deposed to the respondents' answering affidavits.
- [11] The applicants suspect that Mr Myburgh was well aware of the pending application for winding up when he lured the applicants into a false sense of security, by signing the acknowledgement of debt, and without mentioning a word that there is an application for winding up on its way. The application for liquidation was issued on 1 April 2022 and the settlement agreement was only concluded in July 2023.
- [12] This application was precipitated by the Nova Group's non-payment of the final lump sum amount which in terms of the settlement agreement fell due on 15 January 2024.

C. THE ISSUES

- [13] Faced with demand for payment, the Nova Group raised two points, namely:

13.1 It is alleged that the settlement agreement should be rectified, alternatively that certain tacit terms should be read into the settlement agreement. Based on what is alleged in the answering affidavit, the rectification and/or the tacit terms will have the effect that the Quatro Group of companies will no longer be able to claim payment of the debt owed by the Nova Group of companies; and

13.2 It is alleged that the Quatro Group of companies prematurely instituted the present application. This allegation is in essence based on an allegation that the written demand was only served on the Nova Group of companies thirteen days prior to the launching of the present application. In making this statement the Nova Group of companies have ignored the fact that representative of the Nova Group of companies (also the deponent to the answering affidavit) timeously received the demand.

- [14] The Nova Group thus bears the onus to prove the alleged rectification that it relies on.
- [15] The Nova Group contend that as respondents they are not indebted to the applicants in terms of the settlement agreement as rectified; alternatively, by virtue of the tacit terms of the settlement agreement.

D. DISCUSSION

- [16] Moreover, the respondents continue and allege that the applicants' application was prematurely instituted prior to a cause of action having been completed. On this basis alone, the applicants' application must fail. The outcome of this complaint rests with the outcome of the rectification defence.

- [17] Mr Hollander submitted on behalf of the respondents that the applicants are effectively asking this court to reject the respondents' version on paper and should therefore have made an election to refer the matter to oral evidence or trial. Since the applicants have not made such an election, they have forgone their opportunity and the respondents' version should be accepted.
- [18] The respondents' case on rectification of the agreement rests on imputing into the agreement what they call tacit terms which the parties really intended was that the bulk payment should be paid by 15 January 2024 conditional upon a sale agreement in respect of the Liberty Mall where Liberty, the 9th respondent, had a mortgage bond and ceded that bond to the applicants, that property had to have been sold by the 15th of January or at any other indeterminate time and the sale proceeds, so the respondent say, are required in order to enable them to make that bulk outstanding payment. The difficulty with this proposition is that the disposal of this property is no longer going to be easy, regard being had of the fact that Mystic Blue the owner of the property has been liquidated.
- [19] It begs the question why the applicants would abandon the opportunity they had to proceed with the winding-up applications and procure execution, only to end up in an uncertain situation that is suggested by the respondents.
- [20] The settlement agreement itself states that:
- "2.5 The acknowledgement of debt is made unconditional and by entering into this Acknowledgement Nova waives and/or abandons any defences they may have towards their indebtedness to Quatro." [2] [emphasis provided].
- [21] Mr Van der Merwe SC submitted for the applicant that there is no dispute between the parties that the agreement has a non-variation clause [3] which further makes it unlikely that a rectification could have been entertained by the parties in the manner alleged by the respondents. Clause 13.1 provides as follows:
- "13.1 No additions to, alterations, variations or cancellation hereof shall be of any force or effect, unless reduced to writing and signed by the parties in writing."*
- [22] In SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere [4] the Appellate Division confirmed the enforceability of non-variation clauses amidst purported oral amendment. This decision has received constitutional approval by the Supreme Court of Appeal in Brisley v Drotosky [5] and the Constitutional Court nod in Barkhuizen v Napier. [6]
- [23] It is a long-established principle of our law that the privity and sanctity of a contract should prevail and should be enforced by the courts. [7]
- [24] A party seeking rectification must do so on the clearest evidence possible and make out a proper strong case for such rectification.

- [25] To succeed in proving the existence of rectification, it was necessary for the respondents to make primary fact allegations in its answering affidavit to sustain the rectification. It is trite that in motion proceedings the affidavits should contain the essential averments necessary to sustain a cause of action (or a defence) and the evidence in support thereof. The Nova Group of companies failed to do so. It is simply not sufficient, in dealing with rectification, to make allegations regarding the intention of one of the contracting parties only. It was necessary for the Nova Group of companies to present evidence in the answering affidavit regarding the common intention of the parties i.e. that both the Quatro Group of companies and the Nova Group of companies had the same intention.[8]
- [26] Mr Myburgh alleges that Mr Lou Jansen van Rensburg, the applicants' attorney, knew that Liberty Mall was selling the Amogela Mall and that he (Myburgh) had considered and signed the settlement agreement under extreme pressure and haste and on the incorrect premise that the settlement accorded with his and Van Rensburg's discussions.
- [27] What is clear from Mr Myburgh's answering affidavit[9] and the correspondence referred to above, is that the parties were negotiating on a without prejudice basis,[10] which negotiations resulted in the signing of the agreement.
- [28] It is common cause that the respondents complied with the agreement up to the payment of 15 December 2023, only when the 15 January 2024 final lump sum fell due to be paid that the issue of rectification is brought up.
- [29] Clause 3.1.8 of the agreement has all along been uncontentious. If the parties to the agreement had at any stage negotiated and became ad idem as to the imposition of any conditions as to its fulfilment, same could have been incorporated therein at that point. This points out that the need for the rectification of this agreement on only this crucial point is a contrivance by the respondents.
- [30] The respondents' answering affidavit does not establish that the true intention of the parties as it existed at the time when the agreement was reduced to writing was to attach any condition to the final lump sum payment.[11]
- [31] The answering affidavit also does not set out any mistake in drafting the agreement and what such mistake was and on whose part, it arose and if it was an error common to the parties. [12]
- [32] As regards the respondents' contention that the applicant should have made an election to have the application referred for oral evidence or to trial, the approach by the courts are established by now. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[13] it was held that where no real dispute exists, there is no reason for incurring the delay and expense involved in a trial action: motion proceedings in such a case are generally recognised as permissible.

E.

CONCLUSION

[33] From a conspectus of the papers and a consideration of the submissions, the alleged disputes are not real, and the functioning of the court cannot be hamstrung and circumvented by this most simple and blatant stratagem.[14]

[34] Accordingly, I find that the respondents have breached the settlement agreement between the parties.

[35] The following order is made:

Judgement

is granted in favour of the applicants, jointly, against the respondents, jointly and severally, the one paying the other(s) to be absolved, in the following terms:

- (i) Payment of the capital amount of R7 406 703.26 (SEVEN MILLION FOUR HUNDRED AND SIX THOUSAND SEVEN HUNDRED AND THREE RAND AND TWENTY-SIX CENTS);
- (ii) Interest on the aforementioned amount calculated at mora from the 1st of March 2024 until final payment.

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

including costs of two counsel where so employed.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 14/10/2024

Date of Judgment: 27 November 2024

On behalf of the Applicants: Adv. MP Van der Merwe SC

With him: Adv J Eastes

(Heads of Argument prepared by: Adv APJ Els SC)

Instructed by: Jansen van Rensburg & Partners

E-mail: lou@jvrandpartners.co.za / jana@jvrandpartners.co.za

On behalf of the Defendants: Adv. L Hollander

Duly instructed by: Faber Goertz Ellis Austen Inc, Bryanston

e-mail: diaan@fgea.co.za / nicholas@fgea.co.za

c/o Friedland Hart Solomon & Nicholson; Pretoria

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[1] See Clause 2.3 and 2.3.1 of the Acknowledgement of Debt and Undertaking to Pay.

[2] Clause 2.5 of the Acknowledgement of debt and undertaking to pay.

[3] Clause 13 of agreement.

[4] 1964 (4) SA 760 (A).

[5] 2002 (4) SA 1 (SCA).

[6]

[2007] ZACC 5; 2007 (5) SA 323 (CC)>

[7] Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others 2020 (5) SA 247 (CC).

[8] See Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999

(2) SA 279 (W) at 323G.

[9] Answering Affidavit paras 31-70.

[10] See CM13 last paragraph, CM14 documents.

[11] Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd [2007] 3 All SA 18 (SCA) (20 March 2007)

[12] Ibid, Propfocus v Wenhandel.

[13] 1949 (3) SA 1155 (T).

[14] See Soffiantini v Mould 1956 (4) SA 150 (E).

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