

SOUTH AFRICA / JUDGMENT

Rossouw NO and Others v Leeuwenhoek Boerdery (EDMS) BPK and Others (2627/2011) [2011] ZAWCHC 566 (4 November 2011)

[2011] ZAWCHC 566

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman

CASE / FILE NUMBER

2627/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 2627/2011

In the matter between:

Willem Daniel Rossouw N.O.First Applicant

Gabriel Petrus Rossouw N.O.Second Applicant

Ewald Lindeman N.O.Third Applicant

and

Leeuwenhoek Boerdery (EDMS) BPKFirst Respondent

Daniel Lamprecht Van ZylSecond Respondent

Christine ImmelmanThird Respondent

JUDGMENT DELIVERED ON 4 NOVEMBER 2011

Baartman,J

- [1] On 4 February 2011 under case number 27475/2010 (the eviction application), I granted an eviction order evicting the Gawie Rossouw Trust (the Trust) from the farm of Leeuwenhoek Boerdery (Edms) Bpk (the first respondent) and certain ancillary relief. It was common cause in the eviction application that the first respondent was the owner of the farm and that the Trust had farmed the land in terms of a rental agreement but that the Trust had defaulted on its rental obligations, which in turn had resulted in the cancellation of the

agreement and eventually the eviction order. In this application, the Trust sought the setting aside of that order on the basis of fraud. I deal with the detail of the alleged fraud below.

NATURE OF THE ALLEGED FRAUD Allegations in the eviction application relevant to these proceedings

- [1] On 4 February 2011 under case number 27475/2010 (the eviction application), I granted an eviction order evicting the Gawie Rossouw Trust (the Trust) from the farm of Leeuwenhoek Boerdery (Edms) Bpk (the first respondent) and certain ancillary relief. It was common cause in the eviction application that the first respondent was the owner of the farm and that the Trust had farmed the land in terms of a rental agreement but that the Trust had defaulted on its rental obligations, which in turn had resulted in the cancellation of the agreement and eventually the eviction order. In this application, the Trust sought the setting aside of that order on the basis of fraud. I deal with the detail of the alleged fraud below.

NATURE OF THE ALLEGED FRAUD

Allegations in the eviction application relevant to these proceedings

- [2] In the eviction application, Daniel Lamprecht Van Zyi (the second respondent), a director of the first respondent, alleged that he had been authorised by the first respondent's directors to institute those proceedings. The second respondent alleged that the first respondent had two directors, Christine Immelman (the third respondent) and himself. In its opposition to the eviction application, the Trust alleged that the first respondent had 3 directors, the 2 aforementioned directors and Dr Macgregor (Dr Macgregor), a representative of the first respondent's minority shareholder. The records of the registrar of companies (the CIPRO records) confirmed the Trust's allegation. It was further common cause that Dr Macgregor had not been a party to the decision either to cancel the rental agreement or to institute the eviction application.
- [3] The Trust, in its opposition to the eviction application, alleged that on 14 January 2011, Dr Macgregor had confirmed the correctness of the CIPRO records to its attorney, Mr De Villiers (De Villiers). The Trust further alleged that Dr Macgregor had informed De Villiers that he was not opposed to the Trust continuing its occupation of the farm provided it honoured its rental obligations. [4] In response to the challenge, the respondents denied that Dr Macgregor was a director of the first respondent, instead they

alleged the following:

- (a) At a meeting held in 2005, Dr Macgregor had not been reelected; instead only the second and third respondents had been elected as directors of the first respondent.

- (b) The CIPRO records had not been corrected due to an administrative error and Dr Macgregor had not participated in the administration of the first respondent since the 2005 meeting. The Trust, however, alleged that that meeting had been held in 2007 and not in 2005, The respondents conceded stating that they had been in the bona fide although mistaken belief that the meeting had been held in 2005. I, for purposes of this judgment, will accept that reference to the 2005 meeting is reference instead to the 2007 meeting.
- (c) The third respondent, attested to an affidavit in which she alleged that on 20 January 2011, she had met Dr Macgregor who informed her that he did not consider himself a director of the first respondent because he had not been reelected at the meeting referred to above. According to the third respondent, Dr Macgregor offered to provide her with a copy of the minutes of the meeting as proof that he was no longer a director of the first respondent.
- (d) The third respondent further indicated that Dr Macgregor denied that he had told De Villiers that he had been disposed towards the Trust continuing its occupation of the farm provided that it honoured its rental obligations and that he would rectify the misstatement.
- [5] It was common cause, that at the times relevant to the eviction application that Dr Macgregor and the second respondent were embroiled in litigation. Both parties cited that pending litigation as the cause for Dr Macgregor's unwillingness to attest to an affidavit in the eviction application. Hearsay evidence
- [6] Both parties relied on hearsay evidence from Dr Macgregor in the eviction application. In granting the eviction order, I accepted the hearsay evidence proffered by the respondents that on 20 January 2011 Dr Macgregor indicated to the third respondent that he did not consider himself a director of the first respondent because he had not been reelected at the meeting referred to above. It followed that the second respondent was authorised to have instituted the eviction application. Macgregor denied
- [7] In this application, the applicants have denied that Dr Macgregor told the third respondent that he no longer considered himself a director as alleged by her. On 4 May 2011, I referred that narrow dispute to oral evidence. At the hearing, Dr Macgregor was a single witness for the Trust and the second and third respondents testified on behalf of the respondents. THE APPLICABLE LEGAL PRINCIPLES
- [8] In terms of the Common Law, a judgment may be set aside on the grounds of fraud. It is clear, however; that a final order should not be lightly set aside. (See *Swart v Wessels* 1924 OPD 187) It is so that the onus is on the Trust to prove that the respondents:
 - (a) were "privy to the fraud";
 - (b) placed incorrect evidence before court;
 - (c) did so "fraudulently and with intention to mislead"

- (d) presented facts to the court that diverged from the true facts to such an extent that the court, had it known the true facts, would have given a different judgment. (See Erasmus Superior Court Practice at B1 307 B1 308) THE SINGLE WITNESS
- [9] The Trust relied on Dr Macgregor's evidence in support of its version of the conversation between him and the third respondent. Advocate Gerber, who appeared for the respondents, submitted that as a single witness, Dr Macgregor's evidence had to be: "...credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth". He relied on the decision of *Hattingh v Roux N.O. and others* 2011 (5) SA 135 (WCC) for that proposition. I agree, i, for the reasons set out below, am of the view that Dr Macgregor's evidence did not meet that test:
- (a) Advocate Combrink, the Trust's counsel, conceded that: "Macgregor ... dit word toegegee dat hy homself van tyd tot tyd weerspreek het, maar word aan die hand gedoen dat dit was ten aansien van minder relevante aspekte was, wat nie met die kernvraagstukke in die saak verband hou nie"
- (b) In my view, Dr Macgregor did contradict himself on aspects relevant to the dispute and which affect his credibility. Dr Macgregor testified that during his conversation with the third respondent on 21 January 2011, there was no dispute regarding his status as director. In cross examination, he said that they had words "woorde gehad" regarding his status. When he was confronted with the contradiction, the witness became argumentative.
- (c) Dr Macgregor said that he had offered to provide the third respondent with a copy of the minutes of the 2007 meeting because they would prove that he was still a director. It is so that the minutes, annexed to his affidavit, were kept by Dr Macgregor's wife and prepared by his attorney. The following appear from the minutes: "Verkiesing en aanstelling van direkteure van Leeuwenhoek Boerdery (Edms) Bpk. Aangesien dr Macgregor nie betrokke is by Leeuwenhoek Boerdery nie, versoek mnr D van Zyl, namens Kolskoot Befeggings, met 'n 92.5%aandeelhouding dat dr L Macgregor nie meer as 'n direkteur dien nie. Dr L Macgregor stem nie hiermee saam nie. Die nuwe direkteure na stemming vir heraansteiling is: D L van Zyi en Christine Immelman."
- (d) Dr Macgregor's explanation for his belief that he was still a director in view of the minutes was incomprehensible. Initially he said that no voting had taken place; however, when pressed in cross examination, he said that the voting had been irregular because it had not been done through ballot.
- (e) Dr Macgregor said that he had a claim, a loan account, against the first respondent, which claim he could apparently only enforce in his capacity as director of the first respondent. Therefore it was important to him that he remained a director. Dr Macgregor was unable to give an intelligible explanation for his belief. I accept that although Dr Macgregor was not legally trained, he did have considerable experience with legal entities:

- (i) Since 2000 he had been a director of the first respondent; (ii) Prior to that, for a number of years, he had farmed in a “vennootskap” partnership. (iii) In addition, he was a partner in a medical practice.
- (f) Suffice it to say that Dr Macgregor’s evidence on this aspect was unsatisfactory.
- (g) As indicated above, Dr Macgregor undertook to provide the third respondent with a copy of the minutes. He testified that he had in an attempt to honour his undertaking requested his attorney to provide the respondents with a copy of the minutes and proof that it had previously been sent to them. In cross-examination, it transpired that Dr Macgregor, when he gave the undertaking, had had a copy of the minutes to hand in his brief case. It was also common cause that the respondents were under pressure because their replying papers in which they had to deal with the challenge to the second respondent’s authority were due to be filed on 26 January 2011.
- (h) Therefore, the third respondent’s sole purpose for meeting Dr Macgregor had been to solicit, at all costs, his assistance in meeting the challenge to the second respondent’s authority to have cancelled the lease agreement and institute the eviction proceedings. The third respondent attempted:
 - (i) to obtain proof from Dr Macgregor that he was no longer a director of the first respondent; it is clear that a copy of the minutes would have achieved that goal; (ii) alternatively, to convince Dr Macgregor to ratify, in his capacity as director, the decisions relevant to the eviction application. As indicated above, the respondents were determined to ward off the challenge at all costs.
 - (i) In light of the factors that were common cause between the third respondent and Dr Macgregor at that meeting, his explanation for not providing her with a copy of the minutes at the time is incomprehensible. The respondents urgently needed what Dr Macgregor had in his brief case and he understood it at the time.
 - (j) As indicated in paragraph 3 above, the Trust alleged that Dr Macgregor had informed its attorney, Mr De Villiers, that he was disposed towards the Trust’s continued occupation of the farm should the Trust meet its rental obligations. Dr Macgregor denied that he had given De Villiers that indication. In cross examination, Dr Macgregor confirmed that he had discussed that aspect with the third respondent and that he had undertaken to rectify the matter with De Villiers. This evidence contradicted his evidence in chief. Dr Macgregor did not contact De Villiers to rectify the position and he was unable to explain his failure.
- [10] In my view, the discrepancies in Dr Macgregor’s evidence are relevant to a determination of this matter. His evidence did not meet the test referred to above. THE RESPONDENTS’
VERSION

- [11] The third respondent confirmed that the purpose of her meeting with Dr Macgregor had been as set out in paragraph (h) above. She said that Dr Macgregor had indicated that he had not considered himself a director after the 2007 meeting. Dr Macgregor had undertaken to provide her with a copy of the minutes so that in the eviction proceedings, the respondents could prove that he was not a director of the first respondent. In my view, her version is more probable in view of the following:
- (a) The minutes would have, in the respondents' view, proved that Dr Macgregor was no longer a director of the first respondent. As indicated above, the respondents had limited time to file their replying papers. The third respondent testified about and provided proof of "sms" - correspondence between her and Dr Macgregor after their meeting. It is apparent from the correspondence that she pursued the minutes with some force.
 - (b) The third respondent pursued the minutes until the respondents had filed their replying papers. Although the respondents did not annex a copy of the minutes, because Dr Macgregor had failed to make good on his undertaking, the third respondent attested to an affidavit setting out her version of the discussion with Dr Macgregor which served the same purpose as the minutes would have done. [12]The second respondent corroborated the third respondent's evidence in material respects. In my view, their version is, on the facts of this matter, the more probable version.

CONCLUSION

- [13] I, for the reasons set out above, am of the view that the applicants failed to show that the respondents placed incorrect evidence before the court. It follows that the application must fail. Costs
- [14] The application was postponed on a number of occasions and the costs of those postponements stood over for later determination. I intend to order those costs to follow the result of the application. Order
- (a) The application is dismissed with costs such costs to include those incurred by the various postponements. Baartman J
- [2] In the eviction application, Daniel Lamprecht Van Zyi (the second respondent), a director of the first respondent, alleged that he had been authorised by the first respondent's directors to institute those proceedings. The second respondent alleged that the first respondent had two directors, Christine Immelman (the third respondent) and himself. In its opposition to the eviction application, the Trust alleged that the first respondent had 3 directors, the 2 aforementioned directors and Dr Macgregor (Dr Macgregor), a representative of the first respondent's minority shareholder. The records of the registrar of companies (the CIPRO records) confirmed the Trust's allegation. It was further common cause that Dr Macgregor had not been a party to the decision either to cancel the rental agreement or to institute the eviction application.

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(See Erasmus Superior Court Practice at B1 307 B1 308)

THE SINGLE WITNESS

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Dr L Macgregor stem nie hiermee saam nie.

Die nuwe direkteure na stemming vir heraansteiling is:

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THE RESPONDENTS' VERSION

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[12] The second respondent corroborated the third respondent's evidence in material respects. In my view, their version is, on the facts of this matter, the more probable version.

CONCLUSION

[13] I, for the reasons set out above, am of the view that the applicants failed to show that the respondents placed incorrect evidence before the court. It follows that the application must fail.

Costs

[14] The application was postponed on a number of occasions and the costs of those postponements stood over for later determination. I intend to order those costs to follow the result of the application.

Order

(a) The application is dismissed with costs such costs to include those incurred by the various postponements.

Baartman J

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