

SOUTH AFRICA / JUDGMENT

Tayob v Multi Furn Wholesalers and Retailers (Pty) Ltd (32604 / 2017) [2018] ZAGPPHC 548 (6 August 2018) [2018] ZAGPPHC 548

COURT

North Gauteng High Court, Pretoria

BEFORE

Mavundla

CASE / FILE NUMBER

32604 / 2017

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IN THE HIGH COURT OF SOUTH
AFRICA,
GAUTNEG DIVISION, PRETORIA
CASE NUMBER: 32604 / 2017
6/8/2018
In

the matter between:

MAHOMED
MAHIER
TAYOB
APPLICANT
(In
his capacity as the business Rescue Practitioner of
Resfam
Investments CC, registration number
1993/
027798 / 23) (under Business Rescue)
And
MULTI
FURN WHOLESALERS AND RETAILERS (PTY) LTD
RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The applicant, a business rescue practitioner appointed in respect to Resfam Investments cc (the "close corporation") approaches this Court on urgent basis in terms of Rule 6(12)(a) read with s136(2)(b) of the Companies Act 71 of 2008 for a declaratory order in the following terms:

1.1 ordering the respondent to deliver to the applicant the original lease agreement between Resfam Investment CC in business rescue and the respondent;

1.2 alternatively, in the event that there is no written lease agreement, the respondent be ordered to provide the applicant with the full particulars of the terms of any oral lease agreement between the applicant and Resfam, including but not limited to, the full particulars of the parties, the date of the agreement, the duration of the agreement and the rent amount and to whom it is payable ("the lease agreement");

1.3 That, should the lease agreement or oral lease agreement not be provided to the applicant within 24 hours after service of this order, it be declared that there is no valid lease agreement in existence between Resam and the Respondent;

1.4 That, should it transpire that a lease agreement or oral lease agreement purports to exist, the applicant be authorised to cancel such lease agreement between Resam and the Respondent in terms of section 136(2)(b) of the Companies Act 71 of 2008;

1.5 That the costs of the application be paid by the Respondent on a scale as between attorney and client.

[2] The above mentioned close corporation was placed in business rescue on 9 July 2015 at the behest of its sole member Mr Ismail Suleman Essack who passed a resolution in that regard. The property is situated in a business area at 110 Potgieter Street, Modimolle. A creditor of the close corporation, namely Standard Bank, holds three bonds over the property to the total amount of R2.2 million. After the liquidation application was launched by Standard Bank, an agreement was entered into between the applicant and Standard Bank, the latter being the largest creditor of the close corporation, in terms whereof, the property was sold by public auction to settle the winding-up application. The property was sold in a public auction, although not without any incident, for an amount of R3 million.

[3] According to the applicant, on the 22 March 2017, attorney Zehir Omar sent two letters to the applicant, contending that he was acting on behalf of the sole member of the close corporation, Mr Ismail Sulliman Essack ("Essack). The first letter was sent under the heading "RESFAM INVESTMENTS CC (IN BUSINESS RESCUE)" / I S Essack:[1]). In this letter Mr Omar stated that he acts for the member of Resfam Investments CC, Mr IS Essack . The second letter was sent under the heading "MULTI FURNITURE {PTY} LTD/ RESAM

INVETSMENTS CC {IN BUSINES RESCUE}" [2] Mr Omar

in this letter stated that he acts for Multi Furniture (Pty) Limited, the respondent in casu. In both letters Mr Omar alleged that Multi Furn (Pty) Limited is renting the property from the Close Corporation and that the respondent in turn is sub-letting the shops to members of public.

[4] The applicant further contended that from the correspondence received from Omar, the latter was acting on behalf of both the respondent and for Essack. The respondent alleged that it concluded a lease agreement with the close corporation, which according to the applicant was without his consent and after the date of the commencement of the business rescue. Although he requested a copy of

the lease agreement on several occasions, same was never forthcoming.

[5] According to the applicant, because of the alleged lease referred to by Attorney Zahir Omar, the applicant is in a position where it cannot give vacant possession of the property to the purchaser. The respondent further alleged, through Omar, that it made certain

improvements on the property. In this regard, the respondent now contends that the amount of its lien is R1, 726, 903 effected between 06 April 2015 and November 2015 as at in March 2016, which is a contradiction to an earlier assertion that , it indicated that the lien was only R450, 000. 00.

[6] The applicant further contends that while the lease agreement is allegedly concluded on 1 April 2015, it could not have been entered

into at such stage, as it was not disclosed in the course of the business rescue and it must have been backdated and that it could

have only been entered into after the close corporation was already under business rescue. The applicant further contended that because Attorney Omar was purportedly acting on behalf of both the sole member of the close corporation and the respondent, in itself indicates an improperly close alignment of interests, so that the lease agreement and the respondent itself should be treated as a sham.

[7] The applicant contended further in his replying affidavit that respondent in opposing the application is perpetrating fraud and tries to obtain an unfair advantage in favour of the members of Resfam. He further questioned the involvement of the deponent to the answering affidavit, contending that he is a member of the Close Corporation of auditors practising under the name and style of Wadee Hassen and Associates CC. He contends further that the true involvement of Wadee Hassen and Associates CC is to attempt to obtain an advantage on behalf of Resfam. The true person behind Multi Furn Wholesalers (Pty) Ltd is The true person behind Multi Furn Wholesalers and Resfam Investment CC is and has always been Ismail Sulliman Essack and his son with whom they share same names.

- [8] The applicant further disputes the alleged improvements and the alleged amounts. The respondent alleged that during the period of April and up until November 2015 it effected improvements in an amount of R1 729 903. 06, in contradiction to an earlier correspondence dated 9 March 2016. The applicant contends that the Court should reject these alleged improvements and lien and also find that there was no lease agreement.
- [9] The applicant further referred to a pending interdict application under case number 268/2017 he instituted against Essack who is the aforementioned member of the Close Corporation. The application was for the removal of Essack as a member of of the Close Corporation. Annexure "PCL3" was attached to the papers, through a supplementary affidavit, and is a court order of 15 June 2017 in terms of which Mahomed Mahier Tayob was removed as a member of Resfam Investments CC.
- [10] It is common cause that on the 30 May 2017, under the same case number hereinabove, Wright J made the draft order marked "X" an order of court, in terms of which it was ordered that the matter was urgent in terms of Rule 6(12)(a) as read with section 136(b) of the companies Act 71 of 2008, and ordered the respondent to deliver to the applicant the original lease agreement ("the lease agreement") between Resfam Investments CC (in business rescue) ("Resfam"); and in the alternatively, in the event there is no written lease agreement, the respondent is ordered to provide the applicant with the full particulars of the terms of any such oral agreement between the applicant and Resfam, including but not limited to, the full particulars of the parties, the date of the agreement, the duration of the agreement and the rent amount and to whom it is payable ('the oral lease agreement').
- [11] According to the applicant, the purposes of the application is to order the respondent to produce an alleged lease agreement between it and the Close Corporation, and if the respondent fails to do so, that it be declared that there is no valid lease agreement between the Close Corporation and the respondent in existence. If it is found that such lease agreement exists, the court authorise the applicant to cancel it in terms of section 16(2)(b) of the Companies ACT OF 2008.
- [12] The answering affidavit of the respondent was deposed to by one Inayet Hussein Hassen who described himself as a member and director of the respondent and that he is dully authorised to depose to the affidavit. He confirmed that Mr Omar is the attorney of I S Essack, the member of Resfam Investments
- [13] According to Hassen, who deposed on behalf of the respondent, during or about 1 April 2015 , a written lease agreement was concluded between the respondent and Resfam Investments CC and signed by I.S. Essack in order to lease a portion of immovable property known as Erf C / 166 Modimolle situated at No 123 Nelson Mandela Drive, Modimolle. The said immobile property specifically the portion which the lease related was previously a used car dealership and consisted of a vacant lot (the second portion of the property) and a used car sales room (the first portion to which the lease agreement related. On or about 13 April 2015, a further lease agreement was concluded between the respondent and Resfam

Investments to lease the vacant lot. Attached to the papers, are copies of a lease agreement between Multifurn Pty Ltd and Inayet Husssein Hassen in respect of immovable property situated at 1223 Nelson Drive Mandela Drive Shop 1238 Nelson Mandela drive Modimolle dated 12 November 2015; Lease agreement between Multi Furn (Pty) Ltd and Vulani Funeral (Mrs Raisebe Funeral in respect of immovable property at 123 Nelson Mandela Drive Modimolle dated 18 October 2017.

- [14] The respondent persisted with its contention that there is a lease agreement concluded with the applicant, in this regard attached a copy of the alleged lease agreement (annexure RA2) which was concluded between I S Essack on behalf of Resfarm and I. N. Haasen on behalf of Multifurn Wholesale and Retailers (Pty) Ltd over the relevant property in issue on the 1 April 2015 Also attached is a copy of a lease agreement between Resam Investments and Multifurn Limited over part of the property that was improved by the Tenant on the property being Erf Modimole Township corresponding to 123 Nelson Mandela Street Modimolle Limpopo; Various copies of photographs showing a huge building housing vehicles, some parts still under construction.
- [15] The respondent has further attached a copy of a lease agreement concluded between Multifurn (Pty) Ltd and Ngoako J Moagi (Pty) Ltd over a portion of the building incorporated at Inayet Development situated at 123 (A) Nelson Mandela Dr Modimolle on the 12 November 2015; copy of a lease agreement between Multifurn (Pty) Ltd and Mohammad Jamshed Akbaa Sethi over property Ltd over immovable property situated at 123 (B) Nelson Mandela Dr Modimolle; copy of lease agreement between Multifurn (Pty) Ltd and Vukani Funeral Mrs Raisibe Almarine Pole over premises situated at Nelson Mandela Dr Modimolle.
- [15] It needs mentioning that in an affidavit deposed to by the applicant under case number 268/2017 on the 18 January 2017, Ismail Silliman Essack is cited as the first responded, and alleged to be collecting rental from tenants of ERf 166 and refused to hand such collected rental to the applicant. The import of this is the fact that the applicant was as far back as in January 2017 aware that the respondents was subletting the immovable property.
- [17] In this matter, there are disputes of facts, which cannot be resolved on papers. The primary dispute pertain to whether: the lease agreement, sought by the applicant, produced in the answering affidavit , was backdated to suit the expediency of the respondent; the respondent has effected any improvements on the immovable property and if so to what extent; the role played by either Ismail Silliman Essack Issack senior or junior, and the impropiator or lack thereof of Mr Omar. The answer to these questions can only be reached through cross examination. The applicant has not sought that the matter be referred to trial. In the circumstances, bearing in mind the relief sought, I find myself constrained to dismiss the application with cost.[3]
- [18] In the result the application is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 06 AUGUST 2018

APPLICANT'S ADV

: ADV J F BARNARDT

INSTRUCTED BY

: DLBM INCORPORATED

RESPONDENT'S ADV : ADV P VENTER.

INSTRUCTED BY

: BOOYSEN DRYER & NOLTE INC

[1] Annexure "H".

[2] Annexure "I"

[3] Vide Tamarillo (Pty) Ltd v 8 N Aitken (Pty) Ltd 1982 (1) SA 398 (AD) at 430G-431A.

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