

SOUTH AFRICA / JUDGMENT

Thomas v Petso and Others (017371/2022) [2024] ZAGPJHC 129 (5 February 2024)

[2024] ZAGPJHC 129**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Crutchfield

CASE / FILE NUMBER

017371/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: 017371/2022****(1)****REPORTABLE: NO****(2) OF INTEREST TO OTHER****JUDGES: NO****(3)REVISED****In**

the matter between:

LINDIWE

GRACE THOMAS

Applicant

And

REFILWE

PETSO

First

Respondent

ALEX

MESSAN

Second

Respondent

CREATIVE

WORK SPACES CC

Third

Respondent

JUDGMENT**CRUTCHFIELD J:**

- [1] The applicant, Lindiwe Grace Thomas, claimed summary judgment in the capital sum of R4 840 000.00 against the first, second and third respondents, Refilwe Petso, Alex Messan and Creative Work Spaces CC respectively, jointly and severally the one paying the other to be absolved, together with interest and costs.
- [2] The first respondent opposed the application.
- [3] The applicant delivered a supplementary affidavit and whilst the applicant's legal representatives did not move formally for the admission of the supplementary affidavit at the hearing before me, the first respondent sought a postponement of the hearing to answer to the supplementary affidavit. Given the lateness of the application for the postponement and that it was made from the bar without an affidavit setting out the reasons for the postponement, I declined the application for the postponement.
- [4] In the circumstances, the first respondent has not answered to the applicant's supplementary affidavit.
- [5] Furthermore, however, the first respondent referred in her heads of argument to the matter of Absa Bank Ltd v Mphahlele NO & Others,[1] in which the court found that a plaintiff in a summary judgment application should not be entitled to introduce evidence or facts that did not appear in the plaintiff's particulars of claim or declaration. A plaintiff in summary judgment proceedings may not introduce new evidence or documents as to why a defendant should not be given leave to defend an action and to show that the plaintiff has an unanswerable case. New evidence or new documents may not be introduced in circumstances where they were not referred to by the plaintiff in the particulars of claim. In the light of the authority,[2] with which I agree, I do not take account of the applicant's supplementary affidavit for the purposes of this judgment.
- [6] The basis of the applicant's claim was that the applicant and the first respondent concluded an oral agreement of settlement for repayment of the full amount advanced by the applicant, that the first respondent breached the oral agreement, alternatively that the first respondent misrepresented various issues to the applicant resulting in the first respondent effectively having misappropriated the funds advanced by the applicant.
- [7] The first respondent denied being indebted to the applicant in the claimed amount of R4 840 000.00.

- [8] The applicant's case for summary judgment must be certain or unanswerable. The first respondent is obliged to disclose fully the nature and grounds of the defence raised by the first respondent and the material facts relied upon for that defence. The first respondent's defence must be bona fide and good in law.
- [9] The first respondent's defence was that she and the applicant operated a joint venture in the cannabis industry in the Kingdom of Lesotho ("Lesotho") and the Republic of South Africa ("SA"). The applicant would fund the expenses of the joint venture until the first respondent could contribute to the joint venture financially, whilst the first respondent would be responsible for the daily running and management of the joint venture. The applicant and the first respondent were equal partners in the joint venture.
- [10] The applicant alleged effectively that the first respondent defrauded her and failed to account for the use to which the funds advanced by the applicant were put by the first respondent.
- [11] The first respondent's alleged offer to repay the applicant "in full" within a two month period was set out in electronic mail correspondence ('email'), addressed to the applicant and dated 3 May 2022, annexure G to the applicant's founding affidavit. The first respondent stated in the alleged offer that she was working to repay the applicant "in full" during the year of 2022 and raised various proposals as to how she intended to achieve that. Furthermore, the first respondent stated that she wanted to pay the applicant and that she would do so within the year but needed time to do so.
- [12] The applicant alleges that she accepted the first respondent's offer to repay the applicant "in full", thereby concluding a settlement agreement between them. The first respondent's precise words in annexure G were that she was "working hard to pay (the applicant) in full this year".
- [13] Subsequently, the first respondent refused to sign an acknowledgement of debt prepared by the applicant's attorneys, in that the first respondent required time until the end of 2022 to settle the debt. I deal further hereunder with the acknowledgement of debt.
- [14] Dissent between the applicant and the first respondent about the amount of time that the first respondent required to settle her indebtedness followed but the first respondent persisted in her refusal to sign the acknowledgement of debt.
- [15] The applicant alleged that the first cannabis licence procured by the first respondent in pursuit of the joint venture was a sham and that the first respondent herself filled in the dates for which the licence was valid. The first respondent admitted that there were three iterations of the first licence and explained the circumstances thereof.

- [16] The second licence did not materialise, whilst the immovable property registered in the name of Soul Farmers (Pty) Ltd, in which the applicant and the first respondent are equal shareholders, ('the farm'), exists in Natal and constitutes security for the funds advanced by the applicant for the purchase thereof in the sum of R1 million.
- [17] As stated, the applicant alleged that the first licence was a sham or a fraud, that the first respondent tampered with it by inserting the dates during which the licence would operate and that the first respondent proffered three versions of the alleged fraudulent licence.
- [18] The first respondent explained the circumstances thereof. The first respondent stated unequivocally under oath that she paid R1 500 000.00 in respect of the first licence and that she procured the first licence for Cannacare (Pty) Ltd, a company registered and incorporated in Lesotho, in which the applicant and the first respondent are co-directors and shareholders. Whilst the first respondent did not attach proof of payment of the R1 500 000.00 in respect of the first cannabis licence, she stated under oath that she paid the money and procured the licence.
- [19] A second cannabis licence application for Cannaprime (Pty) Ltd, (a second company established by the first respondent in Lesotho and in which the applicant and the first respondent were co-directors and equal shareholders), was not successful. No funds were expended according to the first respondent on this second licence application. The first respondent alleged that she kept the applicant updated on all developments relating to the procurement of the two cannabis licences.
- [20] The applicant, during 2020 and in pursuit of the parties' joint venture in South Africa, advanced R1 million for the purpose of the purchase of the farm. The applicant's legal representatives conceded that the immovable property existed and that leave to defend could be granted in respect of the R1 million advanced by the applicant for the purchase price of the farm.
- [21] The first respondent set out an accounting in her opposing affidavit as to the purpose to which the funds advanced by the applicant were put. The applicant paid the funds into an account in the name of the third respondent, managed and controlled by the first respondent. The funds however, were not advanced to the first respondent herself.
- [22] Between February and May 2020, the applicant paid R2 500 000.00 to the third respondent's account in respect of the procurement of the two cannabis licences in Lesotho already mentioned, and various expenses in respect thereof. The first respondent alleged that R1 500 000.00 was put towards the procurement of the first licence whilst no funds were expended on the second licence in respect of which the application was unsuccessful.
- [23] Nothing was said by the first respondent as to how the R1 million difference between the cost of the first licence, R1 500 000.00 and the R2 500 000.00 advanced by the applicant, between February and May 2020, was utilised. The R1 million, in the circumstances, was not accounted for by the first respondent.

- [24] According to the first respondent, the sum of R390 000.00 was advanced by the applicant during or about February 2021 in respect of the annual renewal fee of the first licence and related expenses of the joint venture and that the funds were utilised accordingly. An additional amount of R950 000.00 was advanced by the applicant according to the first respondent for the procurement of the South African cannabis licence and related expenditure. The application for the SA permit was unsuccessful.
- [25] As a result, whilst the first respondent's figures as to how the funds advanced by the applicant were utilised in pursuit of the joint venture, were rounded off and lacking in detail, the first respondent did account in broad strokes for the use of the funds other than the R1 million aforementioned.
- [26] Furthermore, the first respondent set out the human resource contribution, management contribution, made by her to the joint venture and detailed those individual contributions and the tasks attended to by her. Most of them had a cost factor associated therewith such as environmental impact assessments and drone assessments, to mention only two.
- [27] In short, the first respondent's defence was that the parties' established a joint venture, the running expenditure of which was paid by the applicant whilst the first respondent attended to the management and running of the joint venture.
- [28] The first respondent's version set out the nature and the grounds of her defence and the material facts relied upon. Details in respects of which the funds advanced by the applicant were used were somewhat sparse but the bare bones thereof were furnished by the first respondent other than in respect of the R1 million referred to earlier, being the difference between the R2.5 million advanced by the applicant in respect of the procurement of the Lesotho cannabis licences and the R1.5 million used in respect of the procurement of the first licence.
- [29] In the circumstances, other than the R1 million aforementioned, the first respondent alleged sufficient to defend the alleged fraudulent misrepresentations raised by the applicant.
- [30] As to the alleged oral agreement of settlement on which the applicant relied, the first respondent set out the relevant portion of the email, annexure G, in full. The first respondent made various proposals therein as to how she would repay the applicant "in full" but the amount thereof was not stated by the first respondent, other than to say she would repay the applicant in full. It was not apparent what the amount of "in full" was.

- [31] This was material as clearly the first respondent did not defraud the applicant of the R1 million expended by the applicant in respect of the purchase of the farm and thus the expression “in full” would exclude the R1 million as a result. The meaning of the expression “in full” was not unequivocal or certain and cannot sustain summary judgment for the amount of R4 840 000.00 as claimed by the applicant.
- [32] Furthermore, the date by when or the terms upon which the first respondent would repay the applicant were not apparent from annexure G. The first respondent stated that she would pay within the year and needed time being a few months, in which to do so.
- [33] The applicant, however, alleged that she accepted the first respondent’s alleged offer, annexure G, resulting in the settlement agreement between the parties. The content of annexure G, however, was not unequivocal in respect of the amount to be paid by the first respondent, the terms of the repayment or the date/s of the repayment. Annexure G, read in full, does not amount to a settlement agreement such that it is capable of sustaining summary judgment.
- [34] Further to the amount of the applicant’s claim, the applicant’s legal representatives, subsequent to receipt of annexure G, prepared an acknowledgment of debt for signature by the first respondent in the amount of R2 850 000.00, which the first respondent refused to sign. The marked variance between the amount of the proposed acknowledgement of debt for R2 850 000.00 and the claim for summary judgment of R4 840 000.00, adds to the uncertainty of the amount of the applicant’s claim for summary

judgment.

- [35] Given that annexure G does not rise to the standard of an agreement capable of sustaining summary judgment, or an agreement of settlement, there is no basis for the alleged repudiatory breach by the first respondent and the applicant’s claim in that regard as a basis for summary judgment, must fail as a result.
- [36] Whilst I have noted that the first respondent failed to detail the use to which the R1 million difference between the R2 500 000.00 advanced by the applicant for the procurement of the Lesotho licences and the payment of R1 500 000.00 for the first licence, the first respondent’s alleged services and human resource contributions also need to be brought into the equation. They need to be quantified and taken into account in the accounting of the joint venture.
- [37] Furthermore, the first respondent on 5 and 21 December 2022 respectively, paid R1 500 000.00 to the applicant as part of the first respondent’s capital contributions to the joint venture.
- [38] In the light of the first respondent’s monetary and other contributions to the joint venture, as well as the accounting

provided by the first respondent as to how the funds advanced by the applicant were utilised, the first respondent has set out a defence as well as the nature and grounds thereof and the material facts relied upon, just sufficient to stave off summary judgment. Moreover, the first respondent's defence is bona fide and good in law. There is not enough on the papers before me to find that the first respondent made the misrepresentations alleged by the applicant.

[39] I cannot find that a settlement agreement arose between the parties, the applicant and the first respondent, for the reasons set out above and nor can I find that there was a repudiation by the first respondent thereof. Furthermore, the amount of the applicant's claim is not sufficiently certain for the purposes of summary

judgment.

[40] Accordingly, the application for summary judgment is dismissed. The costs of the summary judgment application are costs in the cause of the main action.

I hand down the judgment.

CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 5 February 2024.

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COUNSEL FOR THE FIRST RESPONDENT: ADV. R PETERSON

INSTRUCTED BY: VAN HULSTEYNS ATTORNEYS

DATE OF THE HEARING: 26 January 2024.

DATE OF JUDGMENT: 5 February 2024.

[1] Absa Bank Ltd v Mphahlele NO & Others

[2020] ZAGPPHC 257 (26 March 2020) ('Mphahlele').

[2] Mphahlele id.

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