

SOUTH AFRICA / JUDGMENT

Tlakula and Others v Absa Bank Ltd (29037/2010) [2017] ZAGPJHC 158 (20 June 2017) [2017] ZAGPJHC 158

COURT

South Gauteng High Court, Johannesburg

BEFORE

J.S. Nyathi

CASE / FILE NUMBER

29037/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 29037/2010

Not reportable

Not of interest to other judges

Not revised

In the matter between

NKHENSANI TLAKULA FIRST APPLICANT

MUSA MASEBENZA SECOND APPLICANT

AAA AIR CONDITIOING (PTY) LTD THIRD APPLICANT

and

ABSA BANK LTD RESPONDENT

JUDGMENT

NYATHI AJ:

1. This is an opposed application for the setting aside of a suite of agreements concluded during 2005 and 2009 and for the rescission of a court order obtained by consent during March 2011. The rescission application is brought in terms of the common law.

2. The suite of agreements refers to:
 - 2.1 A Shareholders Agreement between the first and second applicants and the respondent in respect of the third applicant dated 17 August 2005;
 - 2.2 A Deed of Suretyship concluded between the first applicant and the respondent dated 17 August 2005;
 - 2.3 A Deed of Suretyship concluded between the second applicant and the respondent dated 17 August 2005;
 - 2.4 An Acknowledgement of Debt concluded between the first and second applicants and the respondent dated 18 August 2009;
3. The first and second applicants approached the respondent seeking finance for a BEE deal in which they were purchasing the third applicant ("the business").
4. The applicants allege that senior official(s) of the respondent, in particular one Mr. Jean Vosloo (who was tasked with negotiation of the transaction on behalf of the applicants) misconducted himself at various stages leading to the conclusion of the transaction and the underlying agreements by providing false and misleading information to the investment banking committee to obtain approval for the transaction. Upon becoming aware of these acts of misconduct the respondent tried to suppress these acts instead of sharing same with the applicants.
5. The two main funding requirements were that the respondent had to conduct a due diligence investigation to its satisfaction. To this end the respondent appointed KPMG consultants. The other requirement was the appointment by the respondent of a mentor to guide the applicants. One Mr. Harry van der Merwe was later appointed as such.
6. The respondent assumed the role of financier and business partner to the respondent.
7. Mr. Vosloo took over negotiations with the seller one Mr. Hendrik Oostdewaal Traut.
8. The first applicant lists in her founding affidavit details of alleged offending conduct by the respondent and/or its official(s),

in particular by Mr. Vosloo. The business is apparently over-valued with promises of a pipeline of pending future projects valued in the multi-millions of Rands.
9. The business was sold to the first and second applicants for R8.2 million in early October 2005 after all conditions precedent were satisfied.
10. The deal was structured such that first and second applicants each held 26% of the shares and Mr. Traut held 28% with the remaining 20% held by the respondent.

11. On 06 April 2006 the mentor Mr. Harry van der Merwe wrote an e-mail to one Peter Gordon, an official of the respondent asking him to pass the note on to the appropriate parties at ABSA.
12. In the e-mail he states that "Nkhensani and Musa the blacks buying the business together with ABSA and the vendor clearly did not understand what they were buying, the inherent business risks, how to evaluate the business and whether the purchase consideration was representing fair value. Illustrating this point, they were surprised that the balance sheet indicated that R4m was due to the vendor."
13. He further expressed serious concerns about the prospects of the business, especially considering that it was almost entirely
dependent on a Mpumalanga Public Works tender which was coming to an end soon. He highlighted the fact that "...the KPMG due diligence report indicated that this tender was a three year tender from 1 April 2005, which is incorrect..."
14. The rest of the letter is replete with facts indicating a purposeful withholding of critical facts from the first and second applicants.
15. On the 05 September 2006 the applicants wrote a letter to the respondent in which they raised concerns about whether the acquisition price represented fair value.
16. Subsequent thereto, the parties then concluded a settlement agreement with Mr. Traut to reduce purchase price of the business on the 23 November 2006. This dropped the purchase price to R5, 2 million.
17. At a later stage two addenda to the shareholders agreement were negotiated and signed by the parties. The purchase price was then reduced to R2, 8 million.
18. The applicants made several payments in terms of their obligations but ended up falling into arrears with their repayments.
19. The respondent opposes the application on the grounds that:
 - (a) The applicant has not made out a proper case for the relief sought and relies instead on the same facts that formed the subject matter of the in the antecedent application that resulted in the consent order now sought to be rescinded by the applicants.
 - (b) The applicants are seeking to regurgitate and reargue the antecedent proceedings under a new rubric of "constitutional bent" argument and gloss;
 - (c) There has been an inexplicable and unreasonable delay in the bringing of this application. There is thus obvious irreparable prejudice to the respondent.

- (d) The applicants have conducted themselves inconsistently with the case they are now pursuing. On becoming aware of the alleged offending conduct by or on behalf of the respondent, they made an election to continue and have thus waived and abandoned their rights to seek the relief in issue. They are estopped from doing so.
 - (e) This application is not bona fide, but an abuse.
20. The complaints directed at the conduct of Mr. Vosloo as well as the concerns raised in Mr. Harry van der Merwe's e-mail show prima facie that the basis for the conclusion of the shareholder's agreement was flawed. This is a legally-sound foundation for seeking legal redress, subject to what follows hereunder.
 21. The parties were before Wepener J in the antecedent application. From submissions made by Counsel for the respondent, it appears the applicants were at that stage legally represented. For some reason, the applicants decided to conclude an acknowledgement of indebtedness and had same made on order of court. The issues relating to alleged fraudulent conduct by the respondent were thus never fully ventilated at that stage. For all intents and purposes they made an election to go on with the transaction. There appears no intention to resile from or repudiate the agreement.
 22. It is some (12) twelve years after the conclusion of the shareholders' agreement and deeds of suretyship, 8 (eight) years after the conclusion of the acknowledgement of debt and more than 6½ (six and a half) years after the granting of the Wepener order. The delays in prosecuting the various stages of this matter are to say the least extraordinary in the circumstances.
 23. It was submitted by Mr. Mmusi on behalf of the Applicants that the judgment by consent is consequent to the sale agreement which is in turn consequent to misrepresentation. Further it was contended that the applicants then made payments of R900 000.00 after the consent agreement before falling into arrears again. At this stage the respondent then commenced Section 65 proceedings in the local Magistrate's court. Applicants could not afford legal representation and sought to oppose personally. (First applicant's founding affidavit to this application).
 24. In *Bowditch v Peel and Magill* 1921 AD 561 at p572, Innes C.J held: "A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. ...It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate. Here the plaintiffs alleging that the contract was fraudulently induced not only claimed damages as distinct from rescission, but they claimed damages for breach of contract. By their pleadings they elected to stand by the contract, and thereby they abandoned any right to rescind it. The learned Judge held that fraud had not been proved, and that, therefore, the plaintiffs could not claim damages on that basis; but they could claim rescission. Even then, however, they still had the other choice; they could

stand by the contract and enforce it, or claim damages for its breach. The principle was laid down by DE VILLIERS, C.J. (Woodstock Municipality v Smith (26 &C at p. 701)).”

25. Mr. Amm submitted on behalf of the respondent that the applicants did not exercise their remedies within a reasonable time, neither did they timeously allege any knowledge of deception.
26. The legality of prescriptive time bars and the considerations of public policy came starkly to the fore in Barkhuizen
- v. Napier.[1] The Constitutional Court held that a time limitation clause in a short term insurance policy was unconstitutional in that it violates the right of an individual to approach a court for redress.
27. Similarly, in Mohlomi
- v. Minister of Defence,[2] the court considered a time limitation provision in a statute which regulated the institution of proceedings against the South African

National Defence Force. The provision expected of potential claimants to give notice of one month before issuing summons. The claimant had only six month to sue from the date on which the loss was suffered. The court found the clause to be unconstitutional.

28. Counsel for the applicant also placed much reliance on Barkhuizen v Napier[3] for the proposition that the suite of agreements at issue here should be set aside due to constitutionality and the Wepener order rescinded.
29. Counsel for the respondent, Mr. Amm's main contention is that the application is flawed. The main point raised is whether the alleged fraud raised by the applicant induced His Lordship Wepener J to make the consent order he made? He then submits that the applicants have failed to produce any sustainable evidence in this regard. This, he proceeds, is particularly so given the fact that the Wepener order was negotiated and granted by consent.
30. Another ground of opposition is that the applicants should be estopped from relying on the information raised by Mr. Harry van der Merwe since they should have acted on it earlier.
31. The consideration on which the courts in the matters of Barkhuizen and Mohlomi (supra) decided the constitutionality or otherwise of the impugned clauses or provisions was public policy.
32. In Bafana Finance Mabopane v. Makwakwa and Another[4], Cachalia AJA held that "An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be contra bonos mores, and therefore not enforceable, if it can be shown that such an agreement would deprive the party of protection which the legislature

considered should, as a matter of policy, be afforded by law."

33. Quoting from Wille,[5] the learned Justice said "An agreement is contrary to public policy, 'if it is opposed to the interests of the state, or of justice, or of the public.' "
34. As quoted with approval by Cachalia AJA, Wille goes on to state the following: "The interests of the community or public are of paramount importance in relation to the concept of public policy; accordingly, agreements which are clearly inimical to the public interest, whether they are contrary to law or morality will not be enforced. Furthermore, it is the tendency of the proposed transaction, rather than its proved result, which determines whether or not it is contrary to public policy. The chief classes of agreements contrary to public policy are those which tend to: (i) injure the state or the public service; (ii) defeat or obstruct the administration of justice; or (iii) interfere with the free exercise by persons of their rights...' [Emphasis by Cachalia AJA]
35. 'Public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.[6]
36. In light of the foregoing considerations, I reach the conclusion that the agreement by consent, when viewed against the backdrop of the misrepresentations that were perpetrated by respondent and/or its representatives was contrary to public policy and cannot prevail.
37. I therefore make an order in the following terms:
37. 1 that the following agreements be declared null, void and unenforceable:
- (a) Shareholders Agreement concluded between the first and second applicants and the respondent in respect of the third applicant dated 17 August 2005
 - (b) Deed of suretyship concluded between the first applicant and the respondent dated 17 August 2005;
 - (c) Deed of suretyship concluded between the second applicant and the respondent dated 17 August 2005;
 - (d) Acknowledgement of debt concluded between the first and second applicants with the respondent dated 18 August 2009;
- 37.2 That the order granted by his Lordship, the Honourable Wepener J on 17 March 2011 is rescinded and set aside.
- 37.3 That the respondent is ordered to pay the costs of this application on the attorney and client scale.

J.S. Nyathi

Acting Judge of the High Court

Date of Hearing: 4 May 2017

Judgment

Delivered: 20 June 2017

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[1]

[2007] ZACC 5; 2007 (5) SA 323 (CC); (CCT72/05) [2007] ZACC 5

[2] 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

[3] Supra

[4]

[2006] SCA 49 (RSA)

[5] Wille's Principles of South African Law

[6] Brisley v. Drotsky 2002 (4) SA 1 (AD) at 8

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