

SOUTH AFRICA / JUDGMENT

TR Eagle Air (Pty) Ltd and Another v Thompson (A206/2018) [2020] ZAGPPHC 801 (13 November 2020) [2020] ZAGPPHC 801

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi V V, Mudau T P, Lenyai M M D

CASE / FILE NUMBER

A206/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
CASE
NUMBER: A206/2018

REPORTABLE:	YES/NO
	OF
	INTEREST TO OTHER JUDGES: YES/NO
	REVISED
	DATE:13
	NOV 2020
	In
the appeal between:	TR EAGLE AIR (PTY) LTD
	FIRST APPELLANT
	PRT
	RUDMAN
	SECOND APPELLANT
	and
	RW
	THOMPSON
	RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellants were the applicants in the court a quo. Their appeal is against a judgement granted in favour of the respondent and the appeal is with leave of the said court a quo. The appellants had

approached the court in respect of a sale of shares agreement entered into with the respondent wherein they sought the following order that:

“1. The respondent is ordered to comply with the warrantees recorded in clauses 11.10 and 11.11 of the sale of share agreement, attached to the founding affidavit as annexure “C”;

2. The Respondent is ordered to pay to the Applicants the amount of R728 310.66, alternatively, R665 150.66 plus interest, a tempore morae, calculated from 1 June 2016 to date of payment;
 3. The Respondent is ordered to pay the Applicant’s costs of suit;”
- [2] At commencement of this hearing there was no objection to the grant of condonation for the late filing of the respondent’s answering affidavit.
- [3] It was common cause between the parties that the issues on appeal related to the interpretation and application of clauses 11.10 and 11.11 of the sale of shares agreement, the applicants demanding enforcement of these clauses and, on the other hand whether or not the issues could be resolved on affidavit, the respondents also contending foreseeable disputes of fact as a result of which the application should be dismissed with costs. The application was dismissed with costs due to dispute of facts which could not be resolved on affidavit.
- [4] The respondent also raised the non-compliance by the applicants with Rule 49 (13)(a) of the Uniform Rules of Court and, contended that the appeal should be struck off the roll with costs. This was raised for the first time in the Heads of Argument of the respondent which were served on the applicants on 29 September 2020. The applicants had not dealt with such contention in any supplementary heads of argument, as a result we ruled that we would hear argument on this aspect and on the merits and rule thereafter.

BACKGROUND

- [5] In the main, the facts summarised herein pertain to the issue relating to warrantees given by the respondent consequent upon a sale of shares agreement, particularly relating to the balance standing to the credit of students who were receiving flight training at the time of take-over of the business by the appellants on 1 June 2016.

- [6] The respondent as sole proprietor, operated a flight training school known as Eagle Aviation. He entered into a written Memorandum of Understanding with the second appellant and his son Percival Theodore

Rudman Junior, wherein 49% of the shares would be acquired by a shelf company known as Questa Trade 306 (Pty) Ltd, with the respondent

retaining 51% of the shares in his business. Thereafter a sale of shares agreement was concluded and the agreement was annexed to the papers as annexure 'C'. In terms of the said agreement the appellants purchased the respondent's 51% shareholding in the company for R1.7 million.

- [7] It is common cause that the prayers sought in the notice of motion pertain to the respondent's alleged breach of clauses 11.10 and 11.11 of annexure 'C', which according to the second appellant warranted that there shall be sufficient money in the company's bank account 'to cover all monies held to the credit of students' receiving flight training with the respondent' which training was to be taken over by the appellants. The respondent agreed to rectify any shortfall occurring by making payment into the bank account of the company, the first appellant. Although the second appellant narrated at length difficulties encountered with the respondent, which related to the tax warrantees and other issues, he anticipated that the respondent might raise a number of factual disputes. The clauses relied upon in annexure "C" read as follows:

"11.10 The Seller will also make available to the Purchaser recent statements of account pertaining to students, reflecting the balances due in favour of students and the Seller warrants that if there is any shortfall, such shortfall will be paid into the banking account of the company before the completion date;

11.11 The Seller also warrants that there is sufficient money in the banking account of the company to cover all monies held to the credit of students and should there be a shortfall between the bank balances as reflected in the bank statements of the company and the monies held in trust on behalf of students, the Seller will immediately rectify the situation by making a transfer of any shortfall into the account of the company."

- [8] According to the second appellant the parties were to be represented by their accountants on the effective date, that is, the date of take-over of the business by the appellants. The second appellant contended that the purpose of the meeting was for the respondent "to inform the first applicant's new accountant of the details relating to the books and to ascertain the correct figures relating to the credit of the students" and, "specific instructions were given to verify the students credits against the respondent's bank account."

- [9] Mrs Erba Thompson, mother of the respondent did the bookkeeping for the respondent. She handed over a document titled a “customer age analysis” as at 31 May 2016. The document was annexed to the papers as annexure “J”. The second appellant contended that according to her the document gave all particulars of the students, their deposits and the value at which they still had a claim or demand against the first applicant for rendering flight training.”
- [10] The second appellant calculated the amount allegedly owing by subtracting from the grand total reflected on the age analysis, annexure “J” dated 31 May 2016 which amounted to R1 157 076.66, from the balance reflected on a bank statement annexure “K” reflecting a closing balance also as at 31 May 2016 amounting to R428 766.00. The difference of R 728 310.66 was the amount claimed in the notice of motion. Although the second appellant denied that the appellants were indebted to the respondent with regard to certain three companies and fuel credits, the alternative amount of R665 150.66 claimed took into account the figures of indebtedness so alleged by the respondent and, deducted same from the amount claimed in the main.
- [11] The respondent raised several points in limine in his answering affidavit: (i) that the founding affidavit was not properly commissioned; (ii) the misjoinder and locus standi of the second applicant; (iii) an application to strike out certain paragraphs in the founding affidavit which were allegedly not germane to the issues before the court (iv) foreseeable and irreconcilable factual disputes on the papers.
- [12] According to the respondent the business model engaged for 14 years was such that deposits made by the students for flight training, were paid into the business account in order to ensure that flight lessons, ground briefings, simulator training, pilot exams and all other services related to the training programme were accomplished. The training entailed the acquisition of aircraft; facilities for classrooms; training facility; purchase of fuel; repairs to aircraft used in training. Annexed to the answering affidavit as “RWT10” was a copy of a contract entered into with the students, where there is agreement that no refunds would be payable to them in respect of deposits paid into business for their flight training programmes.
- [13] The respondent contended that at no stage was there any agreement or any impression created, that the student deposits would be held in trust or that the business operated a trust account. He refers to two occasions where this subject was discussed in the presence of one Ms Michelle Rademan, the Flight School General Manager and with Ms Thompson. The latter who handled the internal bookkeeping also held a meeting with the second appellant to illustrate how the business operated by pastel age analysis and the second appellant was happy with the explanation and raised no questions. The pastel accounts catered not only for the students but for the instructors to 'effectively manage the business. The respondent contended that the student debit and credit age analysis as at 31 May 2016 accorded with the opening balance in the bank statement as at same date and that

there were no discrepancies.

- [14] The second appellant denied in reply that there were no instances in which refunds were payable to students. The second appellant made reference to a provision allowing for a refund on production of medical proof by a student where applicable. He referred to requests made to the respondent for information on credits due to students and bank statements which were not forthcoming for the months, March to June 2016. Whether or not he had access to information pertaining to the business module practiced was not relevant to resolving the issue regarding the breach of a warrantee.

Non-Compliance with Rule 49 (13)(a) of the Uniform Rules of Court

- [15] Rule 49 (13)(a) provides the following:

“Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly of or partially from that obligation, the appellant shall before lodging copies of the record on appeal, with the registrar, enter into good sufficient security for the respondent's costs on appeal.”

- [16] Mr Van Niekerk contended that the respondent persisted with his application in that the Rule was peremptory in nature and did not confer a discretion on the court. Furthermore, that it was only the court which heard the application for leave to appeal which could release the applicant from giving security. There was concession by Mr Cilliers that the appellant had not complied with the rule, however, he contended that such noncompliance amounted to an irregular step and, the respondent could have approached the court by way of a Rule 30 application. He contended further that the respondent had instead went ahead to file heads of argument.
- [17] Rule 30(1) provides that where an irregular step has been taken the other party may apply to set it aside. Within the meaning of the rule an irregular step is 'one which advances the proceedings forward', in other words advances the proceedings nearing to completion,' Cyril Smiedt (Pty) Ltd v Lourens 1966 (1) SA 150
- (0) at 152 E and Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor 1984 (1) SA 152 (W) at 153C. The question will then arise, is it material that the respondent in an appeal engage a Rule 30 procedure where the appellant has failed to give security, can it be said that he or she has acquiesced and waived such right and, that the appeal must proceed.
- [18] Rule 49 (13)(a) is peremptory. The rule does not place any responsibility on the Respondent. The rule obliges the appellant to give security. The rule does not give a court granting leave to appeal the discretion to absolve an appellant from giving security when the record is filed with the Registrar. The Rule envisages that the respondent shall be satisfied that sufficient security is given that his costs will be paid in the event of the appeal not succeeding. The rule entitles the respondent to waive his right to such security. The rule envisages an instance where the court granting leave to appeal may release the appellant wholly or partially from giving security on application to it. The latter may occur where the

respondent has not waived his right and, this will oblige the appellant to place facts to the satisfaction of the court why he or she should be released either wholly or partially from giving security when filing the record of appeal.

[19] In *Strouhos v Shear* 2003 (4) SA 137 (T) it was held that where Rule 30 had not been brought, the appeal was to proceed and the respondent was entitled to move for the appeal to be struck for noncompliance with the Rule. In *Boland Konstruksie Maatskappy (Edms.) Bpk v Petlen Properties (Edms.) Bpk* 1974 (4) SA 291 (C) at 293 D-H, the court mentioned the undesirability of allowing the matter to proceed where there was no explanation why there was noncompliance. The court emphasized on the need to file a proper application for condonation, supported by affidavit thereby also on the other hand allowing the other side the opportunity to respond. In this matter the second appellant is a practicing attorney who is expected to have known better of the importance to provide security for costs in the appeal and, the possibility of prejudice to the respondent should no security be given. When the heads of argument were served there was knowledge on his part that he had not complied and he was forewarned. This in my view should have triggered prompt attention to either negotiate security and apply for condonation, or alternatively to have the matter removed, to tender wasted costs in order to attend to compliance and condonation. I am of the view that it is proper to strike the appeal off the roll. It is unfortunate that we allowed counsel to argue on the merits, however, noncompliance in these circumstances should not be condoned.

[20] In the result the following order is given:

1. The appeal is struck off the roll with costs including costs of senior counsel.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

I agree,

MUDAU T P

LENYAI M M D

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON :

14 OCTOBER 2020

JUDGMENT

RESERVED ON :

14 OCTOBER 2020

ATTORNEY FOR APPELLANTS :

RUDMAN ATTORNEYS

ATTORNEY FOR RESPONDENTS : R W THOMPSON ATT'

C/O FINCK ATTORNEYS

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Prepared on 12 October 2026 · Esheria