

SOUTH AFRICA / JUDGMENT

Travico (Pty) Ltd v Kinnear and Others (8288/07) [2007] ZAGPHC 26 (13 April 2007) [2007] ZAGPHC 26

COURT

High Courts - Gauteng

BEFORE

Ebersohn

CASE / FILE NUMBER

8288/07

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IN

THE HIGH COURT OF SOUTH AFRICA

(TRANVAAL

PROVINCIAL DIVISION)

NOT

REPORTABLE DATE: 13/4/2007

CASE

NO: 8288/07

In

the matter of

,

"

TRAVICO

(PTY) LTD Applicant

and

FRED

GEORGE KINNEAR

First

Respondent

PROTOURS

ISLE OF MAN LTD

Second

Respondent

EAGLE

CREEK INVESTMENTS (PTY) LTD.

Third

Respondent

TIMOTHY

MPOPOLI MATHEBULA

Fourth

Respondent

PATRICIA

NORA SENANI FAKUDE-NKUNA N.O.

Fifth

Respondent

CORNELIUS

FRANCOIS MARAIS

Sixth

Respondent

COACHCOR

SA (PTY) LTD.

Seventh

Respondent

CORAM:

EBERSOHN AJ

JUDGMENT

HANDED DOWN ON 13th APRIL 2007

JUDGMENT

EBERSOHN AJ.

[1] This matter came before the Court as an urgent application. It was

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postponed for more than a week and the matter was then argued.

[2] The application is opposed by the 1st, 2nd, 4th and 5th respondents. The sixth respondent was nominally cited only.

[3] As founding, answering and replying papers were filed this Court is able to finally dispose of this matter instead of granting a rule with a return date.

[4] The prayers are set out as follows in the notice of motion:

"1.

Dispensing with the forms and service provided for in the Rules of this Honourable Court and disposing of the matter by way of urgency in terms of Rule 6(12).

2.

That the First to Fifth Respondents be ordered to restore applicant's possession and control over and in Seventh Respondent and its business with immediate effect.

3.

That the First to Fifth Respondents be prohibited to take control, of and/ or to interfere with the management and/ or business activities of Seventh Respondent, without a valid Court Order pending finalization of the dispute between the parties.

4.

That the First Respondent, jointly and severally with any other Respondents that oppose this application, be ordered to pay the costs of this application.

5.

Further and/or alternative relief. "

[5] This is a classic spoliation application.

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[6] It is common cause that the 7th respondent for about the past 15 years did business renting out buses.

[7] Until the 27th March 2006 the 1st, 2nd, 3rd, 4th, 5th and 6th respondents owned the shares in the 7th respondent company. On the 25th March 2006 the directors of the applicant adopted a resolution to the effect that the applicant could purchase the shares in the 7th respondent. On the 27th March 2006 the shareholders of the 7th respondent decided to sell their shares in the 7th respondent to the applicant. A comprehensive deed of sale regarding the sale of the shares was signed by the parties on the 30th March 2006. This agreement does not make provision for the retention by the sellers of the control over the assets and the management of the 7th respondent whose shares

were sold in favour of the sellers until the full purchase price shall have been paid.

[8] In terms of the deed of sale an amount was payable in cash and further the applicant was to pay the loan accounts of the 2nd respondent in and up to the 7th respondent.

[9] In terms of the deed of sale the payment of the aforesaid amounts was to be made "On the effective date or as soon as reasonably possible." The effective date was the 31st March 2006.

[10] It is common cause that the business of the 7th respondent which was a going concern was indirectly part of the sale.

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[11] It is the applicant's case that it and the ex-shareholders of the 7th respondent from time to time conducted negotiations with regard to the payments to be made in terms of the deed of sale and the applicant in effect made a vast total payment to date. The dispute between the parties regarding whose funds was used to effect the payment with need not be resolved by this Court and the dispute whether the sellers of the shares could and did cancel the deed of sale need also not to be resolved by this Court. In this regard reference must be made to clause 12 of the deed of sale wherein the parties agreed to refer such disputes to an arbitrator, which clause reads as follows:

"12.1

12.2

12.3

Should any party fail to perform in terms of this agreement and or should any dispute arise with regard to the interpretation of any of the terms of this agreement such failure to perform and or dispute shall be referred to arbitration by the prejudiced party within 14 days from such failure to perform and or dispute has arisen.

The parties agree that such arbitration shall be conducted in terms of the Arbitration Laws of SA as expeditiously as possible and the Chairman of the Bar Council of the Pretoria Bar will appoint an arbitrator.

The ruling of such arbitrator shall be final and binding and there shall be no right of appeal against his ruling."

[12] It does not appear from the papers that the disputes were at any stage referred to an arbitrator.

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[13] The business of the 7th respondent which was acquired by the applicant

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as set out above at all material times and at least from the 31st March 2006 was

managed by the 6th respondent, who also happened to be one of the sellers of the shares in the 7th respondent to the applicant and who was also a shareholder and director of the applicant. The respondents denied that Marais managed it on behalf of the applicants but there is no merit in this denial as is set out hereinlater.

[14] On the 8th February 2007 the 1st respondent turned up at the business premises of the 7th respondent and instructed the 6th respondent to vacate the premises as "he" (the 1st respondent) was taking over control of the business of the 7th respondent. The 1st respondent gave a different version namely that he was not happy with the performance of

the 7th respondent and decided to rather run the business himself. This version is clearly not true and the 1st respondent had no right to interfere there as is set out later herein. The 1st respondent also had a meeting with the staff of the 7th respondent at which meeting he informed the staff that he took over control of the business.

- [15] The applicant's attorneys addressed a letter to the attorneys of the 1st to the 5th respondents informing them that the conduct of the 1st respondent was illicit. The 1st to the 5th respondents did not deny that the 1st respondent, who acted on his behalf and also on behalf of the 2nd, 3rd, 4th and 5th respondents, acted illicitly. The attitude of the 1st to the 5th respondents was that Marais, the 6th respondent, did not possess and control the business of the 7th respondent on behalf of the applicant but in fact possessed and controlled the

business on behalf of the respondents. In this regard, on a proper evaluation of the facts, the respondents erred in that the 7th respondent itself owned its own

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business and operated its business on its own behalf although the shares in the 7th respondent were held by others.

- [16] The application to Court was launched on the 19th February 2007 and the papers were served on the 21st February 2007.
- [17] On the 1st March 2007 the attorneys of the 1st to the 5th respondents addressed a letter to the applicant's attorneys to the effect that the deed of sale was cancelled with immediate effect. This happened after the application was launched and it is not for this Court to determine whether the cancellation was

valid or not if regard is had to the contents of clause 12 of the deed of sale.

- [18] It is clear that Marais, the 6th respondent, was in control of the business and assets of the 7th respondent on behalf of the 7th respondent and through it on behalf of the applicant, at the time the 1st respondent "took over" the business and assets of the 7th respondent as is set out above. It was also the attitude of the 1st to the 5th respondents that they handed over possession and control of the business of the 7th respondent to the applicant which is verified by the contents of the letter their attorneys wrote to the applicant which letter reads as follows:

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"We are now instructed to advise you that should the sellers not receive payment of the amounts due as provided for in clause 2 and 4.1 of the agreement on or before the 31st July 2006 the sellers will immediately terminate the agreement and repossess the business and the assets sold in terms thereof."

The respondents tried to undo the said concession by their attorney but failed

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to accomplish it. Bearing in mind the following their effort in any case was futile:

a)

the 1st respondent gave as reason for taking control of the business his concern about the way in which Marais, the 6th respondent, was managing the affairs of the 7th respondent and a loss being incurred. According to the deed of sale all risks in and to the business passed to the purchaser namely the applicant. The 1st respondent accordingly had

no right to intervene. It was the applicant's contention that the 1st respondent intervened in an attempt to force the applicant to make payment of the balance outstanding on the purchase price. This accords with the contents of the respondents' attorneys' letter;

b)

on the 15th May 2006 the 1st respondent on a letterhead of a company called Buscor (Pty) Ltd of which he was the managing director, wrote a letter to Volvo SA (Pty) Ltd regarding some tradeback units,

apparently busses which letter reads as follows and is self-explanatory:

"Your e-mail dated 31 March 2006 refers.

I would like to point out that no agreement was reached as this was a final proposal only by Mr. Lindblad.

As you are aware, I am no longer a shareholder in Coachcor (Pty) Ltd. as I have sold my shares to a company called Travico, on 31 March 2006.

I have had discussions with the new shareholders but they informed me that your proposal is not acceptable to them. They insist that the tradeback units be returned to Volvo";

c)

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on the 8th February 2007, the 1st respondent on a letterhead of the 7th respondent, Coachcor (Pty) Ltd., wrote a letter to the 6th respondent, Marais, wherein he confirmed an agreement between himself and Marais in terms whereof the services of Marais were terminated with immediate

effect. The question arises on what basis the 1st respondent had the right to meddle in the affairs of the 7th respondent and to conclude agreements on behalf of the 7th respondent, seeing that he, according to the letterhead, was not a director of the 7th respondent, but which letterhead reflected that the 6th respondent, Marais, in fact was the director of the 7th respondent, and in terms of his letter to Volvo referred to supra, not even a shareholder of the 7th respondent unless he lied to Volvo;

d)

in the papers the respondents complain that the applicant utilised funds of the 7th respondent to pay the purchase price of the shares and refer to the provisions of the Companies Act which prohibited that. If the respondents were in control of the 7th respondents, as they aver they were, it is not comprehended how it came about that the applicant managed to utilise such vast funds of the 7th respondent being a company which they did not control, but was controlled by the respondents, according to the respondents.

[19] Mr. Maritz, who appeared for the respondents argued that no sane person

would pass control over the merx to strangers before they performed in terms of the contract with regard to the payment of the purchase price. Mr. Cilliers, who appeared for the applicant, responded thereto by stating that control passed

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to the purchaser in terms of the contract whether it was fair or not.

[20] It is abundantly clear that Marais managed the business and affairs of the 7th respondent on behalf of the applicant and that the 1st respondent through his acts carried out the threat to dispossess the applicant and to take back control of the 7th respondent. It is the finding of this court that the 1st respondent through his act of spoliation thus illicitly deprived the 7th respondent, and through it the applicant, of the right of possession of the business and assets of the 7th respondent.

[21] A person who has suffered spoliation has a speedy and summary remedy in a mandament van spolie, more usually referred to as a spoliation order and occasionally as a writ of spoliation. In *Mans v Marais* 1932 CPD 352 at 356 it was stated that the object of the order is

"merely to restore the status quo ante the illegal action. It decides no rights of ownership; it secures only that if such decision be required,

it shall be given by a court of law; and not effected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and no worse, position than he was in before the spoliation. There is consequently nothing inherent in a mandament van spolie which demands that it should be conditioned as being granted pendente lite. "

[22] The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands and to dispossess another illicitly of possession of property, and if he does, the court will summarily restore the

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status quo ante, as a preliminary to any inquiry into the merits of the dispute. (See Voet 41.2.16; 43.17.7; Nino Bonino v De Lange 1906 TS 120; Sillo v Naude 1929 AD 21; Nienaber v Stuckey 1946 AD 1049).

[23] The respondents raised a point in limine in the answering affidavit to the effect that the deponent Rocha, who signed the founding affidavit, was not properly authorised to sign it on behalf of the applicant. This was denied in the replying affidavit. Taking the contents of the various affidavits in their totality this Court is satisfied that he was properly authorised and the point in limine is dismissed.

[24] Spoliation having been proven the following order is made:

1.

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The noncompliance by the applicant with the rules of Court regarding service and time limits be condoned and the matter be dealt with on an urgent basis.

The 1st, 2nd, 3rd, 4th and 5th respondents are ordered to forthwith and with immediate effect restore the applicant's possession and control over and in 7th respondent and its business and assets.

The 1st, 2nd, 3rd, 4th and 5th respondents are prohibited to

take control of and/or to interfere with the management and/or business activities of the 7th respondent, or attempt to do so, without a valid Court Order empowering them to

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do so.

The 1st, 2nd, 4th and 5th respondents are ordered to pay the costs of this application jointly and severally, payment by the one absolving the other, such costs to include the costs of two counsel where two counsel were employed by the applicant.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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Prepared on 13 October 2026 · Esheria