

SOUTH AFRICA / JUDGMENT

Van Rooyen and Another v Imperial Transport Holdings (Pty) Limited and Another (31063/2000) [2004] ZAGPHC 12 (9 July 2004)

[2004] ZAGPHC 12**COURT**

High Courts - Gauteng

BEFORE

Motata

CASE / FILE NUMBER

31063/2000

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(TRANSVAAL****PROVINCIAL DIVISIONS****DATE:**

09/07/2004

CASE

NO: 31063/2000

UNREPORTABLE

In

the matter between:

LEON

VAN ROOYEN &

MARIANA

VAN

ROOYEN.....JOINT

PLAINTIFFS

And

IMPERIAL

TRANSPORT HOLDINGS

(PTY)

LIMITED.....1ST

DEFENDANT

IMPERIAL

HOLDINGS

LIMITED.....2nd

DEFENDANT

JUDGMENT

MOTATA. J

The plaintiffs in their capacities as the trustees of the Andre van Rooyen Trust, sue the defendants in contract. The plaintiffs alleged that on or about 22 May 1998 and at Germiston Andre" van Rooyen who was then a trustee of the Andre" van Rooyen trust and who acted in his capacity as a trustee for and on behalf of the Andre" van Rooyen trust, and the first defendant alternatively the second defendant represented by M H O Els concluded an oral agreement in terms of which the trust and the defendants would cause a company to be formed the shares in which would be held 40 percent by the trust and 60 percent by the first defendant alternatively the second defendant. The companies that would be formed would carry on business of timber harvesting and extraction. The first defendant and alternatively the second defendant would upon formation of the company pay to the trust a sum of R1 .5 million in consideration for the good will and expertise in the business of timber harvesting and extraction which the trust would make available to the company to be formed. Upon receipt of the R1.5 million the trust would lend and advance a sum of R200 000.00 to the company and the trust warranted in favour of the first alternatively the second defendant that the profit of the company and from the business of timber harvesting and extraction for the three years following upon commencement of the business by the company would not be less than R3 160 945.00.

The defendants both denied that they have contracted with the trust. The defendants plead that the second defendant and one Andre" van Rooyen ("Van Rooyen") concluded an agreement (partly oral partly by conduct) during the period March to July 1998 that the second defendant would cause a company to be formed and Messrs Els, Swanepoel and A Luther would be appointed as directors of the new company and would negotiate to acquire any new equipment which is necessary for the running of the business of the company to be formed.

There is thus a main issue in dispute between the plaintiff and the defendants as to who the contracting parties to the agreement had been. In addition there are a series of disputes as to the terms of the oral agreement which shall be dealt with below.

It is trite that the plaintiff bears the onus in this action, The plaintiff must prove the agreement it relies upon. This will include proving, on a balance of probabilities, who the contracting parties to the agreement had been and what the terms of the agreement were. It also includes the negative onus of disproving the version pleaded by the defendants. Vide *Kriegler v Minitzer* 1949

(4) SA 821 (A) also *Topaz Kitchens (Pty) Limited v Naboom Spar (Edms) Bpk* 1976

(3) SA 470 (A) 472-474.

The parties to the agreement

In his evidence in chief Van Rooyen testified that at the meeting of 20 May 1998 he negotiated in his capacity as a trustee of the Andre" van Rooyen trust. Stated that at that stage he was the sole trustee of the trust and during cross-examination he stated that his wife the second plaintiff had already been a trustee at that stage.

Van Rooyen testified that he negotiated with the Imperial group represented by Messrs Els, Swanepoel and Luther. He did not know

which company in the group he was dealing with. Only when he saw the draft agreement prepared by Messrs De Vries Serobe, did he notice that the contract had been prepared in the name of the second defendant and not the first. He stated in his evidence that it was acceptable to him ("heeltemal aanvaarbaar") that the contract be placed in the name of the second defendant. This

notwithstanding, and because there had been no references to the first defendant in the correspondence, and because certain of the letters had be written on the letterhead of the first defendant, the trust sued the first defendant as well. Despite the plea that the agreement that had been concluded had been concluded with the second defendant, the plaintiffs persisted with the action against the first defendant. In an application for summary judgment which was launched and the version of the defendants as to the contracting party on the side of the defendants had been confirmed on oath. This notwithstanding and even in his evidence the plaintiff still persist with the action against the first defendant.

The real thrust of the plaintiffs' version lies in the capacity in which Van Rooyen acted. The evidence of the defendants is to the contrary that the first plaintiff was not acting in his capacity as a trustee of the Andre van Rooyen trust but was acting in his personal capacity and that he intended utilising some legal entity as his nominee to hold his rights. This is evident from the following:

1. The evidence of Groenewald, called on behalf of the plaintiff, who testified that by virtue of the impending sequestration of Van

Rooyen, the latter could not do the transaction in his own name and that the transaction was with Van Rooyen or his nominee. This is born further by the plea of the defendants.

2. The evidence of Swanepoel where he says Van Rooyen never contracted in his capacity as trustee for the A van Rooyen trust but the transaction was to be with Van Rooyen or a nominee. This is further underscored by the documents generated by Swanepoel, ie his contemporaneous manuscript notes, the written instructions by Swanepoel to Dr Laurens, the joint venture agreement prepared by Dr Laurens where the contracting party is stated to be a nominee.

However, Van Rooyen throughout his evidence attempted to suggest that he at all times acted as a trustee for the Andr6 van Rooyen trust. His own actions, however, speaks louder than his words. In this regard the following is of importance.

1. The Andre van Rooyen trust had existed prior to this transaction (having been incorporated long before this transaction), the Lothair Bosbou Trust (LBT) was formed by Van Rooyen during June 1998 on the advice of his attorney. This trust was formed shortly after the contract is the subject matter of this action and that in his evidence there is no suggestion nor with the discussion with Imperial that the money would be paid to the Andre van Rooyen trust which appears from the bundle pages 106 to 109 where the following appears:

"8.4.4 Die Rl 300 000.00 balans sal betaal word in trust aan A van Rooyen nadat 'n verband op die plaas Elandspruit ten gunste van Imperial geregistreer is..."

"8.4.10 Alle betalings sal aan 'n trust gedoen word wat A van Rooyen se belang sal hou. Die trust sal nog gestig word.

8.4.11 Niks sal nou op skrif geplaas word nie.

A van Rooyen vertrou Imperial met sy 40 persent aandeelhouding en Imperial vertrou A van Rooyen met die geld wat nou oorbetal sal word."

From this document which is prepared by Van Rooyen on 25 June 1998 clearly shows that Van Rooyen himself saw payment to him via a trust that was in the process of being incorporated. That can only be LBT and not the A van Rooyen trust. The references to A van Rooyen trust must be read subject to the qualification in 8.4.10. These references mean nothing more than Van Rooyen indicating that he will nominate a trust which was in the process of being formed. His attempts in the witness box to explain away LBT were at least unconvincing and illogical.

That this is so, can be seen from his own notations on the manuscript document prepared by Dr Laurens. At page 123 of the bundle he in his own handwriting writes in the name "Lothair Bosbou Trust". When Van Rooyen instructed his attorney to prepare an agreement because the agreement prepared by Laurens contained inaccuracies, he instructs his attorney to prepare such an agreement in the name of Lothiar Bosbou Trust. This can be found in the bundle of documents page 134. When Van Rooyen is given an opportunity by his attorneys when the agreement was forwarded to him and then his attorney writes to De Vries Serobe on 15 June 1999 and states that:

"Ons klient bevestig dat dit die basis van die kontrak tussen hulle weergee."

His attorney, Mr Willemse, confirmed on behalf of Van Rooyen, that the transaction is between LBT and the second defendant. On 27 September 1999 Van Rooyen wrote to Mr Swanepoel and stated that payment had to take place to the trust referred to in the agreement. In the first paragraph he identified that agreement as been the agreement prepared by his attorney. Payment thus, according to him, had to be made to LBT and not to the plaintiff. That Van Rooyen himself was the principal in this transaction to Imperial when settlement was discussed as contained in the letter on page 160 of the bundle. There he suggested that he should be paid Rl.2 million as part of the settlement proposal. He records:

"A van Rooyen gee sy 40 persent belang in die maatskappy prys."

In his report of the meeting of 6 April 2000 he wrote that he suggested a settlement which incorporated that LBT gives up its 40 percent interest in the company and no reference was made of the plaintiff. Again in his written instructions to his attorney on 19 May 2000 he recorded to his attorney that LBT is entitled to 40 percent in the company and there is no reference whatsoever to the A van Rooyen trust being the plaintiff herein.

However, Van Rooyen attempted to explain his words and conduct by stating that the agreement had been the agreement and that it was open to him to change the agreement with the consent of Imperial cannot be believed if one has regard to the plethora of meetings held at the instance of Van Rooyen where he persistently adopted the attitude that the agreement was with LBT and that LBT was entitled to the 40 percent shareholding. This he conveyed to his attorney who in turn incorporated LBT in the agreement that he Van Rooyen wanted Imperial to sign.

The evidence of Bothma, the friend of Van Rooyen does not assist at all and in this instance the plaintiff. The fact that Bothma was unaware of this particular transaction is not surprising. LBT was formed at a time that Van Rooyen was in the process of being sequestered and this is evident from the evidence of Bothma that this trust was formed solely for the purposes of Van Rooyen and Van Rooyen controlled the trust and all that Bothma effectively did was to sign cheques from time to time and that he had signed the deed of sale in respect of the acquisition of the farm by the LBT. The fact that Bothma signed a sale agreement for a farm for the trust would appear not to be surprising since Van Rooyen qua insolvent could not sign such an agreement and any conveyancer. would have insisted on being satisfied that the agreement and the transfer documents were properly executed.

The first plaintiff failed to call the second plaintiff the other trustee. If the agreement had been with the first plaintiff then the second plaintiff would have known about it. During cross-examination Swanepoel testified that it did not matter to Imperial which entity Van Rooyen elected to nominate. He was adamant that this notwithstanding Van Rooyen did not on 20 May 1998 nominate the plaintiff as his nominee. That this is so, must be the inevitable conclusion when one considers all the references by Van Rooyen to LBT. It is deduced from the evidence that the first plaintiff had nothing to contribute to the new venture. Van Rooyen was the key and because of his pending sequestration, he nominated a trust - LBT - to act as his vehicle in the transaction. Once he nominated LBT he could not thereafter nominate the first plaintiff in these proceedings. From the foregoing the court is unable to decide who the contracting parties had been and in the light of the onus the plaintiff must fail.

The terms of the contract

The second area of dispute pertains to the terms of the oral contract. Here the court is faced with two diametrically opposed versions. There are certain areas of agreement on what had been discussed and these include:

1. That a new company had to be formed;

2. That a 60/40 split in shareholding was agreed upon;
3. That Van Rooyen would provide R200 000.00 working capital;
4. That assets would be acquired from the insolvent estates and/or the financial institutions that held the hire purchase agreements for the purposes of the business of the new company;
5. That a profit guarantee for a period of three years had been agreed upon (there is a small dispute as to whether the period initially was four years, but it is accepted by Swanepoel that it was later agreed to be three years).

These areas of dispute include the following:

- (a) Whether or not the 40 percent shareholding would be transferred to Van Rooyen's nominee upon formation of the company;
- (b) Whether or not the profit guarantee was to be formulated as a percentage net profit on turnover (as per Swanepoel) or whether or not an actual figure of R3 016 945.00 was agreed upon;
- (c) That Imperial had to pay R1.5 million to Van Rooyen or his nominee, who would in turn utilise R200 000.00 thereof as working capital for the company; and
- (d) Whether or not the plaintiff qua owner of the farm Elandspruit would register a mortgage bond over its property as security for the profit guarantee. On the defendants'

version no such bond had to be passed.

The defendants had investigated the businesses operated by Van Rooyen during March/April 1998. They did this with reference to the

financial statements provided by Van Rooyen in his personal capacity and in respect of the company known as "Van Rooyen Forestry

(Pty) Limited" On an analysis of the financial statements read with the due diligence study completed by Van Rooyen, there was no asset value here. The agreements which formed the heart of the whole new joint venture with Mondi and Sappi had terminated at the end of April as contained in the letters of Van Rooyen dated 25 May 1998 to Sappi and Mondi in the bundle on pages 71 and 72.

Van Rooyen claimed that the payment of R1.5 million would be in consideration for the good will and expertise in the business of

timber harvesting and extraction which the trust would make available to the company to be formed and further in the particulars of claim the plaintiff alleged that represented by A van Rooyen made available to the company "goodwill and expertise in regard to the business of timber harvesting and extraction".

Particularity was sought as to the detail of the goodwill and expertise which Van Rooyen would make available and he answered that:

"A van Rooyen was 'n gekwalifiseerde ingenicur met 22 jaar ondervinding in die ingenieursbedryf, insluitend besigheidsbestuur sedert verkryging van sy graad waarvan plus minus 8 jaar ondervinding opgedoen is; spesifiek in die houtbedryf. Hy was 'n lid van die Suiwer Afrikaanse Bosbou Kontrakteursvereniging en klandisiewaarde het ingesluit sy lang verhouding met onder andere hout- en pulp maatskappye, Sappi en Mondi."

It is common cause that the A van Rooyen trust had no goodwill and/or expertise to make available. The only goodwill and/or expertise that could have been made available is Van Rooyen himself.

That goodwill must be seen in the context of the fact that he in eight years managed his forestry business to the extent that he had to be sequestrated. It is that goodwill that the trust contends for which the defendants had agreed to pay R1.5 million. The defendants had to pay for all the assets that were necessary to commence the business. It did so with its own funds (albeit that it might have been on loan account to the new company). Van Rooyen could not and did not contribute any money to such acquisition. Van Rooyen was appointed as manager of the new business with a very attractive financial package (an initial salary of some R18 000.00 per months with the use of an expensive 4X4 motor vehicle). This would appear to be at the time or rather on the verge of being sequestrated and thus without any resources whatsoever. Had Van Rooyen met the profit guarantee, there would have been inexistence a new company with an inherent value to which he, Van Rooyen had only contributed by means of his skills for which he was paid for. After three years he would then be entitled to 40 percent of the new successful venture through his nominee. That is what he was receiving as quid pro quo in this transaction - not the R1.5 million. Swanepoel made it clear that Imperial took all the risk in the new venture and that Van Rooyen only stood to benefit if the new company were to be as successful as Van Rooyen had projected in his cash flow statements. After three years, Van Rooyen would own 40 percent of a successful business, backed by the financial muscle of Imperial.

I can find no logical and or commercial sense in the defendants agreeing to give Van Rooyen 40 percent of the shareholding and paying

him R1.5 million and simultaneously wanting security for the profit guarantee. Logic dictates that the version by Swanepoel is by far the more probable ie that the R1.5 million that had been discussed arose out of the urgent need by Van Rooyen to obtain finance. The defendants' version that it undertook to approach Imperial Bank to see if the latter would be prepared to loan and advance Van Rooyen the R1.5 million against the security of his farm, Elandspruit, is far more probable.

The evidence of Groenewald is diametrically opposed to the defendants' version. Groenewald demonstrated that his memory of his involvement with the defendants is sketchy. He only worked for the defendants for about a year, but he cannot remember when he started his employment and when he left his employment. His contemporaneous note during the discussion only bears the following:

"Om R1 .3 miljoen uit te betaal verlang sekuriteit."

He purported to have kept notes of the agreement yet he failed to record the salient features of the so-called agreement ie 60/40 split, the R1 .5 million price agreed upon and the profit guarantee. One would have expected of a person with a financial background who as he had testified, was keeping a minute of the meeting, to have recorded these salient features. He did not.

Groenewald thereafter prepared the Maqua minute and he was uncertain as to precisely when he had prepared this minute. The minute furthermore is not a mere transcription of his manuscript notes as contained in the bundle. In the minute he once again failed to record the salient features of the agreement that is the payment of R1.5 million, the 60/40 split and the profit guarantee. At best there is oblique references to payment in paragraph 6 where the farm is said to "serve as security against payment".

When Groenewald is approached by Van Rooyen almost two years after the event, he remembers R1.5 million as contained in his statement dated 28 February 2000. He could not remember the exact figure but he links the payment with the profit guarantee and the bond.

The actions of Van Rooyen after the 20 May 1998 meeting is of particular significance. He stated that he prepared the 25 June 1998 agenda and that such agenda and that such agenda had been discussed with Els, Swanepoel and Luther. He was, however, only prepared to testify that the information as contained on page 107 had been discussed. This was accepted by the defendants. Swanepoel, however, made it quite clear that he never saw the version of Van Rooyen as to the agreement. Luther was in charged of the operational detail of the transaction and not the agreement itself. Swanepoel was the person who had to deal with this agreement, Swanepoel took notes during the meeting of 20 May 1998. When Swanepoel was taxed during cross-examination, as it was put to him that these notes were prepared after the meeting. Two reason were advanced to Swanepoel in support of this submission, ie that his reference to "Coopers Trust" could only have been inserted after the end of June 1998 when Van Rooyen testified he was sequestered. The letter of Coopers Trust dated 6 June 1998 demonstrated this approach to be incorrect. The second reason pertained to the figure of R5.2 million for the assets. Swanepoel's evidence was that the figure was discussed at the meeting and recorded by him. This Swanepoel instructed his attorney in writing as contained on page 121 of the bundle. There was no reference to payment of R1.5 million to Van Rooyen; paragraph 2 thereof contained a clear reference to the loan that Swanepoel had testified about. This document was prepared at the beginning of August 1998, as was confirmed by Laurens who received a fax on 5 August 1998. It is not an ex post facto attempt by Swanepoel to create a version. His version of the agreement has been constant.

Swanepoel caused the written agreement to be prepared, which Van Rooyen received during August 1998. Therein there is no reference whatsoever to payment of R1.5 million to Van Rooyen and/or his nominee. There was reference to a loan by Imperial Bank to enable Van Rooyen to put up the R200 000.00 and that such loan would enable Van Rooyen to make payment of the R200 000.00 working capital to the company. From the evidence it was common cause that no such loan was ever granted by Imperial Bank and therefore the R200 000.00 was never paid. Van Rooyen's reaction to this was significant. On his version the amount of R1.5 million-had to be paid on the incorporation of the company during June 1998. Two months later he saw an agreement where no reference whatsoever is made to payment of R1.5 million. One would have expected any reasonable businessman to react immediately. He desperately wanted money on his own version. Yet Van Rooyen does not write any letter of demand and does not attempt to procure payment of the R1.5 million allegedly due to him at that stage. He on his own version instructed his attorney to prepare a new agreement as the agreement

prepared by Dr Laurens was incorrect. The first contact that Laurens received, was a phone call from his "kollega Willemse"

during December 1998 who promised to send a letter containing his comment on the agreement. Willemse then prepared an agreement which contained the version of Van Rooyen.

That agreement, however, only reached De Vries Seroebe during June 1999, more than a year after the conclusion of the agreement. The first time that Van Rooyen demanded payment is in his letter of 27 September 1999 where he stated:

"Al die voorwaardes is nagekom, behalwe die betaling aan die trust in die kontrak genoem."

That statement was made shortly before the October 1999 meeting. Thus, for more than fifteen months Van Rooyen did nothing did not attempt to . the R1.5 million that on his version became due and payable on the incorporation of the company.

On his version the 40 percent shareholding had to be registered in the name of his nominee, yet this never happened. No demand was forthcoming from Van Rooyen for the shares to be transferred and even to date he still considered the shares to be irrelevant. The only possible explanation is that the version of Swanepoel in this regard is to be preferred ie that the shares would be held by Imperial as security for the profit guarantee. That was sufficient security for Imperial.

On his own version Van Rooyen was entitled to appoint one director to the new company. He never attempted to appoint any person to act on his behalf. Yet again, the version of Swanepoel as to what the terms of the agreement had been was implemented ie the directors of the new company were Els, Swanepoel and Luther, as has been noted by him in his notes at the time of the conclusion of the agreement.

During cross-examination of Swanepoel, a handwritten notation on the reverse of exhibit C was put as being in support of the plaintiffs' version. Swanepoel could not identify the handwriting of the person who made the note, but disagreed with counsel's interpretation thereof. His reasoning was sound. There is nothing before the court to show who made the note, when the note was made and the circumstances existing when the note was appended.

There were other witnesses identified in the documents and the evidence, notably MHO Els and A Luther. They were not called by the defendants. Swanepoel testified that Els retired during the beginning of 2000 due to ill-health. He also testified that Luther was concerned with the operational detail of the agreement. Even Van Rooyen addressed his concerns about the agreement to Swanepoel.

Whilst it is so that in proper circumstances the court may draw an inference against a litigant who fails to call a witness, it can only do so when the witness is available (as Els and Luther were) and where the witness could "elucidate the facts before the trial court". Cf *Elgin Fireclays Ltd v Webb* 1947

(4) SA 744 (A) 749/750.

Swanepoel dealt in extenso with the defendants' version. The decision not to call additional witnesses must be viewed in the light of the onus, as discussed above. Els (who incidentally deposed to the affidavit, exhibit E) and Luther, who only would have served to corroborate the version of Swanepoel, who was the main person dealing with the agreement.

From an overview of the conduct of the parties inevitably leads to the conclusion that the parties acted in accordance with the agreement as contended for by the defendants ie: no payment was made, no bond was taken, no demand was made for the shares to be transferred, no demand was for a director to be appointed by Van Rooyen and no R200 000.00 capital was injected.

In my opinion the probabilities overwhelmingly favour the version of the defendants as to the terms of the agreement.

In the circumstances the plaintiffs' claim is dismissed with costs.

J MOTATA

JUDGE OF THE HIGH COURT

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