

SOUTH AFRICA / JUDGMENT

Van Wyk v Ekosto 1042 CC (3023/2012) [2013] ZAECHGC 7 (6 February 2013)

[2013] ZAECHGC 7

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, Y Ebrahim, N G Beshe

CASE / FILE NUMBER

3023/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO 3023/2012

DATE HEARD: 03/12/2012

DATE DELIVERED: 06/02/2013

In the matter between

PIETER JOHANNES FRANCOIS VAN WYKAPPELLANT

and

EKOSTO 1042 CCRESPONDENT

JUDGMENT

ROBERSON J:-

- [1] On 3 March 2011 Andrews AJ granted the following order against the appellant, following an application by the respondent for the eviction of the appellant from certain immovable property owned by the respondent (the property) and a hotel business (the business) conducted on that property:

“It is ordered that:

- (a) respondent be ejected from the erfs 109, 110, 111, 112, 113 and 114 each being approximately 536 m2 and held under title deed T36963/2002 by applicant and hereafter referred to as “the property”,

- (b) respondent be ejected from the hotel business that is being conducted from the property trading as Rhodes Hotel (hereafter referred to as “the business”);
 - (c) that respondent hand the said business to applicant;
 - (d) that the sheriff of this court be empowered and ordered to eject the respondent from the said premises and business after four weeks after the handing down of this order;
 - (e) that the respondent be ordered to pay the costs herein on a party and party scale.”
- [2] The appellant opposed the application on various grounds, but this appeal, which is with the leave of the court a quo, is limited to a narrow issue, namely whether or not the appellant’s contractual right to occupy the property and the business had been terminated. The appellant claimed that the purported right of the respondent to evict him arose as a result of a simulated transaction which was not enforceable.
- [3] The facts relating to the issue are largely common cause. The former sole member of the respondent was one Nigel Owles. On 15 May 2009 Owles and the appellant concluded a sale agreement in terms of which Owles sold his member’s interest in the respondent to the appellant, and ceded his claims against the respondent to the appellant. The purchase price was R4 550 000.00 in cash and R140 000.00, representing the value of a Ford Ranger motor vehicle, making a total of R4 690 000. Ownership of the member’s interest was to pass to the appellant on payment in full of the purchase price and delivery, inter alia, of an amended CK2 founding statement reflecting that 100% of the member’s interest vested in the appellant. The agreement recorded that the appellant had taken physical control and possession of the business on 1 March 2009.
- [4] The whole agreement was subject to the fulfilment of a suspensive condition to the effect that the appellant succeeded in raising loan finance from a commercial bank in the sum of R4 000 000.00 within 40 days after the accounting officer of the respondent had provided the appellant with the financial statements of the respondent for the fiscal year ending on 28 February 2009.
- [5] Clause 14.2 of the agreement provided as follows:

“If the suspensive condition is not fulfilled within the said allowed time limits or such later date(s) as may be agreed to by the parties, then, the purchaser shall remain the owner of the Ford Ranger, the purchaser shall, until the members’ interest is sold in the manner contemplated in this clause 14.2, continue to manage the hotel and related businesses for his own account and the parties shall jointly use their best endeavours to find a buyer for the member’s interest at a purchase price of at least R4 000 000.00 plus interest thereon at 8,5% per annum calculated from the effective date to the date of payment of the purchase price. If a buyer has not been found within 90 days from the date that the suspensive condition should have been fulfilled the member’s interest shall be sold by way of public auction.”

- [6] The suspensive condition was not fulfilled and the appellant and Owles were unable to find a purchaser of the member's interest. A public auction was held on 1 March 2009, at which Owles purchased the member's interest. The respondent thereafter brought an application in the Free State High Court for the eviction of the appellant from the property and the business. The application was dismissed following the upholding of a point in limine taken by the appellant, that the sale of the member's interest to Owles was void because he was still the owner of the member's interest. As a result the appellant was, in accordance with clause 14.2 of the agreement, entitled to continue to manage the business.
- [7] On 17 September 2010 a second public auction was held at which a trust known as the Rhodes Trust (the Trust) purchased the member's interest. The trustees of the Trust are Roelof Johannes Rossouw and Johan Hendre Conradie. Rossouw is an attorney and deposed to the founding and replying affidavits in the application. Rossouw and Conradie were authorised on 10 September 2010 by the Master of the Free State High Court to act as trustees. In terms of the Trust deed the following persons are capital beneficiaries of the Trust, to be selected by the trustees in terms of their discretionary powers: Owles, any spouse of Owles, the children of Owles, the legal descendants of the children of Owles, and the testate heirs of Owles and any relative of his related to him by blood or affinity, if none of the other beneficiaries are alive on the vesting date. The income beneficiaries are selected by the trustees from the capital beneficiaries.
- [8] According to the respondent, following the sale of the member's interest on 17 September 2010, the appellant's right to remain in occupation of the property and to conduct the business came to an end and his continued occupation and management of the business was accordingly unlawful.
- [9] The appellant alleged that the sale of the member's interest in the respondent to the Trust was a simulated transaction designed to avoid the effect of the Free State High Court order. In reality, so he alleged, Owles had again purchased his own member's interest and was a front for the Trust.
- [10] In *Zandberg v Van Zyl* 1910 AD 302 Innes JA said the following at 309:

*“Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable,*

which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement

other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius (Ad. Cod., 4.22.2) remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it.”

(See also *Michau v Maize Board* 2003 (6) SA 459 (SCA) at 464A-E.)

- [11] The appellant bore the onus to prove that there was a “definitely ascertainable” real intention on the part of Owles and the Trust which differed from the alleged simulated intention. (*Michau v Maize Board* (supra) at 464E). The appellant attempted to discharge this onus by alleging that that Owles was a front for the Trust and was using the Trust as a mechanism to avoid the effect of the Free State High Court order. It was submitted on the appellant’s behalf that the purchase of the member’s interest by the Trust was intended to benefit Owles and nobody else. Owles, so it was submitted, was the only identified capital beneficiary in the Trust deed and the Trust capital would eventually devolve upon him. It therefore could not be said that the purchase of the member’s interest by the Trust was a sale as contemplated in clause 14.2 of the agreement between Owles and the appellant. It also seemed to be suggested in argument that the circumstances of the establishment of the Trust were suspicious, in that the Trust was probably established during the period between the two auctions, and letters of authority were issued to the trustees a week prior to the second auction.
- [12] In my view, in the context of a number of other factors, this evidence and the inferences drawn in argument did little to support the appellant’s case. Clause 14.2 of the agreement between Owles and the appellant clearly provided for a sale by public auction if they failed to find a purchaser of the member’s interest. It was therefore inevitable that once the sale concluded in the first auction was found to be void, another public auction had to be held, as provided for in clause 14.2. A public auction is what it says: it is open to the public to bid for whatever is being sold. The auctioneer conducts the sale. As was submitted on behalf of the respondent, the appellant himself could have bid for the member’s interest. Another person could have bid a higher price than that bid by the Trust, in which case the member’s interest would have been sold to someone other than the Trust. In these circumstances there was no guarantee that the Trust’s bid would be successful. There was no suggestion by the appellant that the public auction was improperly conducted or that there was any collusion between Owles and the auctioneer.
- [13] Furthermore, the trustees have discretionary powers with regard to the income and capital benefits and one cannot read into the Trust deed that Owles alone will receive the Trust capital and income.

- [14] As was further submitted on behalf of the respondent, the appellant did not suggest that the Trust had not been duly registered by the Master of the High Court. The Trust is a separate legal entity and through its trustees is capable of entering into contracts such as the one alleged to be simulated.
- [15] In all these circumstances, I am of the view that the allegation that Owles effectively purchased his own member's interest in an attempt to defeat the Free State High Court order amounted to nothing more than speculation. It falls far short of evidence necessary to prove that what was expressed in the sale agreement between Owles and the Trust did not record their true intention. In the result the appellant's right to remain in occupation of the property and conduct the business came to an end and the court a quo correctly granted the order of eviction.
- [16] The appeal is dismissed with costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

Y EBRAHIM

I agree.

N G BESHE

For the Appellant: Adv J J F Hefer, instructed by Netteltons Attorneys, Grahamstown

For the Respondent: Adv N Snellenburg, instructed by Neville Borman & Botha Attorneys, Grahamstown

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2013/7.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-wyk-v-ekosto-unknown-topic-aecghc-2013>

Prepared on 12 October 2026 · Esheria