

SOUTH AFRICA / JUDGMENT

Wainstein v Fane (16781/2015) [2018] ZAGPPHC 828 (24 August 2018)

[2018] ZAGPPHC 828

COURT

North Gauteng High Court, Pretoria

BEFORE

Bester

CASE / FILE NUMBER

16781/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 16781/2015

In

the matter of:

EARLE

WAINSTEIN

Applicant

and

MADELEINE

FRANCES FANE

Respondent

JUDGMENT

BESTER AJ

- [1] The respondent, in her capacity as the executrix of the estate of her late husband Raymond Fane, issued summons against the applicant under this case number in 2015 for payment of R1 100 000,00.

On 4 November 2015 the parties concluded an agreement of settlement, which was made an order of court on 11 May 2016.

[2] On 14 September 2017 the respondent caused a writ of execution to be issued for the outstanding balance of the debt. The applicant claims that he has not breached the settlement agreement, so that no writ should have been issued. He applies for the setting aside of the writ.

[3] The application turns on the interpretation of the settlement agreement. Clause 4 provides as follows:

“4.1. For the purpose of this clause 4, “net profit” shall mean the net profit after tax, on a consolidated basis, earned by the Defendant from the Defendants’ companies, as reflected in the monthly accounts concerned and calculated in accordance with Generally Accepted Accounting Practice.

4.2. The sum of R1 000 000,00 (One Million Rand) will be paid in the following amounts on the following dates:-

4.3. R99 500,00 (ninety nine thousand five thousand (sic) Rand) has been paid by the Defendant to the Plaintiff by or on 17 September 2015.

4.4. thereafter monthly instalments as and when earned that are equal to 30% (thirty per cent) of the net profit of the Defendant’s company are to be paid by the Defendant to the Plaintiff by no later than close of business on the seventh (7th) day of each and every month succeeding the month in which the initial instalment in clause 4.3 is made until the entire settlement amount is discharged in full.

4.5. The Defendant shall account to the Plaintiff’s legal representative each and every month by providing the Plaintiff’s legal representatives with the calculation indicating what 30% (thirty per cent) of the net profit has been for the month in question.”

[4] Clause 6, in relevant parts, provides as follows:

“In the event that

(1) Any one instalment is not paid on due date subject to such delay contemplated in clause 5 above; or

(2) ...

(3) The Defendant breaches any other obligation that he owes to the Plaintiff as provided for therein, then and in such event:-

6.1. the full balance then outstanding shall be due and payable immediately with demand being given on 5 (five) days notice or any further act, matter or thing to be done by the Plaintiff; and

6.2. the Plaintiff shall be entitled to cause a writ of execution to be issued for the full balance then outstanding plus interest at the applicable mora date (sic) (presently 9%) per annum thereon.”

[5] The applicant states that the settlement agreement was concluded in the context of him earning periodic amounts from Jasper Technologies International LLC (“Jasper”), an external company, of which he is a director. Jasper, he explained, does not earn profits every month, and he thus agreed that he would pay an amount of 30% of the profits made by Jasper, as and when such profits were made. Thus, if Jasper did not earn a profit in a particular month, no payment would be due.

[6] The respondent initially denied that the settlement agreement

contemplated profits earned from Jasper only, but during argument Mr Silver, who appeared for the respondent, accepted this to be the position.

[7] Thus, the settlement agreement provided that no payment would be made in a month when Jasper did not make a profit.

[8] The applicant contends that he was not in breach of the settlement agreement, and that the writ could therefore not have been issued. He testifies in paragraph 19 of his founding affidavit:

“I did not breach the agreement. I have accounted to the respondent on each occasion when I earned a net profit from my company and I accounted to her for the profit which I received. Where a profit was earned, such monies were paid over to the respondent.”

[9] The respondent states that the writ was issued on the basis of a failure to account, not a failure to make a payment that became due. Mr Silver pointed out that it would be impossible for the respondent to know that an amount of profit was not paid over, unless such a profit was disclosed in the monthly accounting in the first place.

[10] There is no dispute between the parties that the spreadsheet attached

to the founding affidavit constitutes the applicant’s accounting to the respondent. It is evident from the spreadsheet and the founding affidavit generally that the applicant, at least until argument, interpreted the settlement agreement to require of him only to account in respect of those months when Jasper actually earned a profit, and that he did not need to account for those months in which no profit was made.

[11] Clause 4.4 expressly stipulates that 30% of the profit shall be paid as and when earned by the company. Thus the obligation to make payment only arises where Jasper makes a profit in a particular

month. However, clause 4.5, which deals with the duty to account, is worded differently. The clause stipulates that the defendant shall account to the plaintiff’s legal representative each and every month by providing it with the calculation indicating what 30% of the net profit has been for the month in question. This clause does not limit accounting to months where profit was made, but includes all months. Thus, the accounting would in some months reflect that no profit was made.

[12] Not only is this interpretation clear from the wording, but it is also the business-like interpretation.[1] If the applicant did not have such an obligation, the undesirable situation would inevitably occur that the respondent, when not receiving an accounting in a particular month, would not know whether that is because there is no profit, or whether the applicant is simply not complying with his obligations. The wording of the settlement agreement, treating the obligation to pay and the obligation to account expressly in different terms, seems to me to have been designed to prevent such a consequence.

[13] The applicant, on his own version, and as is evident from the accounting attached to his founding affidavit, did not account every month, but only in respect of those months when Jasper earned a profit. Mr Cohen, who appeared for the applicant, in argument conceded that a failure to account for a month, even where no profit

had been earned, constituted a breach of the settlement agreement.

[14] In an attempt to avoid the consequences of the breach, Mr Cohen raised three further arguments. Mr Cohen relied on clause 6(3), which stipulates that the outstanding balance will only become due and

payable if a demand, made in terms of clause 6.1, had not been met. He argued that the applicant had complied with the respondent's

demand. It is evident from the papers that the respondent made a demand for an accounting on 25 August 2017, and Mr Cohen relied on the date of the response of 29 August 2017 to support the argument that there was timeous compliance, that is, within the five days allowed.

[15] However, as Mr Silver pointed out, the date of 29 August 2017 is incorrect. It is evident from the email under cover of which the letter was transmitted, that it was only sent to the respondent's

attorney on 4 September 2017, and was thus out of time.

[16] Mr Cohen further contended that the demand asked for more than the respondent was entitled to, because her attorney asked for an accounting together with supporting documentation setting out income and expenditure. Mr Silver conceded that the respondent could not insist on supporting documentation. He countered that no accounting whatsoever was forthcoming for certain months, and that the fact that the demand overstated the content of the accounting to be provided, does not render the demand void. I agree.

[17] Mr Cohen also argued that it was not proper for the respondent to have failed to disclose to the court the affidavit that necessarily would have had to be provided to the registrar in order for the writ

to have been issued. Mr Silver countered that it is not the applicant's case that the affidavit was not provided or that it was deficient, and that the applicant's case relied purely on the applicant's contention that he did not breach the settlement agreement. In those circumstances, he argued, the affidavit was not relevant evidence. Although it is somewhat odd that the affidavit did not find its way to the court file, I agree with Mr Silver. In the circumstances, no negative inference can be drawn from the fact that the affidavit is not in the papers.

[18] The applicant was in breach of the agreement, for a failure to account as contemplated in the agreement. The applicant thereafter failed to comply with the demand, and the respondent was thus entitled to have caused the writ to be issued.

[19] Mr Silver implored me to consider the applicant's personal attacks on the respondent's attorney in a serious light, and to impose an appropriate costs order as censure. Although I agree

that the allegations of high-handed conduct on the part of the respondent's attorney were not warranted, I do not deem this to be a sufficient reason to make a costs order on a higher scale.

[20] In the result, the application is dismissed with costs.

A Bester

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Heard:

14 August 2018

Judgment:

24 August 2018

For the Applicant:

Adv RG Cohen

instructed by:

Glynnis Cohen Attorney

For the Respondent:

Adv MD Silver

instructed by:

David Oshry & Associates

- [1] See for instance *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in [18]
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