

SOUTH AFRICA / JUDGMENT

Wolmer v Mastertrade 286 (Proprietary) Limited (2013/45428) [2024] ZAGPJHC 146 (21 February 2024) [2024] ZAGPJHC 146

COURT

South Gauteng High Court, Johannesburg

BEFORE

SC Mia

CASE / FILE NUMBER

2013/45428

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case Number: 2013/45428

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

21 February 2024

In

the matter between:

RODNEY

WOLMER

Applicant/Defendant

And

MASTERTRADE

286 (PROPRIETARY) LIMITED

Respondent/Plaintiff

JUDGMENT

- [1] The applicant and defendant in the trial seeks to an order that the defendant's special plea of locus standi be determined separately in terms of the provisions of rule 33(4) of the Uniform Rules of Court. The remainder of the issues are to be stayed until the special please is determined. The application is opposed by the respondent. I shall refer to the parties as in this application after their description below.
- [2] The background to the matter is as follows. The applicant and defendant is an adult male businessman, who has his chosen service address as Allan Allschwang and Associates Incorporated of 58 Peter Place, Bull and Bear House, Lyme Park Bryanston. The respondent and plaintiff in the main application is Mastertrade 286 (Proprietary) Limited, a private company with limited liability registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 121B Rivonia Road, Athol, Johannesburg.
- [3] The respondent and Notylia CC(the shareholders) were the shareholders of Zafra (Pty) Ltd (Zafra), a profit company, duly incorporated in accordance with the company laws of South Africa. Mr IT Zackon was a director of Zafra and a shareholder of the respondent at all relevant times. Zafra was the registered title owner of two units, 6 and 20 in the sectional title scheme known as Twindale Sectional Title Scheme SS245/1984, situated at 75 Maude Street, Sandton.
- [4] The applicant was the director and in control of Exdev (Pty) Limited (Exdev). Exdev acquired the remaining units in Twindale Sectional Title Scheme that belonged to Zafra. It also wished to purchase the two units belonging to Zafra. The respondent conducted their own business from the two units and refused to sell.
- [4] On 2 December 2005, Zafra and Exdev concluded a written agreement of sale (the Zafra agreement) in terms of which Exdev purchased from Zafra, the two sectional title units 6 and 20, together with an undivided share in the property. The agreement was subject- to material express terms, which included that the applicant would develop the property. The respondent would be allocated office space in the development in accordance with certain specifications agreed upon. The purchase price for the office space was agreed at the price of R3 150 000. In the event that the applicant failed to deliver the units, the applicant was to pay damages of R 500 per day from the date of completion to the date of occupation.
- [5] The applicant failed to provide a written agreement within thirty days from the date the applicant and the respondent agreed to the Zafra agreement. The respondent informed the applicant that the agreement had lapsed and would not be revived unless the suspensive condition was fulfilled. The agreement was revived. The respondent was nominated to purchase one unit only as the second unit was no longer required because the respondent's co-shareholder had passed away.

- [6] The parties, therefore, concluded a further agreement known as the Maude Street agreement. In terms of this agreement, the purchase price was agreed upon and reflected in clause 8 of the agreement. In the event that the unit was not available for occupation, the purchase price would be reduced by R250 per day for each day that occupation was delayed beyond 31 December 2008. The transfer of the units from the respondent to the applicant took place on 5 May 2006, after the revival of the suspensive condition in the Zafra agreement.
- [7] On 7 December 2005, the applicant concluded an agreement with Firefly Investments 74 (Pty) Ltd for the sale of all units in Twindale Scheme including the units sold in terms of the Zafra agreement. The respondent maintains this agreement was a fraudulent transaction and was concluded knowing the Zafra agreement was binding. The subsequent Maude Street transaction was concluded whilst the applicant was aware it had sold the entire scheme to Firefly Investments 74 (Pty) Ltd and would not be able to deliver occupation of the unit to the respondent. The applicant was placed under final winding up on 25 September 2012. The respondent acquired knowledge of the facts in March or April 2013.
- [8] The respondent maintains that the applicant knew that the Maude Street agreement constituted a double sale agreement as it was sold by Exdev to Firefly. The applicant never intended that Zafra or the respondent would acquire ownership in the new development. Had the respondent been aware of the true position that Exdev had entered into an agreement of sale with Firefly to sell all of the units in Twindale Sectional Title scheme with no provision made for the pre-emption right of Zafra or its nominee, it would not have entered into the agreement. It would also not have disposed of its major asset had it known that the applicant intended disposing of the sectional title scheme. It maintains that the applicant is personally liable to the respondent as the shareholder and nominee of Zafra for personal liability being damages in terms of the common law or in terms of section 424 of the Companies Act 1973 and section 22 of the Companies Act of 2008 read with section 218(b) for losses it has suffered as a result of the applicant's conduct, in the sum of R 5 894 000 with interest at the rate of 15.5% from the date of judgment.
- [9] The applicant raised a special plea in response to the claim. It seeks to have the issues raised below be determined separately.
- "1. The Plaintiff seeks to hold the Defendant personally liable for the debts of Exdev (Pty) Ltd ("Exdev") in terms of Section 424 of the Companies Act 61 of 1973.
2. The Plaintiff pleads at paragraph 29 of the particulars of claim that "arising out of the Defendant's conduct" the Plaintiff "as shareholder and nominee of Zafra" has suffered damages in the sum of R5 894 000.00, being the cost of purchasing alternative premises to those owned by Zafra in a similar type and positioned location in Sandown, alternatively Sandton.

3. To the extent that the damages arise out of Exdev's breach of the "Zafra Agreement" for which damages the Defendant is alleged to be personally liable- or for a fraudulent misrepresentation made by the Defendant to Zafra, such damages claim belongs to Zafra.
4. The Plaintiff, as the shareholder of Zafra, has no locus standi to claim damages from the Defendant by virtue of the legal principles set out in Foss v Harbottle.
5. Zafra's purported "nomination" of the Plaintiff as "the purchaser of one of the units in the proposed development", as alleged in paragraph 9.2 is invalid in that, inter alia:-
 - 5.1. It fails to comply with the provisions of the Alienation of Land Act 68 of 1981; and
 - 5.2. In any event, such "nomination" occurred after the Zafra Agreement had lapsed.
6. The Plaintiff was accordingly not "nominated" by Zafra under and in terms of the Zafra Agreement, and has no locus standi to claim damages from the Defendant.
7. Accordingly, the Plaintiff has no claim against the Defendant, whether in its capacity as shareholder or alleged "nominee" of Zafra."
- [10] The applicant requests that the issue of locus standi be determined separately from the main action in terms of rule 33(4) of the Uniform rules of court and that the remainder of the issues be stayed until the issues defined in the order for separation are dealt with.
- [11] The rule provides that :

"33(4) If, in any pending action, it appears to the court mero moto that there is a question of law or fact which may conveniently be decided before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall have on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."
- [12] Counsel for the applicant argued that a separation should be granted unless it appeared that issues could not be determined separately. It was for the applicant to delineate the issues to be determined separately and this would not be possible where the issues were inextricably linked with the main issues. The submission was that the issue of locus standi was sufficiently discrete and separate to enable it to be determined apart from the issues to be determined in the main action at trial. Counsel for the applicant submitted that hypothetically, even if the respondent's version was considered based on the misrepresentation which purported to cause the loss in delict, the issue that the respondent was required to prove was that it had locus standi. On the discrete issue of locus standi, the respondent had to show it could sue the applicant in delict for a wrong the applicant had committed to the company in which the respondent was a shareholder. Counsel submitted

that the decision in *Hlumisa Investment Holdings RT Ltd v Kirkinis and Others*^[1] was instructive in the matter at paragraph 21, where the Court said:

“[21] In considering whether the essential conclusions of the court below are correct it is necessary, at the outset, to deal with the contention by the appellants, near the commencement of their heads of argument, that the directors' reliance on the legally recognised bar against a reflective loss claim is nowhere to be found in their exceptions and, consequently, the court below erred in having regard to submissions in that regard. This was all the more so, it was contended, if regard is had to rule 23(3) of the Uniform Rules of Court, which provides that the grounds upon which an exception is founded 'shall be clearly and concisely stated'. That contention can be disposed of briefly. The rule against claims for reflective loss will be examined in some detail later in this judgment. For present purposes it suffices to state its essentials: Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action. In their exceptions, the directors contended that ABIL and/or African Bank ought to have brought an action, if one was sustainable, and not the appellants as shareholders in ABIL. The exceptions accordingly encompassed the no-loss principle. There is thus no merit in this point.

^[13] Counsel continued that the evidence relating to the main action was comprehensive and would entail expert evidence relating to the replacement of properties among the issues, with intense cross-examination about the intentions of the parties and misrepresentations. The issue relating to locus standi could be determined with documentary evidence and little oral testimony. The applicant's contention was that Zafra had locus standi and not the respondent. This was not required to be determined in this application. But demonstrated the discreteness of the application. Thus it was appropriate to grant a separation for this issue of locus standi to be determined separately prior to the main action. In support of the submission it was highlighted that the respondent accepts there is a problem with its particulars of claim in that it submits that the applicant ought to have delivered an exception, conceding there are errors. It states that mistakes occur and indicates it would have amended its papers upon receipt of the applicant's exception which it intends to do in due future.

^[14] In opposing the application counsel for the respondent referred to the decision in *Denel(Edms) Bpk v Vorster* ^[2] where the Court said:

“ In many cases, once properly considered, the issues will be found to be inextricably linked, even though at first sight, they appear to be discrete. And even when the issues are discrete, expeditious disposal of the litigation is best served by ventilating all the issues at one hearing, particularly when there is more than one issue that might readily be dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order and, in all cases, it must be so satisfied before it does so

it is the duty of the Court to ensure to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion...”

[15] Counsel for the respondent, submitted that even where issues may be discrete, the expeditious disposal of the litigation is best served by ventilating all the issues at one hearing. This is more so when there is more than one issue for determination to dispose of the matter. Counsel emphasised that it was the duty of the court to be satisfied that the issue to be tried was clearly circumscribed to avoid confusion when it considered making an order for separation which counsel argued was not the position in the present matter. Counsel submitted that the decision in *Pieters NO v Absa Bank Limited*[3] was different in that the matter there was a narrow issue which bore no relation to the merits of the claim of damages.

[16] In advancing his argument that the *Pieters* matter was distinguishable from the present matter counsel submitted that it was necessary to consider whether it would be fair to separate the issues, whether there would be any prejudice, and whether there was the possibility of a duplication of evidence. He referred to para 14 of the *Pieter* decision where Van Der Linde J said:

“[14] I accept, with respect, the defendant's submissions about the principles that should be applied in applications such as these.

Separation is all about the convenient and expeditious disposal of litigation, and the sobering dicta of the Supreme Court of Appeal in *Denel (Edms) Bpk v Vorster* are certainly telling considerations against over-ready separation orders. Convenience is the password; so says the rule. I would

venture that, as is so often the case with rules of Procedural Law, at the heart of the rule lies respect for the administration of justice, and the rule of law. Cases should not be unduly delayed; that famously or perhaps infamously denies justice.”

And at [16]

“[16] Moving on to more practical considerations, the quintessential separable issue is a narrow but discrete point, involving little

documentary or viva voce evidence, which finally decides the case one way or the other. Generally, absent other considerations, a challenge to the locus standi of one of the parties qualifies as a separable issue. The other considerations raised here are the appeal point, the unavailability of evidence point, and the case management agreement point. I believe that the first two of these were appropriately answered by the plaintiff in her riposte, to which I have already referred above”

[17] I am indebted, to both counsel for their submission which have afforded me the opportunity to consider the matter thoroughly with the benefit of their authorities readily available.

[18] Having considered the submissions made, I am of the view that the application for a separation of the issue regarding locus standi is a narrow and discrete issue as compared to the issues that may be traversed in the main action. The determination of the discrete issue of locus standi may resolve the issues in the main action. The issue of costs follow the outcome.

[19] In the result, I make the following order on the separation application:

1. That the applicant/defendant's special plea of locus standi, as articulated in paragraphs 1 to 7 of the special plea, be determined as a separate issue in terms of the provisions of rule 33(4) of the Uniform Rules of Court.
2. The remainder of the issues in the action shall be stayed until the special plea has been dispensed with.
3. The respondent plaintiff is directed to pay the costs of the application.

SC Mia

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: J M Hoffman

Instructed by Alan Allschwang and Associates Inc

For the Respondent: T Ossin

Instructed by Roy Sutter Attorneys

Heard: 11 August 2023

Delivered: 21 February 2024

[1] Hlumisa Investment Holdings RT Ltd v Kirkinis and Others 2020(5) SA 419 (SCA)

[2] Denel(Edms) Bpk v Vorster 2004(4) SA 481 (SCA) para 3

[3] Pieters NO v Absa Bank Limited 2017 JDR 0341 (GJ)

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