

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2014/8100

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

12 MARCH 2014

FHD VAN OOSTEN

In the matter between

MICHAEL ANDALIS

APPLICANT

and

JOHANNA JACOBA BARTMANN

FIRST RESPONDENT

CHARISSA BARTMANN

SECOND RESPONDENT

CILLIERS BARTMANN

THIRD RESPONDENT

DOUBLE STARS TRADING 612 CC

t/a ORANGE CAR WASH

FOURTH RESPONDENT

Practice - urgent application - mandament van spolie – requirements - possession and control of business premises - employee of business not qualifying for protection under the mandament - mutually destructive versions-approach to based on Plascon Evans rule - respondents' version accepted for purpose of deciding application - applicant failed to establish a case - application dismissed with costs

J U D G M E N T

VAN OOSTEN J:

[1] This is an application in which the applicant, by way of the *mandament van spolie*, seeks to be restored into possession and control of the business known as Orange Car Wash (the business). The application was launched by way of urgency and came up for hearing before Moshidi J on 6 March 2014. The respondents

opposed the application and counsel appeared of their behalf at the hearing. The learned judge issued an order in terms of which the matter was removed from the roll, times for the filing of further affidavits specified and costs reserved. The respondents' answering affidavit and the applicant's reply thereto were subsequently delivered and the matter was enrolled for hearing in the urgent court before me. I am satisfied that sufficient urgency exists to warrant the hearing thereof today.

[2] The applicant and the first respondent were formerly married but 4 years later divorced in 2010. The first and second respondents are siblings born from the first respondent's previous marriage. The essence of the dispute between the parties concerns the business and the applicant's relation thereto. The business is owned by the fourth respondent (the CC).

[3] The versions of the parties are diametrically opposed and mutually destructive. The applicant states that the business commenced in September 2009 in terms of an oral agreement concluded between the applicant and the respondents. In terms of the agreement the business would be owned by the CC and the parties would share the membership interest in the CC as follows: the applicant and the first respondent 35% each and the third and fourth respondents, 15% each. The applicant was further to manage and control the business. After the divorce the applicant states, and in terms of an 'arrangement' between the applicant and the first respondent, the *status quo* remained. On a date, which is not mentioned, the applicant was summoned to a meeting at the OR Tambo International Airport which took place between him, the first, second and third respondents, the first respondent's erstwhile husband and two other persons. The applicant was accused of having embezzled the funds of the business and a demand was made for the immediate handing over of the keys of the business as well as its cell phone. He says he was intimidated and threatened with police interference and action to such extent that he feared for his life which coerced him to oblige. Having handed over the keys and the cell phone he maintains that he has been deprived of the possession and control of the business in respect of which he seeks restitution, relying on the *mandament van spolie*.

[4] The first, second and third respondents save for admitting that the applicant is no longer employed by the CC, deny all material allegations made by the applicant. The first respondent states that she in fact, on her own, started the business in 2007

when the CC was registered of which she was and still is the only member. The applicant was appointed as the manager of the business and entrusted with the day to day running and management thereof. She denies the agreement relied on by the applicant or that he or the second and third respondents were at any time members of the CC. She, on a date, place and in a manner which is not stated, confronted the applicant with having misappropriated funds of the business which she states he readily admitted. She then summarily terminated his services as an employee of the CC. The first respondent accordingly disputes the applicant's right and title in and to the business or membership in the CC.

[5] The *Plascon Evans*-rule finds its application in this case. Counsel for the applicant submitted that the respondent's version ought to be rejected out of hand for the following two reasons: firstly, reference is made to the applicant's salary slip in the answering affidavit and that a copy thereof was attached but no such document has been annexed and, secondly, one of the persons alleged by the first respondent to have been present at the Airport meeting, one Chris Janos, has deposed to an affidavit annexed to the applicant's reply, denying that he was present. In regard to the missing annexure counsel for the respondents confirmed that no such document existed and that a mistake occurred in the answering affidavit. Although not satisfactory, I am not satisfied that this aspect takes the matter any further. As for Janos, I do not think his mere denial is sufficient to serve as a basis for a credibility finding. The general rule that credibility ought not to be decided on affidavits, in my view applies.

[6] The respondents' version that the applicant was merely an employee of the CC who was summarily dismissed following upon his admitted dishonesty, must accordingly be accepted. An employee does not have the right to possession as is required for purposes of the *mandament van spolie* (see *Venter v Livni* 1950 (1) SA 524 (T); *Greaves and others v Barnard* 2007 (2) SA 593 (C)). The fate of the application however, in my view, falls to be decided on a further ground which is that the applicant has simply failed to establish the rights which he now seeks to protect. In the founding affidavit the applicant states that the agreement, which I have alluded to, was concluded and the terms thereof are set out. What is seemingly missing from the affidavit is whether those terms were in fact implemented. On this score the first

respondent, apart from disputing the agreement, relies on the a CK2B form issued by the Companies and Intellectual Property Commission which shows that she is the sole member of the CC. In his reply the applicant admits the contents of the form but then attempts to save the day in stating that he 'in all actuality' was a member with a 35% member's interest. The reason belatedly proffered for the registration of the first respondent's 100% member's interest was his bad credit record at the time which he maintains would have constituted an obstacle in obtaining a lease for business premises. In this regard the applicant adds that he 'reserves his rights' to claim rectification of the CIPC records. The essential and opportune time for having raised and dealt with this aspect was in the founding papers. The applicant should not be allowed and cannot make out a case in the replying affidavit. In passing it should be mentioned, in any event, that the applicant's version in the reply clearly contradicts the allegations in the founding affidavit that the second and third respondents were also, in terms of the agreement, to become members of the CC.

[7] In summary: the applicant has failed to establish his entitlement to possession and control of the business on the basis relied on and in consequence that he was spoliated. It follows that the application falls to be dismissed.

[8] In the result the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV D BLOCK

APPLICANTS' ATTORNEYS

STEVE IOULIANO ATTORNEY

COUNSEL FOR RESPONDENTS

ADV SD MARITZ

RESPONDENTS' ATTORNEYS

PRETORIUS INC

DATE OF HEARING
DATE OF JUDGMENT

12 MARCH 2014
12 MARCH 2014