IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 26469/17

(1)REPORTABLE: NO
(2)OF INTEREST TO OTHERS JUDGES: NO
(3)REVISED
17 January 2019 
DATE SIGNATURE

In the matter between:

JERENIQUE BAYARD N.O	**First Applicant**
SARITA ERICA RICKS N.O	**Second Applicant**
ROY ABRAHAMS N.O	**Third Applicant**
and	
STRATEGY HOUSE (PTY) LTD	**First Respondent**
LYDON BARENDS	**Second Respondent**
CJ BENJAMIN	**Third Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] On 10 January 2019, I made judgment in this matter. I noticed the following day that the judgment handed down was erroneously made in that it was an incorrect version. The parties were then contacted and informed about this error and that the court intended rescinding the judgment.

[2] The judgment handed down on 10 January 2019 is rescinded and replaced by the judgment below.

[3] This is an application in terms of which the applicant seeks an order directing the first and third respondent to pay JSL Family Trust the amount of R1 350 000.00. The applicant, JSLJ Family Trust, is a family trust registered as such under trust number IT000661/2015 (T). The other applicants including the deponent to the founding affidavit are trustees of the Trust and cited in these proceedings in their representative capacity.

[4] The first and second respondents (the respondents) filed notice to oppose the applicant's application. They however did not file the answering affidavit within the prescribed timeframe. It was for this reason that they filed an application for condonation for the late filing of what they referred to as "Preliminary, Answering Affidavit." The first respondent is, Strategic House (Pty) Ltd, a company registered in terms of the Companies Act of 1973.

[5] The delay in filing the answering affidavit was according to them due to the incorrect advice by the applicant's legal representative concerning the different practices in the Cape High Court and the North Gauteng High Court.

[6] The respondents further filed an application to be allowed to file the supplementary answering affidavit. The reason for this seems to be due to the fact that the applicants did not respond to the points of law raised in the

"Preliminary answering affidavit." The other reason is that the applicant has failed to file a notice of bar against them and that gave them the impression that they (the applicants) had abandoned the litigation.

[7] The requirements for an application for codonation are well known in our law and thus there is no need to repeat the same in this judgment. The test to apply is also trite, being whether it is in the interest of justice to grant or refuse condonation.

[8] In my view, the respondents have failed to satisfy the requirements of condonation for the late filing of the answering affidavit. The explanation is so poor that it amounts to no explanation. It accordingly follows that the application for condonation stands to fail. It also follows that there can be no basis to talk about a supplementary affidavit as there is nothing to supplement. In any case, there is no satisfactory explanation as to why the rule relating to the number of permissible affidavit in motion proceedings should not apply in this matter.

[9] The other point raised by the respondents in their purported supplementary affidavit is the application to rectify the agreement to provide for the period of the payment once the venture was profitable. This point is also unsustainable in that it does not make business sense when the agreement is interpreted in its context. In my view this application was unnecessary.

[10] To summarize, it is my view that the respondent has failed to make out a case for: (a) condonation for the late filing of the answering affidavit and (b) the filing of the supplementary affidavit, and (c) for the rectification of the agreement.

[11] In relation to the third respondent a default judgment was granted against her on 19 July 2017 by Manamela AJ. The order made reads as follows:

> "**1. ORDER IN RESPECT OF 3rd RESPONDENT:**
>
> 1.1 The 3rd Respondent is ordered to pay to the Applicant an amount of R1 350 000.00 . . . ., within 30 days of the granting of this order.
>
> 1.2 The 3rd Respondent is ordered to pay interest on the amount set out in prayer 1.1 supra *a tempore morae* at a rate of 25% within 30 days of granting of this order.
>
> 1.3 The 3rd Respondent is ordered to pay costs of this application.
>
> **2. ORDER IN RESPECT OF 1st and 2nd RESPONDENTS**
>
> 2.1 The application against the 1st and 2nd Respondents is removed from the unopposed roll for adjudication at the opposed roll.
>
> 2.2 The 1st and 2nd Respondents are ordered to pay Applicants' taxed costs of application; and Counsel's costs of the 19th of July 2017 on the opposed basis.
>
> 2.3 The 1st and 2nd Respondents are ordered to serve and file a formal application to compel discovery in terms of Rule 35 (7) of the Uniform Rules of Court within (fifteen) 15 days of this order (if any).
>
> 2.4 The 1st and 2nd Respondents are ordered to file their answering affidavit within 15 (fifteen) days of the granting of this order,

where after the Applicant shall file its affidavit as per the Uniform Rules of Court (if any).

Background facts

[12] It is common cause that the agreement was concluded between the parties during November 2015 and it is that which is attached to the applicant's application. The essential terms of the agreement were that:

a. The first and second respondents owned the exclusive rights of the Liverpool Football Academy soccer school programme in South Africa;

b. The respondents wished to raise funds and further expertise in the form of the share issue and thus agreed to issue shares to the applicant and the third respondent.

c. The applicant would within seven days of the production of the shares subscribe for the shares which the first respondent would issue as share capital and which amount to 35% of shareholding in the first respondent.

d. In return for the shares, the applicant was to contribute the amount of R1 600 000,00 to the first respondent of which R250 000,00 was for the purchase of the shares and R1 350 000,00 was to be a loan amount for the first respondent.

e. The amount of R1 350 000,00 to be repaid monthly over a period of 18 months from the effective date".

[13] The applicant contends that the obligation to pay for the loan rested with the three respondents. The agreement also made provision for an arbitration process in the event of a dispute arising between the parties.

[14] It also seems common cause that the respondents failed to pay the loan amount within the 18 months as stipulated in the agreement. The attempt by the applicant to have the dispute concerning the failure to comply with the contract resolved through arbitration was unsuccessful. Thus the issue of exhausting the dispute through the contractual dispute resolution mechanism did not arise.

[15] It would also appear that the other aspects of the agreement were that the first respondent was appointed as a consulting company and the third respondent as the chief executive officer of the Liverpool project.

The case of the respondents

[16] The respondents have in the supplementary affidavit raised the following preliminary legal points; *res judicata*, *locus standi*, non-compliance with the General Law Amendment Act in relation to surety and dispute of facts.

[17] The respondents argued that the matter was *res judicata* because of the default judgment made by Manamela AJ. As indicated earlier the third respondent was ordered to pay the applicants the amount of R1 350 000.00 with interest. In relation to the first and the second respondent, the order removed the matter from the unopposed roll and placed it on the opposed roll. Also, the respondents were granted leave to file their answering affidavit within fifteen days of the granting of that order.

[18] In support of their proposition that the defence of *res judicata* applied in this matter the respondents relied on the decision of the Supreme Court of Appeal in Prinsloo NO v Goldex 15 (Pty) Ltd and Another,[1] where the court set out the principles governing the defence of *res judicata*. The common principle set

[1] 2014 (5) SA 297 (SCA).

out in that judgment is that for the defence to sustain, it must be shown that the parties are the same, the issues are the same and the matter has already been finally adjudicated upon in proceedings between the parties. This means, once these requirements are satisfied the issue/s raised in the matter cannot be raised again.

[19] The SCA further made the following important point in assessing the sustainability of the defence:

> "The recognition of the defence will in such cases require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others..."

[20] In my view the defence of *res judicata* does not find the application on the facts and the circumstances of this case. In the first instance, the court did not make a final determination of the issues between the parties. If that were the case, then the court would not have removed the matter from the unopposed motion roll and placed it on the opposed roll. Fairness and equity would require that the issue of joint liability be inferred from the order, for if the court was of the view that joint liability did not apply it would not have directed that the matter be placed on the opposed roll and granted the respondents leave to file their answering affidavit.

[21] In relation to *locus standi* the respondents contended that the applicant does not possess the requisite *locus standi* because of failure to attach the Master's letter of authority and trust deed to the founding affidavit.

[22] In Breetzke and Others v Alexander and Others,[2] the court held that the general rule is that only the co-trustees of a trust acting together have the *locus standi* to bring or defend legal proceedings on behalf of the trust

[23] In Gross and Others v Pentz,[3] the court held that, as a general rule, the proper persons to act in legal proceedings on behalf of a trust, testamentary or otherwise, are its trustees, and the beneficiary of the trust does not have *locus standi* to do so. But a distinction must be drawn between actions brought on behalf of a trust for example to recover damages from a third party, on the one hand, and on the other, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate.

[24] Trusts do not have juristic personality, and therefore, unless a statute confers juristic personality on a specific trust, it cannot sue or be sued. Therefore, to litigate for or against a trust, it is the trustees in their capacity as such (and not in their private capacity) who must bring and defend actions about a trust. Trustees who bring an action or application need to aver their capacity and also need to state that they were properly appointed by a given instrument (for example a trust deed) or order of the court. Unless the others authorise one or more of the trustees, all trustees must be joined in suing and all trustees must be joined when action is instituted against a trust.

[25] The other point raised by the respondents is that the case of the applicant is that of restitution because the applicants have not tendered to return the shares which were allocated, their claim stands to fail. In my view, this point

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[2] (12922/14) [2015] ZAKZPHC 44 (8 September 2015).
[3] 1996 (4) SA 617 (A).

has no merit when regard is had to the facts and the circumstances of this matter.

[26] The applicants are not claiming the return of the total amount that had been put forward in support of the project. As indicated earlier in this judgment the amount of R1 350 000.00 claimed by the applicant concerns the loan which the respondents were to pay within eighteen months but failed to do so. It is not an amount related to the purchase of the shares.

[27] It is trite that a party confronted with a breach of contract is entitled to either sue for damages or specific performance. In the present matter, the ultimate purpose of this application was to have the respondents pay for the loan in the sum of R1 350 000.00 to the applicant. In this respect, the applicants state in paragraph 1.1 of the founding affidavit that:

> "That the Respondent be ordered to pay the Applicant an amount of R1 350 000..."

[28] The above discussion in my view reveals quite clearly that the facts in this matter are fairly common cause. The cause of action is also clearly set out in the notice of motion and in particular in paragraph 1.1 quoted above. There is also no basis for the contention that there is a genuine dispute of fact that disqualifies the applicant to the relief sought.

[29] In light of the above I find that the applicant has made out a case for specific performance.

Order

[30] In the premises the following order is made:

1. The First and Second Respondents, together with the Third Respondent are ordered to pay to the Applicant an amount of R1 350 000.00 within 30 days of the date of the granting of this order, the one paying the other to be absolved.

2. The Respondents are to pay the interest on the above amount at the prescribed rate.

3. The Respondents are to pay the costs of this application the one paying the other to be absolved.

4. The Respondents' counter application is dismissed with costs on attorney and client scale.

E Molahlehi

Judge of the High Court

Johannesburg.

Representation:

For the Applicant: Adv N Breytenbach

Instructed by: Charle Rossouw Attorneys

For the First and Second Respondents: Adv M Matlapeng

Instructed by: Rurik Mckcaiser Attorneys

Heard: 9 October 2018

Delivered: 17 January 2019