

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



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

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Case number: A5005/2015

In the matter between:

BARNETT: ELMER ROBIN N.O.

First Appellant

BARNETT: YOLANDI N.O.

Second Appellant

BARNETT: ELMER ROBIN

Third Appellant

BARNETT: ANDRE GEORGE N.O

Fourth Appellant

BARNETT: MARIA CORNELIA ESTELLE N.O.

Fifth Appellant

BARNETT: ANDRE GEORGE

Sixth Appellant

DE JAGER: BARBARA WILHELMINA

Seventh Appellant

and

RANKOU: EDWARD SERAME

Respondent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This appeal, against the judgment of our late sister Mayat J handed down on 17th May 2013, concerns an application by the applicant ('Rankou') to rescind from a written contract entered into between himself and two trusts ('Barnett Family Trust' and the 'Elmer and Yolandi Trust') for the sale of shares in a company known as Lumin Light Nett (Pty) Ltd ('Lumin').
2. The facts may be very briefly stated. The first six respondents are all members of the Barnett family. Sixth respondent ('George') performed building alterations for Rankou who was satisfied therewith and the two entered into business discussions regarding Lumin. Pursuant thereto, Rankou concluded a written agreement on 20th February 2008 with the Barnett Family Trust and the Elmer & Yolandi Barnett Family Trust for the sale and purchase of 33.33% of the issued shares in Lumin for the purchase price of R 2 million. Subsequent thereto, during 2008 and 2009, Rankou received five dividend payments. Share certificates in Lumin were issued in his name.
3. By 2010, Rankou learnt that Lumin was suffering from the recession and in a cash-flow crisis and further funds were required. Rankou signed an application for an overdraft facility with Nedbank which was declined¹. This led to further discussions and Rankou ultimately took the view that the Memorandum of Agreement for the Sale of Shares ('the agreement') in Lumin "should be declared *void ab initio* and of no force or effect" alternatively "be cancelled" and that first and second respondents as trustees of the Barnett Share Family Trust ('Elmer' and 'Yolandi') alternatively third respondent ('Elmer') in his personal capacity and fourth and fifth respondents as trustees of the Barnett Family Trust ('George' and 'Maria') alternatively fourth respondent ('George') George in his personal capacity be ordered to refund the sum of two million Rand (R 2 000 000) to Rankou.
4. The application brought by Rankou before Mayat J relied on a number of procedural and *locus standi* issues pertaining to the trusts, alleged failure of the written agreement to properly reflect the discussions and real agreement which had taken place prior to written conclusion and signing of same and alleged misrepresentations inducing conclusion of the written sale of shares agreement.

¹ The court was not furnished with a copy of the application for overdraft facilities and thus does not know in what capacity Rankou signed this document.

5. The learned judge in the court *a quo* found that the one trust was not in existence and that, absent authorization for co-trustees to act independently, the written agreement was void ab initio. The learned judge also found that Rankou's averments pertaining to the oral agreement were plausible whilst the Barnett's averments pertaining to the written agreement were untenable.

THE PARTIES

6. The Memorandum of Agreement for the Sale of Shares, dated 20th February 2008 identifies three entities on the first page: the 'Company' which is Lumin, the 'Sellers' which are both the Barnett Family Trust IT 5424/01 and the Elmer & Yolandi Barnett Family Trust IT 12901/06 and the 'Purchaser' who is Rankou. The agreement spells out that the purchaser and the sellers have reached an agreement for the sale and purchase of 33.33 % shares in the company from the sellers.
7. At the time this agreement was concluded, 20th February 2008, only the Barnett Family Trust IT 5424/01² and the Barnett Share Family Trust IT 12901/06³ had been registered. The Elmer & Yolandi Barnett Family Trust did not yet exist and had not been registered.
8. Rankou avers that he had no knowledge of (and therefore no particular interest in the identity of) the existence of the trusts or their role in the agreement.
9. The learned judge in the court *a quo* found that the written agreement was unenforceable in relation to the Barnett Share Family Trust because Elmer had signed on behalf of the Elmer & Yolandi Barnett Family Trust which was not yet extant although he was a trustee of the Barnett Share Family Trust; because there was no suggestion that Elmer was in error at the time he did so; because of the absence of any averments pertaining to the common continuing intention of all parties to the agreement; and the failure to seek rectification of the agreement on the basis of the agreement.
10. There is no dispute that the trust referred to as the Elmer & Yolandi Barnett Family Trust did not exist at the time of the agreement. There is no dispute that the Masters Reference Number IT 12901/06 attached to the 'seller' on first page of the agreement and in the definitions clause is that of the Barnett Share Family Trust. All the respondents - Elmer, Yolandi, George and Maria have confirmed on oath⁴ in their answering affidavit that "the trustees for the time being of the Barnett

² Page 308 of the papers which discloses that only George and Maria were trustees at the time.

³ Page 272 of the papers which discloses that only Elmer and Yolandi were trustees at the time.

⁴ Paragraph 55 of the Answering Affidavit.

Share Family Trust and the Barnett Family Trust respectively intended to enter into the contract concerned to sell shares”. and that “ the first respondent [Elmer] and the fourth respondent [George] were duly authorized by their co-trustees to act on behalf of each of their respective co-trustees in entering into the contract concerned.” Elmer was a trustee of the Barnett Family Share Trust.

11. I can see no reason why, In the circumstances, the approach to be taken to these facts should not follow that set out by Miller JA in *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 AD that “a defendant who raises the defence that the contract sued upon does not correctly the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by plaintiff as it stands to be corrected”. *Gralio supra* was followed and applied in in *Citibank NA, South Africa Branch v Paul N.O. and Another* 2003 (4) SA 180 (TPD) at 188D-E and in *Boundary Financing Ltd v Protea Property Holdings Pty Ltd* 2009 (3) SA 447 (SCA) at 453A-B.
12. The Barnetts say that they always intended the Barnett Share Family Trust to enter into the agreement and the master’s reference number to that trust is obviously reflected in the agreement. The Barnetts do not formally need to claim rectification. This court is entitled to determine the matter upon the basis of the written agreement as it stands to be corrected should this court decide that the agreement should be so rectified. After all, the issue is the details of the true terms of the contract. There is no variation of the contract only correction of the name of a party in the document which reflects that contract. It is not necessary that there be a mutual mistake on the part of all contracting parties – in the present case the details of the trusts were, according to Rankou, irrelevant and of no concern to him.
13. I regret that I am unable to agree with the approach taken by the learned judge in the court *a quo* on this point and cannot agree that the absence of a claim for rectification renders the agreement “effectively unenforceable at least in relation to the Barnett Share Family Trust”. I do not take the view that “one of the averred sellers of the shares in the company, as described in the written agreement, does not exist”. Both trusts existed at the relevant time – both were correctly identified by their registration numbers, one was misnamed.

RESOLUTIONS AND AUTHORISATIONS

14. In the agreement, each Trust, as seller, is recorded as “duly authorized by the Trustees” and the memorandum is signed by George on ‘behalf of Barnett Family Trust’, Elmer “on behalf of Elmer & Yolandi Barnett Family Trust.”
15. Rankou complains⁵ that the agreement should be declared “*void ab initio*” apparently on the ground that there are “no resolutions underlying” which authorize only Elmer and George to sign as opposed to each of Elmer and Yolandi and of George and Maria, as co-trustees, being required to sign.
16. The learned judge in the court *a quo* found that there was nothing to suggest that the relevant trustees of each of the trusts jointly with their co-trustees bound the trusts in relation to the written agreement. This finding was made because there are no resolutions to show that the co-trustees of each of the two trusts acted jointly to authorize either Elmer or George to sign the agreement. The general rule is that trustees are obliged to act jointly in dealings with the outside world unless otherwise authorized. Accordingly, the court found that the trust deeds did not empower Elmer or George to act independently and there was no evidence to suggest that co-trustees had delegated their powers or authorized these trustees. Therefore the written agreement could not be enforced against a third party in the position of Rankou.
17. Certain Deeds of Trust are attached to the Barnetts’ answering affidavit – Annexure LLN2 for the Elmer Barnett Share Family Trust⁶ and Annexure LLN4 for the Barnett Family Trust⁷. There is nothing in either deed of trust which requires any resolution of the trustees to be reduced to or made in writing. There is nothing in either deed which requires both trustees to sign any document executed for or on behalf of the trust. There is nothing in either deed which prohibits the delegation of duties by one trustee to another. Provision is made for the co-trustees to determine from time to time the manner in which documents shall be signed. There is also no provision in the Trust Property Control Act 57 of 1988 that resolutions taken by trustees of a trust should be in writing.
18. There is no evidence, in the form of minutes of meetings or resolutions, recording that the co-trustees of each trust took a decision that one trustee only could sign the written agreement on behalf of both trustees. In argument, much was attempted to be made of the requests for such documentation from the Barnetts’

⁵ Paragraph 103.1 of Founding Affidavit

⁶ Page 273 of the papers

⁷ Page 309 of the papers

attorney which documentation was never forthcoming. The upshot is that it never came and apparently does not exist. There was much criticism of the absence of any explanation for the failure to make or keep such documentation. This takes the matter no further.

19. All the respondents - Elmer, Yolandi, George and Maria have confirmed on oath⁸ in their answering affidavit that "the trustees for the time being of the Barnett Share Family Trust and the Barnett Family Trust respectively intended to enter into the contract concerned to sell shares" and that "the first respondent [Elmer] and the fourth respondent [George] were duly authorized by their co-trustees to act on behalf of each of their respective co-trustees in entering into the contract concerned." This version of the respondents which (in motion court proceedings must be accepted unless patently absurd⁹) is that they are not only permitted to but that they always intended to and did act jointly without written record thereof.
20. Accordingly, it is difficult to agree with the submission made by Rankou complaining of the absence of a written resolution authorising only one trustee to sign the agreement on behalf of each trust. I regret that I am unable to agree with the finding of the learned judge in the court *a quo* for the reasons I have set out above.

AGREEMENT

The Oral Agreement claimed to be concluded

21. Rankou's challenge to the terms of the agreement is against as it is recorded in writing. He avers that the real agreement was concluded in the course of various discussions. He reached an agreement in December 2007¹⁰ with George and with Lumin¹¹ (represented by George), that he would "inject" the sum of R 2 million into Lumin, he would receive one third of the shares in Lumin and dividends in respect thereof, he would be a "silent partner" and participate on the level of a director.
22. These terms are described as either 'express' or 'implied' or 'tacit' and definitely 'oral'. In other words, it is whatever is not recoded in the actual written document as the agreement between the parties.
23. Ultimately Rankou's only complaint is that his 'injection' of R 2 million was never recorded as a loan but as the 'purchase price' for the shares. All other terms of

⁸ Paragraph 55 of the Answering Affidavit.

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*.

¹⁰ Paragraphs 24 and 25 of the founding affidavit.

¹¹ Paragraph 25.2 of the founding affidavit.

the agreement were met - he did receive the one-third of the shares, he did receive dividends, he did participate in the affairs of the company.

24. Rankou supplies no details this 'injection': He would "inject R 2 000 000 into the business of Lumin" and would "be given one third of the shares of Lumin" and "would receive dividends in respect of my one third of the shares"¹². This R 2 million injection "would be reflected on an interest free loan account in my favour in the books of Lumin"¹³.
25. Rankou is silent in his founding affidavit as to the terms of the "injection". It is appreciated that he maintains that he was not purchasing the shares which he acquired. But he does not set out the length of time that his injection would remain in Lumin, whether any interest or benefit (other than dividends and shares) would attach thereto, under what circumstances he would be free to withdraw this injection.
26. Rankou alleges that he agreed only to make an investment in Lumin. He would become a shareholder but his investment would not be a purchase price for these shares and his investment would remain on the books as a loan. This would have the more fortunate result that he would be identified as a creditor in the books of the company and his R 2 million would not be lost in case of a loss of any value in his shares.

The Written Agreement as Recorded.

27. Rankou identifies himself as "an adult businessman". He is clearly a successful businessman since he has expended some R 50 000 on an entrance gate to his property and lighting along the perimeter as well as a further R 500 000 on home alterations including two additional garages, enlargement of the reception area, addition of a bar, addition of a study and a revamp of the existing dwelling.
28. The document which this astute businessman signed is headed "Memorandum of Agreement for the Sale of Shares"¹⁴. It is a six page document which Rankou has signed on the lower right corner of each page. He is identified as the "purchaser" on the first page and each page, sometimes adjacent to his signature, is reference to the sale and purchase of shares in the company. I note that beneath Rankou's signature on the second last page there is however no indication that he is the purchaser, but nothing turns on that fact.

¹² Paragraphs 24 and 25 of founding affidavit.

¹³ Paragraph 25 of founding affidavit.

¹⁴ Page 70 to 75 of the papers.

29. A non-variation clause is contained within the agreement.
30. Both the maxim *caveat subscriptor* and the prescription against parol evidence may be perceived as having diminishing roles in our modern law but good reason need be shown why neither rule should apply. The written document cannot be completely rewritten to suit a version which is completely contrary to that contained in that written document. We are not here concerned with a small amendment or completion of a lacuna or clarification of an ambiguity. Rankou seeks to completely ignore the written document which he, a businessman, signed.
31. Rankou claims that he intended to and only “injected” or “invested” the sum of R 2 million into Lumin and that this money was “a loan” to be reflected in the ‘loan account’ in the books of the company. Yet the document proclaims itself to be an agreement “for the sale of shares”, refers to the parties as “sellers” and “purchaser”, records the “sale price” and makes no mention of any loan account. Obviously this court cannot be asked to rewrite the written document to reflect an entirely contrary agreement. Instead, Rankou asks that the document be declared void *ab initio*.

The Judgment of the Court *a quo*

32. The court *a quo* found that Rankou’s averments pertaining to the oral agreement was “plausible”. The court found that fifth respondent’s (‘Maria’) averments pertaining to the purchase price “accruing” to the “sellers” were “so untenable in the circumstances... that they could be rejected merely on the papers”. The learned judge found her view was fortified by the absence in the agreement of any substantive obligation imposed on the sellers of the shares and the absence of the vesting of any rights in Rankou in relation to the sellers. Furthermore, the agreement was silent on any loan accounts by shareholders.
33. I have some difficulty in following the learned judge’s reasoning. It is difficult to see why the purchase price should accrue to anyone other than the identified sellers of those shares i.e. the trusts. It would be unusual that any further obligation would attach to sellers of shares other than that they transfer same to the purchaser. Similarly it is difficult to envisage any further rights vesting in a purchaser other than acquisition of the shares purchased. The absence of any mention of a loan account is of no assistance to Rankou – it rather contradicts his version.

34. These are motion court proceedings in which credibility issues should play no part and I cannot find that the averments of Rankou are more or less 'plausible' than those of the Barnetts in the circumstances of this written document.
35. (this was not an issue in argument)
36. I am unpersuaded by the reasoning of the learned judge in the court *a quo*. It is for Rankou to make out a case for setting aside this written agreement. I do not find that the version of the respondents is, in any way, improbable or even unusual for the reasons I have already given.

MISREPRESENTATIONS

37. Rankou avers that either Elmer alone or Elmer and George or George alone made certain misrepresentations which they knew to be false and which induced him to enter into the agreement.
38. I have had some difficulty in comprehending the nature of the misrepresentations which Rankou avers caused him to conclude this written agreement. Are the misrepresentations that the Lumin business was a good operation assured of healthy rewards? Are the misrepresentations that there would be a profitable return? Are the misrepresentations that the Barnett family were *bona fide* and honest in their dealings? Are the misrepresentations that Rankou was not purchasing a shareholding? Are the misrepresentations that he would be making a loan recorded as such in the financial records of Lumin?
39. The chronology is that there was initially mention of a franchise opportunity and thereafter an opportunity to make a capital injection into the company in exchange for both shares and dividends. Finally, there was the written agreement.
40. Rankou sets out the nature of his discussions with the Barnetts. He does not set out by whom or when or how he was induced to conclude this written agreement. In short, he is silent on the perpetrator of, the nature of and the inducement offered with regard to the alleged misrepresentations.
41. I have already commented on the document which he initialed and signed and the apparent absence of anything unusual or concealed therein.
42. It would appear that it is Rankou's case (and perhaps the finding of the learned judge in the court *a quo*) that an attorney, by the name of de Jager, who (either alone or in collusion with some or all of the Barnetts) made misrepresentations and thereby perpetrated the inducement.

43. It is common cause that Rankou was referred to an attorney who is seventh respondent ('De Jager'). It is Rankou's version that de Jager "expressly told me that she did not know Lumin" or Elmer or George (and only knew Maria as a former receptionist). Rankou claims that de Jager did some investigations and then informed him that she believed the Barnetts to be "nice people" who were "Christians". Attorney de Jager informed Rankou that she believed that this was a "good deal". Rankou states, in reply, that de Jager advised him that he could seek the independent advice of an auditor on the financial statements of Lumin.
44. Rankou avers that de Jager told him that the agreement which had been drafted "conformed to my requirements" and "safeguarded my position". De Jager then "read the body thereof to myself" but Rankou himself "never even read the agreement".
45. On his own version, Rankou did not seek independent advice on the finances of the company and did not conduct any type of due diligence investigation. Rankou did not even attempt to read the written agreement which he initialed on six pages and signed in full on one of them.
46. At most, Rankou says that de Jager read the body of the agreement over to him. He does not say or spell out that de Jager read out to him an agreement which was and is entirely different to that which is recorded to writing. He does not say that de Jager concocted a verbal version for him which is entirely contrary to that which he signed. He says nothing in the papers as to that which de Jager did read to him. Did she refer to sellers and purchaser? Did she make mention of injections and loans? Did she specify that he was an investor with a loan account? Nowhere is the court informed what Rankou was told by de Jager which is, in any way, contrary to the written document.
47. It must be noted, without making any finding of dishonesty or impropriety on the part of attorney de Jager, that she was not a party to the written agreement. In *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (C), the court held that a fraud emanating from an independent third party "will have no effect upon the contract" unless that third party is acting "in collusion with or as the agent of one of the parties" (453C).
48. There is no evidence of collusion between the Barnetts and de Jager. There is no evidence of any inducement of Rankou by anyone that he enter into the agreement. Rankou states that he knew what he wanted but that the document which he did not read did not reflect his intentions.

49. Accordingly, I cannot find, as did the court a quo, that Rankou's averments pertaining to the oral agreement was "plausible" or that the respondent's averments were "untenable". The learned judge did not go so far as to find that there had been misrepresentations but I can envisage no other basis for deciding to void this written agreement.

50. The learned judge in the court a quo made certain comments on the 'negligence' of de Jager apparently by reason of her failure to set out in detail and account for the transfer of the R 2 million funds from her trust account and to whom. The court also made a punitive costs order against de Jager.

51. I cannot see any negligence on the part of de Jager. There has been no trial and no cross-examination of either party. On the papers, it is difficult to conceive on what basis de Jager would be required to provide any accounting to Rankou for dispersal of these funds and that there could be any negligence on her part in failing so to do.

CONCLUSION

52. For all these reasons I regret that I am unable to agree with the finding of the learned judge in the court a quo.

53. In the result it is ordered as follows:

- a. The appeal is allowed with costs.
- b. The order of the court a quo is set aside and substituted with the following order: The application is dismissed with costs.

DATED AT JOHANNESBURG 16th NOVEMBER 2015

SATCHWELL J

I agree.

MAKUME J

I agree.

WEPENER J

Counsel for Appellant: Adv R Goslett.

Attorneys for Appellant: De Jager Attorneys.

Counsel for Respondent: Adv J Van Rooyen.

Attorneys for Respondent: Van Jaarsveld Attorneys.

Dates of hearing: 11 November 2015.

Date of judgment: 16 November 2015.