

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 20018 / 2014

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

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SIGNATURE

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DATE

In the matter between:

XSPAN MEATS (PTY) LTD

Applicant

And

AVIWE NTANDAZO NDYAMARA n.o.

1st Respondent

FRANS LANGFORD N.O

2nd Respondent

DANIESE ELAINE STEYN N.O

3rd Respondent

JUDGMENT

MASHILE J

[1] On 5 June 2014, this Court per Spilg J, with the consent of the parties, granted an order in the following terms:

- "1. The First, Second and Third Respondent will return to XSPAN MEATS (Pty) Ltd and/or XSPAN LOGISTICS CC and/or Jorge Sebastiano Paulo, and connect, the following equipment:-*

 - 1.1) Handman VFQ08 FILLER machine within 24 hours;*
 - 1.2) CUMMINS GENSET and PANEL before 16h00 on 6 June 2014;*
- 2. The First, Second and Third Respondents note that they formally abandon the complete paragraph 2 of the Order made by the Magistrate Dolmas on 18 December 2013 under case number 1133/2013;*
- 3. XSPAN MEATS (Pty) Ltd and/or XSPAN LOGISTICS CC and/or Jorge Sabastiano Paulo is to pay monthly amounts of respectively R 7 000-00 and R 5 000-00 as compensation for the use of the items listed In paragraphs 1.1 and 1.2 respectively, payable on the first day of each consecutive month In advance into the Estate Account opened for OUTSPAN*

CHICKEN & MEAT CC (In Liquidation) being ABSA account 408 254 1797, which payments will continue to be made monthly until proper market valuations are attained and XSPAN MEATS (Pty) Ltd Is provided an opportunity to make an offer for payment of/or In settlement of this respective items;

4. *The First, Second and Third Respondent pay an amount of R 17 000-00 for cost."*

[2] The Applicant now seeks to:

- 2.1 Vary the order in terms of Uniform Rule of Court No 42(1)(c);
- 2.2 Declare certain valuations certificates procured by the Respondents to be non-compliant for lack of satisfaction of the requirements of a valid valuation certificate;
- 2.3 Order the Respondent to secure forced sale valuations for the Handman and Cummins machines referred to in the order of Spilg J of 5 June 2014, such valuations to be prepared by a registered and sworn valuator;
- 2.4 Order the Respondents to present the sworn valuation to the Applicant who will be provided an opportunity to make an offer for payment of / or in settlement of the respective items;

2.5 Order the Respondents to furnish the Applicant with VAT invoices for the purchase of the 4 Hino Trucks, the Freelander and Discovery vehicles which were sold in the liquidation of Outspan Chicken & Meat CC. In the alternative, ordering that the Respondents, as the parties responsible for the arrangement of the sale of the trucks, to assist the Applicant in securing such VAT invoices.

[3] In 2013, Outspan Chicken & Meat CC went into liquidation and the Respondents were appointed as its liquidators. The business of Outspan Chicken & Meat CC was forced to fold following that liquidation. Before its liquidation, Xspan Chicken and Meat CC had purchased a Handmann VF608 Filler bearing serial number VF607-27696 and a 200KVA Cummins Genset and 200KCA bearing serial number 9195976 (hereinafter "the equipments") from Standard Bank of South Africa.

[4] In November 2013, the Applicant concluded an agreement with the Respondents in terms of which it hired the equipment's for a total sum of R12 000.00 per month. On 2 June 2014, the Respondents removed the equipment's from the Applicant in response of which the Applicant launched a spoliation application in this Court wherein it claimed the return of the equipment's. On 5 June 2014 and by consent of both parties, this Court granted the order referred to in paragraph 1 above.

- [5] A terse uncontested background of the circumstances that unfolded before the granting of the order on 5 June 2014 is that its wording and contents were a subject of intense negotiations between the parties. Two difficult issues arose during the negotiations and they concerned contribution towards the costs of the applicant (Xspan Chicken and Meat CC) and reference to 'proper valuations'. Costs were ultimately resolved with the Respondents agreeing to contribute an amount of R17 000.00 as captured in the order.
- [6] Attorney Yasmin Omar insisted to the attorney of the Respondents, Ms Hartzler, that reference to 'proper valuations' was to be substituted for 'market valuations'. Both parties finally resolved that the order should read as it stands now. Spilg J perused the proposed order and amended it to reflect the intention of the parties.
- [7] It is now paragraph 3 of the order of Spilg j that the Applicant seeks to vary by the deletion of the words, "market valuations" and substituting therefor with "forced sale valuations". In doing so, it is enthused by the fact that if the order is not varied, the Respondents will unlawfully and in contravention of the agreement that they have with it, endeavor to exert the optimal price from it to which it is not ordinarily entitled.

[8] In 2014, the Respondents and the Applicant entered into an agreement in terms of which the latter purchased certain vehicles from the Respondents. The Respondents secured VAT during the sale and promised to furnish Applicant with a VAT invoice to enable it to recover its VAT from the South African Revenue Service. The Respondents are said to have declined to furnish the Applicant with the VAT invoices to enable it to claim from the South African Revenue Service.

[9] This Court is asked to decide whether or not:

- 9.1 It can vary its order dated 5 June 2014 in the manner suggested by the Applicant;
- 9.2 The valuations that the Respondents obtained for purposes of paragraph 3 of the order of 5 June 2014 are legally competent;
- 9.3 The Respondents should be ordered to provide VAT invoices to the Applicant for the purchase of the vehicles to enable it to claim VAT from the South African Revenue Service.

[10] The Respondents have contended that the Applicant does not have *locus standi* to launch these proceedings because it was not a party to the proceedings of 5 June 2014 the order of which it now seeks to vary by this application. They have submitted that this Court is entitled to dismiss the Applicant's claim solely on that point alone. They have further asserted

that the Applicant cannot vary the order as it was the product of comprehensive negotiations between the parties and in any event this was not one of the instances where a court could vary its own order.

[11] With regard to the validity of the valuations, the Respondents conceded albeit not in so many words that the documents do not constitute valid valuations as legally contemplated because they do not comply with some of the requirements, which will be pointed out as this judgment unfolds. Lastly, the Respondents deny that the Applicant is entitled to receive VAT invoices from them because the money was not paid to them. In those circumstances they fail to understand how the Applicant could demand to be provided with the invoices.

[12] In its endeavour to amplify its application for the variation of the order, the Applicant argued that the draft order was prepared by the Respondents' legal representatives and that it and its attorneys did not think that the term "proper market value", now captured in the order, would entail a valuation on the open market.

[13] It was always contemplated, contended the Applicant, that the valuations to be attached would be the value that the Respondents would secure from an auction sale. More particularly, this valuation would be a "forced sale" value in view of the Respondents selling same by auction in terms of

liquidation proceedings. From this, the Applicant concludes that the common continuing intention of the parties at the time that the court order was agreed to, was that the Applicant would offer to the Respondents the amount they would likely secure at an auction.

[14] Accordingly, to the extent that the order fails to reflect that common continuing intention at the time when it was granted, it stands to be varied so that it can be consistent with the intention of the parties at the time. The words, 'proper market valuation' must be deleted and substituted therefor with 'proper forced sale valuations'. Insofar as the provision of VAT invoices is concerned, the Applicant simply believes that it purchased the vehicles from the Respondents and the latter promised to provide VAT invoices, which it must now honour.

[15] Uniform Rule of Court 42 is headed, Variation and Rescission of Orders and reads as follows:

"(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.”

[16] It is trite that once a court has made a final pronouncement on a matter, it will subsequently have no authority to correct, alter, or supplement it. The rationale behind that general principle being that it has thereupon become *functus officio* - its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. See **Firestone SA (Pty) Ltd v Genticuro Ag 1977 (4) SA 298 (A) at 306F-G.**

[17] Exceptions to the above general principle are the following:

17.1 The order may be supplemented in respect of accessory or consequential matter such as costs or interest or judgment debt, which the court inadvertently overlooked;

17.2 The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order;

17.3 The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention;

17.4 Where counsel has argued the merits and not the costs of a case but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order. In this regard, see again the Firestone case *supra* at 306G-307H.

[18] The basic principles applicable to the understanding of documents also apply to the interpretation of a court's judgment or order. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. See **Garlick v Smartt and Another 1928 AD 82 AT 87** and **West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 AT 188**.

[19] The Respondents' assertion that the Applicant has no *locus standi* as it was not a party to the urgent proceedings that led to the granting of the order on 5 June 2014, which is now the subject of this judgment is without merit and must be rejected. The wording of Rule 42 is unequivocal - it is 'upon the application of any party affected' that can launch this kind of an application. While the Applicant was not a party to the proceedings of 5 June 2014, it is unquestionable that it was profoundly affected by the order against Xspan Chicken & Meat CC. Accordingly, its *locus standi* to bring these proceedings is unwavering.

[20] The order was granted pursuant to comprehensive negotiations between the parties. In fact it is uncontested that it was the Applicant who during those negotiations intransigently insisted on the current wording of the order. In the circumstances it is rather duplicitous to now launch this application claiming that there was a common error when the order was granted. The Respondents were not mistaken when they asked the court to make the draft an order of court. This Court has pronounced on the subject and it is final. The request to vary the order is not one of the instances covered by Rule 42(1) or the exceptions to the general principle and must accordingly fail.

[21] Turning to the validity of the valuations. The Respondents might have thought otherwise when they prepared their heads but during argument in court their Counsel conceded that the valuations presented to the Applicant are not proper valuations. For that reason, I hold the view that this matter should not detain this Court for more than is necessary. The Respondents must obtain proper valuations for presentation to the Applicant as per the order of 5 June 2014.

[22] The valuations that must be obtained by the Respondents, however, are not what the Applicant refers to as 'proper forced sale valuations'. They are to be those that the court ordered the Respondents to obtain on 5 June 2014 – 'proper market valuations' it being this Court's finding that no case for 'forced sale valuations' has been made by the Applicant.

[23] Again, the issue pertaining to the furnishing of VAT invoices is not one that should occupy this Court for long especially in the absence of a replying affidavit. Accepting that the facts are that Paulo offered to and arranged with Standard Bank and Wesbank directly that the outstanding amounts due in terms of the existing finance agreements are either paid off or re-financed, I agree that the Respondents cannot provide Paulo with VAT invoices. Paulo cannot expect to obtain VAT invoices from the Respondents when no money was paid to them other than by Standard Bank and Wesbank. Paulo has failed to provide proof that he made payments to the Respondents for the purchase of the vehicles.

[24] As though that was not sufficient, Paulo has also not provided copies of all the finance agreements regarding these specific vehicles that were in existence before the liquidation of OUTSPAN CHICKEN & MEAT CC (in liquidation). In the circumstances, there is no basis on which this Court can order the Respondents to issue VAT invoices for money paid to Standard Bank and Wesbank. In fact, it is staggering that the Applicant would demand that such VAT invoices be furnished by the Respondents when a different party received the money. If any party should be ordered to provide such invoices, it should be Standard Bank and Wesbank

[25] In the result, I make the following order:

- 1. The documents from Park Village are declared not to be proper valuations.*
- 2. The Respondents must secure proper market valuations for the Handmen & Cummings machines and such valuation must be prepared by a registered and sworn valuator.*
- 3. The Respondent shall represent the sworn evaluations to the Applicant who will be provided an opportunity to make an offer for payment of / or in settlement of the respective items, in particular, the Handmen & Cummings machines.*
- 4. The remainder of the prayers contained in the Notice of Motion are dismissed.*
- 5. Each party to pay its own costs.*

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 09 MAY 2016

DATE OF JUDGMENT: 01 AUGUST 2016