



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

7 November 2023

DATE

Case Number: 8713/2019

In the matter between:

QUINN VAN NIEKERK

Applicant

and

LOUELLA MAZZUCHETTI

First Respondent

ERF 1 PROPERTY GROUP (PTY) LTD

Second Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 7 November 2023.

JUDGMENT

POTTERILL J

Introduction

[1] In this matter the applicant [Mr van Niekerk] is seeking from the first respondent [Ms Mazzuchetti] to “render a true and proper statement of account together with substantiating documents reflecting the correct income, assets, expenditure and liabilities of the Erf 1 Property Group (Pty) Ltd [Erf 1 Property] since its inception.” This statement of account must be rendered within two months from such order and the debatement of the account must take place within one month from the date it was rendered. Furthermore, “Payment to the applicant of whatever amount appears to be due to the applicant upon debatement of the account.”

[2] Ms Mazzuchetti attached to her answering affidavit the audited financial statements of Erf 1 Property. These statements reflect the income, assists, expenditure and liabilities of Erf 1 Property. Mr van Niekerk avers that this accounting is not good enough for accounting and debatement. He baldly denies the amount of the profit reflected.

[3] It is common cause that Mr van Niekerk and Ms Mazzuchetti and a Mr Lessing had a business relationship, stemming from a verbal agreement, with the intent for Ms Mazzuchetti to, as a registered estate agent, sell property and split the profits between the parties in equal shares. For this purpose a company through which the business was to be conducted, Erf 1 Property Group was formed.

Facts in dispute

[4] From here the parties' versions radically part ways. In an action instituted in the Regional Court of Pretoria against Ms Mazzuchetti and Erf 1 Property, the plaintiff therein is cited as Erf 1 Centurion (Pty)(Ltd) [Erf 1 Centurion]. Mr Van Niekerk is a

director in this company. Therein it is averred that Erf 1 Centurion concluded a verbal agreement with Ms Mazzuchetti. This is in stark contradiction to the version in this matter where Mr Van Niekerk avers the verbal agreement was concluded between him personally and Ms Mazzuchetti. The action has not been prosecuted to finality and there has been no further processes followed after an exception to the summons was filed. Although Mr Van Niekerk persists that Erf 1 Property was only a vehicle, and not a party to the agreement, he upon receipt of the answering affidavit proceeded to join Erf 1 Property as second respondent herein. Covering all the bases does however not resolve the factual dispute on the papers as to whom the parties were that concluded this verbal agreement. Was it Erf 1 Centurion, Erf 1 Property or the parties in person? This is a material dispute of fact directly relevant to the relief sought.

[5] It is in dispute what the nature of the relationship between the parties were; was it a joint venture or a partnership? Mr Van Niekerk refers to it as joint venture and Ms Mazzuchetti a partnership. The true nature of the relationship is important to determine the duties and obligations of the parties and whether a fiduciary duty of Ms Mazzuchetti existed and to what extent.

[6] There is a dispute as to when this verbal agreement terminated. Ms Mazzuchetti avers it terminated between all the parties in March 2016 when Mr Lessing informed them that he wanted to opt out. Mr Van Niekerk avers that in March 2016 only Lessing terminated his agreement and the agreement between him and Ms Mazzuchetti proceeded. Erf 1 Property was registered during March 2016 with Mr Lessing opting out in March 2006, a few days after the registration of Erf 1 Property. In an email from Mr Van Niekerk he sets out that "after Lessing's exit Erf 1 Centurion and the respondent would go into business together to market and run Erf 1 Propoerty Group (Pty) Ltd." This contradicts Mr van Niekerk and Mazzuchetti just proceeding as normal with now each sharing 50 % instead of sharing the profits three-way with Mr Lessing gone. This dispute again impacts directly on the relief sought.

[7] There are more questions than answers created in the affidavits. From when must Ms Mazzuchetti account, if she has such a personal duty, taking into account when the vehicle through which the profits was to flow was only registered in March 2016? Would it include the period before the registration? These are questions that can only be answered in *viva voce* evidence as to what was agreed in the verbal agreement.

Reasons for decision

[8] Mr van Niekerk is seeking final relief on motion proceedings. When a court is confronted with a factual dispute the court must first determine whether the factual dispute is a real and *bona fide* dispute of fact. This is intertwined with the trite *Plascon-Evans*¹ test that has stood the test of time and endorsed in the Supreme Court of Appeal in *inter alia Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA):

“[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

In *National Director of Public Prosecutions v Zuma*² {footnote verwysing asb} the Court in paragraph [26] found as follows:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”

[9] The argument on behalf of Mr Van Niekerk that I must use a robust common sense approach to this matter³ only implies that if I find the version of Ms Mazzuchetti palpably implausible, far-fetched or clearly untenable I can take a robust approach and

² 2009 (2) SA 277 (SCA)

³ *Facie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

reject the version without resort to oral evidence; therein lies the robust approach of a court. It does not imply I can simply grant the order because it only relates to a rendering of an account. There must be a basis for such an order and if that basis is disputed then that defence must be evaluated in terms of the *Plascon-Evans* Rule.

[10] But, in any event Ms Mazzuchetti denies that she has a duty to account because she had attached the audited financial statements.

[11] The defence raised is plausible, not far-fetched or clearly untenable. The version put up as to who concluded the agreement, the terms of the agreement and termination of the agreement has a factual basis and cannot be rejected. The question as to who must account to whom, for what period and if such a fiduciary duty exists, cannot be resolved on affidavit. There are accordingly *bona fide* factual disputes that cannot be resolved by means of motion proceedings on affidavit. Mr. Van Niekerk knew of these factual disputes from the opposition to the summary judgment application in the action instituted in the regional court and email correspondence.

[12] I accordingly make the following order:

[12.1] The application is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 8713/2019

HEARD ON: 14 August 2023

FOR THE APPLICANT: ADV. J.H. LERM

INSTRUCTED BY: EW Serfontein & Associates Inc.

FOR THE FIRST RESPONDENT: ADV. C.E. KOTZE

INSTRUCTED BY: Gildenhuys Malatji Attorneys

DATE OF JUDGMENT: 7 November 2023