



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D6486/2018

In the matter between:

OSMAN ASMALL

Applicant

and

TORNOTRIM (PTY) LTD

Respondent

ORDER

- (a) It is declared that the agreement between the parties relating to the sale of the business known as Nu-Store Tongaat has been validly cancelled.
- (b) The respondent is ordered to return the said business to the applicant against the return by him of all amounts paid to him in respect of the purchase price of the business. This order is without prejudice to the applicant's right to claim such further restitution from the respondent as he is able to prove.
- (c) The respondent is ordered to pay the costs of the application.
- (d) The registrar is directed to refer the papers in this matter, together with a copy of this judgment, to the South Applicant Revenue Services and to the Director for Public Prosecutions, KwaZulu-Natal, so as to enable them to decide what steps, if any, they should take in this matter.

JUDGMENT

Delivered on: 22 February 2019

PLOOS VAN AMSTEL J

[1] This is an application for the return of a business pursuant to the cancellation of the agreement in terms of which it was sold to the respondent. The only real issue on the papers is whether or not the agreement was validly cancelled.

[2] The business is a clothing and shoe retail store in Tongaat, trading as Nu-Store. The applicant started the business in 1968 and ran it successfully until he sold it to the respondent in June 2017. He says in the founding affidavit that the agreement was partly written and partly oral. The written part of the agreement provided for a purchase price of R2, 5 million, payable by way of a deposit of R300 000; 38 monthly instalments of R55 000 each; and a final instalment of R110 000. He says on the day when the written agreement was signed he and the respondent, represented by its shareholder and director, one Shaikh, orally agreed that the respondent would pay an additional amount of R2 million, by way of a deposit of R300 000 and the balance in instalments of R50 000 per month.

[3] The deposits were paid, and the store was handed over to the respondent at the end of June. During July 2017 the respondent raised certain issues about the store, pursuant to which a written addendum was signed in terms of which the purchase price was reduced by a sum of R250 000 and the instalments referred to in the written agreement were reduced to R50 000 each.

[4] At the end of July two of the respondent's cheques in respect of the instalments were dishonoured, which led to another meeting. This resulted in a further reduction of the purchase price of R675 000, and an agreement that the monthly instalments would be R105 000 each. To this end Shaikh signed a document in terms of which the respondent undertook to pay 20 instalments of R50 000 per month, commencing on 31 July 2017, and a final instalment of R25 000 on 31 March 2019, together with 35 instalments of R55 000 per month, and a final instalment of R25 000 on 30 June 2020.

[5] The respondent continued to pay the monthly instalments, but defaulted at the end of February 2018. It raised various complaints about the business and suggested a further reduction in the purchase price. This was rejected by the applicant and on 13 March 2018 his attorney gave written notice to the respondent of its breach and said if it was not remedied within 14 days the agreement would be cancelled. No further payment was made and on 6 April 2018 the applicant's attorney notified the respondent that the agreement was cancelled.

[6] Counsel for the respondent submitted that it was not open to the applicant to cancel the agreement as the respondent was up to date with the instalments in terms of the written part of the agreement, and the applicant could not rely on the oral agreement as the written agreement provided that it was the only agreement between the parties. The obvious difficulty for the respondent is that it was common cause on the papers that the purchase price consisted of the amount referred to in the written agreement plus the amount which had been agreed orally. It would be unconscionable to allow the respondent to escape liability in respect of the oral agreement, which it admitted, simply because it was recorded in the written agreement that it constituted the whole agreement between the parties. Both parties knew that that was not the case and they contracted on that basis. In any event, the written undertaking signed later by the respondent's director provided for instalments of R105 000 per month, which would have covered the full balance of the purchase price. It was on the basis of the respondent's failure to continue to pay these instalments that the agreement was cancelled.

[7] Counsel further submitted that the respondent was entitled to stop paying the instalments when it came to its notice that before the handover stock had been removed unlawfully from the store. When the respondent became aware of the alleged fraud it had a number of options available to it. It could have cancelled the agreement and demanded its money back; it could have elected to abide by the agreement and claim damages; or it could have ignored the fraud and continued with the agreement. It was however not open to it to stop paying the instalments, unless it cancelled the agreement. It did not cancel the agreement and its failure to continue to pay the instalments was a breach. It failed to remedy the breach after it was put on terms to do so, with the result that the applicant was entitled to cancel the agreement.

[8] The applicant sought an order for the return of the business, but on the papers did not tender to return the payments which had been made by the respondent. He suggested that he first needed to do a stock take so that he could calculate what restitution he was willing to make. A tender to return the payments was however made in the applicant's heads of argument. After some discussion in court counsel for the parties were agreed that if I find for the applicant I should make an order declaring that the agreement was validly cancelled, and order the respondent to return the business to the applicant against payment by him of the

amounts which had been paid in respect of the purchase price. It will then be left to the applicant to assess whether the return of the business to him constitutes proper restitution, and if not, to take such further steps as he may be advised.

[9] Counsel for the respondent submitted that the applicant should be deprived of his costs as he had tried to defraud the South African Revenue Service by understating the amount of the purchase price in the written agreement. There is some merit in the suggestion, but both parties took part in the fraud. I also think the respondent's challenge to the validity of the cancellation was without substance. I intend however to refer the papers and this judgment to the appropriate authorities.

[10] The order that I make is as follows:

- (a) It is declared that the agreement between the parties relating to the sale of the business known as Nu-Store Tongaat has been validly cancelled.
- (b) The respondent is ordered to return the said business to the applicant against the return by him of all amounts paid to him in respect of the purchase price of the business. This order is without prejudice to the applicant's right to claim such further restitution from the respondent as he is able to prove.
- (c) The respondent is ordered to pay the costs of the application.
- (d) The registrar is directed to refer the papers in this matter, together with a copy of this judgment, to the South Applicant Revenue Services and to the Director for Public Prosecutions, KwaZulu-Natal, so as to enable them to decide what steps, if any, they should take in this matter.

Ploos van Amstel J

Appearances:

For the Applicant : L. Olsen

Instructed by : Shepstone & Wylie.
Durban

For the Respondent : D Tobias

Instructed by : Omar Attorneys
: Durban

Date Judgment Reserved : 15 February 2019

Date of Judgment : 22 February 2019