IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 13440/2011

In the matter between:-

LUCKPATHIA GOPEE **APPLICANT**

and

MAHENDRA GANGARAM HURDEEN **FIRST RESPONDENT**

PRAVESH GANGARAM HURDEEN N.O. **SECOND RESPONDENT**

THE MASTER OF THE HIGH COURT
PIETERMARITZBURG **THIRD RESPONDENT**

NEESHENDRA GANGARAM HURDEEN **FOURTH RESPONDENT**

ORDER

<u>The interlocutory application</u>

1. The first respondent's supplementary affidavit, the annexures attached thereto and the confirmatory affidavits annexed thereto are admitted and the first, second and fourth respondents are authorized to use same during the course of the opposed matter set down for hearing on the opposed roll on 26 May 2014;

2. The first respondent is to pay the costs of such application;

Main application

3. The main application is referred for the hearing of oral evidence on the limited issues referred to in paragraphs 7.1 and 7.2 of the judgment;

4 The wasted costs occasioned by the hearing of the main application on 26 May 2014, is to be borne by the first respondent, such costs are to include the costs of senior counsel;

5. The costs of the entire application are reserved for determination by the court hearing oral evidence.

JUDGMENT

HENRIQUES J

[1] The applicant's claim is for specific performance emanating from an alleged agreement concluded between the applicant and the late Gangaram Hurdeen (the deceased) dated 16th November 2000.

[2] The applicant instituted motion proceedings against the respondents seeking *inter alia* a declarator directing the first respondent to sign all documents and carry out all acts necessary to transfer to the applicant a public permit with registration number PMD1310571/1.

[3] Applicant's case

[3.1] The applicant in support of her claim relied on the averments contained in the affidavit of Sudesh Ramdas, her son, the general manager of Springfield Omnibus Services (Durban) CC.

[3.2] It is contended that an agreement of purchase and sale was concluded whereby the deceased sold to the applicant the public bus permit held in the name of Newlands West Transport (Pty) Ltd, for a purchase consideration of R 90 000-00.

[4] The agreement contained suspensive conditions and was contingent upon the deceased acquiring transfer of the permit into his name. In effect, the deceased had sold his right, title and interest in and to the permit to the applicant.

[5] The deceased died on 09 December 2002 and the permit subsequently vested in the deceased's estate and was thereafter transferred to the First Respondent who collected same on or about 24 June 2011.

[6] <u>First respondent's case</u>

[6.1] The first respondent raised various defences in his answering affidavit, supplementary affidavit and further supplementary affidavit filed just prior to the hearing of the opposed application;

[6.2] I propose dealing with a summary of the defences as set out hereunder:-

[6.2.1] <u>The applicant's *locus standi*</u>

The first respondent contends that there is no causal nexus between the applicant and the first respondent in that at the time of concluding the purchase and sale agreement, registration of the permit vested in the company. On a proper construction of the agreement it is clear that the deceased sold a contingent right which he would acquire in the future and ex *facie* the agreement the applicant is a contracting party. The first respondent's contention is ill conceived in that the concept of *locus standi* relates to the legal capacity to sue and not to the validity or efficacy of the underlying claim or agreement. There is accordingly no merit in such defence.

[6.2.2] <u>First respondent's authority/*locus standi*</u>

It is clear from the papers that the public permit subsequently vested in the deceased's estate and was thereafter transferred to the first respondent.

As previously alluded to, the sale was premised on the contingency that the deceased would acquire registration of the permit in his name, hence the deceased's right would come into existence in the future. This eventuality occurred albeit after the death of the deceased. There is accordingly no merit in the contention that the deceased did not have the right to sell his right, title and interest in and to the permit and equally the defence that the deceased lacked *locus standi is* without legal premise.

[6.3] Successful challenge under Case No. 9019/2000

The suggestion that the agreement of sale was successfully impugned under the above case number is simply devoid of factual substance and I need not delay myself any further with this defence;[1]

[6.4] Prescription

The respondent contends that the applicant's claim has prescribed by the effluxion of time since the signature of the agreement, subsequent death of the deceased and until the date the application was instituted. The term debt as defined in the Prescription Act has been cogently interpreted by the Constitutional Court in the case of *Makate vs Vodacom (Pty) Ltd* (CCT52/15) (2016) ZACC 13 (26 April 2016). The Constitutional Court ruled that the concept debt should not be given a wider meaning than its ordinary interpretation. In finding that the deceased had sold a future right, it is axiomatically reasonable to conclude that prescription in respect of the claim of the applicant would commence on the occurrence of the future event or the enforcement of such event. In the premises, I find that the defence of prescription is without substance.

[1] Paras 15, 16 and 17 indexed page 81.

[6.5] The Road Transportation Act/National Land Transport Transition Act and National Land Transport Act

The first respondent's reliance on the above legislation in substantiation of its submission that the alienation of the public permit in terms of the sale agreement is prohibited by such legislation is without legal foundation. On a proper analysis of the above legislation, it is permissible for the transfer of a public permit by way of a sale provided that such permit is not disposed of through unlawful procedures. It warrants mentioning that unjustifiable reference to the above legislation has simply burdened this court and exacerbated the delay in the preparation and handing down of its judgment.

[6.6] Validity of the agreement

[6.6.1] As referred to earlier in this judgment, the first respondent submitted a report by a hand writing expert, Mr Cecil Greenfield, just prior to the hearing of the application. Mr Greenfield was mandated by the first respondent to conduct a forensic examination of the signature of the applicant appearing on the purchase and sale agreement and to compare same with the applicant's writings in other documents. Mr Greenfield's conclusion was as follows:-

> 'Therefore based on the results of the tests made with the available material, there are, as indicated on the charts, discrepancies between the disputed and known sets of writings that could not be reconciled.'

[6.6.2] The first respondent accordingly contended that the applicant did not sign the purchase and sale agreement, and was not a party thereto and did not suggest in her case that she was represented in concluding the agreement. It was submitted on behalf of the applicant, that even if it was found that the signature on the agreement was not that of the applicant, such signature could be adopted by the applicant. This dispute in my view is an issue not capable of being resolved on the papers and warrants the adducement of evidence.

[6.6.3] It also warrants a mention that it is somewhat questionable as to the reasons why the applicant did not enforce a claim against the respondent's estate at the appropriate stage, when the necessary facts and documents were made available to the applicant by the third respondent. Whilst I do not express a view on this issue, it is extremely likely that same would be raised when oral evidence is presented.

[6.6.4] Counsel for the applicant urged this court to determine this and all other issues on the papers on the basis that a material dispute of fact did not exist. If such approach is to be adopted, the rule as enunciated in *Plascon-Evans Paints (Pty) Ltd vs Van Riebeck Paints (Pty) Ltd***,** (53/84) [1984] ZASCA 51; [1984] 2 ALL SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21ST May 1984) colloquially referred to as the *Plascon Evans* Rule would have to be applied in favour of the respondent's version. This approach may, in my view, lead to an injudicial result.

[7] <u>Conclusion</u>

Having carefully considered the submissions and the averments set out in the respective affidavits, I find that the dictates of justice compels the referral of this application to the hearing of oral evidence on the following limited issues:-

[7.1] Whether the applicant's signature appearing on the purchase and sale agreement is in fact that of the applicant and concomitantly whether the applicant and the deceased were the actual contracting parties;

[7.2] Whether the applicant has complied with its obligations in *inter alia* effecting payment of the purchase price to the deceased in the event that a finding is made in favour of the applicant in relation to the enquiry in paragraph 7.1 above.

[8] <u>Costs</u>

I have previously alluded to the conduct of the first respondent in filing supplementary affidavits, particularly just prior to the hearing of the application. The first respondent at the hearing of the application filed an interlocutory application, which was opposed by the applicant, seeking leave to file a further supplementary affidavit, containing the report of the handwriting expert. The reasons for the delay in the timeous presentation of such affidavit and expert's report is non persuasive, however, in view of the relevance of the findings contained in the expert's report, I am constrained to grant the application. However it is only appropriate that the first respondent bears the costs of such opposed application. The first respondent has further raised several defences which were devoid of factual or legal substance and has unnecessary burdened this court in having to consider and adjudicate on such defences. In the exercise of my discretion, I deem it appropriate that the first respondent should bear the wasted costs occasioned by the hearing on 26 May 2016. There is also no reason why such costs should not include that of senior counsel.

[9] In the result of the following orders are granted:-

The interlocutory application

1. The first respondent's supplementary affidavit, the annexures attached thereto and the confirmatory affidavits annexed thereto are admitted and the first, second and fourth respondents are authorised to use same during the course of the opposed matter set down for hearing on the opposed roll on 26 May 2014;

2. The first respondent is to pay the costs of such application;

Main application

3. The main application is referred for the hearing of oral evidence on the limited issues referred to in paragraphs 7.1 and 7.2 above;

4 The wasted costs occasioned by the hearing of the main application on 26 May 2014, is to be borne by the first respondent, such costs are to include the costs of senior counsel;

5. The costs of the entire application are reserved for determination by the court hearing oral evidence.

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HENRIQUES J

Case information

Date of hearing :	26 May 2014
Judgment delivered on :	9 February 2018
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