

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 3684/2012

In the matter between:

TYALENI LAWRENCE VRIES

Applicant

and

NDLELENI ABEL ALI

Respondent

JUDGMENT BY: MHLAMBI, AJ

HEARD ON: 22 JANUARY 2013

DELIVERED ON: 7 MARCH 2013

INTRODUCTION:

[1] This is an application for an order on the following terms:

That the Respondent be ordered to deliver the operating permit with number LFSLB12030/06 to the Applicant within TEN (10) DAYS from date of this order.

- [2] That the Respondent be ordered to sign all the required documents to transfer the permit back into the name of the Applicant within TEN (10) DAYS after he is requested to do so by the Applicant's attorney of record.
- [3] That the sheriff of the Honourable Court be authorised and directed to attach the permit and to return same to the Applicant in the event of the Respondent failing to comply with prayer 1 *supra*.
- [4] That the Registrar of the Honourable Court be authorised to sign all the required documents to transfer the permit back into the name of the Applicant in the event of the Respondent failing to comply with prayer 2 *supra*.
- [5] That the Respondent be ordered to pay the costs of this application.
- [6] Further and/or alternative relief.

BACKGROUND

- [7] On 28 August 2008 the Applicant purchased the operating permit from NTSELENO CONSTANCIA DESEMELE for a purchase price of R15 000,00.

- [8] On 15 December 2008 the Applicant and the Respondent entered into a written agreement in terms of which the Respondent rented the permit from the Applicant for an amount of R2000.00 per month. It was an express term of the agreement that the permit must be changed into the Applicant's name in the event of the Applicant requiring the permit or in the event of the Respondent failing to make payment of the monthly rental.
- [9] The Respondent failed to perform in terms of the agreement by failing to make payment of the agreed monthly rental.
- [10] During July 2011 the Applicant, the Respondent and ALWYN MTWAZI entered into a verbal agreement in terms of which the Applicant would rent an operating permit from the said Mtwazi. The Respondent would pay the R2000.00 due to the Applicant in terms of the rental agreement between the Applicant and Respondent over to Mtwazi on a monthly basis.
- [11] The Respondent failed to perform in terms of the agreement by paying an amount of R1000.00 to the said Mtwazi for the month of August 2011, September 2011 and October 2011.

[12] The Applicant required the permit in order to have his taxi scrapped.

[13] Despite several requests the Respondent failed to return the permit to the Applicant.

[14] The Respondent denied the rental agreement and alleged that Constancia Desemele sold the permit to him on 25 November 2008.

[15] The Respondent furthermore denied that he entered into the other two agreements as set out in the founding affidavit and alleged that his signature was falsified.

[16] In the replying affidavit the Applicant annexed confirmatory affidavits of the other parties and witnesses to the agreement, which confirmed that the Respondent did in fact enter into the agreement and that his signature appeared on the written documents.

ISSUES:

[17] Whether the Respondent entered into the agreements as set out in the founding affidavit;

[18] Whether there is a duty on the Respondent to return the permit to the Applicant;

[19] Whether a factual dispute had arisen.

EVALUATION:

[20] In argument, Counsel for Appellant argued strongly that this matter should not be referred for the hearing of oral evidence as the Respondent had not raised a real dispute of fact which could not be determined from the affidavits.

[21] He argued further that despite Section 77(1) of the National Land Transport Act, No 5 of 2009, this Court granted an order in terms of which the Respondent in that case was ordered to take the necessary steps to effect the transfer of the authority under that permit to the Applicant in terms of Section 58 of the Act.

[22] I have difficulty with this line of reasoning. Firstly, Section 77(1) of the Act provides as follows:

[23] The authority conferred by an operating Licence or permit may not:-

- (a) Be ceded or otherwise alienated by the holder, except in terms of a transfer under Section 58 and no person may be a party to such a cession or alienation, or
- (b) Be hired out by the holder or be hired out by any other person

[24] A transaction concluded in contravention of subsection (1) is invalid and has no legal force.

[25] It is therefore evident that the agreement of 5 December 2008, embodied in **Annexure “B”** of the founding Affidavit, being the rental agreement of the operating licence, and the cause of Respondent's action cannot hold water as the agreement has no legal force. To endorse this agreement would be endorsing a nullity.

[26] In **Khokho v Makgetla and Others** (3049/2012) [2012] ZAFSHC 139 (8 August 2012) the learned Moloi J never pronounced himself on the effect of Section 77(1) on transactions of this nature.

[27] In that case the Applicant, who had bought a taxi operating permit from the First Respondent, had learned that the First Respondent had sold it to the Second Respondent and that the Third Respondent, the Road and Transport Licencing Board, was in the process of transferring the said operating permit into the name of

the Second Respondent. He launched an application to stop the transfer process.

[28] It was alleged that the Appellant had cancelled the agreement by way of an SMS message sent to the First Respondent. The crucial issue to be decided by the Learned Judge was whether or not the First Respondent accepted the offer to cancel the agreement of sale by the Applicant.

[29] It is therefore clear to me that this case is distinguishable from the present one and that Counsel for Respondent cannot rely on it as supporting his case based on a rental agreement.

[30] I therefore find that specific performance based on this ground alone, cannot be granted.

[31] Respondent on the other hand maintained that a certain Constancia Desemele, the previous holder of the permit with number LFSLB 12030/06, sold it to him on 25 November 2008; and in proof thereof relied on Annexure "01", the latter to be marked "TV 2" which happened to be an affidavit attested to by the said Constancia on 25 November 2008 which reads as follows: "I declare that **I willingly** transfer my permit to: Ali Ndleleni Abel".

- [32] Subsequent to the purchasing of the permit, he immediately applied for the transfer of the Licence into his name which was issued to him on 26 March 2009. He also denied that he appended his signature on annexures “B” and “C” of the founding affidavit. Annexure “B” being the lease agreement of the 15th of December 2008 and annexure “C” being a memorandum of understanding between the Applicant and the Respondent dated 16 December; (no year indicated). However, in the founding affidavit it was alleged as having been signed on 16 December 2011.
- [33] In terms of this agreement, the Applicant would register his Toyota Hi-Ace vehicle into the name of the Respondent so that the scrapping process could be done; the Respondent transferring all the proceeds resulting from such scrapping into the Applicant’s account as soon as the money was paid into the Respondent’s account.
- [34] Lastly he contended that he knew that the Applicant and Constancia Desemele, had a romantic relationship and found it strange that the Applicant failed to attach a confirmatory affidavit by the said Desemele in support of the allegations he made about her.
- [35] Confirmatory affidavits of all the parties and witnesses to the transactions were attached to the replying affidavit.

- [36] Ms Desemele confirmed in her affidavit the sale agreement of her operating licence to the Applicant for R15 000.00 and denied having sold such licence to the Respondent as alleged. She confirmed her affidavit of 25 November 2008 and that it was signed during the negotiations leading up to the conclusion of the agreement between the Applicant and the Respondent as indicated in annexure "B". She also denied that she signed annexure "TV 2" as a result of a sale agreement between herself and the Respondent.
- [37] She confirmed that she signed annexure "B" as a witness in the presence of the Applicant, Respondent and Alwyn Mtwazi. The Respondent also signed the annexure.
- [38] In oral argument, like a bolt from the blue, Respondent's Counsel conceded that the Respondent no longer relied on a sale agreement to advance his cause but on either a donation or some other form of alienation which he was at pains to describe.
- [39] This jolted Counsel for Applicant to argue in replication that Respondent's defence had fallen away and that his evidence should be disregarded. I agree with him.

[40] Respondent's Heads of Argument were drafted on 8 February 2013 and filed with the Registrar on 11 February 2013. I found strange the contention of Respondent's Counsel that the matter be referred for oral evidence to determine:

"4.2(a) whether Me. Constancia Desemele signed the affidavit on 25 November 2008 in support of the agreement that she concluded with the Applicant during August 2008 or in support of the agreement with the Respondent on 25 November 2008."

[41] I agree with the contention of applicant's Counsel that Respondent's defence bottomed out when the fatal concession was made on his behalf.

[42] Desemele's affidavit is important in the following respects:

- [1] It dispels any doubts that she sold her permit to the Applicant.
- [2] It confirms that she never received any money from the Respondent for the purchasing of the operating licence and consequently no sale agreement was entered into.
- [3] She neither donated nor alienated the permit to him in any form that would have, as consequence, the transfer of rights.
- [4] The whole scheme of things or negotiations were aimed at benefitting the Applicant.

- [5] It addresses the Respondent's enquiries and/or doubts as to the person she supported when she signed the affidavit of 25 November 2008.
- [6] It annihilates any dispute raised by the Respondent.

REFERRAL TO ORAL EVIDENCE

- [43] In every case the court must examine the alleged dispute of fact and see whether there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence, if this is not done the person against whom relief is sought, might be able to raise fictitious issues of fact and thus delay the matter to the prejudice of the claimant: **Peterson v Cuthbert & Co, Ltd** 1945 AD 420. It is not sufficient that on the affidavits the balance of probabilities is in favour of the applicant's version. The court must be satisfied that a viva voce examination and cross-examination will not disturb this balance of probabilities: **Mahomed v Malk** 1930 TPD 615; **Hilleke v Levy** 1946 AD 214 at 219; **Wiese v Joubert** 1983 (4) SA 182 (0).

"In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real genuine or bona fide dispute of fact... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof... which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as, where the allegations or denials of

the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the paper.”

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

[44] I am therefore of the view that this matter can be determined on the papers without resort to oral evidence.

FINDINGS

[45] In view of the concession made on behalf of the Respondent, it is therefore clear that he did not pay any money to Ms Desemele for the operating licence. It is further more clear that the applicant did purchase the said licence from Ms Desemele and therefore entitled to its being transferred into his name in terms of Section 58 of the National Land Transport Act, 5 of 2009.

[46] It is unclear why the Applicant failed to have the operating licence registered into his name after the agreement of sale; however this speculation does not take the case any further. What is evident is that the Respondent was at all times aware of the Applicant's right and was an active participant in the scheme and negotiations that ensued after Applicant's purchase of the operating licence from Ms Desemele and that he attached his signature on both annexures “B” and “C” to the founding affidavit.

[47] I therefore find that, on the strength of Disemele's evidence and the contents of annexure "C", Applicant is entitled to succeed in his request for relief based on specific performance. See **Khokho v Makgetla**, *supra*. The application therefore succeeds on this ground.

ORDER

[48] **In the result the following order is made:**

The application succeeds and prayers 1 to 5 are granted.

J .J. MHLAMBI, AJ

On behalf of the applicant: Adv. H. Els
Instructed by:
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On behalf of the respondent: Adv. J. S. Rautenbach
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