

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 9919/2011

In the matter between:

INTERACTIVE TRADING 269 (PTY) LIMITED

Applicant

and

CYPRESS ENTERTAINMENT CC

Respondent

CASE NO: 793/2012

In the matter between:

INTERACTIVE TRADING 269 (PTY) LIMITED

First Applicant

TEAZERS COMEDY AND REVUE CC

Second Applicant

and

CYPRESS ENTERTAINMENT CC

First Respondent

SHAUN CRAIG RUSSOUW

Second Respondent

JUDGMENT

Delivered : 16 November 2012

M PILLEMER, AJ:

[1] The late Emmanuel (Lolly) Jackson and Shaun Craig Russouw ("Russouw") operated a nightclub known as Teazer's-Durban in Springfield Park, Durban. The nature of their business relationship is an issue in the litigation.

[2] Jackson died on 3 May 2010. At the time of his death he was the sole director of Interactive Trading 269 (Proprietary) Limited ("Interactive Trading"). Jackson's widow, Demi Megan Jackson ("Demi Jackson"), replaced her late husband as sole director of Interactive Trading after his death.

[3] Interactive Trading owns immovable property situated at 30 Aloefield Crescent, Springfield Park, Durban. It is from these premises that Teazer's-Durban conducts its business. It is common cause that a close corporation of which Russouw is the sole member, Cypress Entertainment CC, is in occupation of the premises and operates the nightclub business.

[4] Interactive Trading instituted proceedings as the applicant under Case No. 9919/11 for the ejectment of Cypress Entertainment CC from the Aloefield Crescent premises. In this judgment Interactive Trading is referred to by name or as "the applicant" as is more suitable in the context and Cypress Entertainment CC similarly is referred to by name or as "the respondent".

[5] The cause of action is the rei vindicatio. The founding affidavit deposed to by Demi Jackson alleges that Interactive Trading is the

owner of the property. She has annexed a copy of the title deed demonstrating ownership. She makes the allegation that Cypress Entertainment CC is in occupation against the applicant's will and on behalf of the applicant seeks ejectment. The affidavit goes on to allege that an oral lease had been concluded for a rental of R20,000 a month in February 2008, that the respondent had taken occupation under that lease and remained in occupation notwithstanding the cancellation thereof. An ejectment order is sought by the owner to recover possession of its property.

[6] In the answering affidavit deposed by Russouw, he makes the point that Demi Jackson has no personal knowledge of the agreement he had with her late husband; he denies the existence of a lease; he points out that Cypress Entertainment CC only came into existence in 2009 and could not have concluded the alleged lease and then contends that respondent has the right to remain in occupation of the premises by reason of a partnership agreement he on behalf of the respondent had concluded with Jackson representing the applicant in September 2009. The case he makes is that the partnership is one between his close corporation and Jackson's property owning company, Interactive Trading. In reply Demi Jackson does not challenge the evidence that she has no personal knowledge of the agreements between her late husband and Russouw, accepts that there is no lease, but nonetheless

notwithstanding her lack of direct knowledge of the facts places the existence of the alleged partnership between Interactive Trading and Cypress Entertainment CC in issue, challenging the plausibility of the version of that partnership as set out by Russouw in the answering affidavit, which she contends is fanciful and should be rejected by the court on the papers.

[7] Not content with disputing the existence of the partnership, Demi Jackson decided to cover her bets and, on behalf of Interactive Trading, gave notice terminating any partnership that may exist between Interactive Trading and Cypress Entertainment CC, or with Russouw. This she did by letter dated 12 January 2012. She followed this up with an urgent application brought by Interactive Trading as a first applicant for an accounting and the appointment of a liquidator to the estate of the partnership. This second application was brought under Case no. 793/2012.

[8] Both cases were set down for hearing on the same date and argued together by agreement between the parties.

[9] The line taken on behalf of the applicant in the ejectment application was that the court should find that the version of the respondent should be rejected on the affidavits without reference to oral evidence. Applicant sought as primary relief an ejectment

order. In the alternative it was contended that should I decide against the applicant on this approach and dismiss the application for ejectment, then Interactive Trading as an applicant in the application for an account and the appointment of a liquidator to the partnership estate seeks relief under the second application on the basis that the partnership has been repudiated and thus come to an end necessitating, in the light of the disputes between the parties, the appointment of a liquidator. Apart from costs this is the only relief now persisted in conditionally in relation to the second application.

[10] When the matter was argued Mr Lamplough, counsel for Interactive Trading, made an unequivocal election not to have the matter referred for oral evidence for the cross-examination of Russouw with regard to the existence of the partnership and its terms. Mr Lamplough was emphatic that his client did not consider such an approach would provide meaningful relief due to the delay that would be inevitable on that approach and he made it clear that a referral to evidence should not be made *mero motu* by the court. Mr Findlay SC, who with Mr Ungerer appeared for Cypress Trading CC in both applications, also elected not to seek a reference to oral evidence.

[11] The ejectment case thus is to be decided under the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–F (where it was held that the court must deal with the matter on the basis of the respondent's version coupled with the admitted facts in applicant's papers).

[12] Mr Findlay submitted that the double barreled approach to the litigation adopted by Interactive Trading was not permissible since it amounted to approbating and reprobating. He contended that Interactive Trading had to make an election either to accept or reject the partnership. It was his contention that it could not do both, even in the alternative or conditionally as it has attempted to do. Once having denied the existence of the partnership and then persisting in that denial in the ejectment application, Mr Findlay submitted that it is not permissible for an applicant to purport to terminate a partnership it denies exists. He submitted that a litigant in law may not base his or her case on the defendant's defence, which the litigant contends is untrue.

[13] What has to be decided first is whether or not on the papers the respondent has made a case that on the application of the Plascon Evans rule is sufficient to withstand the ejectment application because, if that is answered in the negative, then whether or not the first applicant can change horses after the first

horse falls and ride off in the opposite direction on the second horse whose very existence she does not accept, does not arise if the first horse does not fall.

[14] The evidence of Russouw with regard to the partnership and its terms is of course not contradicted by other testimony since the only person who could have done so is the late Emmanuel Jackson. This in itself does not mean that the evidence has to be accepted. In *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 869D–E, the following was said:

“In regard to the appellant’s sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. *Wigmore on Evidence*, 3ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

‘it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded.’”

Also in *Siffman v Kriel* 1909 TS 538, Innes CJ at 543 says:

“It does not follow, because evidence is uncontradicted, that therefore it is true . . . The story told by the person on whom the onus rests may be so improbable as not to discharge it.”

[15] The evidence given by Russouw to prove the existence of the partnership between Interactive Trading and Cypress Entertainment

CC is set out in paragraphs 6 (d) to 6(i) of the answering affidavit. I set this out below:

"6

(d) The Respondent remains in occupation of the premises in pursuance of an oral partnership agreement entered into between the parties on or about 14 September 2009 and at or near Durban.

(e) In concluding the agreement the applicant was duly represented by Emmanuel Jackson (Jackson), who at the time was the sole director of the applicant and I represented the respondent as its sole member.

(f) The partnership agreement replaced a previous agreement of partnership between the applicant and me in terms of which the applicant's contribution was to make available the premises in which the partnership business was to be conducted and my contribution was to control its day to day activities and generally manage the business under the trading name of "Teazer's-Durban". In addition as part of my contribution I assumed interim liability for all expenses incurred in improving the premises for the successful operation of the partnership business. It was a material term of the original partnership agreement that in the absence of any further contractual arrangement to the contrary these expenses incurred by me would constitute a loan to the partnership in the sense that they would be repaid should the partnership be dissolved. No further agreement in respect of these expenses was reached save for the transfer of my right of repayment to the respondent referred to below. They accordingly remained a repayable loan.

(g) The effect of the new partnership agreement was that the respondent simply replaced me as a partner and save for the change in partners would continue as before. It was specifically agreed that the new partnership would assume the liability for the monies I had advanced to the old partnership under the previous partnership agreement thereby transferring my rights of repayment to the respondent. The remaining terms and conditions of the partnership remained the same.

(h) The material express, alternatively implied, further alternatively tacit terms of the new partnership agreement were, *inter alia*, as follows:

- (i) The partnership would continue trading under the name "Teazer's – Durban".
 - (ii) The applicant and respondent in partnership would occupy and use the premises as the previous partnership had before and the respondent would continue to fund any improvements to the premises as I had previously done. The nature of the business caused this to be a virtually an ongoing liability.
 - (iii) Profit would continue to be shared as and when available.
 - (iv) In the event that the partnership were to be dissolved then, prior to such dissolution, a proper accounting and debatement would take place in which the costs of improvement would be deducted from the profits as well as any drawings made by the parties during the currency of the partnership. Thereafter a 50% division would take place. As it was anticipated that such process would take time due to the complexity thereof it was a term of the partnership agreement that until the accounting and debatement was finalized and the partnership liquidated it would continue to trade which it was viable and of financial benefit to do so.
- (i) During the course of the new partnership between the parties hereto the applicant represented by Jackson and me on behalf of the respondent made such drawings as the profitability of the partnership would allow."

[16] The parties are *ad idem* that an email was sent setting out what emerged from a meeting held to try and resolve issues. The accountant acting for Russouw sent the email to the attorney

representing Demi Jackson. No issue was made as to the admissibility of the email and both parties referred to it in their papers. It provides important insights and is quoted in full below:

" Hi Allan,
Thank you for affording us the opportunity in settling the Durban Operation.

As I understand the conclusion of the meeting was as follows:

Cypress Entertainment CC will remain status quo for the operation known as Teazers – Durban.

In return, they will pay a monthly fee to be determined by Teazers Pty Ltd. A "license agreement" or "franchise type agreement" will be entered into.

A lease agreement will be entered into between Interactive Trading and Cypress for the rental of the property. The rent to be paid will also be negotiated through you.

Please inform us as to who is Interactive Trading and who is their legal representative.

These agreements are to be retrospectively dated to 1 June 2010.

The agreement to be in place ASAP as you require same for the winding up and liquidation of Teazers Comedy and Revue CC.

Franchise Type Agreement.

At the time of Lolly Jackson's death, there was an arrangement in place whereby R100,000 (One Hundred Thousand rand) was paid to him from Durban.

It was thought to be pertinent to continue with this agreement.

However, the World Cup came and went with a negative impact on the operation. In August Durban was raided by home affairs resulting in 3 dancers been able to work. As you know this is totally unacceptable. Head Office knew of the problem but did not assist by sending dancers or any other form of assistance was offered.

Business took a dive and only in November did things start to get back to normal. Then the Festive Season came and went with revenue taking a hiding.

Whilst we agree with the R100,000 charge for June & July, we feel that if all things being equal, Mr Jackson would have reduced his fee as the turnover is not there to substantiate it. During the 3 famine months no fees payable.

In summary our account is as follows:

June	R100,000	
July	R100,000	
August	00.00	
Sept	00.00	
October	00.00	
November	R40,000	
December	R40,000	
January	R40,000	
February	R40,000	
Total Due including Rent		R360,000
We have transferred		R200,000
Teazers fee from Advocate re Corporate Visa		
Paid by Durban Advocate		R100,000
Amount due for February		R 60,000

As you are well aware the R100,000 paid to Mr Jackson was deemed to include VAT.

All charges to the bank account were included in this amount.

PAYE, SDL, UIF, VAT was also included in this payment.

In reality therefore Cypress is contributing more than its fair share.

We would therefore require invoices made out by the relevant companies from June 2010.

1) a franchise fee of R20,000 inclusive of VAT

2) Advertising fee of R10,000 inclusive of VAT. This is payable and due ONLY when the advertising manager includes advertising for the KZN region. For the record the website regarding Durban still has Leon as the manager. He left us in June 2006. So what are we paying for?

3) Lease Charges direct to the Property Company.

LEASE CHARGE

We were told that the rental was R20,000 per month including VAT.

This is acceptable to us however, when the building was purchased Mr Jackson told Shaun to upgrade and extend the club. This meant that walls had to be demolished a mezzanine floor was to be erected plus tiling the entire area.

The material cost amounted to R380,000 and labour amounted to R470,000. A total cost of R850,000.

Mr Jackson told Shaun that he would be reimbursed him once the club was finished.

Mr Jackson came to Durban for the Grand Opening and instructed Ricardo to repay Shaun the money. Ricardo has all the invoices as he was going to claim the VAT on the alterations and repay Shaun. To date obviously nothing has transpired.

We propose that we recoup these charges from the "Landlord" amortized over the 48 months.

Durban Loan 1 and 2

I am attaching a schedule given to me by Paul. Neither Shaun nor myself can make out what the "Loans" are for. The narratives are not descriptive and therefore make no logical sense.

All I can reiterate is that with the R100,000 paid to Teazers covered all aspects of the business.

Please investigate and hopefully tell us that the schedules were given to us in error.

Looking forward to your positive response."

[17] The crucial question is whether or not there was a partnership between the two corporate entities, Interactive Trading and Cypress Entertainment CC as opposed to one between Russouw and Jackson or between Jackson and Russouw's close corporation, Cypress Entertainment CC or a franchise type agreement or some other arrangement.

[18] *Prima facie* it is improbable that a partner to a venture like this would be a property owning company. The whole purpose behind having a property owning company is to distance the property from the risky business enterprise and to protect it from creditors should the business enterprise fail. So one would have expected some explanation as to why what is *prima facie* unusual would be agreed.

[19] A further feature is that a partnership between individuals terminates on the death of one of the partners. Russouw deals with the death of Jackson in paragraph 6(k) of his affidavit in the following manner: "Jackson died on 3 May 2010 although this did not affect the partnership as Jackson was not a partner in his personal capacity." It was important therefore for Russouw for the applicant, Interactive Trading and not Jackson personally to be the partner and he clearly appreciated this since he expressly mentions it and draws the distinction, when there was no reason to have done so, which points to there being a sensitivity on this aspect and a motive to bend the truth.

[20] Russouw relies upon an oral agreement and in those circumstances certain evidence is essential to establish the *bona fides* of the defence. What one would expect is evidence of the circumstances under which the contract of partnership was concluded; why it was to be the applicant rather than Jackson personally that entered into the partnership; an explanation as to why a property owning company would take the risk of being a partner in a business venture and why they decided to do things this way; where the agreement was reached and how the terms were expressed if express terms were relied upon and which of the terms was express; why it is contended that terms were to be implied or were tacit and what these terms were and how the conclusion that they are terms arises; why there is no written agreement or tax records, accounts or other documentation to support the version set out in the affidavit. None of this appears in the answering affidavit. Instead what Russouw has done is to set out the terms as if in a cumbersome pleading, essentially setting out a legal conclusion without setting out the facts that give rise to that conclusion. It is not a written document that is being

summarised it is an oral arrangement where the detail of the circumstances and what was said or done is vital. The defective approach is most evident in paragraph 6(h) where the introductory words are: "The material express, alternatively implied, further alternatively tacit terms of the new partnership agreement were" This is an unsatisfactory way of setting out evidence in an affidavit, particularly when it is not a concluding paragraph following facts that could lead to one of a number of conclusions and where the wording may perhaps be acceptable.

[21] If these features that cause disquiet are tested for consistency and credibility against the email quoted earlier the problems are significantly magnified. It is decidedly odd for the author of the email to make the enquiry: "Who is Interactive Trading?" when it is on Russouw's case the principal and partner, the owner of the property and the central player. The author of the email was clearly not of that view and saw Jackson as the business partner; not necessarily in the strict sense of partnership either from what else is set out in the email.

[22] The two sentences in the email: "At the time of Lolly Jackson's death, there was an arrangement in place whereby R100,000 (one hundred thousand rand) was paid to him from Durban. It was thought pertinent to continue with this agreement." are inconsistent with the Applicant being a partner who shared in profits. The payments referred to were obviously in the view of the

author of the email being made to Jackson personally in terms of an agreement with him. The R100,000 per month is later in the email described as a “fee” earned by Jackson. This is inconsistent with any form of partnership and totally inconsistent with the partnership contended for by Russouw. Finally the R100,000 is said at the end of the email to be a payment to Teazers (a reference to the “franchisor”) and to cover all aspects of the business. Yet again this is inconsistent with the partnership relied upon by Russouw.

[23] The total amount due to Jackson is tabulated in the letter and appears against an entry reading: “ Total Due including Rent”. This too is inconsistent with the partnership that Russouw deposes to in the answering affidavit in terms of which no rental was payable. The rent referred to is expanded upon later in the email where the author records: “We were told that the rental was R20,000 per month including VAT.” The past tense is used and appears to refer to the historical rental payable by Russouw or his close corporation for the use of the premises and included in the R100,000. The rental was also paid to Jackson or Teazers but not to the applicant, which is another feature that is inconsistent with the alleged partnership.

[24] The email also deals with the claim for the cost of improvements to the premises and to support the claim the

following is said: " Mr Jackson told Shaun that he would reimburse him once the club was finished." No mention of Interactive Trading and it is the late Mr Jackson that was going to do the reimbursing not the applicant. This too is at odds with what is said in the affidavit.

[25] The author of the email was clearly unclear as to the nature of the role played by Jackson and Teazer's (Pty) Ltd which emerges from the manner in which the payment of R100,000 to Jackson is dealt with in the email and specifically when it is said that "PAYE, SDL, UIF, VAT was also included in this payment". PAYE, SDL, and UIF would relate to payment of remuneration and VAT to a fee or royalty payment perhaps. None would relate to drawings as a partner by a corporate entity. No return is provided to explain what was meant in the email, which in this respect contradicts the version of the partnership as set out in the answering affidavit.

[25] The most telling thing about the email is that it makes no reference at all to the alleged partnership between Interactive Trading and Cypress Entertainment CC, yet it is dealing with a proposed formalising of the business arrangement. The most crucial feature was the termination of the partnership, which is dealt with very specifically in the answering affidavit yet in the email where one would expect the implications for the partnership to be dealt

with, had it existed, nothing at all is said. The affidavit does not ring true and the question that has to be answered is whether or not it must just be taken at face value and the case decided on that version as suspect as it is.

[26] The Supreme Court of Appeal in the case of *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another* 2011 (1) SA 8 (SCA); [2011] 1 All SA 1 (SCA) at paragraphs 19 and 20 set out the approach that a court must adopt in circumstances such as the present to decide whether the averments in the answering affidavit can be accepted or not. It is the duty of the court to undertake an objective analysis of the disputes when required to do so as is explained in the following extract from the judgment.

[19] The court *a quo* approached the matter on the basis that the facts pertaining to the agreement of 5 May 2008 were in dispute and that there had been no request by the appellant that the matter be referred for evidence or trial. It then applied the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–F (where it was held that the court must deal with the matter on the basis of the respondent's version coupled with the admitted facts in applicant's papers). However, in *Truth Verification Testing Centre CC v AE Truth Detection CC and others* 1998 (2) SA 689 (W) at 698H–J, Eloff AJ said:

"I am also mindful of the fact the so-called robust common-sense, approach which adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to situations where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable."

I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes when required to do so. In *JW Wightman (Pty) Ltd v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA), it was suggested how that might be done in appropriate circumstances. The present case calls for a similar analysis.

[20] A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless, the courts have recognised reasons to take a stronger line to avoid injustice."

[27] In the *Wightman* case Heher JA added that:

"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."

[28] The first applicant had no knowledge of the partnership. Russouw was aware that the relevant facts were within his knowledge. He had a duty in such a circumstance to take the court into his confidence and set them out fully. His silence on the circumstances under which the improbable partnership was established is inexcusable and leads to the inference that it was not capable of substantiation because it was untrue. There is no evidence at all as to how the oral agreement came to be concluded. The "where, when, how" is the very least one would expect would be set out. Simply pleading a conclusion and deposing to it does not

constitute evidence, yet that is what the answering affidavit largely consists of. If these terms were expressly agreed one would expect the occasion where this occurred to be given and the reasons why the agreement was not reduced to writing provided. If the terms were implied or tacit then the evidence of the reasons why this conclusion is drawn and the evidence on which it is based should be provided. Yet the deponent contends himself with the form “express, alternatively implied, alternatively tacit” to set out the terms of the partnership agreement. Heher JA in *Naidoo v Sunker* (126/11) [2011] ZASCA 216 deals with situation not dissimilar to the present situation in an ejectment case where he referred to his earlier judgment in *Wightman t/a J W Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) paras 11 to 13 and went on to say:

“The alleged knowledge of the respondents concerning the long lease was averred without reference to any detail as to when, where and how the information was communicated to them. Such facts being peculiarly within the knowledge of the first appellant, his silence on the matter is inexcusable and explicable only by the inference that the bald allegation was false or not capable of substantiation.”

[29] I have come to the conclusion that the defence of the partnership existing between the applicant, Interactive Trading, and the respondent, Cypress Entertainment CC is fanciful and not sustainable on the papers before me. This is one of those rare cases

where the respondent's version is so clearly untenable that the court is justified in rejecting that version merely on the papers. The rei vindicatio accordingly succeeds and so in application under Case No. 9919/11 the applicant is entitled to an ejectment order as prayed to take effect on 30 November 2012. Costs will follow the result.

[30] In the application under Case No. 793/12 no order is made, which is what the applicant sought if I found for it in the first application. The two cases are closely linked and having regard to the result I am of the view that the appropriate costs order in the second application is one where each party will bear its or his own costs.

[31] In the result the following orders are made:

Case No. 9919/11

(a) The respondent, its successor in title and everybody holding under or through it ("the occupier") is ordered to vacate premises situated at No 30 Aloefield Crescent, Springfield Park, also known as Portion 79 of Erf 391 Springfield, Registration Division FT, Province of KwaZulu-Natal ("the premises")

(b) In the event of the occupier failing to comply with paragraph 1 on or before 30 November 2012, that the Sheriff be

and he is directed and authorised to do all things necessary to evict the occupier from the premises.

- (c) The respondent is ordered to pay the applicant's costs.

Case No. 793/12

- (a) No order is made on the application
(b) Each party is to bear its/his own costs

M PILLEMER, AJ

Counsel for the Applicant: AJ Lamplough

Applicant's Attorneys: Beukes & Sonja Nel Attorneys

Counsel for the Respondent: A Findlay SC and RG Ungerer

Respondent's Attorneys: Weber Attorneys

Date of hearing : 9 November 2012

Date of Judgment : 16 November 2012