

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr.: 3386/2005

In the matter of:

BASIL WEINBERG

Applicant

and

PS 2033 INVESTMENTS CC

1st Respondent

CONSTANTINOS RETSINAS

2nd Respondent

JUDGMENT:

MATSEPE, AJ

HEARD ON:

3 NOVEMBER 2005

DELIVERED ON:

24 NOVEMBER 2005

INTRODUCTION

THE PARTIES

The applicant is a director of companies having his principal place of business at Long Ridge Building 53, Ridge Road, Glenhazel, Johannesburg. The 1st respondent is a close corporation duly incorporated in accordance with the company laws of the Republic of South Africa, which formally traded as OK Grocer Botshabello.

The 2nd respondent is Constantinos Retsinas, a businessman residing at number 93 Dan Pienaar Drive, Heuwelsig, Bloemfontein.

The applicant is approaching the court by way of notice of motion and makes an application for an order in the following terms: -

Prayer A

1. Payment by the First Respondent of the sum of R1 641 288,79;
2. Interest on the aforesaid amount of R1 641 288,79 at the rate of 15,5% per annum from the 10 June 2005 to date of final payment;
3. Costs of suit;
4. Further and/or alternative relief.

Prayer B

5. Payment by the Second Respondent in the sum of R820 644,40, jointly and severally with Prayer A against First Respondent, the one paying the other to be absolved;
6. Interest on the aforesaid sum of R820 644,40 at the rate of 15,5% per annum from 10 June 2005 to date of final payment;

7. Costs of suit;
8. Further and/or alternative relief.

In support of the application the applicant filed his own affidavit which is supported by way of annexures. The two respondents filed notice of intention to defend supported by an opposing affidavit by 2nd respondent together with annexures.

BACKGROUND

On the 4th of December 2002 the 1st respondent entered into a sale of business agreement with Ligo Properties CC, to which I shall refer to as “Ligo”, in terms of which Ligo sold its business with effect from the 1st of April 2001 to the 1st respondent for a purchase price of R6 000 000,00 (six million rand). Applicant is a member of Ligo.

Applicant is also a member of a close corporation, Varese Investments CC which I shall refer to as “Varese” which is the owner of the property where 2nd respondent was conducting his business.

On the 20th of April 2005 Ligo obtained a court order cancelling the agreement of sale entered into between itself and 1st respondent on the 4th of December 2002. It was also ordered that 1st and 2nd respondents, in that application, should restore the business referred to, in the papers therein, to Ligo failing which the sheriff was ordered to repossess the said business from 1st and 2nd respondent and restore same to the applicant, Ligo.

On the same day Varese, of which applicant is a member, obtained an order cancelling the lease agreement entered into between Varese and 1st respondent on the 3rd of December 2002. The order also contained a prayer evicting the 1st respondent and all persons claiming occupation through it from the premises, being Shop Number OK Shopping Centre CBD, Erf 143, Botshabello, Free State and for payment of the sum of R64 085,95 as well as interest on the outstanding amount at the rate of 2% per month, a *tempora morae* and cost of the suit.

At the time that the sale and lease agreements were entered into between Ligo, Varese and the 1st respondent the 1st respondent entered into a franchise agreement with Shoprite Checkers (Pty) Ltd which agreement was signed by 2nd respondent as a member of the 1st respondent. As a condition for the granting of the franchise agreement the applicant herein was required to sign an unlimited deed of suretyship binding himself in favour of Shoprite Checkers (Pty) Ltd as surety and co-principle debtor for the due and proper fulfilment of all the obligations of 1st respondent and for the due and proper payment of all amounts owing by 1st respondent's members to Shoprite Checkers (Pty) Ltd.

The 2nd respondent also signed an unlimited surety as co-principal debtor for the due and proper fulfilment of all the obligations of 1st respondent who was trading as "OK Grocer Botshabello" to Shoprite Checkers. The surety agreement provided the following:

1. That it would be in the discretion of Shoprite Checkers to determine to the extent, nature and duration of the facilities and that all admissions and acknowledgements of indebtedness by the franchisee (the First Respondent) would be binding of the sureties;
2. That a certificate rendered by Shoprite Checkers and certified by the manager thereof or the manager of any office thereof, showing the amount of the First Responent's indebtedness from time to time and interest thereon accrued and dividends and interest received out of the proceeds of any sale, would be *prima facie* proof of the correctness thereof;
3. The 2nd respondent waived all benefits arising from the legal exceptions *ordinis seu excussionis et devisionis* and *de duobus vel pluribus reis debend*;

The applicant was the previous franchisee of the same store which

the 1st respondent acquired from Ligo and it was because of this that he was required to sign a surety in favour of Shoprite Checkers for the obligations of the 1st respondent. This deed of suretyship was signed by the applicant on the 23rd of January 2002, as it appears that this was a prerequisite for the granting of the franchise by Shoprite Checkers to the 1st respondent. At the time of the cancellation of the sale and lease contract, the 1st respondent, was the franchisee of Shoprite Checkers (Pty) Ltd and was operating its business in accordance with the franchise agreement.

On the 21st of April 2005, Shoprite Checkers demanded payment from the applicant in the amount of R1 632 795,23 on the basis of an acknowledgement of debt signed by the 2nd respondent on behalf of the 1st respondent on the 20th of April 2005. The same day the orders were granted in respect of goods sold and delivered to the 1st respondent. First and second respondents failed to make payment of any amount in terms of the said

acknowledgement of debt and after adjustments were made, payment was made to Shoprite Checkers in the amount of R1 641 288,79 which according to the applicant was paid as follows:

1. A cheque deposit in the amount of R650 000,00 on the 6th of May 2005.

[As this point is raised by the respondents as part of their defence, it is to be noted that this cheque was issued by M. Weinberg (Pty) Ltd in favour of Shoprite Checkers and annexed as annexure “BW8”, in applicants founding affidavit.]

2. A payment of R991 288,79 which was an electronic transfer from applicant's Investec account to Shoprite Checkers. A copy of the proof of such payment was also annexed as annexure “BW9”.

It is thus common cause that the amount of R1 641 288,79 was paid to Shoprite Checkers.

It is submitted by the applicant that the 2nd respondent became surety and co-principal debtor for the due payment and the

obligations of the 1st respondent to Shoprite Checkers (Pty) Ltd for an unlimited amount, that the 1st respondent was indebted to Shoprite Checkers in the sum of R1 664 275,79, but failed to pay the said sum or any amount to Shoprite Checkers on the due date, or at all and that applicant paid the full indebtedness of the principal debtor (the 1st respondent) to Shoprite Checkers having been called upon by Shoprite Checkers to do so. Thereafter he demanded payment from the 1st and 2nd respondents on the 19th of July 2005 respectively. Reference can be made to annexures “BW10” and “BW11” of the papers wherein he respectively claims R820 644,40 from Mr. Constantinos Retsinas (the 2nd respondent) and Mrs. Irene Retsinas and R1 641 288,79 from the 1st respondent. No payment has been made by any of the respondents to the applicant notwithstanding demand.

DEFENCES

First and second respondents oppose the application and raise

three defences in the alternative. I intend to deal with the three defences separately:

1. **Applicant did not pay.** The respondent points out correctly that in order for the applicant to succeed he must, *inter alia* alleged and proof that he has discharged the principal debt and that the discharge secured the release of the 1st and 2nd respondents. It cannot be disputed that the principal debt has been discharged and as such the release of the 1st and 2nd respondents from their obligation to Shoprite Checkers was ensured. Respondents argue in this regard that the discharge and the release was in part not effected as a result of payment by the applicant but was a result of payment made in part by a company H Weinberg (Pty) Limited, registration number 05/16594/07 and that, notwithstanding the fact that applicant states that such payments was made on his behalf by the said company, it cannot be said that such payment was made by the applicant himself. In arguing this point the respondents state that because there are no

particulars given as to why company H Weinberg (Pty) Ltd paid an amount apparently on behalf of the applicant, it cannot be concluded that such payment was made on behalf of the applicant. Because the applicant constantly referred to the difference between him and other legal entities, he cannot now claim that such legal entity paid on his behalf.

In this regard an observation by Van Heerden, DCJ in the matter of **INFO PLUS v SCHEELKE AND ANOTHER** 1998 (3) SA 184. On 192 C – D is apposite. There the following was stated:

“In the present case it was, of course, not the appellant but the second respondent who paid the aforesaid sum of R61 436,52 to Wesbank. However, if that sum was paid in settlement of the balance outstanding under the instalment sale agreement, the condition in question would have been fulfilled. For it is hardly necessary to say that a debt owing by A to B may be extinguished by a payment made by a stranger to B in discharge of that debt even if A is unaware of such payment.”

What the respondents are therefore arguing is that because it cannot be determined why the “stranger” company, H Weinberg (Pty) Ltd paid the amount, the applicant is therefore not entitled to claim that the amount was paid by him although it did cause the extinguishing and thus discharge of the debt (even if partially).

The probabilities are in the favour of accepting the version of the applicant that the payment was indeed made by H Weinberg (Pty) Ltd on behalf of the respondent and that such payment contributed to the discharge of the debt due and payable to Shoprite Checkers.

It is consequently found that respondents defence on the basis of this ground, considered separately, fails.

2. **Applicant should have defended the matter.** As far as this defence is concerned it is argued by the respondents that the applicant should have refused to pay the claim of Shoprite Checkers because Shoprite Checkers had failed

to tender ownership of the goods to the applicant and correctly asserts that it is trite law that if a surety upon whom demand by the creditor for performance in terms of a contract of surety is made, has any defence at his disposal that the principal debtor might have against the creditor, he should raise such defence against the creditors claim. In this regard reference is made to the case of **IDEAL FINANCE CORPORATION v COERTZER** 1970 (3) SA (1) A. It is further argued that when a contracting party asks for specific performance of a contract, is required when there are reciprocal obligations to tender, alternatively prove that he has complied with an antecedent or reciprocal obligation.

It must be born in mind that as decided in the Ideal Finance Corporation matter, *supra* such a defence should be a defence *in rem*. See page 8, paragraph F-G of the cited case, where the following observation is made:

ï°Die verskil wat daar in ons reg getref word tussen verwere in rem, waarop die borg hom kan beroep, en verwere wat slegs met

die persoon van die hoofskuldenaar saamhang en waarop die borg hom nie kan beroep nie, gaan terug na die Romeinse reg.”

The question therefore that needs to be answered is whether there was a defence *in rem* that the applicant could have raised against Shoprite Checkers. In this regard the case of **CORRANS v TRANSVAAL GOVERNMENT** 1909 (1) (TS) 605 at 626 is cited as authority for the view that the surety must be regarded as if he was the debtor and the following is quoted:

“Or we may say that the sureties who complete the work abandoned by the principal debtor step into the shoes of the debtor so far as the latter’s rights and duties under the contract are concerned. The sureties who complete the contract – which, as I have said, is one and indivisible – must be regarded as if they were the debtors. That being the case, they were entitled, before they handed over the work, to claim from the creditor the payment of the moneys still due under the contract. Any other view would appear to me most inequitable as over against the sureties.”

It is on the basis of the Corrans decision *supra* that it is argued that applicant was entitled to ask for ownership of the goods sold and delivered and only subsequent to this, would he be obliged to make the payment to Shoprite Checkers (Pty) Ltd. In the matter of Info Plus *supra* the Court found the argument that in a hire purchase agreement, where delivery of the *merx* to the purchaser has been effected, there should be a further agreement between the parties, in the sense of a mutual intention at the time of fulfilment of the condition that ownership shall be transferred to the purchaser, somewhat artificial, and the court *a quo* concludes that:

¡°The real agreement is reached when delivery takes place,..”

Vide page 190, paragraph I-G and page 191 paragraph H:

¡°At the risk of repetition I stress that at that time both requirements for transfer of ownership are satisfied in as much as conditional delivery *ipso iure* becomes an unconditional

one.”

Counsel for the applicant argues that delivery of the goods sold had already taken place at the time of payment by the surety and that such goods were delivered to the 1st respondent and that the ownership therefore passed to the 1st respondent *ex lege*. He further argued that, at the least when cancellation of the purchase contract as well the lease contract was effected, the goods in question were in the possession of the 1st respondent and further that such ownership could therefore not have been transferred to the applicant.

In this regard he relied heavily on the decision of Info Plus *supra*, where it was decided that the debtor in a hire purchase contract became the owner of the vehicle even when he was no longer in possession thereof once the debt owing was extinguished.

The respondent relies on paragraph 20 of the franchise agreement between Shoprite Checkers (Pty) Ltd and 1st respondent which reads as follows:

°20.1 All goods purchased by the FRANCHISEE from OK Distribution Centre or OK Suppliers shall be deemed to have been purchased by the FRANCHISEE as agent for the COMPANY, and shall remain the property of the COMPANY until payment in full of all amounts owing by the FRANCHISEE ...”

and

°20.2 Ownership of the COMPANY products will not pass to the FRANCHISEE unless and until the purchase price is paid ...”

It is clear from the above that once full payment had been made ownership of the products passed on to the franchisee who is the 1st respondent. As the relevant goods were delivered to the 1st respondent and the debt had been extinguished it follows that the 1st respondent

ex lege became the owner of the goods so delivered. It can therefore not be found that the applicant could have raised this defence in the light of the fact that he, would not be entitled to ownership of the goods. Thus it cannot be held that the applicant negligently failed to raise the defence which was open to the principal debtor as indeed such a defence would not have succeeded for the reasons set out above.

The circumstances in the Corrans matter *supra*, can be distinguished from those in the present case as that case refers to a building contract whereas in this case we are dealing with transfer of ownership.

It is therefore found that respondent's defence on this ground, considered separately, must fail.

3. Applicant's exercise of his right to the counter performance.

The respondent avers alternatively that applicant or Ligo gave affect to the applicant's rights to the counter performance

due in terms of the contract between the 1st respondent (applicant or Ligo) and Shoprite Checkers (Pty) Ltd, in that it started trading and selling the stock on or about on 2nd April 2005. Further, respondents are aware that applicant benefited from these alleged payments in the sense that he became the owner of the stock and proceeded to sell it, alternatively donated it in the further alternative he sold it to Ligo Properties CC. Applicant denies that he took possession of the stock as alleged and state that Ligo took possession of the premises, after the court's decisions, and restocked the store and commenced trading. Respondent attached photographs which were taken on the 20th April 2005 of stock which was on the premises.

Despite a letter written by attorneys for Shoprite Checkers dated the 21st April 2005 stating:

“It is of utmost importance to do a proper stock take and it will be also in the interest of Mr. Basil Weinberg to do a proper stock take.”

there is no indication on the papers that this was done and as such there appears to be a dispute of fact as to how much stock was on the premises and its value. In any event applicant's case is that when the court ordered the cancellation of the sale and lease agreement on the

20th of April 2005, it was Ligo and not the applicant which took possession of the business as the order granted by the court was not in favour of the applicant but in favour of Ligo.

Applicant denies that he started trading with the stock as he lives in Johannesburg. He further submits that if it was believed by the respondents, that Ligo took possession then Ligo should have been made a party to these proceedings. Respondents should have instituted 3rd party proceedings to join it which they chose not to do. Applicant further denies that the supermarket was fully stocked implying that much of the stock which forms the subject matter of the payment made by the applicant to Shoprite Checkers had already been sold by the 1st respondent. He consequently denies that the stock that Ligo Properties took possession of was worth R1,6 million and as such that the stock value was common cause between the parties. He further submits that the stock was not the subject matter of this application and for that

reason did not deal with it further. He refers to annexure “RA2” of his replying affidavit which is a letter written by applicant’s attorneys to respondent’s attorneys on the 19th of April 2005 which amongst other states in paragraph 3 thereof:

“On the contrary, your client is in unlawful possession of the premises and business and by selling goods is effectively stripping the business of its assets.”

Applicant denies that he sold any stock to Ligo or donated it to Ligo and states that Ligo took control of the premises after obtaining the court order. The taking of the stock at that time is regarded by the applicant as irrelevant and he submits that in any event the value of such stock did not exceed R700 000,00. Applicant then refers to annexure “A” of respondent’s annexures to his opposing affidavit which is a letter written by 1st respondent’s attorneys to the applicant’s attorneys wherein amongst others it is stated that:

Our instructions are that the business known as OK Foods Botshabello was returned to Ligo Properties CC as a going concern on the 20th of April 2005 and that when possession was taken from PS 2033 Investments CC business was stocked to the value of R1 600 000,00 and the safe and tills also contained cash on hand. The business commenced trading shortly thereafter despite requests by ourselves to receive a detailed inventory from Ligo Properties CC of the stock and the cash on hand at date of takeover, same has not been delivered.”

(It is to be noted that 1st respondent was at least on the 21st of July 2005 of the view that OK Foods Botshabello, was returned to Ligo Properties CC as a going concern on the 20th April 2005 and not to applicant.)

Respondent’s third defence is inescapably linked to the issue of the value of the stock which was at hand at the time when Ligo took possession of the premises and by its very nature raises a dispute of fact. It is therefore necessary to consider the relevance of this dispute.

Since, as has already been found that the ownership of the stock

was transferred to the 1st respondent, and further that the applicant could not have raised a defence based on ownership, the question whether respondents third defence is relevant to the adjudication of this application becomes pertinent.

The dispute that needs to be determined on facts outside the papers filed herein, is therefore a dispute between 1st respondent and Ligo, which is not a party to this action.

To hold, as respondent seems to be arguing, that the applicant would be unduly enriched to the value of the stock that appellants left on the premises, when Ligo took over, would negate the fact that applicant never become owner or took possession of the stock.

To hold that it would be equitable to allow the respondents to raise set-off as it were, of the value of the stock in dispute, against the claim of applicant would equally ignore the fact that, he, applicant never took possession of the stock and that the stock was returned to Ligo, which fact is admitted by respondents in their

letter dated 21st July 2005.

The issues that gave rise to the dispute herein, can sufficiently be dealt with on the papers. The dispute of fact that can only be evaluated and decided upon, at a trial are issues that relate to a dispute between Ligo and 1st respondent. Such a dispute is therefore subject of another inquiry.

The respondents' third defence also fails in the circumstances.

The following order is made:-

Against 1st respondent:

1. Payment of the amount of the sum of R1 641 288,79.
2. Interest on the amount of R1 641 288,79 at the rate of 15,5% per annum from 10th June 2005 to date of final payment.
3. Costs of the suit.

Against 2nd respondent:

1. Payment in the sum of R820 644,40, jointly and severally against 1st respondent, the one paying the other to be absolved.
2. Interest on the sum of R820 644,40 at the rate of 15,5% per annum from the 10th of June 2005 to date of final payment.
3. Costs of the suit.

V. MATSEPE, AJ

For the applicant:

Adv. A.F. Jordaan SC
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For the 1st and 2nd
respondents:

Adv. S. Grobler
Instructed by:
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