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

Reportable/Not Reportable

Case No: 735/2024P

In the matter between:

RED FIRE TRADING (PTY) LTD

APPLICANT

and

LEIRA INVESTMENTS CC

RESPONDENT

ORDER

The following order is granted:

The application is dismissed with costs on scale B.

JUDGMENT

MARION AJ

Introduction

[1] This is an application where the applicant seeks an order rectifying the Sale of Business Agreement ('the agreement') concluded by it and the respondent and thereafter directing the respondent to comply with the agreement.

[2] The applicant sought the following relief in its notice of motion:

'1. Paragraph 3.1.2 of the Business Sale Agreement concluded by the applicant and the respondent on about 2 June 2023 ("the Business Sale Agreement") is hereby rectified by the deletion thereof in its entirety and by the substitution thereof with the following:

"that the purchaser provide proof to the seller that Shell South Africa has confirmed that it will conclude a retail supply agreement with the purchaser upon the purchaser obtaining the necessary retail fuel license from the Department of Mineral Resources."

2. Alternatively to paragraph 1 above, Paragraph 3.1.2 of the Business Sale Agreement concluded by the applicant and the respondent on about 2 June 2023 is hereby rectified by the deletion of the words "dealer franchise agreement" appearing therein, and by the substitution thereof with the words "retail supplier agreement".

3. It is declared that the respondent's purported cancellation of the Business Sale Agreement is invalid, and that the Business Sale Agreement remains extant and binding on the parties thereto.

4. The respondent is directed to do all things and sign all documents as are required to effect transfer of the business trading under the name and style of Auto Stop Service Station from premises situated at 2[...] S[...] M[...] Drive, Edwin Swales, Durban as a going concern from the respondent to the applicant.

5. In the event that the respondent fails or refuses to sign any such documents as are envisaged by paragraph 4 above, the Sheriff of the Court is hereby authorised to sign said documents on the respondent's behalf.

6. The respondent is directed to pay the costs of this application.'

Background

[3] The applicant, Red Fire Trading (Pty) Ltd, is a private company, duly registered and incorporated in terms of the company laws of South Africa. The respondent is Leira Investments CC, a close corporation, duly registered and

incorporated in accordance with the close corporation laws of South Africa. The respondent carries on business as a Shell service operator from 2[...] S[...] M[...] Drive, Durban.

[4] On 2 June 2023, the applicant and respondent concluded the agreement, in terms of which the respondent would sell to the applicant its business known as 'Auto Stop Service Station' as a going concern. The terms of the agreement, save for paragraph 3.1.2 thereof, are common cause. The applicant and respondent agree that the reference in the agreement to 'Dealer Franchise Agreement' is an error and should read 'Retail Supply Agreement'.

[5] Clause 3 of the agreement deals with suspensive conditions. The relevant portions read as follows:

'3.1 The sale of the business shall be subject to the following suspensive conditions, which must be fulfilled within 30 (thirty) business days after the last date of signature of this agreement:-

3.1.1 ...

3.1.2 that the purchaser provide proof to the Seller that Shell South Africa has concluded a dealer franchise agreement with the Purchaser....'

It is common cause that clause 3.1.2 of the agreement constitutes a suspensive condition. If relief is granted for the rectification of the agreement, then the applicant avers that this suspensive condition would have been fulfilled as of December 2023. The rectified clause 3.1.2 requires the applicant to obtain confirmation from Shell South Africa that it will conclude a retail supply agreement with them, subject to the Department of Mineral Resources and Energy's (DMRE) approval of the applicant's application for a retail fuel licence.

Issues to be determined

[6] Mr Aldworth appeared on behalf of the applicant and Mr Ploos van Amstel appeared on behalf of the respondent. The main issue to be determined is whether the applicant should have foreseen that serious disputes of fact would have arisen, and if so, whether the application ought to be dismissed. Depending on the outcome of this issue, and if the court finds that there are no disputes, the issues to be determined are twofold: (a) whether the applicant has made out a case for

rectification and the further relief sought, and (b) whether the suspensive condition in clause 3.1.2 of the agreement was timeously fulfilled by the applicant.

Disputes of fact

The respondent's contentions and submissions

[7] The respondent argued that the applicant approached the court by way of motion proceedings for final relief. The respondent referred the court to *National Director of Public Prosecutions v Zuma*,¹ where the Supreme Court of Appeal held the following:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.'

[8] The respondent further stated that the applicant should have foreseen the probability that disputes of facts were bound to develop. These averments were made clear by the respondent as early as the filing of their answering affidavit.²

[9] The respondent submitted that the court has a discretion to dismiss an application in terms of rule 6(5)(g) of the Uniform Rules of Court³ where disputes of facts have arisen. The respondent further stated that in the event that the application is not dismissed, then the respondent's version should be accepted, as per the *Plascon-Evans* rule.⁴

[10] The respondent further submitted that the general rule that rectification should be sought by way of action proceedings and not motion proceedings, was restated in *Fourie's Poultry Farm (Pty) Ltd v KwaNatal Food Distributors (Pty) Ltd (In Liquidation) and others*.⁵ It was submitted that this was especially the case when

¹ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

² See in this regard the respondent's answering affidavit para 6 at page 164 of the indexed bundle.

³ Uniform Rule 6(5)(g) provides that 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision...'

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (*Plascon-Evans*).

⁵ *Fourie's Poultry Farm (Pty) Ltd v KwaNatal Food Distributors (Pty) Ltd (In Liquidation) and others* 1991 (4) SA 514 (N) (*Fourie's Poultry*) at 527C.

there is a dispute about the common intention of the parties and that even with the benefit of oral evidence, such a claim is difficult to prove.

[11] Both the respondent and the applicant agreed that the requirements to succeed in a claim for rectification are as follows:

- ‘(i) an agreement between the parties which was reduced to writing;
- (ii) that the written document does not reflect the common intention of the parties correctly;
- (iii) an intention by both parties to reduce the agreement to writing;
- (iv) a mistake in drafting the document;
- (v) the wording of the agreement as rectified.’⁶

[12] The respondent submitted that only paragraph (i) above was common cause. The respondent further submitted that in respect of two of the requirements, namely the common intention of the parties and whether a mistake occurred in drafting the agreement, there were serious disputes of fact. Between 24 March 2022 and 2 June 2023, the parties were in discussions regarding the terms and finalisation of the draft agreement. Mr Ploos van Amstel argued that at all times during these discussions, the applicant was legally represented. The respondent, in annexure ‘AA2’ to its answering affidavit, succinctly sets out the chronology of the discussions and amendments to the agreements between the parties. There were numerous drafts of the agreement and the respondent argued that the insertion of clause 3.1.2 was not a mistake. The respondent averred that the numerous requests for extensions by the applicant to sign a fuel supply agreement with Shell indicated the applicant’s acceptance of clause 3.1.2.

[13] Both the applicant and respondent agreed that that there was a dispute in respect of the fulfilment of the suspensive condition referred to in clause 3.1.2. The respondent argued that the agreement lapsed due to the applicant’s non-fulfilment of clause 3.1.2. The respondent submitted that the applicant, via email correspondence, requested an extension to fulfil the suspensive condition on five separate occasions. On 31 July 2023, the applicant made a second request for an

⁶ *Voltex (Pty) Ltd v First Strut (Rf) Ltd (In Liquidation) and others* 2022 (3) SA 550 (GP) para 49.

extension of 30 business days. The respondent averred that this extension expired on 12 September 2023. The following request was made only on 14 September 2023 and the respondent agreed thereto on 18 September 2023. The respondent submitted that a failure to fulfill a suspensive condition renders a contract of no legal force and automatically ends it.⁷ As a consequence, the agreement lapsed and could not be revived by waiver or an extension unless the parties concluded a fresh agreement.

[14] In support of this argument, the respondent referred the court to *McPherson v Khanyise Capital (Pty) Ltd and others*⁸ which summarises the principles held in *Benkenstein v Neisius and others*⁹ and *Fairoaks Investment Holdings (Pty) Ltd and another v Oliver and others*¹⁰ as follows:

‘The principles applicable can therefore be summarised as follows:

28.1 A suspensive condition cannot be waived or extended after the time for fulfilment of the condition has passed.

28.2 An agreement that has “lapsed” by virtue of the non-fulfilment of a suspensive condition or the failure of a resolutive condition cannot be “revived”. It is necessary for the parties to enter into an entirely new agreement. The new agreement can of course be on the same terms and conditions as the old.

28.3 If the new agreement is concluded on the same terms and conditions as the old, but the suspensive conditions are not excised, or extended, the new agreement “self-destructs”. This is because the agreement is by its terms subject to a suspensive condition that has failed.’

[15] The respondent conceded that their attorney was mistaken in law when he referred to the breach clause in paragraph 5 of the letter dated 11 December 2023 sent to the applicant. The respondent argued that if there is no right to compel performance of a suspensive condition, then there can be no issue of a breach warranting cancellation of the contract.¹¹

⁷ *Commissioner, South African Revenue Service v Bosch and another* 2015 (2) SA 174 (SCA) (*Bosch*) para 31.

⁸ *McPherson v Khanyise Capital (Pty) Ltd and others* [2009] ZAGPHC 57 para 28.

⁹ *Benkenstein v Neisius and others* 1997 (4) SA 835 (C).

¹⁰ *Fairoaks Investment Holdings (Pty) Ltd and another v Oliver and others* [2008] ZASCA 41; 2008 (4) SA 302 (SCA).

¹¹ *Bosch* para 31.

[16] The respondent argued that the email of 23 November 2023 sent to the applicant made it clear that this was to be the last extension. The respondent submitted further that there was a clear dispute of fact as to the applicant's interpretation of the letter dated 11 December 2023. The applicant interpreted the letter as a further extension until 9 January 2024 to comply with clause 3.1.2. This view is in contradiction to the applicant's attorney's letter dated 19 December 2023, where he stated that the applicant had no idea which clause in the agreement had not been complied with.

The applicant's contentions and submissions

[17] The applicant argued that clause 3.1.2 did not conform to the common intention of the parties. The intention of the parties was for the applicant to obtain confirmation from Shell South Africa that it would conclude a retail supply agreement, as opposed to having to actually conclude such an agreement. The applicant stated that this was as a result of an error on the part of the attorneys drafting the agreement.

[18] Mr Aldworth submitted that it was common cause that Shell South Africa would not conclude a retail supply agreement with a franchisee until such time as the DMRE had approved the applicant's retail fuel licence. He submitted that it was a known fact that the application for such a licence from the DMRE was a delayed process. He argued that it was nonsensical that the agreement required the applicant to only apply for a retail fuel licence from the DMRE but to conclude a retail supply agreement with Shell South Africa.

[19] The applicant further stated that the respondent's arguments pertaining to the current wording of clause 3.1.2 were also nonsensical. The respondent had argued that the original wording of clause 3.1.2 was agreed upon to avoid protracted delays by the applicant and place the applicant on a time limit. The applicant submitted that in the event of any delays, the respondent would have had a right to place the applicant in breach and subsequently cancel the agreement. The applicant argued that this line of argument was nonsensical.

[20] Mr Aldworth submitted that the respondent fails to proffer an explanation as to why the parties were not ad idem in respect of the wording of clause 3.1.2. He stated that the wording in the said clause does not serve the purpose of protecting the respondent. The inclusion of the suspensive condition in clause 3.1.2 is clearly for the applicant, as the value of the business is premised on the Shell franchise agreement.

[21] In respect of the fulfilment of the suspensive condition, the applicant argued that if the agreement is rectified as sought, the relevant suspensive condition would have been fulfilled by no later than 20 December 2023. If the rectification is not granted, the applicant submitted that the suspensive condition would nevertheless have been fulfilled on 8 January 2024, within the time frame of the extension, as interpreted by the applicant. The applicant stated that the agreement became final and binding pursuant to the fulfilment of the condition on 8 January 2024. The applicant's version was that the respondent's attorney's letter dated 11 December 2023 clearly stated that should it fail to fulfil the suspensive condition contained in paragraph 3.1.2 of the agreement by 21 December 2023, it would be in breach of the agreement, and should it thereafter fail to conclude the necessary retail supply agreement with Shell South Africa by close of business on 9 January 2024, the agreement would be cancelled.

[22] Both the applicant and respondent agreed that it was not necessary to place the applicant in breach for the non-fulfilment of a suspensive condition. However, the dispute relates to the applicant's interpretation of the correspondence dated 11 December 2023 to afford it an extension until 9 January 2024 to fulfil clause 3.1.2. The applicant disputed the respondent's submission that the agreement lapsed due to the non-fulfilment of the suspensive condition on 21 December 2023. Shell South Africa and the applicant had subsequently concluded the retail supply agreement on 8 January 2024. The applicant argued that the respondent is obliged to comply with its obligations in terms of the agreement and further that the applicant is entitled to the relief sought in paragraphs 3, 4 and 5 of its notice of motion.

The law and analysis

[23] Rectification proceedings should be brought by way of action proceedings. In *Tugendhaft v Fratellis Bright Water Commons CC and another* the court held:¹² 'Rectification generally should be brought by action. It concerns the common intention of the parties to the agreement, which as a rule can only be properly resolved on the hearing of oral evidence.'

[24] The following was held in *Hadiaris v Freeman and Freeman*:¹³

'All these safeguards can be employed in an action, but none of them can be employed in an application. That is an extremely good reason why proceedings for rectification should be by action and not by petition. A signed contract is a solemn transaction, and such transactions form the very basis and foundation of all commerce and industry, and in the ordinary course signed contracts are always enforceable according to the terms of the written instrument. If such contracts could be rectified on motion when the allegation of mutual mistake is not admitted, the very foundation of the commercial structure would be shaken. There are very grave reasons why such a claim should only be made by action, and not a single reason why it should be allowed to be made by petition. The only proper safeguard to preserve the enforceability and sanctity of written contracts is to provide that rectification of such contracts is to be claimed by action and not by petition.'

[25] The court held the following in *Fourie v Spruyt Incorporated Attorneys and others*:¹⁴

'The challenge facing the applicant is the choice of proceedings. She chose the motion route where rectification is not an option.'

In *Fourie's Poultry* it was held that the rule is not always immutable:¹⁵

'It follows that the rule is not immutable but, like any rule of practice, is capable of being relaxed in a situation where its *raison d'être* is absent. Such a situation is par excellence one in which there is no dispute of fact as to the common intention of the parties.'

¹² *Tugendhaft v Fratellis Bright Water Commons CC and another* [2008] ZAGPHC 180 para 6.

¹³ *Hadiaris v Freeman and Freeman* 1948 (3) SA 720 (W) at 726-727.

¹⁴ *Fourie v Spruyt Incorporated Attorneys and others* [2022] ZAGPPHC 151 para 12.

¹⁵ *Fourie's Poultry* at 527E-G.

[26] The general rule in matters where there is a dispute of fact has been clearly set out in *Plascon-Evans*:¹⁶

‘It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.’

[27] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* the following was stated:¹⁷

‘[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test

¹⁶ *Plascon-Evans* at 634H-I.

¹⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA).

is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. 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] On the papers as they stand there are clear disputes of fact. The respondent disputes that the written agreement failed to reflect the common intention of the parties correctly or that there was a mistake in drafting the agreement. In terms of the case law, rectification should be brought by way of action. Mr Ploos van Amstel argued that the applicant should have foreseen these disputes of fact and that the application for rectification should have been brought by way of action. He further argued that in terms of Uniform rule 6(5)(g) and the *Plascon-Evans* rule, the court has a discretion to dismiss the application with costs.

[29] There are clear disputes of facts regarding the issue of whether the suspensive condition in clause 3.1.2 was fulfilled. The respondent avers that the condition was not fulfilled timeously, and that the agreement lapsed. A lapsed agreement cannot be revived, and it becomes necessary for the parties to enter into a new agreement. The applicant avers that the suspensive condition was fulfilled within the period that the extension was granted, being 8 January 2024. This dispute was pleaded by the applicant in its founding affidavit.

[30] If an applicant at the outset of the proceedings could not have reasonably foreseen the dispute, the court has a discretion to refer the matter to trial.¹⁸ In casu, the applicant was aware from the outset that there were disputes of fact. The

¹⁸ D E van Loggerenberg Erasmus: *Superior Court Practice* (RS 24, 2024) at D1 Rule 6-45.

applicant's attention was further drawn to the said disputes in the answering affidavit and heads of argument. The applicant has not requested the court to refer the matter to trial or to oral evidence.¹⁹

[31] In light of the case law, I find that disputes of facts exist on the papers before me. The applicant avers that the wording of the agreement, once rectified, will represent the true intention of the parties. The respondent avers that clause 3.1.2, as it stands, reflects the true intention of the parties considering the various draft versions of the agreement and that the parties were legally represented. Rectification generally should be brought by action. Flowing from that is the further dispute as to whether the suspensive condition in clause 3.1.2 has been fulfilled or not. I agree with Mr Ploos van Amstel that the applicant should have foreseen these disputes and proceeded by way of action. In my view, and for the above reasons, the application should be dismissed.

Order

[32] In the result I make the following order:
The application is dismissed with costs on scale B.

MARION AJ

Appearance:

Applicant:	Mr DWD Aldworth
Instructed by:	Tomlinson Mnguni James Pietermaritzburg randles@tmj.co.za

¹⁹ *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and others* [2008] ZASCA 40; 2008 (4) SA 325 (SCA) para 53.

Respondent: Mr JA Ploos van Amstel
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