

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 046028/2024

DATE: 2025-09-09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE 28/11/2025

SIGNATURE 

10 In the matter between

ROUTE 66 PUB AND GRILL (PTY) LTD & ANOTHER

Applicant

and

VAAL RUGBY ORGANISATION (PTY) LTD AND 3 OTHERS

Respondent

J U D G M E N T

20 **LIEBENBERG, AJ:** Herewith my *ex-tempore* judgment. The two applicants, the Route 66 Pub and Grill (Pty) Ltd and Mr Andries de Beer approached this Court for relief along the following lines:

1. For a declaratory order that Mr Koos Blomerus, who is now deceased, and Mr de Beer entered into a partly

oral, partly written agreement and that the deceased and the second applicant created rights and obligations between each other which rights also affected the first applicant, Route 66.

10 2. Secondly, declaring that the partly oral partly written agreement entered into between the deceased and Mr de Beer, in respect of the sale of deceased's 50% shareholding in Route 66 and the sale of the deceased's 100% shareholding in the first respondent at the Vaal Rugby Organisation (Pty) Ltd, I shall refer to it as VRO is a valid agreement as at 26 August 2021 and binding on the deceased's estate.

3. Furthermore, the applicants seek an order declaring that the rental agreement entered into between Route 66 and VRO in October 2016 was effectively cancelled as of the 26th of August 2021.

20 4. Then the applicants seek an order that this Court make orders against the, the second respondent, who is the appointed executor in Blomerus senior's estate late, to reflect this alleged agreement in the liquidation and distribution account.

The applicants seek final relief. Thus, insofar as there is any dispute of fact, that dispute of fact has to be resolved on the basis of the facts as alleged by the respondents together with the facts alleged by the

applicants, which are, in fact, admitted by the respondents.

The applicants contend for an agreement reached by way of WhatsApp messages that passed between Mr de Beer and the deceased.

It is important to note that it is common cause that at the time of the conclusion or the negotiation and then the alleged conclusion of this agreement, the deceased was unable to speak, his vocal cords having being removed as a result of cancer.

10 The inherent probabilities are thus that the only real manner for the, in which the deceased could communicate with anybody was in some form of writing, whether email, text messages, or even in manuscript letters.

The applicants contend that the agreement reached between the parties had the following tacit oral, tacit and implied terms.

1. That the rental agreement as between Route 66 and VRO would cease to exist;
- 20 2. That any arear rentals owed by Route 66 to VRO would be incorporated into the sale price and would form part of the agreement;
3. That all outstanding utilities and other debts owed by VRO would be taken over by Mr de Beer and Route 66's liability as the sale encompassed. In other

words, Mr de Beer says he would be solely responsible for the debt of VRO;

4. Further terms included that the deceased would sell 100% of his, of the shareholding in VRO to Mr de Beer, as well as the deceased's 50% shareholding in Route 66 would be sold to Mr de Beer;

5. That the purchase price for both sets of shareholding would be R4.8-million;

6. That the sale price would be payable in terms of a payment schedule attached to the founding affidavit, those are monthly amounts;

7. The effective of the agreement would be the 1st of November 2021 but then according to Mr de Beer, the deceased requested that the agreement commences earlier so that the effective of the commencement of this agreement of sale, would be the 31st of August 2021; and

8. Then, finally, that simultaneously with the transfer of ownership of the shareholding, a covering bond would be registered over the immovable property owned by the first respondent in favour of the deceased, that is as security for payment of the purchase amount. Additionally the two applicants would be responsible for the costs associated with that bond.

It is evident from the founding affidavit that the registration of a bond over the property of the, of VRO is an essential term of the agreement. Only the first and second respondent opposed this application. The deponent to the answering affidavit is the son of the deceased, Mr Janus Blomerus.

There is, the dispute of fact which exist on the papers can be summarised as follows:

1. Mr Blomerus, the respondents, contend that whilst
10 they accept that there had been negotiations as between the deceased and Mr de Beer regarding the sale of the deceased's shareholding in both Route 66 and VRO, no final agreement had, in fact, been concluded.
2. The respondents also contend that the terms of the agreement contended for, and that is the, specifically the registration of a covering bond, is struck by the provisions of section 44 of the Companies Act, that is the new Companies Act. By virtue of section 44 of the
20 Companies Act whenever a company provides financial assistance, whether by way of a loan or guarantee, the provision of security or otherwise, to any person for the purpose of, or in connection with the subscription to any option or any securities issued or to be issued by the company or for the purchase of securities of the

company, unless the memorandum, and it is only if the memorandum of incorporation allows for such an agreement, that such security to be given, that a company may give such financial assistance subject to the provisions of subsection 3 and 4 of section 44.

3. Prior to financial assistance being given by a company, the shareholders must pass, amongst others, a special resolution adopted within the previous two years which approved such assistance, either for a
10 specific recipient or generally for a category of potential recipients and the board, that is the directors of such a company, is satisfied that (a) immediately after providing the financial assistance, the company would satisfy the insolvency and liquidity test provided for in section 4 of the Act and (b) the terms under which the financial assistance is proposed to be given, are fair and reasonable to the company.

I am satisfied that that agreement contended for, relates at least in part, to the acquisition by Mr de Beer of
20 the deceased's shareholding in VRO and the proposed registration of a mortgage bond over the property of VRO, constitutes financial assistance. In this, the Court is guided by the judgment in *Karoo Auctions (Pty) Ltd v Hersman* 1951 (2) SA 33, a judgment of the full bench comprising of Reynolds and Sampson J. The Court found that the passing

of a bond over assets was financial assistance.

By virtue of subsection (5) of section 44 of the Companies Act:

“A decision of a board of a company to provide financial assistance, contemplated in subsection (2) or an agreement with respect to the provision of any assistance, is void to the extent that the provision of that assistance would be inconsistent with
10 (a) this section or (b) a prohibition condition or requirement contemplated in subsection (4).”

On the papers before me, Mr Kelly, acting for the applicants, were constrained to concede that no solvency and liquidity test had been performed by the board, which, at the time, comprised of the deceased.

In his heads of argument filed on behalf of the applicant, Mr Kelly sought to convince the Court that given that the deceased was the sole shareholder at the time in
20 VRO, the non-compliance regarding the special resolution to be passed ought to be excused on the basis of there clearly having been mutual assent, that is the shareholder being fully aware.

The applicants cannot succeed in the relief they seek on at least two bases. Given the factual disputes on

the papers, I am not convinced and/or satisfied that the WhatsApp messages, copies of which are attached to the founding affidavit, evidence each of the terms contended for.

On the respondents' version, a meeting was to have been held, at the very least on 25 November 2021, when Mr Blomerus junior, the deponent, arrived at the deceased's home to find Mr de Beer and his girlfriend trying to have the deceased sign documents but Mr de Beer also telling Mr
10 Blomerus that the attorney, Mr Jimmy de Kock, the applicant's attorney of record, was on his way for a meeting.

The applicants, in the boldest of fashions, in reply, simply deny these allegations. The inherent probabilities of the respondents' version demonstrate that:

1. Some form of documentary evidence must have existed regarding the terms proposed and contended for by the applicant. It is also clear that some or consultation were to be scheduled between the
20 deceased, Mr de Beer, and Mr de Kock. That consultation, apparently, never occurred.

2. The oral agreement cannot be regarded as a valid agreement for at least two reasons:

a) There was non-compliance with the requirements of section 44(3) and by virtue of subsection (5)

the agreement is void.

b) Further, insofar as the registration of a mortgage bond or a covering bond was by all accounts an essential term of the agreement. The incumbrance of the immovable property of VRO by way of a bond, constitutes an incumbrance of land which, to my mind, requires the agreement to be in writing, failing which, the agreement is void.

10 Mr Gibson, on behalf of the respondents, argued and sought to demonstrate, and manage to demonstrate that his clients, even prior to the institution of this application, upon receipt of a draft version of the founding affidavit, warned the applicants and their attorney of the dispute of fact, a denial of the agreement contended for, demonstrated that the applicants, despite invitations by the executrix to do so, failed to provide documentation to support a claim against the deceased's estate and, in fact, waited some two years after the appointment of the executrix to launch these
20 proceedings.

The respondents contend that the applicants ought to bear of the costs of a dismissal of the main application on a punitive scale. I am not inclined to accede to that request but different considerations apply in relation to the counter-application.

In the counter-application the first respondent, VRO, seeks a declarator that the lease agreement remains valid and that the first applicant in the main application, remains bound by the, those terms of the lease agreement.

I can find nothing on these affidavits, demonstrating a valid cancellation of the lease agreement as contended for by the applicants. The lease agreement, as one normally finds in agreements of this nature, contains a non-variation clause. That is where the parties to that
10 agreement, Route 66 and VRO, had agreed that the only manner in which the lease agreement could be varied or even cancelled, was by way of it being recorded in writing, signed by all parties or on behalf of all parties.

According I find that the lease agreement concluded between the first applicant and the first respondent remains valid and binding.

In relation to the counter-application, the lease agreement contains a clause, entitling the landlord to punitive costs in the event of litigation.

20 In the result, I grant an order in the following terms:

1. The main application is dismissed with costs, including the costs of counsel on scale C.
2. The counter-application is granted in that:
 - 2.1 The lease agreement concluded between the first applicant and the first respondent on 13 October

2016 is declared to be of full force and effect.

2.2 The first applicant is to adhere to its obligations
in terms of the lease agreement.

2.3 The first applicant is ordered to pay the costs of
the counter-application on a scale as between
attorney and client.

That is my order.

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LIEBENBERG, AJ

JUDGE OF THE HIGH COURT

DATE: 09/09/2025