

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case Number: 2424/2012

In the matter between:

Michel Mathee

First Applicant

Marinda Huysamer

Second Applicant

And

Aldes Alliance Business Brokers

First Respondent

Aldes Business Brokers (Franchise)

Second Respondent

Africa (PTY) LTD

Meyer Nel

First Intervening Party

Frederick Van Aarde Nel

Second Intervening Party

JUDGMENT DELIVERED ON FRIDAY 21 SEPTEMBER 2012

Baartman,J

[1] On 13 June 2012, I dismissed an application to preserve R2 325 000 (the purchase price) pending finalisation of litigation. My reasons for that order appear from the judgment, I deal with it herein only to the

extent necessary. At the time, the purchase price was in the respondents' trust account.

- [2] At the hearing, the intervening parties led new evidence from which it appeared that the purchase price was paid over to the intervening parties shortly after judgment but before the applicants gave notice of their intention to appeal. Therefore, the intervening parties have argued that the matter has become moot. Although the applicants accept the evidence, they do not agree that the matter has become moot. I deal below with mootness before dealing with the individual grounds of appeal.

THE MATTER HAS BECOME MOOT

- [3] As indicated above, the applicants sought to preserve the purchase price in the respondents' trust account. The money has since been paid out. It follows that there is no longer an "existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law." (See **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) at paragraph [21] footnote 18).
- [4] Notwithstanding this factual situation, a court has discretion to hear an application despite it being moot. The Constitutional Court has entertained matters that were moot in circumstances where the issue to be determined had resulted in conflicting decisions among the different divisions and its judgment would have had practical effect for a wide audience. (See **MEC for Education, KwaZulu Natal, and Others v Pillay** 2008 (1) SA 474 (CC))
- [5] This matter is distinguishable from the matters in which the courts have exercised discretion and entertained the matter despite its

obvious mootness. The applicants' claim arose in the following circumstances: (paragraphs 3–9 of my judgment)

– “[3] Since December 2006, the applicants have operated a franchise business through the Big Bay Fish Company (Pty) (**the company**), in which they held all the shares. On 12 October 2011, the applicants, acting on behalf of the company, and the intervening parties entered into an agreement (**the October agreement**) in terms whereof the intervening parties acquired the restaurant business from the company. The October agreement was subject to suspensive conditions that had to be met by 1 November 2011, the effective date.

[4] The conditions were not met by 1 November 2011. The reasons for the failure to have met the conditions are the subject of dispute; I deal with them only to the extent necessary for this judgment. It was common cause that by 1 November 2011, the franchisor had not agreed to the sale, which was a material suspensive condition.

[5] On 4 November 2011, in an attempt to overcome the difficulties experienced with the October agreement, the applicants, now acting in their personal capacity, and the intervening parties entered into a share sale agreement in terms whereof the intervening parties brought the shares in the company from the applicants.

[6] The November agreement purported to be an addendum to the October agreement and provided:

“This Addendum is made and entered into by the parties to the Main Sale Agreement signed on the 12th October 2011, and attached hereto, for the purchase of the Cape Town Fish Market, Big Bay, Bloubergstrand.”

[7] When the November agreement was concluded, the October agreement was of no force and effect because the suspensive

conditions had not been met by the effective date. The signatories to the November agreement, despite purporting to enter into an addendum to the October agreement, did not amend the effective date of the latter agreement. It is in issue whether, in law, the parties in those circumstances revived the October agreement.

[8] *On 4 November 2011, the intervening parties paid the balance of the purchase price. Despite the November attempt to give effect to the sale of the restaurant business, the suspensive conditions embodied in the October agreement had not been met; importantly, the franchisor had not approved the new owners therefore the parties were not able to give effect to the purchase agreement. On 23 November 2011, the intervening parties withdrew from the agreement.*

[9] *The applicants and the intervening parties laid claim to the purchase price. The respondents threatened to pay the purchase price over to the intervening parties. Therefore, on 13 February 2012, the applicants approached the court on an urgent basis without any notice to the intervening parties. They obtained interim relief preserving the purchase price. It follows that the applicants had to have acted with the utmost good faith when they launched their application. It is in issue whether the applicants acted with the utmost good faith. Below, I first deal with the applicants' lack of candour."*

[6] *In my view, the matter has become moot and leave to appeal should be refused on that ground alone. I nevertheless deal with the grounds of appeal in turn below:*

THE GROUNDS OF APPEAL

First ground of appeal

"The court erred and misdirected itself by failing to hold that the addendum concluded between the applicants and intervening parties on November 4, 2011 constituted a binding agreement that, read with changes required by the context, incorporated in terms of the October agreement and that the applicants by reason thereof enjoyed a protectable prima facie right."

- [7] The parties to the November agreement were not the same as those who concluded the October agreement. It follows that the November agreement could not have included the terms of the October agreement. As the applicants were not parties to the October agreement, they have no basis to claim relief based on that agreement. There is no merit in this ground of appeal.

The second ground of appeal

"The court erred and misdirected itself in holding that the intervening parties were the owners of the monies held by the respondents in trust and that the threat by the respondents to pay such monies to the intervening parties did not on the part of the applicants give rise to a legitimate apprehension of irreparable harm to their protectable rights under the November agreement entitling them to interim relief."

- [8] It was common cause that the intervening parties had paid the money into the respondents' trust account pursuant to an agreement to purchase the Big Fish Company (Pty). The parties did not go through with the intended transaction. Subject to the terms of the failed contract, the intervening parties remained the owners of the money. In this matter the contract contained suspensive conditions which were not met. It follows that that contract lapsed, therefore the intervening parties remained the owners of the money.

- [9] When the applicants launched the *ex parte* urgent application, they intended to issue summons against the intervening parties. There was no indication the intervening parties would not have been able to settle any judgment which the applicants might obtain against them. In fact the papers indicated that the first intervening party was a man of means. There is no merit in this ground of appeal.

The third ground of appeal

"The court erred and misdirected itself in holding that the applicants did not make full disclosure of the facts upon which they rely for interim relief and that the disclosure of rectification was a sine qua non for the obtaining of interim relief and that in any event in failing to hold that the applicants enjoy reasonable prospects of succeeding on the question of rectification."

- [10] The applicants were parties only to the November agreement. It follows that they needed rectification before they could rely on the October agreement. They did not disclose that fact in the *ex parte* application. The failure to have disclosed the required rectification was at issue not the prospect of success in an application for rectification. There is also no merit in this ground of appeal.

The fourth ground of appeal

"The court erred and misdirected itself when holding that the balance of convenience did not favour the applicants by failing to uphold the November agreement and in particular give due weight to clause 17(b) incorporated therein from the October agreement and by failing to give any consideration and weight to the fact that the intervening parties had already agreed for the respondents to retain in trust the purchase price of the shares and loan claims acquired from the applicants pending the final resolution of the matter, which the main action seeks to achieve."

- [11] The applicants tried to rely on an agreement between the respondents and the intervening parties to which they were not party. There is no merit in this ground of appeal.

The fifth ground of appeal

“The court erred and misdirected itself in dismissing the application and especially by failing to direct that the hearing of the main action be expedited whilst preserving the status quo in terms of the interdict sought by the applicants.”

- [12] At date of judgment the pleadings had not yet closed, direction for an expedited hearing would have been premature. There is no merit in this ground of appeal.

The sixth ground of appeal

“The court erred and misdirected itself in mulcting the applicants with costs when the more appropriate order would have been to direct that the costs of the application stand over for determination in the main action once the outcome of that action had been determined.”

- [13] I ordered that costs should follow the result; the applicants have not suggested that I have exercised my discretion improperly. It follows that there is also no merit in this ground of appeal.

COSTS

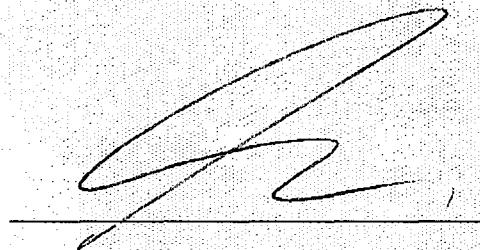
- [14] At the hearing, the applicants were surprised with an application to lead new evidence. It was therefore necessary for the hearing to be postponed to afford the applicants an opportunity to deal with the application. I intend to order the intervening parties to pay the wasted costs occasioned by that postponement.
- [15] The applicants nevertheless on the resumption of the hearing opposed the application. However, the applicants' representative

conceded that the intervening parties had an obligation to have informed the court about the changed circumstances. I intend to direct that the applicants pay the costs incurred in the application to lead new evidence on the second day.

CONCLUSION

[16] I, for the reasons stated above, am of the view that there is no reasonable prospect of another court coming to a different finding.

- (a) The application for leave to appeal to the Supreme Court of Appeal is dismissed with costs such costs to include the costs of 2 counsel, save that:
 - (i) The intervening parties are to pay the costs occasioned by the postponement of the matter on the first day of the hearing.
 - (ii) The applicants are to pay the costs incurred in respect of the second day of the application to lead new evidence.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line and a small flourish.

Baartman J