


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5220/18

(1)	<u>REPORTABLE: YES</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES</u>
(3)	<u>REVISED:</u>
<u>22/03/2019</u> DATE	
 SIGNATURE	

In the matter between:

LEAKGONA MULTIMEDIA (PTY) LTD
DZINGE PRODUCTIONS CC

1st Applicant

2nd Applicant

and

FASSIE RECORDS CC
ESTATE LATE BRENDA FASSIE
BONGANI FASSIE
LEGACI NOVA ENTERTAINMENT
VAUGHAN EATON
SHOWBIZ BEE
MASTER OF THE HIGH COURT, GAUTENG

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1] On 6 February 2018 and by agreement, an interim interdict in terms of Part A of the notice of motion was granted against the respondents on the following terms, that:

- "1.1 Pending the finalisation of the relief sought in Part B, the Respondents are interdicted and/or restrained from conducting any casting auditions, promotions, advertisement and production of the movie of the late Brenda Fassie directly or indirectly through any third party;
- 1.2 pending the finalisation of the relief sought in Part B, the Respondents are interdicted and/or restrained from continuing with any preproduction for the movie of the late Brenda Fassie directly or indirectly through any third party;
- 1.3 pending the finalisation of the relief sought in Part B, the First, Second and Third respondents are interdicted and/or restrained from entering into any contract with any third party for the production of the late Brenda Fassie movie".

[2] The applicants now seek the following relief in accordance with Part B of the notice of motion dated 24 January 2018:

- 2.1 that any agreement between the first respondent; and the third, fourth, fifth and sixth respondents for the production of the late Brenda Fassie movie be declared null and void;
- 2.2 that the termination notice, dated 14 December 2017, terminating the joint venture agreement between the applicants and the first and second respondents, be declared of no force and effect and be set aside;
- 2.3 an order declaring the purported agreement between the first, second and third respondents entered into with third parties, null and void;
- 2.4 that the respondents be interdicted and/or restrained from entering into any agreement, directly or indirectly through third parties with anyone for the production of the Brenda Fassie movie; and
- 2.5 that the first, third, fourth and sixth respondents pay the costs of this application.

[3] The late Brenda Fassie ("the deceased") is a well-known and popular South African music icon and had during her lifetime won several music awards.

- [4] The third respondent, Mr Bongani Fassie, is the son and sole heir of the deceased. Mr Themba Mthembu was appointed executor of the deceased estate after the first executor, Mr David Feldman was removed at the instance of the third respondent.
- [5] It is common cause that on 6 October 2011 the applicants and the first respondent, Fassie Records CC, represented by the third respondent, concluded a joint venture agreement ("the first agreement") for the production of a film on the life of the late Brenda Fassie ("the deceased").
- [6] The first agreement provided, *inter alia*, that:
- 6.1 the applicants would provide the finance for the production of the movie;
 - 6.2 the third respondent would make available to the applicants in pursuit of the production of the movie, material, inclusive of photographs and video images of the deceased;
 - 6.3 the applicants would be entitled each to 45% of the proceeds of any profits made from the movie and the third respondent to 10% of the profits;

- 6.4 the first respondent grants the applicants non-exclusive rights to the use of the Brenda Fassie trademark;
- 6.5 in the event of any breach of the agreement by either party:
 - 6.5.1 the first respondent could terminate the first agreement by giving the applicants three months' notice of its intention to resile from the agreement;
 - 6.5.2 the applicants could terminate the first agreement forthwith without giving any notice to the first respondent;
- 6.6 the applicants would seek the consent/consult the first respondent before entering into any agreement with a third party; and
- 6.7 any dispute arising in relation to the terms of the agreement would be referred to arbitration.

[7] At the hearing of this matter counsel for the applicants conceded that this agreement was invalid by virtue of the fact that at the time it was entered into, the deceased estate had not been wound up and was still under the control of the executor. Even though the third respondent was an heir to the estate, no rights over the estate had vested on him. There was no link between the first respondent and the deceased estate. Therefore the first and second respondents could not purport to

transfer any rights to the applicants which they did not have. As a result prayer 2 of Part B of the notice of motion was abandoned.

- [8] Subsequent to the conclusion of the invalid first agreement and on 24 May 2012, the applicants concluded a joint venture agreement ("the second agreement") with the executor of the deceased's estate. In this second agreement the applicants acknowledged that the rights to the Brenda Fassie name were an asset of the deceased estate. Furthermore, the applicants were granted 'non-exclusive rights to use of the Brenda Fassie trademark and the right to 'produce, edit, market and distribute a film based on the photographs and video images' of the deceased'¹. The terms of the second agreement were otherwise substantially identical to the terms of the first agreement save that the second joint venture agreement also provided that the applicants would provide copies of all agreements they intended concluding with third parties relating to the filmmaking project to the deceased estate prior to them signing any such agreements².

- [9] In the founding affidavit, the applicants allege that they had started with some preparation for the production of the movie which included, *inter alia*, conducting interviews with various people who had dealings with

¹ Clause 7 of the agreement.

² Clause 5.1.1 of the agreement.

the deceased and contracting a scriptwriter, Professor Zakes Mda, and a movie director, Mr Ntshavheni wa Luruli. The applicants contend that these preparatory work was done with the full knowledge of the third respondent who was updated on all developments relating to the project.

[10] It is common cause that on 26 October 2017 the fifth respondent, Mr Vaughan Eaton, had a meeting with the deponent to the founding affidavit, Mr Ernest Sello Twala ("Mr Twala"), at the offices of the first applicant. At that meeting the fifth respondent informed Mr Twala that he was the manager of the third respondent. Further, during the meeting, the fifth respondent requested some information relating to the production of the movie as he wanted to protect the interests of the second and third respondents. He was given some documentation relating to the research done on the project.

[11] At the time the meeting between Mr Twala and the fifth respondent took place, the deceased estate had been finally wound up and the executor had transferred the estate to the third respondent. This is evidenced by an e-mail attached to the answering affidavit wherein the executor alludes to the final winding up of the estate and its transfer to the third respondent. Although counsel for the applicants objected to

the admission of this email, nothing turns on it as it is a fact that the estate had been finally wound up.

[12] On 14 December 2017 the fifth respondent dispatched a letter to the applicants in which he gave notice summarily terminating the first agreement. However, this termination is irrelevant as the agreement was invalid from the onset. The fifth respondent further requested the applicants to provide him with a copy of the second agreement. The third respondent alleges that he was unaware of this agreement until the fifth respondent obtained a copy from Mr Twala.

[13] It is the applicants' contention that the third and fifth respondents could not terminate the first agreement as they have already started performing in terms of the second agreement and that until such time that a court order is granted terminating the agreement, it remained valid and effective. In support of this contention the applicants rely on several authority dealing with the validity of an otherwise invalid administrative action by various public entities which has not been set aside.

[14] It was submitted that in spite of the provisions of clause 7 (non-exclusive rights), the third respondent could not give the rights given to

the applicants in that by his conduct he had intended for the applicants to have exclusive use of the rights.

[15] Further it was submitted on behalf of the applicants that the second agreement was valid as according to the executor, the third respondent had consented to the conclusion thereof. In support of this submission and at the hearing of this application, counsel for the applicants handed up a copy of an email (dated 5 September 2018) from the executor of the deceased estate who intimated that he had concluded the second agreement with the applicants at the instance of the third respondent. However, no confirmatory affidavit by the executor was filed.

[16] Furthermore, it is the contention of the applicants that s 47 of the Administration of Estates Act³ ("the Act") does not apply as the agreement entered into with the executor is not a sale agreement as contemplated in s 47. S 47 provides that:

"Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

³ Act 66 of 1965.

- (a) In the case where an absentee, a minor or a person under curatorship is heir to the property; or
- (b) If the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the said property in such a manner and subject to such conditions as the Master may approve".

[17] On behalf of the respondents it was submitted that the second joint venture agreement was invalid in that when the executor purported to conclude the agreement with the applicants, he did not seek the written consent of the third respondent, in contravention of s 47 of the Act. It is the respondents' contention that at the time the second agreement was concluded, the third respondent was neither consulted nor was his written consent sought by the executor before concluding the agreement with the applicants.

[18] Further, it is the respondents' contention that even if the second agreement is found to be valid, in terms of clause 7, the applicants cannot deny the third respondent from contracting with any other person as they were not given exclusive rights to the material pertaining to the deceased's life.

[19] In the alternative, although not pleaded, it was argued that the application was premature as the applicants failed to comply with the

provisions of clause 18⁴ of the agreement by referring the dispute to arbitration.

[20] It is not in dispute that the applicants and the executor concluded second agreement. What is to be determined is whether the second joint venture agreement was validly entered into by the executor. If not that is the end of the applicants' case. If a finding is made that the second agreement was valid, it needs to be determined whether the interpretation given to clause 7 by either party is correct.

[21] When a person passes on, the deceased estate initially resides with the Master of the High Court until an executor for the deceased estate (either provisional or final) is appointed. The effect is that the assets of the deceased estate cannot be disposed of without the consent of either the Master (in the event that an executor has not been appointed) or the executor.

[22] Even though the executor to the deceased estate could deal with the assets of the deceased estate whilst still in control of those assets, this right is subject to the heir(s) of the deceased estate giving written consent to any disposal of any assets of the deceased estate.

⁴ Clause 18.2 of the second agreement provides that: "If the dispute has not been resolved by such negotiation as referred to in clause 18.1 above, the parties shall forthwith submit the dispute to the Arbitration Foundation of Southern Africa ("AFSA") for administered mediation, upon the term set out by the AFSA secretariat".

[23] The applicants have given a restrictive interpretation to the word sell in s 47. 'To sell' means to give or hand over (something) in exchange for money. The executor, by giving over to the applicants the estate's intellectual profit in exchange of a share in the profits made through the exploitation of the deceased name and other material, is in effect involved in a sale. I am of the view that applicant's counsel submission in this regard cannot be sustained. The executor was required to obtain the written consent of the third respondent before contracting with the applicants. As indicated above, in an email handed up during the proceedings, Mr Mthembu alleges that he concluded the second agreement when requested to do so by the third respondent, which claim is denied. Such request was not in writing as envisaged by the provisions of s 47 of the Act. I am satisfied that the failure by the executor to obtain the written consent of the third respondent renders the second agreement invalid from the onset.

[24] With regard to the applicants' argument that the second agreement remains valid until set aside by the court is misplaced in view of the fact that the agreement was invalid from the onset due to non-compliance with a peremptory statutory provision.

[25] In the event that I am wrong with regard to the validity of the second agreement, I am not convinced by the applicants' contention that the second agreement gives them exclusive rights to produce the Brenda Fassie movie. The meaning of the wording of clause 18 of the agreement is clear. With regard to the interpretation of contracts the Supreme Court of appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ stated that:

"[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors⁶. The process is objective not subjective. A

⁵ 2012 (4) SA 593 (SCA).

⁶ Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an interactive process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act*

sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself⁷, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[26] The applicants were given 'non-exclusive rights to use of the Brenda Fassie trademark and the right to 'produce, edit, market and distribute a film based on the photographs and video images' of the deceased'.

[27] In order to succeed in an application for a final interdict, an applicant has to show on a balance of probabilities that:

- (i) it has a clear right;

1986 [2010] 1 All ER 571(SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and Others v Kookmin Bank* [2011] Lloyd's Rep 34 (SC) para 28...

⁷ Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.


- (ii) that an injury was actually committed or was reasonably apprehended; and
- (iii) that it has no other satisfactory remedy available to it.

[28] The applicants are seeking a final interdict. The test is whether the facts averred by the applicant and admitted by the respondent, together with the facts alleged by the respondent justify the relief sought. I am satisfied that the applicants failed to prove it has a clear right as a basis for the relief sought.

[29] With regard to costs, costs follow that result.

[30] In the result the following order is made:

'The application is dismissed with costs'.


N P MNGQIBISA-THUSI
Judge of the High Court

For the Applicant Adv M Tshivhase (instructed by Mmathuntsha Inc Attorneys)

For the Respondent Adv E Abrahams (instructed by Durrheim Letly Inc)