REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: B3312/2023

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
21 /12/ 2023	
DATE	SIGNATURE

In the matter between:

KABELO SEEMS BOKABA	Applicant
and	
TAMMY TAYLOR NAILS GLOBAL FRANCHISING (PTY) LTD	First Respondent
TAMMY TAYLOR NAILS SA FRANCHISING (PTY) LTD	Second Respondent
MALENY JUANITA VILJEN	Third Respondent
ABSA BANK LIMITED	Fourth Respondent
CAPITEC BANK LTD	Fifth Respondent
NEDBANK LTD	Sixth Respondent
FIRST NATIONAL BANK LTD	Seventh Respondent
STANDARD BANK LTD	Eighth Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 21 December 2023.*

JUDGMENT

KUBUSHI, J

Introduction

[1] The application turns on the question of repudiation. The Applicant seeks an order in terms of which the Sale Agreement concluded between the Applicant on the one hand, and the First Respondent duly represented by the Third Respondent on the other hand, is declared to be repudiated.

[2] The application stems from an urgent *ex parte* application instituted by the Applicant, in two parts, namely, Part A and Part B. In Part A, the Applicant sought an order interdicting the First, Second, and Third Respondents from publishing any defamatory statements about him, and an order interdicting the Fourth, Fifth, Sixth, Seventh and Eighth Respondents from allowing the First, Second and Third Respondents to withdraw any monies from the accounts the said Respondents held with the Fourth, Fifth, Sixth, Seventh and Eighth Respondents, pending the finalisation of Part B of the application. The *ex parte* application was heard by Ally AJ who, on 30 June 2023, issued a *rule nisi* granting the relief sought in Part A of the application. The First and Third Respondents ("the Respondents") anticipated the return day of the *rule nisi* seeking a discharge of the interim order and the dismissal of the relief sought in Part B of the Applicant's application. The anticipation application, which was decided only on the relief sought in Part A of the application, was heard by Van der Schyff J, who, on 10 August 2023, discharged the *rule nisi* and set aside the cost order granted against the First, Second and Third Respondents; and further, ordered the Applicant to pay the costs of the application. Part B of the application is, now, before Court, opposed only by the Respondents who are represented by the same counsel.

The agreement

[3] The Third Respondent is a shareholder, representative and owner of the First Respondent. On or about 3 March 2023, the Applicant and the Second Respondent, duly represented by Maleny Juanita Viljoen (the Third Respondent) and/or Peet Viljoen, entered into negotiations of a franchise agreement, in which a proposed agreement for the purchasing of a franchise store, namely Tammy Taylor Nails Menlyn Maine ("TTNMM") (annexure "FA"), was presented for perusal by the Applicant. It is common cause that the franchise agreement was never signed.

[4] A written Sale Agreement (annexure "SFA") was subsequently concluded in terms of which the Applicant purchased the franchise rights to operate TTNMM as a going concern. The purchase price was set at R 2 000 000. The amount of R 1 500 000 was to be paid on or before 8 March 2023, and the remaining R 500 000 in two instalments, respectively, due by the end of April 2023 and end of May 2023. In terms of the Sale Agreement, TTNMM was to remain the property of the First Respondent until final payment was made. The Applicant paid the deposit of R 1 500 000 on 8 March 2023, and the handover of TTNMM occurred at a handing over meeting that was held on the same day.

[5] It appears that when TTNMM was handed over, the Applicant expected that he would also be given access to the banking account of the business. This was not done. The Applicant alleges that for a period of over two months, he, on numerous occasions, requested the Respondents to give him access, but the Respondents failed and/or refused to do so. He contends that he, as a result, operated the business without knowing whether he was making profit or not. This, according to the Applicant, led to him being unable to pay the balance of the purchase price. He says he regarded the failure by the Respondents to grant him access to the banking account of TTNMM as an act of repudiation. He, as a result, decided to accept the said repudiation and wrote a letter to the Respondents terminating the Sale Agreement.

[6] When the application was instituted, the Applicant premised his case on the Franchise Agreement and the Sale Agreement. The issues between the parties

were, subsequently, narrowed, and resulted in the Applicant abandoning his reliance on the Franchise Agreement. The Sale Agreement became the only subject of the application.

Argument

[7] It is common cause that the Applicant and the First Respondent concluded a Sale Agreement in respect of a going concern. It is also not in dispute that of the amount of the purchase price of R 2 000 000, the Applicant paid an amount of R 1 500 000 as a deposit, with the balance to be paid in two equal instalments of R 250 000 within sixty days. It is similarly not in dispute that the balance of the purchase price was not paid. The issues having been narrowed, the parties are in agreement that the only aspect that remains to be decided is whether or not there was a repudiation of the Sale Agreement.

[8] The mainstay of the Applicant's case is that the Respondents repudiated the Sale Agreement. The ground upon which the Applicant relies for the alleged repudiation is that, although the Respondents handed TTNMM over to him, they failed to grant him access to TTNMM's business banking account. It was argued on behalf of the Applicant that the failure by the Respondents to give the Applicant access to TTNMM's business banking account constituted an act of repudiation of the agreement. To reinforce this argument, the Applicant referred to and relied on the judgments in *Dave Pretorius v Kenneth Bedwell*,[1] and *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou*.[2] The Court in paragraph 10 in *Bedwell,* when explaining the concept of repudiation, expressed itself thus:

> "It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract. Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation,

[1] [2022] ZASCA 4.
[2] 1978 (2) 835 (A) at 845.

cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise."

[9] In addition, the Applicant submits that since TTNMM was sold as a going concern, it was important that when the Respondents handed over the business to him, they handed over everything related to the business. His proposition is that the handover was done so that he can start operating the business, and the essential of handing over, is to allow access to everything in the business to enable the management or operation of the business, and access to the business bank account was of key importance to enable him to do so. In this way, he would know how much the business was making, that is, whether the business was making a profit or loss. Without that information, there was no way that he could have been said to be operating the business. However, despite numerous requests, access was denied, and for a period of over two months, the Applicant did not have access to the business bank account, which led to him writing a letter to the Respondents, terminating the agreement. The Applicant supports this submission by referring to the provisions of section 197 of the Labour Relations Act,[3] which deals with the transfer of a business as a going concern. The section provides that –

"Transfer of contract of employment

1) In this section and in section 197A –

a) "business" includes the whole or a part of any business, trade, undertaking or service; and

b) "transfer" means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

[3] Act 66 of 1995.

b) All the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if between the new employer and the employee;

c) Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

d) The transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer..."

[10] Furthermore, the Applicant, relying on the judgment *in Kopeledi Pty Ltd v Madontsela and Others*,[4] correctly so, argues that whether a business was in fact transferred as a going concern must be determined objectively in the light of the unique facts and circumstances of each case with due regard to the substance and not the form of the transaction.

[11] The Applicant's argument finds credence in the remarks of the Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*,[5] where the following was stated:

> "The phrase "going concern" is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation "so that the business remains the same but in different hands." Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on the new employer. What must be stressed is that this list of factors is not exhaustive and that none of

[4] (2009) 30 ILJ 158 (LC) at para 18.
[5] (2003) 24 ILJ 95 (CC) at para 56.

them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation."

[12] Conversely, the Respondents, in opposing the application, deny that they repudiated the Sale Agreement. They, in that regard, relying on the *Plascon-Evans* rule,[6] contend that there is a material dispute of fact which cannot be decided on the papers as they stand. It was argued on their behalf that in deciding the question of repudiation, the term 'handover' must be interpreted. As a basis of the interpretation, the Respondents refer to the terms of the Sale Agreement. The Respondents contend that nothing is said in the Sale Agreement about granting access of the business banking account to the Applicant. Their argument is that in terms of the Sale Agreement, the Third Respondent is to remain the owner of TTNMM until the full purchase price is paid, and that there was no requirement that the Applicant be granted access to the business bank account. Over and above that, they contend that the Applicant was, on request, provided with the business information (the business financials) prior to the payment of the deposit of R 1 500 000.

Discussion

[13] In accordance with the *Plascon-Evans* rule, 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 only be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with facts alleged by the respondent, justify such an order.[7]

[14] From what is stated above, it is clear that the Respondents have admitted the facts averred by the Applicant, namely that he was denied access to the business banking account; and, together with the facts alleged by the Respondents, that is, that they were not obligated to give the Applicant access to the banking account because in terms of the Sale Agreement, the business was to remain

[6] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 At 634e – 635c.

[7] *See Room Hire Co (Pty) ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 -5*; and Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D –H).

the property of the First Respondent until the full payment of the purchase price has been made, the granting of the relief sought by the Applicant on the papers as they stand, is justified.

Conclusion

[15] The test as to whether conduct amounts to repudiation is whether fairly interpreted, such conduct exhibits a deliberate and unequivocal intention to no longer be bound.[8] Repudiation is said to be in the main, a question of the intention of the party alleged to have repudiated. The true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract.[9]

[16] The evidence proffered by the Applicant is that despite numerous requests to grant him access to the business banking account, the Respondents refused to do so, and without access to the bank account of the business, it could not be said that the business had been handed over to the Applicant or that the Applicant was operating the business. As has been held, what should be considered is the substance and not the form of the transaction. In the circumstances of this matter, it cannot be said that factually, without access to the business banking account, the business had been handed over to the Applicant. The Respondents' evidence on the other hand is that in terms of the Sale Agreement, the business was to remain the property of the First Respondent until final payment was made. On this basis, the Respondents argue that they were not obligated to give the Applicant access to the banking account. It means that the Respondents continued operating the banking account whilst they purported to have handed the business over to the Applicant. This conduct of the Respondent precluded the Applicant from conducting the day-to-day running of the business and must have had a detrimental effect on the running of the business by the Applicant.

[8] See *Culverwell and Another v Brown* 1990 (1) SA 7 (A) AT 14; *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) at para 34.
[9] See *Schlinkmann v van der Walt and Others* 1947 (2) SA 900 (E) at 919.

[17] As indicated in this judgment, handing over of a business as a going concern is meant to allow access to everything in the business so as to enable the management or operation of the business by the new owner. Access to the business account is one of the things that must be given to the new owner and is in essence, of key importance. It is trite that in a sale of business as a going concern, the business largely continues to run in the hands of the purchaser, as it ordinarily did before the sale. Therefore, failure to allow access to the banking account of the business amounts to an unequivocal tender to perform less than is due and amounts to repudiation.[10] The explanations tendered by the Respondents as to why the Applicant was denied access to the business banking account, hold no water. The fact that the Respondents thought they were complying with their obligations under the agreement by refusing the Applicant access, does not help their case. That they refused or failed to perform, that is, to give the Applicant access to the business banking account, when asked to do so, is sufficient to establish repudiation.[11]

[18] In addition, a 'going concern' has been defined by the South African Revenue Service as a "*supply of an income-earning activity*" and that "*the purchaser must be placed in possession of a business which can be operated in that same form, without any further action on the part of the purchaser.*"[12] In the circumstances of this matter, it cannot be said that the Applicant (as the purchaser) was placed in possession of the business which could be operated in the same form as when it was in the hands of the First Respondent.

Damages

[19] Consequently, the Applicant has satisfied all the requirements of repudiation. The conduct of the Respondents, by failing to give the Applicant access to the business account, amounts to an act of repudiation. The Applicant accepted the repudiation by writing a letter to the Respondent and thus cancelling the contract. The Sale Agreement came to an end upon the communication of the acceptance

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[10] See *Janowsky and Others v Payne* 1989 (2) SA 562 (C) at 564I –J.
[11] See *Van Rooyen* above n 2 at 845 – 846.
[12] SARS INTERPRETATION NOTE: NO. 57 dated 31 March 2010.

of the repudiation to the Respondents, and a claim for damages, as a result, arose.

[20] It is trite law that where there is a claim for damages based on a liquid document, the matter can be instituted by means of application proceedings. The Applicant's claim for damages is for the refund of the amount of R 1 500 000, paid into the account of the First Respondent, as a deposit of the purchase price. The argument is that proof of payment of the said amount, which is not disputed by the Respondents, serves as a liquid document. The Respondents do not dispute this submission by the Applicant except that they raise an issue that the Notice of Motion does not seek refund of the deposit as damages in the event that it is found that the Respondents repudiated the agreement.

[21] It terms of Prayers 8 to 10 of the Notice of Motion, the Applicant seeks that annexure "SAF" (the Sale Agreement) be declared void and unenforceable on the grounds that it does not comply with the provisions of the Consumer Protection Act ("the Consumer Protection Act"),[13] and its regulations;[14] alternatively, the Sale Agreement to be declared in conflict with the provisions of the Consumer Protection Act;[15] and further, alternatively an order be granted declaring that the Respondents repudiated the Sale Agreement.[16] The relief sought in Prayer 11 is that in the event of the Court granting either Prayers 7 or 8 or 9 and/or all of them *supra*, then the First, Second and Third Respondents be ordered to refund the Applicant an amount of R 1 500 000, which Applicant paid the First and Second Respondents in the account of the First Respondent for the purpose of the purchase of the franchise in question. The term *"and/or all of them above"* is inclusive of Prayer 10 of the Notice of Motion, which implies that should it be found that the Respondents repudiated the agreement, they should be ordered to refund the amount of R1 500 000. Consequently, the Respondents having been found to have repudiated the Sale Agreement, an order to refund the R 1 500 000 ought to be granted against them.

[13] Act 68 of 2008.
[14] Prayer 8 of the Notice of Motion.
[15] Prayer 9 of the Notice of Motion.
[16] Prayer 10 of the Notice of Motion.

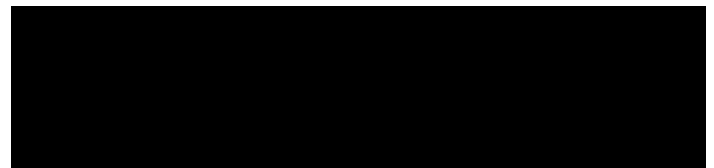
Costs

[22] It is trite that costs are in the discretion of the Court and that they would generally follow the successful party. In this instance, the Applicant is the successful party and, ordinarily, ought to be awarded the costs of the application. However, the Applicant premised his case mostly on the annexure “FA”, that is, the franchise agreement that was never concluded by the parties, which he eventually abandoned, almost, at the Court’s door. He should, as a result, be mulcted with costs for that. On the other hand, since the Applicant is the successful party, he is entitled to some costs, in particular, those for the preparation and hearing of the matter.

Order

[24] The following order is made:

1. The application is granted.
2. The First and Second Respondents are ordered to refund the Applicant the amount of R 1 500 000, jointly and severally, the one paying the other to be absolved.
3. The Applicant is ordered to pay the costs of the application excluding the costs for the preparation and hearing of the matter, such costs to include costs of counsel.
4. The First and Second Respondents are ordered to pay the costs for the preparation and hearing of the matter, jointly and severally, the one paying the other to be absolved, such costs to include costs of counsel.



E M KUBUSHI

JUDGE OF THE HIGH COURT

PRETORIA

APPEARANCES:

For the Applicant:	MR M K LEBEA Instructed by MASHAO KELLY LEBEA INC ATTORNEYS
For the Respondent:	ADV DE KLERK Instructed by MALAN MULLER ATTORNEYS