JT v AT and another [2019] JOL 45646 (WCC)

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

Case No.: **2149/2018**

In the matter between:

JT Applicant

and

AT First Respondent

ERF JACOBSBAAI CC Second Respondent

Heard: 5 August 2019
Delivered: 4 September 2019

JUDGMENT

MYBURGH AJ:

Introduction

[1] In this application the applicant seeks an order that he be declared to be the true, lawful and beneficial owner of 50% of the members' interest in the second respondent and that 50% of the member's interest in the second respondent, currently held in the name of the first respondent, be transferred to him. The applicant seeks relief in the alternative. However, as will become apparent, it is not necessary for me to consider and determine the alternative relief sought.

The facts

[2] The applicant and the first respondent were married in community property, which marriage foundered and ended in divorce on 29 May 2012.

[3] During the subsistence of the marriage, and on 4 November 1997, they became equal members of the second respondent, which owns Erf Jacobsbaai ("*the property*"). However, on 1 December 2007, the applicant, in terms of a deed of donation, donated his member's interest in the second respondent to the first respondent and resigned as a member of the second respondent on 13 December 2007.

[4] By the time the divorce proceedings commenced, approximately five years after the donation, both the applicant and the first respondent had forgotten about the deed of donation.

[5] In a rule 43 application, brought during the divorce proceedings, the second respondent was listed as an asset in the joint estate. In the consent paper that was incorporated in the divorce order, the following was recorded:

> "*2.* ***ERF JACOBSBAAI BK***
>
> *2.1 Die partye is die eienaars en lede van die beslote korperasie bekend as Erf Jacobsbaai en welke beslote korperasie die woning in Jacobsbaai besit en welke woning die Eiseres tans okkupeer.*
>
> *2.2 Die partye sal die eienaars en lede van gemelde beslote korperasie bly, onderhewig aan wat hieronder staan.*
>
> *2.3 Die Eiseres bedryf tans die woning as gastehuis en vir die Eiseres se uitsluitlike voordeel.*
>
> *2.4 Die partye kom ooreen dat die Eiseres geregtig sal wees om voort te gaan om die woning as gastehuis te bedryf en tot Eiseres se uitsluitlike voordeel vir 'n tydperk van drie jaar vanaf datum van die ondertekening hiervan.*
>
> *2.5 Gedurende laasgenoemde drie jaar tydperk sal Verweerder alle erfbelasting en ander munisipale uitgawes ten opsigte van die eiendom betaal, asook die versekering ten opsigte van die eiendom en die huisinhoud.*
>
> *2.6 Na verstryking van die drie jaar tydperk, sal albei partye saam besluit op watter wyse die partye voorts sal handel met die eiendom en die ledebelang in die beslote korporasie.*
>
> *2.7 Desnietenstande dit wat in 2.1 tot 2.5 hierbo bepaal word, sal die Eiseres se uitsluitlike regte tot 'n einde kom met haar dood, hertroue of sodra sy 'n saamleefverhouding met 'n ander man betrokke raak.*

> *2.8 Die partye is geregtig om ter enige tyd met mekaar 'n ooreenkoms te bereik tot dien effek dat die bepalings van hierdie klousule onderling gewysig word*".

[6] Without doubt, Rule 43 application and the consent paper were drafted on the common understanding that the applicant and the first respondent held an equal member's interest in the second respondent.

[7] At time of the divorce, the first respondent was operating a guesthouse from the property, and she continued to do so after the divorce. The applicant moved into the property, by agreement between the parties, in December 2015. On 5 February 2016, the first respondent's attorneys at the time, Schoeman & Hamman, sent a letter which narrated the clause of the consent of paper quoted above, and placed on record that the first respondent had a 50% member's interest in the second respondent. In the letter, proposals were made, *inter alia*, to sell the property. On 11 February 2016, the applicant's attorneys at the time, Swemmer & Levine, sent a letter to the first respondent's erstwhile attorneys, also confirming that the applicant and the first respondent each held a 50% member's interest in the second respondent. In April 2017, the first respondent moved out of the property and the applicant took occupation of the whole property. He had previously occupied a part of the property. At this stage, and as reflected in the correspondence, the applicant and the first respondent were in agreement that they were equal members of the second respondent and were conducting themselves accordingly.

[8] On 15 November 2017, the first respondent's new attorneys, Marius Coertze, sent a letter to the applicant requesting that the latter sign a rental contract. The applicant's erstwhile attorney responded promptly on 21 November 2017. In his response he disputed that the first respondent's attorney had the necessary authorisation to act on behalf the second respondent as he was one of the members of the second respondent and he had not given authorisation. This was the first indication of dissonance between the parties regarding the ownership of the second respondent.

[9] Further correspondence was exchanged between the respective attorneys but as no resolution was reached regarding the issue that the court is now called upon to determine, the applicant launched the application.

The deed of donation

[10] In the founding papers, the applicant made out a case that he be declared the owner of a 50% member's interest in the second respondent based on the facts set out above excluding the conclusion of the deed of donation.

[11] In the answering affidavit, for the first time, mention was made of a deed of donation whereby the applicant had donated his member's interest in the second respondent to the first respondent.

[12] The first respondent asserts that the Windeed report reflects that she is the only member of the second respondent, and that this has been the case since 13 December 2007. She says this is so, as the applicant resigned as a member on 13

December 2007 after she and the applicant had entered into a deed of donation on 1 December 2007, in terms of which he donated his 50% member's interest to her.

[13] The deed of donation is a simple document which reads as follows:

> "*Ek die ondergetekende **JT**, identiteitsnommer # skenk hiermee die volgende:-*
>
> ***50%** Ledebelang in die Beslote Korperasie bekend as **ERF JACOBSBAAI BK** aan **AT**, identiteitsnommer . …*
>
> *Ek die ondergetekende **AT**, identiteitsnommer ontvang met dank die bogenoemde skenking*".

[14] The first respondent does not explain the circumstances around the conclusion of the deed of donation. She simply relies on the fact that it was concluded and that the member's interest was thereafter transferred to her. Her affidavit is conveniently sparse in this respect and her failure to deal with the circumstances surrounding the deed of donation is telling.

[15] The applicant, in his reply, sets out the circumstances surrounding the conclusion of the deed of donation. He explains that while he has no independent recollection of signing the document, it was concluded on the advice of Mr Janse van Rensburg ("*Janse van Rensburg*") of Reko Auditors in Vredendal. He contacted Janse van Rensburg, at the time of drafting the replying affidavit and the latter reminded him of why the decision was made to enter into the deed of donation.[1] Janse van Rensburg, who was the auditor for both the applicant and the respondent at the time, explained that the business conducted by the applicant at the time, Albatross

[1] Janse van Rensburg deposed to a confirmatory affidavit.

Houtwerke, was entitled to a tax dispensation for small business corporations. This dispensation would only available to Albatross Houtwerke, if the applicant could demonstrate that he was not a member of another corporate entity and hence the necessity that he formally divests himself of his member's interest in the second respondent.

[16] According to the applicant, the deed of donation and the subsequent change in the CK2 document of the second respondent was not intended to alter the position regarding the true and beneficial ownership of the second respondent, it was a formal change with the limited objective of making Albatross Houtwerke eligible for the dispensation. (Whether this was the correct thing to do *vis a vis* SARS is not relevant to the determination of this application.)

[17] In essence, what the applicant asserts, when he says this, is that it was a tacit term of the agreement to donate his member's interest to the first respondent that it was a formal change and not change to the true and beneficial ownership of the second respondent. The conclusion that this might amount to a tacit term was not expressly argued by counsel for the applicant. However, the deed of donation, the circumstances surrounding its conclusion and the subsequent conduct of the parties was canvassed in the papers and dealt with, in a good measure of detail, in argument.

[18] In the Alfred McAlpine & Son case[2], His Lordship Corbett AJA (as he then was), defined a tacit term[3] (or a term implied from the facts) as follows:

> "*An unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties*".[4]

[19] A tacit term is a term the parties intended but failed to express, either orally or in a contract.[5] It thus derives from the consensus between the parties as opposed to an implied term that is imported by law.

[20] Regarding the *modus operandi* when deciding whether a tacit term exists or not, the point of departure is the express terms of the contract. In the words of His Lordship Rumpff JA in the Pan American case[6]:

> "*When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term. This is important because an express term may deliberately exclude the possibility of importing tacit terms*".[7]

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2 Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration 1974 (3) SA 506 (A).

3 I adopt the terminology utilised by, *inter alia*, G B Bradfield in *Christie's* Law of Contract in South Africa, 7th Edition, Lexis Nexis, rather than that of *A J Kerr* in The Principles of the Law of Contract, 6th Edition, Lexis Nexus Butterworths, who prefers to refer to such a term as an implied term, rather than a tacit term.

4 At 531-532.

5 Kerr at 340

6 Pan American World Airways Inc. v SA Fire and Accident Insurance Co. Limited 1965 (3) SA 150 (A) at 175C.

7 G B Bradfield, *Christie's* at 197 and the cases cited therein, including Rouwkoop Caterers (Pty) Limited v Incorporated General Insurance Limited [1977] 4 All SA 347, 1977 (3) SA 941 (C) at

[21] A tacit term cannot be imported on a question in respect of which the parties have applied their minds, and for which they have made an express provision in the contract, and no tacit term can be imported in contradiction of an express term.

[22] As pointed out by Bradfield, this principle was succinctly expressed by Van Winsen JA in the SA Mutual Aid Society case[8], where His Lordship stated the following:

> "*A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See Delmas Milling Co. Limited v Du Plessis 1955 (3) SA 447 (A) at 454*".

[23] In this instance there is no express term in the deed of donation which would exclude the possibility of importing the term under consideration, namely that the deed of donation did not bring about a change in the beneficial ownership of the second respondent. The deed of donation is sparse. It does no more that identify the donor, the donation, the donee, the acceptance of the donation and the property. It certainly does not preclude the importation of the tacit term under consideration.

945G; First National Bank of SA Limited v Transvaal Rugby Union [1997] 1 All SA 743, 1997 (3) SA 851 (W) at 864J-865A; Cash Converters Southern Africa (Pty) Limited v Rosebud Western Province Franchise (Pty) Limited [2002] 3 All SA 435, 2002 (5) SA 494 (SCA) at 511C.

8 SA Mutual Aid Society v Cape Town Chamber of Commerce [1962] 1 All SA 583, 1962 (1) SA 598 (A) at 615D.

[24] Moving from the express terms of the contract to the surrounding circumstances, in the Privy Council decision of Douglas v Baynes, it was held that:

> "*The principle on which terms are to be implied in a contract is stated by Kay LJ in Hamlyn & Co. v Wood & Co. [1891] 2 QB p 494 in the following words:*
>
> > *'The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied'*".[9]

[25] This test has been adopted in our courts.[10]

[26] Another formulation of the test that has found favour in our courts is that of Scrutton LJ in Reigate v Union Manufacturing Co.[11], where it was held as follows:

> "*A term can only be implied if it is necessary in the business sense to give efficacy to the contract; i.e. if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'of course so and so will happen; we did not trouble to say that; it is too clear'*".[12]
> [Emphasis added]

[27] Regarding the second part of Scrutton LJ's test, i.e. the bystander test, Bradfield opines as follows:

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9 See Bradfield at 199.

10 See, *inter alia*, Absa Bank Limited v SA Commercial Catering & Allied Workers' Union National Provident Fund [2012] 1 All SA 121, 2012 (3) SA 585 (SCA) at [33].

11 [1918] 1 KB 592 at 605.

12 Once again, I am indebted to G B Bradfield for pointing me to these authorities.

"*This bystander or officious bystander test, clear as it is, also calls for further comment. Despite the subjective form in which the test is expressed, it must be applied objectively in two respects.*[13]

First, it is not necessary to prove that the parties ever directed their minds to the question although Stratford JA said in Barnabas Plein & Co. v Sol Jacobson & Son:

> *'The true view appears to me to be that you have to get at the intention of the parties in regard to a matter which they must have had in mind, but which they have not expressed.*[14] *Thus in Wilkins v Voges, Nienaber JA said 'a tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent, but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one'.*[15]

The correct inquiry is thus expressed by Coleman J in Techni-Pak Sales (Pty) Ltd v Hall:

> *'That does not mean, in my view, that the parties must consciously have visualised the situation in which the term would come into operation. In Broom and Another v Pardess Co-operative Society [1940] 1 All ER 603 MacKinnon LJ, applying the test I have quoted, referred to the hypothetical asker of the question as 'a more imaginative friend'. It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it*[16]'.[17] [Emphasis added]

[28] The test, in the present context is what the parties would have said had they been asked whether the deed of donation changed the beneficial ownership if the second respondent, not what their response was when they actually considered the

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[13] *Greenfield Engineering Works (Pty) Limited v MKR Construction (Pty) Limited [1978] 4 All SA 616, 1978 (4) SA 901 (N) at 909.*

[14] *1928 (AD) 25 at 31.*

[15] *[1994] 2 All SA 349, 1994 (3) SA 130 (A) at 1361. See Botha v Swanepoel [2002] 1 All SA 85, 2002 (4) SA 577 (T); Airports Company South Africa Limited v Airport Bookshops (Pty) Limited t/a Exclusive Books [2015] 3 All SA 561 (GSJ) [34] at [72].*

[16] *[1968] 3 All SA 227, 1968 (3) SA 231 (W) at 236-7.*

[17] Bradfield at 201-202.

issue. I am convinced that they would said something to the effect that: "of course we understand that we still own the second respondent in equal measure, the change is only being done so that Albatross Houtwerke obtain the dispensation and no to change our respective beneficial ownership of the closed corporation.

[29] However, the compelling evidence in this regard is the conduct of the parties subsequent to the conclusion of the deed of donation, in the run up to their divorce and thereafter when they were dealing with issues pertaining to the property.

[30] A most instructive and relevant authority on this issue is Richard Ellis South Africa (Pty) Limited v Miller[18], where His Lordship Kriegler J (as he then was), held as follows:

> "*I am fortified in my reconstruction of what the appellant's reaction would have been by its conduct after the dispute had arisen and even after the respondent had left its employ. Its initial letter, its initial calculation and even its pleadings at the outset did not seek to raise the claim to which the amendment is advanced as a defence. I agree with Mr Lazarus that it is proper to look at such subsequent conduct when one is trying to ascertain whether a particular term is to be implied or not (Meers v Safecar Security Ltd [1982] 2 All ER 865 (CA) at 879)*". [Emphasis added]

[31] As stated, I am convinced that the parties, if asked at the time of concluding the deed of donation whether it changed the beneficial ownership, would have answered in the negative, the most cogent evidence in this case is that of the conduct of the parties subsequent to concluding the deed of donation. The Rule 43 proceedings, the

[18] 1990 (1) SA 453.

consent paper and the initial correspondence addressed by both parties' attorneys was premised on the common understanding that the parties owned the second respondent in equal measure.

[32] Not only was this understanding asserted by the applicant's attorney at the time, this was also done by first respondent's erstwhile attorney. For example, on 5 February 2016, Mr Kaptein of Schoeman & Hamman, writing on the first respondent's behalf stated that:

"Ons wil dit verder ook op rekord plaas dat ons klient 50% ledebelang in die Beslote Korporasie bekend as Erf 188 Jacobsbaai het."

[33] Two things are very clear:

1. Firstly, the deed of donation and the subsequent resignation of the applicant as a 50% member of the second respondent, was not intended to change the beneficial ownership of the second respondent.

2. Secondly, the deed of donation had been forgotten by both parties until the dispute that led up to the application, at which time it was discovered and the first respondent decided to take advantage of the forgotten document.

[34] As already set out above, the Rule 43 proceedings, the divorce order which incorporated a consent paper, and the initial correspondence between the respective attorneys were all underpinned by the common understanding that the applicant and

the first respondent held the members' interest in the second respondent in equal shares.

[35] Furthermore, up until the dispute broke, the parties conducted themselves, *vis-a-vis* the property, in a manner consistent with the common understanding that they held equal members interest in the second respondent.

[36] Thus, applying the bystander test enunciated above, if the question had been asked, at the time of the conclusion of the deed of donation, whether it changed the beneficial ownership of the second respondent, the answer would have been in the negative, and emphatically so.

[37] To the extent that it was argued that there were real and material disputes of fact on the papers (and this was alluded to by counsel for the first respondent) the well-known principles that apply are well-known. I refer, in this regard to the words of His Lordship Mr Justice Cameron (referring to both the Room Hire and the Plascon-Evans cases) who held as follows:

> "*It is an elementary rule of motion proceedings that an applicant cannot succeed in the face of a genuine dispute of fact that is material to the relief sought. Conflicting averments under oath cannot be tested on affidavit but only by oral evidence. Nearly eighty years ago Innes CJ explained that –*
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> > *'(The) reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion,'*
>
> *Innes CJ added a significant qualification: '(Where) the facts are not really in dispute … there can be no objection, but on the contrary a manifest advantage*

in dealing with the matter by the speedier and less expensive method of motion.']

This qualification endorsed in the subsequent classic expositions on the subject led to a gradual but not inconsiderable relaxation of the criteria for determining whether despite a factual dispute relief can be granted in affidavit proceedings. Most notably, Corbett CJ in Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited amplified the ambit of uncreditworthy denials that would not impede the grant of relief. He extended them beyond those not raising a real, genuine or bona fide dispute of fact, to allegations or denials 'are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'".[19]

[38] The first respondent's sparse version regarding the deed of donation does not give rise to a genuine dispute of fact. She says very little. Her lack of detail is telling and there is a good deal she leaves unsaid, and conveniently so. She is rather coy when dealing with the issue that occupies centre-stage in this application. For example, she sheds not light at all on the circumstances surrounding the conclusion of the deed of donation. She also does not provide a compelling explanation of why her conduct leading up to the divorce and thereafter is at odds with the position she now advances. Her version is sparse, vague, untenable and thus to be rejected.

[39] The clear intention of the parties when concluding the deed of donation was not to change beneficial ownership of the second respondent, but to obtain a tax benefit for Albatross Houtwerke. It follows that the applicant is entitled to the formal re-transfer of the 50% members' interest from the first respondent to himself.

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[19] South African Veterinary Council and Another v Symanski 2003 (4) SA 42 SCA.

Prescription

[40] The case advanced by the first respondent, i.e. that the applicants claim has prescribed, has no merit.

[41] Prescription begins to run as soon as the debt is due.[20] The three-year prescription period only commenced when the applicant demanded that the CK document be amended to reflect his member's interest in the second respondent. Until then it could not be said that the debt was due as the deed of donation did not contain an express, tacit or implied term that the member's interest be transferred back to the applicant on a particular date.

Conclusion

[42] In the circumstances, I find that the applicant has made out a case for the relief he seeks.

Order

[43] I order as follows:

1. The applicant is declared to be the true, lawful and beneficial owner of 50% of the members' interest in Erf Jacobsbaai CC.

[20] Harms, Amlers Precedents of Pleadings Eight Edition Lexis Nexis Butterworths at 313 and the authorities cited therein namely Section 12 (1) of the Prescription Act 68 of 1969, Santam Ltd v Ethwar [1999] 1 All SA 525 (A), 1999 (2) SA 244 (SCA) and Barnett v Minister of Land Affairs [2007] ZASCA 95, 2007 (6) SA 313 (SCA)

2. 50% of the members' interest in the second respondent, held in the name of the first respondent, is to be transferred to the applicant.

3. The first respondent is ordered and directed to do all things, and take all steps and sign all documentation necessary to give effect to paragraph 2 above within three (3) days of the granting of this order, failing which the sheriff of the high Court, or his deputy, is empowered to attend to this on her behalf.

4. The first respondent is to pay the costs of this application on a scale as between attorney and own client.

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P A MYBURGH
Acting Judge of the High Court

Appearances:

For the applicant:	Mr V H Ulyate Instructed by V H Ulyate
For the respondents:	Advocate R B Engela Instructed by Marius Coertze Attorneys