IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: **8184/2018**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 19 July 2023
SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

ADRAIN GORDON SPENCE Plaintiff

and

SIMON TUNG-CHENG WU Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The plaintiff claims specific performance in terms of an agreement of sale between the parties. The claim is for payment of an amount of R 15 000 000, 00, being the purchase price that is due and payable by the defendant in terms of the agreement.

[2] The defendant defended the claim and instituted a counterclaim for cancellation of the agreement and repayment of an amount of R 5 025 750,00 which the defendant had paid to the plaintiff in terms of the agreement. The

defendant, furthermore, tenders the payment of equitable compensation to the plaintiff in lieu of the defendant's restitution excluding the plaintiff's former directorship in the companies that form the subject matter of the sale.

Issues common cause

[3] The facts set out *infra* are common cause between the parties.

[4] The parties entered into a partly written, partly verbal agreement on 9 December 2019. The written agreement reads as follows:

> *"AGREEMENT*
>
> *Terms:*
>
> 1. *Simon agrees to pay R20m to Adrian over 3 years (2017/2018/2019)*
>
> 2. *Simon agrees to release Adrian from sureties and will indemnify him*
>
> 3. *Only guarantee is based on the business surviving*
>
> 4. *Agreement is based on trust and a handshake*
>
> 5. *Agreement to be concluded by close of business, Friday 9 Dec 2016*
>
> *Simon Payment Commitment (as per the attached payment schedule)*
>
> 1. *7/12/2016 – Transfer car*
>
> 2. *14/12/2016 – R3m*

3. *20/12/2016 – Loan account (R273k)*

4. *30/4/2017 – Loan account (R600k)*

5. *01/01/2017 to 30/07/2017*

- *7 months' Salary (3 months' notice and 4 months' severance – 16 weeks for 16 years' service)*

- *Jan and Feb = R 255 per month (normal as previously agreed)*

- *Mch – Jul = R 255 per month (First of monthly instalments against R 4m balance) R 1,275m*

6. *01/08/2017 to 30/11/2017*

- *Aug to Nov = R 250 per month = R1m (Second batch of monthly instalments against R4m balance) R1m*

7. *31/12/2017*

- *Dec = R1,724m on 31/12/2017=R1,724m R7m*

8. *2017 – R4m ($x) min per month $20k (R250k)*

9. *2018 – R7m ($x) min per month $20k (R250k)*

10. *2019 – R6m ($x) min per month $20k (R250k)*

11. *If company liquidated, written confirmation by auditors, forfeit 2018-R7m and 2019-R6m*

12. *A grace period of two weeks to be allowed for all payments*

13. No further claims – full and final settlement

<u>Adrian Resignation Commitment</u>

1. 09/12/2016 – Resign as director immediately

2. 09/12/2016 – Return shares immediately – resign as shareholder

3. 09/12/2016 – Immediately appoint new Director (Simon Wu)"

[5] The further express, alternatively implied, further alternatively tacit terms of the agreement were:

5.1 the plaintiff sold to the defendant his shares in Soviet Group (Pty) Ltd and Erf 3[...] F[...] Street Investments (Pty) Ltd ("the companies) for the price of R 20 000 000, 00;

5.2 the plaintiff would transfer his shares to the defendant on signature of the agreement;

5.3 the plaintiff would resign as a director of the companies.

[6] The plaintiff complied with his obligations in terms of the written agreement, in that he:

6.1 transferred his shares in the companies to the defendant; and

6.2 resigned as a director of the companies.

[7] The defendant did not comply with his obligations in terms of the written agreement, in that the defendant failed to pay the full purchase price. According to the plaintiff, the defendant only paid R 5 million on or before 31 December 2017. The defendant avers that he paid an amount of R 5 025 750,

00. Be that as it may, the plaintiff's claim is for payment of the remainder of the purchase price.

Issues in dispute

[8] The dispute between the parties pertains to the terms of the oral agreement. Although the plaintiff did not plead the terms of the oral agreement, the plaintiff dealt with the terms in his evidence.

[9] The defendant pleaded that the terms of the oral agreement were that:

9.1 the plaintiff would not compete in any capacity whatsoever with Soviet, either directly or indirectly for at least the duration of the agreement; and

9.2 the plaintiff would not do anything or cause anything to be done that would adversely affect the value or business of Soviet.

[10] The plaintiff denies that the parties agreed on the aforesaid terms.

[11] It is common cause that the plaintiff competed with Soviet through the Lee Cooper Brand. As aforesaid, the plaintiff, however, denies that it was a term of the agreement that he would not compete with Soviet.

[12] The defendant pleaded that the plaintiff breached the oral terms, in that the plaintiff:

12.1 competed, and still competes, with Soviet through the Lee Cooper brand; and

12.2 interfered with the contractual relationship between Soviet and its employees and/or agents and/or customers.

[13] In respect of the plaintiff's performance, the defendant pleaded that the parties on 8 March 2016, entered into a written cession and pledge of shares

agreement with Hellman Worldwide (Logistics) (Pty) Ltd and Hellman Worldwide Supply Chain Services SA (Pty) Ltd ("Helman) in terms of which the parties ceded and pledged to Helman their respective shareholding in Erf 3[...] F[...] Street Investments (Pty) Ltd.

[14] In the result, the plaintiff could not sell or transfer his shares to the defendant and in the circumstances the plaintiff has not complied with his obligations in terms of the agreement. The defendant is, therefore, excused from making payment to the plaintiff.

[15] I pause to mention, that it is common cause that the aforesaid agreement is still in place.

[16] The defendant's counterclaim is premised on the plaintiff's breach of the oral terms alleged by the defendant. The defendant alleges that he is entitled to cancel the agreement and pleaded: *"the defendant hereby cancels the agreement forthwith and claims restitution"*.

[17] The restitution is pleaded as follows:

> *"Pursuant to cancellation of the agreement the defendant is entitled to claim repayment from the plaintiff of R 5 million, subject to this Court's discretion to determine an equitable amount of compensation in favour of the plaintiff in lieu of the defendant's restitution excluding the plaintiff's former directorship in the companies"*

Evidence

[18] The plaintiff and defendant were both shareholders and directors in the Soviet Group of companies. The company mainly sells denim apparel to retailers, such as Edgars, Truworths etc.

[19] The plaintiff is well known in the retail industry, had the commercial know-how and therefore was the managing director that attended to the day-to-day

running of the company. The defendant had extensive contacts in the financial sector and mainly obtained and provided capital for the running of the company's operations.

[20] The parties were in a business relationship for approximately 16 years and on all accounts, the relationship was healthy and mutually beneficial. As from 2015, the company's financial affairs got increasing worse. During the middle of 2016, the plaintiff indicated that he wishes to withdraw from the company and offered to sell his portion of the business to the defendant.

[21] The defendant was not amenable to the separation and endeavoured to convince the plaintiff to remain in the business. Notwithstanding the defendant's best efforts, the plaintiff was not swayed and negotiations in respect of the sale of the business commenced during October 2016.

[22] The negotiations were facilitated by Carel Bothma (Bothma), the financial director of Soviet. After a lot of to and fro, Bothma presented a draft agreement to the parties on 8 December 2016.

[23] It is common cause that the parties had a discussion about a possible restraint of trade provision after receipt of the draft agreement on 8 December 2016. The respective versions of the parties as to what was discussed and what was actually agreed, differ vastly.

[24] The plaintiff testified that the defendant approached him on the 8th of December 2016 and suggested *"a type of restraint that would prohibit me from trading."* The plaintiff stated that his response was very clear, if the defendant paid the full purchase price of R 20 million on or before 9 December 2016, he would happily look at such an option. The money was, however, not forthcoming and he signed the written agreement in its present form on 9 December 2016.

[25] During cross-examination, the plaintiff was referred to the particulars of claim and more specifically the allegation that the agreement between the parties

was partly written and partly oral. The plaintiff denied that the agreement was partly oral. Upon some prompting from Mr Shepstone, the plaintiff answered that the oral part of the agreement meant *"that we honour each other's personal lives, we basically respect where we come from."*

[26] Mr Shepstone put it to the plaintiff that clause 4 of the agreement, namely *"the agreement is based on trust and a handshake"* represents the verbal agreement that the parties would act in each other's best interest. The plaintiff agreed.

[27] Mr Shepstone pointed out that clause 4 was only inserted into the written agreement after the discussion between the parties about the restraint of trade. The plaintiff agreed. The plaintiff agreed that there was correspondence exchanged between the parties in respect of the implementation of the agreement. The plaintiff was referred to an email that he sent to the defendant on 14 March 2017, in which the plaintiff stated the following: *"I can assure you that my intentions are clear regarding our agreement and I will stick with it. I am a man of my word."*

[28] When asked to which portion of the agreement the plaintiff referred, the plaintiff stated the following: *"And in terms of our agreement where we keep our business tidy, in terms of our personal lives, yes."* It was pointed out to the plaintiff that the term he refers to did not appear in the written agreement, which entails that the agreement between the parties had oral terms as well. The plaintiff insisted that the parties only agreed to the terms that are contained in the written agreement.

[29] The plaintiff's attention was drawn to an email from the defendant dated 5 July 2017, in which the defendant said the following: "*With regards to honour and trust and a handshake. I am sticking to my part. Perhaps you should consider doing the same. I have seen the billboard at Melrose Arch, and it is not a McDonald sign."* The plaintiff was asked whether he knows what the defendant was referring to and the plaintiff provided the following answer: *"At*

the point of exit, Mr Wu questioned what I would be doing, and at that point I was not sure. So, I said who knows, I might open a McDonalds...”

[30] It was put to the plaintiff that he informed the defendant that he would be immigrating to Australia and the plaintiff confirmed that it formed part of their discussion. Mr Shepstone stated that it was for this reason that the last three amounts payable in terms of the agreement were in dollars. The plaintiff answered that immigrating to Australia was only an option.

[31] In respect of his involvement with Denim HQ, the company that trades in the Lee Cooper brand and is in direct competition with Soviet, the plaintiff explained that Mr Kriek, a property developer, wanted to enter the clothing industry and requested the plaintiff to assist. The plaintiff was hesitant to provide the exact date on which he became involved in Denim HQ, until he was referred to an email sent by him on 13 January 2017 using the following email address: a[...]. It was put to the plaintiff that he joined Denim HQ immediately after his departure from Soviet.

[32] Upon further questioning, the plaintiff admitted that he did not use the Denim HQ email address in his correspondence with the defendant. The plaintiff stated that he used another email address because that is the address he told the defendant he will use in their correspondence. During further cross-examination, the plaintiff, for reasons not entirely evident, endeavoured to minimise his involvement in Denim HQ.

[33] The plaintiff could not explain why he did not tell the defendant, with whom he had a 16 year business relationship, that he was involved in Denim HQ.

[34] It was put to the plaintiff that he endeavoured to solicit, Martin Greenberg, Anthony Matthysen and Ramesh Sumke, all employees of Soviet, to come and work for Denim HQ. The plaintiff denied this.

[35] Lastly, it was put to the plaintiff that he interfered in the customer relationships of Soviet. The plaintiff, once again, denied the allegation.

[36] The plaintiff closed its case, and the defendant was called to give evidence. Prior to commencing with his evidence, Mr Shepstone informed the court that, although English is not his first language, Mr Wu will give evidence in English. At the time, it seemed that Mr Wu's command of the English language was sufficient to proceed in English. As will appear *infra*, Mr Wu did not have any difficulties in giving evidence in English during examination-in-chief, but some difficulties arose during cross-eamination.

[37] The defendant testified that there were a few *"chats"* between the parties from 7 to 9 December 2016, prior to the signing of the agreement. The defendant *inter alia* asked the plaintiff what he was going to do after he left Soviet. When asked what else was discussed, the defendant gave the following answer: *"In my words I mentioned you cannot be doing the same business in South Africa"*.

[38] The defendant testified that the plaintiff knew all the suppliers, knew the design and the price at which the products were sold. Any competition from the plaintiff's side would have a negative impact on Soviet.

[39] According to the defendant, the plaintiff responded as follows: *"He asked me to trust his words because we come through the long relationship, he is a man of his words. I have to trust him with a handshake he will not do that."* When asked what he understood from the words: *"I will not do that"*, the defendant answered as follows:

> *"M'Lady, the way I understand is ..because we know each other for so many years so in a way my understanding is he is …..to immigrate to Australia ..*[I] *specifically asked him what you are going to do overseas. He said I do not know I am thinking about opening a McDonald franchising business."*

[40] When confronted with the plaintiff's version that he would only agree on a restraint of trade clause if the full purchase price of R 20 million is paid before

the 9th of December 2016, the defendant denied that such a conversation took place and provided the following answer:

> *"M'Lady, on the state of signature in my mind because the company is so sick all that go through my mind is do not do the same type of business leave me alone give me chance to fix the business and if the business survive you can give room of the three years done to juggle to make a plan to pay him."*

[41] The defendant testified that he requested Bothma to insert clause 4 (*Agreement is based on trust and a handshake*) into the final agreement and provided the following explanation for the insertion of the clause:

> *"M'Lady, because ..he said trust me …I will not do anything to harm you, let me go to Australia so the agreement is based on trust and a handshake. I have to trust you means he is a man of his word and I have to trust him and according to the culture I have that is good enough."*

[42] Mr Shepstone put it to the defendant that the parties orally agreed prior to the signing of the final agreement that the plaintiff will not compete with Soviet. The defendant agreed. When asked why the term was not included in the written agreement, the defendant stated the following:

> *"According to the culture I have, if the person in front of me said he is going to Australia, he is going to open franchise business, then ask to put in US dollar, I was under the heavy pressure, I firmly under the impression I believe he is not going to go in competition or do the same type of business in South Africa."*

[43] On some prompting from Mr Shepstone, the defendant testified that the *"oral"* agreement that the plaintiff *"will not be doing the same business in South Africa"* was reflected in clause 4.

[44] The defendant testified that one of his employees, Martin Greenberg, informed him that the plaintiff is trading in competition with Soviet and told him not to pay the plaintiff.

[45] Mr Potgieter SC, counsel for the plaintiff, commenced with cross-examination on 7 February 2023. Mr Potgieter asked a few questions in respect of the plea filed on behalf of the defendant. The defendant struggled to follow some of the questions and at some stage requested Mr Potgieter *"to use easier English"* and stated that he battles to understand Mr Potgieter's vocabulary.

[46] Mr Potgieter answered that he might be doing the defendant an injustice in proceeding in English. The court requested the parties to discuss the issue and adjourned the court. When the court resumed, Mr Potgieter indicated that he had no further questions for the defendant.

[47] The last witness to testify was Martin Greenberg (Greenberg).

[48] Greenberg stated that he was contacted by the plaintiff, who informed him that he had taken over a clothing factory in Botswana that supplied goods to Soviet. The plaintiff wanted to know whether Soviet will still order goods from the factory. Greenberg discussed the matter with the defendant and the defendant indicated his willingness to continue ordering from the Botswana factory.

[49] A meeting was arranged with the plaintiff, during which meeting the plaintiff told Greenberg that he is investing in the Lee Cooper brand. The plaintiff also wanted to know if Greenberg will join him in the new business venture. Greenberg testified that he was shocked when he learned that the plaintiff joined a business that is in direct competition with Soviet.

[50] Greenberg immediately informed the plaintiff that Soviet will not order goods from a factory that provide goods to a competitor. Upon his arrival at the office, Greenberg informed the defendant that the plaintiff is competing with

Soviet. Greenberg testified that the defendant was equally shocked when he heard the news.

[51] During cross-examination, Greenberg indicated that Soviet is still trading. When confronted with the defendant's pleaded version that Soviet went out of business because of the plaintiff's conduct, Greenberg responded that Soviet did lose some customers in 2017 but are still in business.

[52] Lastly, Greenberg did not consider the plaintiff approaching customers of Soviet as interfering with Soviet's business. Greenberg testified that it was not malicious, but normal business.

Discussion

Oral terms of the agreement

[53] From the evidence it is clear that the respective versions of the parties in respect of the oral terms of the agreement is mutually destructive. The technique generally employed in resolving factual disputes of this nature was succinctly set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at par [5], namely:

> *"…..To come to conclusion on the disputed issues a court must make findings on *a) the credibility of the various factual witnesses; (b) their reliability; (c) the probabilities…"*
>
> and
>
> *"when all factors are equipoised probabilities prevail."*

[54] The plaintiff was a confident witness who stuck to his version during cross-examination. The plaintiff did, however, find it difficult to explain events that did not correspond with his version. In my view, the probability of the plaintiff's version overshadows the question whether he was credible and reliable.

[55] The defendant fared very well during evidence. The defendant came across as an honest person to whom honour, trust and honesty are of utmost importance. His demeanour in the witness stand was humble and straightforward. The fact that the defendant felt a sense of incredulity at the plaintiff's behaviour was palpable in court. The defendant's version was not tested during cross-examination, and I have no hesitation in accepting his evidence as both credible and reliable.

[56] Next, the probabilities of the divergent versions should be examined. Although the plaintiff initially denied an oral agreement, he changed his version during cross-examination and agreed that the parties entered into an oral agreement. In view of the correspondence between the parties and the plaintiff's conduct subsequent to his exit from Soviet, his version as to the terms of the of the oral agreement is far-fetched, to say the least.

[57] The plaintiff admits that he informed the defendant during December 2016 that he did not have any immediate plans and that he considers immigrating to Australia to open a McDonalds This admission does not tie in with the fact that he, immediately after leaving Soviet, joined Denim HQ and commenced in setting up the Lee Cooper brand in direct competition to Soviet.

[58] Furthermore, the contents of the plaintiff's email dated 14 March 2017, to wit *"I can assure you that my intentions are clear regarding our agreement and I will stick with it. I am a man of my word."*, does not make sense. According to the plaintiff's version, he complied with all his obligations during December 2016. The question then arises, to which of his obligations the plaintiff is referring to. At that stage, it could only be the restraint term.

[58] The plaintiff could clearly not afford to have a constraint clause in the written agreement and utilised the defendant's naivety and trusting nature to make sure the restraint term does not find its way into the written agreement. The plaintiff clearly failed to take into account that an oral agreement is as binding as a written agreement.

[59] In the premises, I am satisfied that the defendant proved on a balance of probabilities that the parties orally agreed that the plaintiff will not compete with Soviet.

Plaintiff's claim: Specific performance

[60] In order to succeed with the claim for specific performance, the plaintiff had to allege and prove:

60.1 the terms of the agreement;

60.2 that he performed in terms of the contract; and

60.3 that the defendant failed to perform in terms of the contract.

[See: *Amler's Precedents of Pleading,* Harms, 7th ed, p 356]

[61] In view of the finding that the plaintiff did not perform in terms of the agreement between the parties, the plaintiff has failed to prove the requirements set out *supra* and his claim for specific performance stands to be dismissed.

Defendant's counterclaim: Cancellation of the contract and restitution

[62] In order to succeed with the claim for cancellation, the defendant must prove:

62.1 a breach of the contract;

62.2 that the right to cancellation has accrued because the breach was material; and

62.3 the act of cancellation must be clear and unambiguous.

[See: *Amler's Precedents of Pleading,* Harms, 7th ed, p 115]

[63] Having found that it was a term of the agreement that the plaintiff will not compete with the Soviet brand, the plaintiff, on his own version, breached the term by competing with the Soviet brand.

[64] Has the right to cancel accrued? In *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA) the court stated the following in respect of the right to cancel:

> *"[13] When is a breach, in the form of malperformance, so serious that it justifies cancellation by the innocent party? Van der Merwe et al Contract, General Principles 1st ed (1993) at 255 summarises the position as follows, with reference to decided cases and various writers:*
>
> > *'The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance.'*
>
> *[14] As long ago as 1949 it was said by this Court in Aucamp v Morton 1949 (3) SA 611 (A) at 619 with regard to the relevant question that it was not possible to find a simple general principle which can be applied as a test in all cases because contracts and breaches of contract take so many forms. In deciding, in that case, whether the respondent was entitled to cancel the contract, the Court said (at 620)*

'. . . nor were the obligations which were broken so vital or material to the performance of the whole contract that respondent could say that the foundation of the contract was destroyed'.

[65] In my view, the breach in *casu,* affected a vital part of the contract. The defendant has, therefore, established a right to cancel the contract.

[66] The last question is whether the act of cancellation was clear and unambiguous. The allegations in the counterclaim pertaining to the aforesaid question are briefly as follows:

66.1 on 8 December 2017, the defendant wrote to the plaintiff to demand unconditional and immediate remediation of the breach of the agreement;

66.2 on 11 December 2017, the plaintiff responded to defendant's demand by denying that he was not entitled to compete with Soviet;

66.3 the defendant alleged that the plaintiff's letter constituted a repudiation of the contract, which repudiation the defendant, in a letter dated 14 December 2017, refused to accept. The defendant insisted on specific performance of the terms of the agreement;

66.4 despite the aforesaid demand, the plaintiff persisted with its breach and the defendant has elected to cancel the agreement forthwith.

[67] Mr Potgieter submitted that the defendant's election not to accept the repudiation of the contract by the plaintiff and to insist on performance, precluded the defendant from cancelling the contract. The defendant may not approbate and reprobate.

[68] Mr Shepstone disagreed. Mr Shepstone submitted that the plaintiff's repudiation of the contract was continuous and although the defendant did not elect to accept the initial repudiation, he was entirely within his rights to accept to continued repudiation and to cancel the contract.

[69] The question whether an aggrieved party who has elected to abide by the contract, in the face of persistent breach despite the opportunity to relent, may cancel the contract, was considered and answered in the affirmative in *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA).

[70] In the result, the defendant was entitled to cancel the contract.

[71] Pursuant to the cancellation of the contract, the defendant claims repayment of the amount of R 5 025 750, 00 *"subject to this Court's discretion to determine an equitable amount of compensation in favour of the plaintiff in lieu of the defendant's restitution excluding the plaintiff's former directorship in the companies."*

[72] It is trite that a party claiming restitution when a contract has been cancelled is obliged to tender restitution or to provide a valid excuse for the failure to make such a tender. Failure to do so is fatal to such a claim. [See: *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 (6) SA 358 (SCA)].

[73] The defendant did not present any evidence in order for this court to determine *"an equitable amount of compensation in favour of the plaintiff in lieu of the defendant's restitution".*

[74] In the result, there is no tender for restitution and the defendant's counterclaim stands to be dismissed.

ORDER

The following order is issued:

1. The plaintiff's claim is dismissed with costs.

2. The defendant's counterclaim is dismissed with costs.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATES HEARD:
6-8 February 2023 &
12 May 2023

DATE DELIVERED:
19 July 2023

APPEARANCES

For the Plaintiff: Advocate MVR Potgieter SC

Instructed by: Senekal Simmonds Attorneys

For the Defendant: Advocate RS Shepstone

Instructed by: Errol Goss Attorneys