(REPORTABLE)

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 6448/2004

In the matter between:

KENNETH JAMES ROBERTS 1ST Applicant
CARMEN PATRICIA ROBERTS 2ND Applicant

And

DARON MARTIN Respondent

JUDGMENT: Delivered on the 31st day of January 2005

NDITA, AJ

Introduction

1. This is an application in terms of rule 6(12) of the Uniform Rules of Court. The Applicant seeks an order for the enforcement of a sponsorship agreement which was concluded with the Respondent, in terms of which the Respondent undertook certain obligations in regard to the tennis playing future of the Second Applicant and a confirmation of the spoliation order granted by this court on 16 November 2004.

The second Applicant is an aspiring professional player, a minor aged 17

years old. The application is brought by the first Applicant in his capacity as the legal guardian of and on behalf of the second applicant, his natural daughter. The Respondent is an adult male businessman, who owns cafés and restaurant businesses known as the Tank, in Cape Town. The application is for specific performance of an agreement to sponsor the second applicant's tennis activities. The Applicant also seeks a spoliation order against the Respondent.

The respondent in turn launched an interlocutory application compelling the applicants to furnish security for costs. The parties have since agreed that judgment in that application be considered in the course of judgment of the main action. Advocate AC Oosthuizen (SC) and Advocate G.A Oliver appeared for the Applicant. Advocate I.C Bremridge appeared for the Respondent.

Summary of Essential Facts

The Sponsorship Agreement:

The following facts stand out as admitted facts:

1. The first Applicant and Respondent met in October 2002 when the Respondent made an offer to sponsor some of the tennis activities of the second Applicant.

2. In line with the offer, the Respondent instructed his attorneys, Mallinicks Inc. to prepare a contract purporting to regulate the sponsorship agreement. His attorneys, Mallinicks Inc. prepared the contract and Mr. Matterson; the Respondent's manager presented the contract to the Applicants and asked them to sign it if they were satisfied with contents in the absence of the respondent.
3. Both Applicants signed the contract with Mr. Matterson as their witness on 05 December 2003. (The terms of the contract will be referred to at a later stage). It is common cause that at no stage did the respondent ever sign the contract. It is further common cause, however, that at all material times the Respondent acted in accordance with contract although he did not sign it.
4. The Respondent continued sponsoring the second applicant until July 2004. Furthermore, the Respondent paid for second applicant to participate in the Super Seven tournament in Gauteng. It is a fact that cannot be disputed that there was discussion between the parties concerning the second applicant's playing overseas but the respondent stated his unwillingness to send her overseas until such time that her performance warranted it.
5. It is common cause that the Respondent paid a professional player, Jacqui Booth to assist the second Applicant with her training.
6. On the 30th June 2004, the Respondent's attorneys wrote a letter to the applicants informing them that the respondent "elected not to pursue the sponsorship agreement" and considered himself not "bound thereby".
7. The respondent has to date sponsored the second applicant up to a sum of two hundred and fifty thousand rand (R250 000, 00).

The Spoliation

1. It is common cause that the respondent provided the applicants with a furnished apartment situated at flat 209 Silverhow, Albany Road, Sea Point.
2. Furthermore, it is not disputed that the Applicants were in peaceful and undisturbed possession of the apartment until Mr. Matterson, an employee of Tank Holdings CC removed the furniture thereby depriving

the Applicants of the furniture in the furnished apartment.

3. Both parties agree that the Respondent was not present or physically involved in the removal of furniture from the flat at Albany Road, Seapoint.
4. The Respondent is the sole owner of Tank Holdings CC.

Disputed facts – The Written Agreement

The gravamen of applicant's case is that a binding agreement did in fact come into existence when the contractual offer drawn for the respondent was presented to the applicants and accepted by them in writing. Put differently, the respondent was, by presenting the written agreement to applicants, making an offer to them to enter into a contract on the terms as embodied in the said agreement. After both applicants had signed the contract, the respondent continued performing his obligations as warranted in the terms of the agreement, financing the second applicant's career up until April 2004. According to the Respondent's opposing affidavit the written agreement between the parties was never intended to be a binding agreement between the parties. It was intended that any agreement between the parties would be reduced to writing and duly signed by both parties for it to have a binding effect. The document is dated 2003 and is annexed to the applicant's affidavit exhibit. The Respondent did not sign the agreement. In any event, the Respondent submits that there is a factual dispute on this issue, which means that this issue cannot be decided solely on

the papers but requires the leading of oral evidence. The Respondent further avers that he sponsored the Applicants out of the goodness of his heart and had not at all material times envisaged being contractually bound to fund them. Thus, so argues the Respondent, this application must be decided against the applicant. The Applicant on the other hand alleges that the contract arose upon the applicant's signing the written document.

Disputed facts--The Spoliation

I should point out that the Respondent has no obligation to provide accommodation and furniture to the first Applicant. Neither is he compelled to appoint the first Applicant as the coach to the second Respondent. The first Applicant avers that Mr. Matterson is the Respondent's "assistant", and that the spoliation was carried out on the Respondent's instructions. The Respondent on the other hand admits that Mr. Matterson is an employee of Tanks Holding CC but emphatically denies Mr. Matterson is his "assistant" or employee. The basis of the Respondent's defense on the spoliation is that the furniture in question does not belong to him but belongs to the employees of Tank Holdings CC. It is them who put the furniture in that flat long before the Applicants commenced residing there. On the 8th July 2004, Mallinicks Inc. wrote a letter to the Applicants' attorneys in which they state the following ***"we confirm that in the***

light of the of the contents thereof, our client's representative Mr. Andrew Matterson attempted to contact the guardian with a view to making arrangements to remove our client's furniture and fittings from the premises situated in Green point". This excerpt in my view is an unequivocal admission that by the Respondent that the removing the furniture from the apartment, Mr. Matterson was acting on the express instructions of the Respondent. The assertion by the Respondent that he did not authorize the removal of the assets in view of this letter falls away. The letter by Mallinicks Inc. goes further ***"kindly advise accordingly when it would be suitable for our client to attend upon the premises with a view to removing his assets"***. The client referred to or the matter referred is the matter of the Applicants and the Respondents. The client referred to is the Respondent. I am convinced that the Respondent did authorize Mr. Matterson to remove the furniture and fittings. I accordingly confirm the interim order granted by Judge Desai on the 18th August 2004.

The Application of the Law

Before I consider issues and arguments raised, I should mention that the affidavits reveal that there appears to be a dispute of facts. But the actual issue

this court must consider is whether those disputes raise a real, genuine or *bona fide* dispute of facts. The approach to be adopted in this type of situation is set out *in* ***Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) LTD 1984 (3) S.A 623 at 634 F*** to be:-

"…***where there is a dispute as to the facts a final interdict should only be granted in notice of motion of proceedings if the facts as stated by the respondents together with the admitted facts in applicant's affidavits justify such an order…Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as being admitted*****".*** In making the assessment whether there is a bona fide dispute of facts, this court should proceed with caution and must 'guard against the danger of an injustice being done (more particularly to an injustice to the respondent) if unpleaded issues are *readily* treated as being fully canvassed' ***(see South Peninsula Municipality v Evans and others 2001 (1) S.A. 281 E****).* The law as laid down in ***Plascon Evans*** is that where there is a genuine dispute of facts which cannot be resolved on the papers, the matter must be referred to oral evidence. However in the instant matter, there is clearly no ***bona fide*** dispute of facts.

It is trite law that where an offer is made and the party, to whom it is addressed, with knowledge of the offer, performs an unequivocal and unambiguous act of acceptance, then the parties are in law held to have contracted with one another on the terms as contained in the offer. In the present case, the agreement though not signed by the Respondent was prepared by his attorneys, the Respondent having issued instructions that they should draw such an agreement. It was presented to applicants with express intention that if they were satisfied with contents thereof they would sign the agreement. The signing by the Applicants of the agreement presented to them in my view cannot but constitute an unequivocal act of acceptance.

The Respondent on the other hand had, although he did not sign the contract, continued acting in accordance with terms of the agreement. He provided accommodation, paid a professional tennis coach, as well as surgery for the second applicant. The Respondent in his affidavit suggests that he is not bound by the terms of the contract because his attorneys drafted a document which varied with what he had discussed with them. The Respondent admits requesting his attorneys Mallinicks to prepare an agreement regulating his funding of the second Applicant. In my opinion, this is an indication that his intention was to create an agreement legally binding upon both parties. Surely if he wanted to continue funding the Applicant at his whim or as he desired there would not have been any need for the preparation of an agreement by Mallinicks Inc. Having had the document prepared, the Respondent went further and presented it to both Applicants for signature if they were satisfied with terms. The Applicants duly signed the last page and initialed every other page. The only reasonable inference I can make from this conduct is that the Respondent, by presenting the agreement to the Applicants was making an offer to them to enter into a contract as embodied in the agreement. ***See SAR & H v National Bank of S.A limited, 1924 AD 704 at 715***. In my view the Respondent is legally bound by the terms of the agreement, the document signed by the Applicants clearly was an offer emanating from the Respondent.

Even if my view that the Respondent's offer as accepted by the Applicants constituted a binding agreement may be wrong, according to the Respondent's papers he had an opportunity in January 2004 to consider the contract (Para 148 page 96 of the record). When he discovered that the agreement prepared by his attorneys was not in accordance with his instructions, he had ample time to notify the applicants or insist that his attorneys rectify the agreement seeing that it was at odds and contradictory to that which was discussed between the Applicants and himself. Instead the Respondent continued funding the tennis activities of the second applicant until April 2004 in accordance with warranties he made in the agreement. In fact he continued acting in accordance his obligations and warranties as set out in Para 4.1.6 of the agreement. The paragraph provides that the Respondent shall use reasonable endeavors to enhance and develop the Player's career Activities by appointing the Player's coach. By providing accommodation to second Applicant, and paying for the Super Seven tournament in Gauteng, the Respondent acted in accordance with Para 4.3.5 of the agreement. This contains the provision that shall the Respondent shall fully fund the Player's training, coaching, accommodation, travel and other expenses associated with her career as a professional tennis player.

According ***R.H Christie, The Law of Contract in South Africa***, 4th edition page 122 in ***Meter Motors (PTY) LTD v Lohen 1966 (2) SA 735 T, Snyman J*** read ***Innes CJ*** in ***Goldbalt v Freemantle 1920 AD 123*** as contemplating three types

of writings:

a) A memo facilitating proof of an oral agreement.

b) ***A writing which embodies the agreement of the parties although not signed.*** *(my emphasis)*

c) A written agreement which ought to be signed.

In my view the agreement between the Respondent and the Applicants falls into the second category even though it was signed by the Applicants only. If it had been the Respondent's main intention to fund the second Applicant at his discretion and because of his generous nature then he should have done so at his own discretion. There would have been no need to instruct his attorneys to prepare an agreement and request the Applicants to sign if they were happy with contents. In my judgment the agreement signed by the Applicants embodied the agreement of the parties though it was not signed by the Respondent.

According to the Respondent's affidavit, the agreement drafted by his attorneys was a specimen agreement which he did not get to peruse until January 2004. Clause 4 of the agreement refers to warranties and obligations of the applicant. Para 4.1.1 obliges the Respondent to assist with negotiation of an appropriate program of suitable tennis contests, competitions and tournaments and other engagements subject to clause 2. Para 4.1.3 on the other hand directs the Respondent to source and negotiate contracts for the second Applicant for the

purpose of endorsement and promotion of products and services related to the Activities and obtaining other income-producing activities and opportunities for the second Applicant. Immediately below the Respondent's warranties and obligation clauses there is a specific provision to the effect that the Respondent does not guarantee the procurement of any such activities or opportunities in clauses 4.1.1 and 4.1.3. The inclusion of this provision taking all factors into account, points to the Respondent having perused the contract. Otherwise how else would the Respondent have known that there are certain obligations he could not guarantee? It is clear to me that the agreement was not a specimen agreement; the Respondent would not have tendered to the first applicant for signature a mere specimen. The Respondent is the owner of various cafes and restaurants. As a businessman he must be familiar with contracts and their legal effects, if he was not happy with the agreement signed by the Applicants he would have taken appropriate steps to amend, cancel or rescind it.

In my view, where a party makes a written offer and it is unequivocally accepted and signed by the offeree, but not signed by the offeror, and the offeror continues to act in accordance with terms embodied in the offer, there is no reason why the offeror cannot be bound by the contract. The contrary is clearly untenable.

The Application to furnish security for costs

Having found for the Applicants, it stands to reason that the application that the Applicants furnish security for costs because the proceedings were alleged to have been vexatious falls away. The interlocutory application that the Applicants furnish security for costs is hereby dismissed with costs.

Specific Performance

This matter concerns an aspiring professional tennis player's sponsorship agreement concluded between the Applicants and the Respondent which this court has declared as binding. The Applicants desire to enforce the contract. The prayer in the notice of motion is for an order compelling the Respondent to render performance of all his obligations under the agreement. It has been submitted on behalf of the Respondent that the court should not order specific performance as it would not be just in the circumstances. The Respondent advances the following reasons:-

1. That the Respondent would have difficulty carrying out his obligations because of his business commitments and lack of expertise to perform his responsibilities under the contract.
2. The relationship between the parties has deteriorated to such an extent that it would cause undue hardship on the Respondent to perform in accordance with terms embodied in the agreement.
3. The remedy the court should consider in the circumstances is a claim for damages because it is more adequate and suitable than the specific performance.

It is settled law ***that "although the court will as far as possible give effect to a plaintiff's choice of claim to specific performance, it has discretion in a fitting case to refuse a decree of specific performance and leave the plaintiff to prove his id qoud interest"***. ***(See Farmer's Co-operative v Berry 1912 AD 343 at 350***. In ***Santos Professional Football Club (PTY) LTD v Ingesund 2003 (5) SA 73c at 85 I***, the full bench of the Cape of Good Hope Provincial Division affirmed that it is generally the plaintiff's prerogative to elect whether to hold a defendant to his contract or claim damages for breach.

Firstly, the Respondent has submitted that he would have difficulty carrying out his obligations under the agreement. This necessitates a review of what the Respondent's obligations are in terms of the agreement. For the purpose of clarity, Martin in the agreement refers to the Respondent and the Player refers to the second Applicant.

Clause 1 to 1.3 of the agreement reads as follows:

Subject to clause 2, the Player (represented by her legal guardian) hereby appoints Martin to act and Martin agrees to act as the Player's sole and exclusive manager and agent throughout the world (the ***"Territory"***) to represent the Player in connection with the development, negotiation and organization of all her income producing activities and interests which are or may become available to her arising from her career as a professional tennis player in the sports, entertainment and media industries (the **"*Activities*"**).
1. The Activities shall include but not limited to:
1.2.1 Any performance in competition, training and "on the tennis court" as a

professional player;

1.2.2 Making /exploiting audio and audio-visual recordings of the Player's performances;

1.2.3 All the Player's performances and appearances whether they are live before an audience or not or recorded for sale, exploitation or broadcast;
1.2.4 Exploiting the Player's name and image by merchandising, sponsorship, endorsement or other advertising or promotional means.
1.2.5 Testing and assisting with technical development of any equipment; and
1.2.7 Tennis instruction and demonstration.
1.3 Martin acknowledges that the Player's playing schedule on various Women's International Tours and in professional tournaments which may include those on Women's Tennis Association Tour (WTA) and the South African Women's Tennis Association but not limited to these tours and not excluding the WTA Tour generally shall be negotiated, organized and devised by Martin or whoever is appointed by Martin as her coach during the Term and that the coach's decision in relation to the Player's playing schedule, or alternatively the Player's decision shall at all times be final and take precedence over Martin conducting Activities Provided that the Player shall , and shall procure that her coach shall, discuss such playing schedule with Martin and provide Martin with reasonable notice of such playing schedule. Martin shall refer all enquiries he receives in relation to the Player competing in tournaments to the coach.

The question the court has to consider is whether a specific performance is the appropriate remedy in the instant case. From the reading of the contract, it becomes obvious that the Respondent acknowledges that there are certain responsibilities he would not able to carry out. For instance, the provision that; ***"Martin shall refer all enquiries in relation to the Player competing in tournaments to the coach"***. In my view the Respondent's incompetence as a manager of an aspirant professional tennis player, the second applicant is fully catered for in the terms of the agreement, thus the inclusion of the provision for a

professional coach in the agreement.
I would point out immediately that, it would be undesirable for this court to refuse specific performance simply because the remedy would be inconvenient to the Respondent who himself made the offer fully aware of his limitations.

Secondly, with regard to the acrimonious relations between the parties, one need to point out that throughout the papers, the Respondent does not refer to such kind of relationship between him himself and the second applicant who, after all is the subject matter of this action. The Respondent in Para 133 of his affidavit confirms that the import of his instructions to his attorney clearly states the contribution he has made towards the second Applicant's professional tennis career and his wish to continue "funding" her. This court therefore by ordering specific performance would be doing no more than giving effect to the Respondent's intention as embodied in the agreement. It would therefore in my view be appropriate to compel the contracting party to hold to his contract.

Thirdly, the Respondent has argued that the appropriate remedy in the instant case would be in the form of damages. It is settled law that a defendant has no right to prescribe how the plaintiff would make the election provided by law. Citing ***Brisley v Drotsky 2002 (4) SA SCA Para 94 Foxcroft J*** in the ***Santos*** case (supra) emphasized that courts should be slow in striking down contracts or declining to enforce them and should in specific performance situations refuse performance only when a recognized hardship to the defaulting party had been proved. The determinant question in the present case is whether the Respondent

has proved a recognized hardship or if the specific performance would be inequitable to the Respondent. For the reasons advanced above, it is my judgement that the Respondent has not proved any recognized hardship. As in the Santos case, the second Applicant is the only party who will be prejudiced if she does not perform as required in terms of the contract. The Respondent reserves the right to pursue other remedies in the event of non-performance by the second Applicant.

Fourthly, the Respondent has alleged that at the age of seventeen years, there are no prospects that the second Applicant can still pursue a successful career as a professional tennis player. The Applicants in this regard filed the supporting affidavit of Neil Broad which has not been opposed. Mr. Broad is a tennis coach who was on the Association of Tennis Professionals (ATP) international tour from 1987 to 2000. He played in the Davis Cup Competition for Great Britain and received a silver medal at the 1996 Olympic Games. Mr. Broad's opinion is that for the second Applicant to embark on a professional tennis career, she would need to participate in tournaments both locally and abroad, at the earliest opportunity. According to Mr. Broad, she would need to be based at a venue where there are good coaching facilities and from where it is convenient for her travel to and from tournaments continually.

Conclusion

Applying the rule in the ***Plascon Evans*** case, (supra) it clear that even though the Respondent did not sign the contract, he was at all material times aware of the terms of the contract and acted in accordance with them. The Respondent cannot therefore seek to resile from the contract. Accordingly the application for the enforcement of a sponsorship agreement succeeds. The Respondent is ordered to pay costs of this application including the costs that stood over for later determination on 16 November 2004.

NDITA AJ