

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Case no. 23291/04 Judgment
reserved: 17/03/05 Judgment
delivered: 24/03/05

In the matter between

FEROSA BIBI BATA N O

Applicant

and

MOHAMED YOUSUF BATA

1st Respondent

ZEERUST GARAGE (PTY) LTD

2nd Respondent

GRENS BELEGGINGS CC

3rd Respondent

ALICE COURT CENTRE CC

4th Respondent

BATBRO INVESTMENTS (PTY) LTD

5th Respondent

MARICO EINDOMME CC

6th Respondent

PRICES CENTRE CC

7th Respondent

THEANA HOUGH

8th Respondent

JUDGMENT

LEGODI J

INTRODUCTION

1. The applicant is seeking an order in the following terms:

1.1 That the first respondent be ordered to pay to the eighth respondent an amount of R779 820 within ten days from date of this judgment.

1.2 That the first respondent be ordered to pay to the eighth respondent within ten days from date of this judgment interest at 15,5% per annum on the amounts of which the amount of R779 820 is the sum from the date upon which the first respondent received such amounts.

1.3 That the first respondent be ordered to instruct the lessees of the premises from which the following businesses are conducted, to in future pay all rental in respect of such premises to the eighth respondent:

Computer & Career

Collective clothing

Modern Electronics

Batsons (Honeybee Supermarket)

Maderia Cafe

Flat B(2) situated at Erf 78/1286 Zeerust

Bows Exclusive Boutique

Delta Cellular

Electric Impodium

Just It

Maatla Africa

- 1.4 That the first respondent be ordered to pay to the eighth respondent all rental income which the first respondent received after June 2004 in respect of any of the premises of the second to the seventh respondents together with interest thereon at 15,5% per annum a tempora morae.
- 1.5 That the first respondent be ordered to account to the court of all amounts which he has received since 22 November 2000 in respect of the premises owned by any of the second to seventh respondents together with interest thereon at 15,5% per annum a tempora morae.
- 1.6 That the first respondent be interdicted from interfering with the eighth respondent or any of her personnel in the exercising by her or her personnel of the authority granted to her by order of this court dated 22 November 2000.
- 1.7 That leave be granted to the applicant to supplement this application should the first respondent refuse or fail to comply with the proposed orders referred to above and to apply to court on such amplified papers for an order of committal for contempt of court.
- 1.8 That the first respondent be ordered to pay the costs of this application on attorney and client scale.

BACKGROUND

2. The applicant is the wife of the late Mohammed Sader Bata (hereinafter referred to as the deceased) who passed away on the 11 July 2002. The applicant is suing in her capacity as the appointed executrix of the estate of the deceased.
3. The first respondent is the brother of the deceased and for many years the first respondent and the deceased did business together. The second to the seventh respondents were some of the first respondent and the deceased' businesses.
4. The first respondent and the deceased started to experience some problems in their business relationship. As a result of these problems the first respondent and the deceased agreed to refer their dispute to Waterval Islamic Institute for a religious ruling (hereinafter referred to as FATWA). Subsequent to the religious ruling and the reluctance by first respondent to comply with the ruling the deceased had to approach this court under case 29916/00 for compliance.
5. When the matter under case number 29916/00 served before this court on the 22 November 2000, the first respondent and the deceased agreed to settle the matter on certain terms and as a result a draft court order marked "X" in that case was

made an order of the court. Of importance the order reads as follows:

Die partye tot hierdie aansoek kom soos volg ooreen hangende die finale afhandeling van die aansoek onder saaknommer WP 20604/00 in die Witwatersrand Plaaslike Afdeling hetsy deur 'n beslissing van 'n hof of skikking deur parytye:

1.

Alle beheer en bestuur van die tweede tot sewende respondente vir sover as wat in die eerste respondent en applikant setel word die eerste respondent en applikant ontnem en in die hande van THEANA HOUGH van Bosveld Boekhouers van Zeerust geplaas om dit in belang van alle belanghebbendes te bestuur.

2.

Die eerste respondent en applikant word verbied om enige gelde namens die tweede tot die sewende respondente te ontvang.

3.

Die eerste respondente en applikant word gelas om die tjekboeke, spaarrekeningdokumente, belegging sertifikate, rekordhouding en verwante dokumente met betrekking tot rekeninge van die tweede

tot sewende respondente onverwyld aan gemelde Theane Hough te oorhandig.

4.

Die eerste respondent en die applikant word gelas om alle titelaktes met betrekking tot die onroerende eiendomme van die tweede tot sewende respondente, onverwyld aan Theana Hough te oorhandig.

5.

Die eerste respondente en applikant word gelas om volledige samewerking aan Theana Hough te gee om haar in staat te stel om die tweede tot die sewende respondente effektief te beheer en bestuur.

6. The eighth respondent was therefore cited in the present application by virtue of her appointment in terms of the court order of the 22 November 2000

7. The application under case 20604/00 Witwatersrand Local Division referred to earlier in this judgment was heard by Hoffman AJ on 18 April 2002.
8. The application under case 20604/00 was intended to enforce spiritual ruling by Waterval Islamic Institute. Hoffman AJ found the first respondent was bound by the spiritual ruling. However he found that such a ruling cannot be properly carried out inasmuch as the terms of Fatwa were too vague and unspecific which made it difficult to give effect to the spiritual ruling. As a result he remitted the matter to Fatwa to make a fresh award.
9. The applicant in the present application however wanted to enforce the operation of the court order which was made by agreement on the 22 November 2000 referred to earlier in this judgment pending finalisation of reconsideration of the dispute by Fatwa. The first respondent opposed such a relief on the basis that the order of the 22 November 2000 had lapsed on the 18 April 2002 when Hoffman AJ referred the matter for reconsideration to Fatwa.

ISSUES RAISED

10. In my view the real issues raised by this application are whether or not the court has got jurisdiction to hear this matter and secondly whether or not the order made on the 22nd November 2000 had lapsed by virtue of the order of Hoffman AJ remitting the dispute between the deceased and first respondent to FATWA for more clarity. The last issue raised was whether or not reliefs as prayed for should be granted or whether or not a defence of estoppel or waiver should succeed.

DISCUSSIONS AND SUBMISSIONS

11. Regarding the lack of jurisdiction by this court the first respondent in essence firstly relied on the alleged lapsing of the court order which was granted on the 22 November 2000 referred to earlier in this judgment. Secondly the first respondent alleged that the jurisdiction is excluded by virtue of the Minister of Justice's decision taken on the 1 August 2003 to include Zeerust and Groot Marico in the area of jurisdiction of

the Bophuthatswana court. In my view the attack on jurisdiction would only be justified if one was to find that the court order of the 22 November 2000 had lapsed. When this matter was argued on the 17 March 2005 I made a ruling that the order had not lapsed and that this court does have jurisdiction. I did not give reasons for my decision then on these points in limine. I now turn to give reasons for my decision.

WHETHER OR NOT THE COURT ORDER OF 22 NOVEMBER 2000
HAD LAPSED:

12. In this regard it is important to recall that the order of the 22 November 2000 was by an agreement. The order was to be in existence pending the finalisation of the application under WLD case no. 20604/00 which application was heard and judgment delivered on the 18 April 2002 by Hoffman AJ. In my view the most important part of the order for the determination of the issue herein reads as follows:

Die partye tot hierdie aansoek kom soos volg ooreen hangende die finale afhandeling van die aansoek onder saaknomer WP 2000/20604 in die Witwatersrandse Plaaslike Afdeling hetsy deur 'n beslissing van 'n hof of skikking deur die partye (own emphasis). The issue therefore is whether or not the decision of Hoffman AJ remitting the matter for reconsideration by FATWA was a final decision or whether or not the parties had reached a settlement subsequent to the decision of the 22 November 2000. Firstly it is important to mention that Hoffman AJ found that the first respondent was bound by the ruling of FATWA inasmuch as both the deceased and first respondent referred their dispute to FATWA for arbitration. Secondly Hoffman AJ remitted the matter to FATWA for reconsideration and to make a fresh award and that in doing so, FATWA through Messrs Sanjalvi, Moeftiys, Mia and Afreff should hear such further evidence as they may deem appropriate for the purpose of making fresh award and that in making their fresh award, they must specify in detail, precisely what assets are to be awarded to each of the deceased and first respondent, how the assets are to be divided between the deceased and the first

respondent and what liabilities are to be assumed by each one of them.

13. On behalf of the first respondent it was submitted that the order of the 22 November 2000 had already lapsed on the 18 April 2002 as the application was finally disposed of when the matter was remitted back to the Moesliem Panchayat. On the other hand counsel on behalf of the applicant argued that the reasons for having brought the application in the WLD was in the first instance due to the fact that the first respondent did not want to be bound by the ruling of FATWA and secondly did not want to comply with the terms and conditions of such ruling. Secondly Mr Pelser on behalf of the applicant argued that this dispute is still continuing. One must bear in mind that whilst Hoffman AJ found the first respondent to be bound by the ruling of FATWA, he found himself unable to finally make specific orders regarding the distribution of the assets and liabilities between the deceased and first respondent as he had found the terms of the FATWA to be too vague and unspecific for him to be able to make the ruling of FATWA an order of the court. In his view if

he was to make an order, the practicality of giving effect to the order would lead to further litigation and further problems and that there would undoubtedly be disagreement between the deceased and the first respondent as to the precise what was intended by the Moettiys in the FATWA which they handed down. These findings by Hoffman AJ clearly did not bring the application to finality. What was envisaged really was that FATWA needed to be more specific so that the court under case number 20604/00 could properly give effect to the ruling of FATWA. When one remits a matter for rehearing or reconsideration, normally this will not suggest a finalisation of a matter or dispute between the litigants. Each party in my view should still feel free to come back to enforce his rights in terms of the ruling. I can therefore find no basis to suggest that the order of the 18 April 2002 brought the order made on the 22 November 2000 to an end. The purpose of the order of the 22 November 2000 was to ensure that the dispute between the deceased and the first respondent did not precipitate pending the final order by the court or pending a settlement on the ruling of FATWA and the terms thereof. Hoffman AJ has given one

final ruling that is the first respondent is bound by the ruling of FATWA inasmuch as the deceased and the first respondent subjected themselves to be bound thereby. Hoffman AJ was however unable to enforce the ruling as its terms he found to be too vague to give effect thereto and this did not bring the matter to finality. The costs of the application in the WLD case was to be the costs in the cause. This is a clear indication that the matter was not finalised. This should then bring me to consider the other issue raised in this application.

WHETHER OR NOT THIS COURT DOES HAVE JURISDICTION TO
HEAR THIS APPLICATION:

14. As earlier indicated in this judgment the basis for submission for lack of jurisdiction was that the order of the 22 November 2000 had lapsed. I had already indicated that the order did not lapse and therefore the point in limine on the lack of jurisdiction is disposed of by my finding regarding whether or not the order of the 22 November 2000 had lapsed. If the order had not lapsed, it could therefore be concluded that the parties are still

subject to the jurisdiction of this court by virtue of the order of the 22 November 2000 in terms of which the deceased and the first respondent subjected themselves to the jurisdiction of this court. The applicant now wishes to enforce this order and there can be no better court than this court in enforcing that order.

15. There are other issues which have been raised on behalf of the respondents. For an example it was submitted on behalf of the respondents that the applicant and eighth respondent should be estopped from relying on the order of the 22 November 2000 inasmuch as the first respondent was allowed to collect the said rental over a long period of time without enforcing the said order against the first respondent. Effectively the applicant and the eighth respondent are alleged to have waived any right they might have had against the first respondent. It is so that onus rests upon the party relying on waiver to allege and prove the waiver on a balance of probability. Clear evidence of a waiver is required. A delay in enforcing a right does not per se amount to a waiver. (See *Zuurbekom LTD v Union Co. LTD* 1947 (1) SA 514 A. It was argued on behalf of the applicant that the

deceased wanted to enforce the ruling of FATWA and that on the 22 November 2000 he obtained an order to assert his right. This was inconsistent with the allegation that his intention was to waive any rights. A decision in the WLD was given on the 18 April 2002 and the deceased passed away about 3 months thereafter, without any intention of waiver. It was further submitted that it is highly unlikely that the applicant would give away her rights and thus allow the first respondent to receive substantial amount of money without accounting to the applicant. I am not convinced that the first respondent had shown that the applicant or eighth respondent abandoned any right or that they waived their rights which they could have enforced in terms of the court order. As regard estoppel the one raising such a defence must show that a representation was made, that he or she acted on the basis of such a representation and that he or she acted to his/her prejudice. It was suggested that the representation was in the form of conduct, firstly by the deceased, secondly by the applicant or the eighth respondent. It was suggested that by conduct the deceased from November 2000 till up to the date of his death

during July 2002 did nothing to stop the first respondent from collecting rentals. Firstly one must recall that the WLD case referred to in the order of November 2000 was only heard and remitted for reconsideration on the 18 April 2002. Pursuing the WLD case in my view is not consistent with the alleged waiver of the order of the 22 November 2000. Secondly the letter of the 20 August 2002 in no way suggests any waiver or impliedly agreeing to receipt of rentals by the first respondent contrary to the order of November 2000. The wording of the letter that the first respondent had collected rental which should in terms of the court order have been paid to the eighth respondent, that notwithstanding an attempt to create an atmosphere conducive to addressing the dispute because the deceased and first respondent were brothers and that the deceased during his life time gave instructions not to commit the first respondent for contempt of court is in my view far from suggesting any waiver or representation as alleged and submitted on behalf of the first respondent. It appears from the letter of the 20th August 2002 that the deceased during his life time believed that the monies so received by the first respondent could always be corrected

or achieved afterwards. The onus is on the first respondent to show on a balance of probabilities a defence of estoppel or waiver. I am not satisfied that the first respondent succeeded in establishing either of these defences.

16. Now coming back to the alleged defence of estoppel or waiver against the applicant particularly as regard to the alleged conduct of applicant from the time of her husband's death in July 2002 or from the time she was appointed to administer the estate of her late husband in 2002, till up to the time the present proceedings were instituted, the letter of August 2002 written on behalf of the applicant was relied upon. In this letter the applicant disputes the first respondent's right to terminate the appointment of the eighth respondent. It was alluded in this letter that the first respondent was bound by the order of November 2000 and that the services of the eighth respondent was still needed until the dispute was finalised. I can neither find that the applicant waived the order of the 22 November 2000 nor that a defence of estoppel can be used against her

nor that the conduct of the eighth respondent could be imputed against the applicant.

17. As regard prayers I had expressed the view during discussions that I do not have a problem with prayers 6 and 5 insofar as prayer 5 was to refer to the eighth respondent. Regarding prayer 7 I expressed my difficulties particularly that if the applicant was to be allowed to supplement this application in any subsequent application for committal for contempt of court, this will unnecessarily burden the court with documents which may not be relevant. In my view if prayer 5 in an amended form and prayer 6 were granted and these orders are not complied with, the applicant can bring a simplified substantive application for committal for contempt of court. As regard prayer 8 I was requested to make an order for costs on an attorney and client scale. This was based mainly on the fact that the first respondent was in contempt of the order of November 2000. My difficulty with this submission was that the first respondent raised a defence that the order of the 22 November 2000 had lapsed by virtue of the ruling of Hoffman AJ when on the 18

April 2002 he referred the ruling of FATWA for further reconsideration. I cannot say this stance was ill-founded although I had given a ruling that the order did not lapse. I am therefore hesitant to express the view whether or not the first respondent is guilty of contempt of court as such an application for committal for contempt of court is not before me. I do not therefore think that punitive costs order would be justified.

18. The real difficulty emerged during discussions when dealing with prayer 1. Prayer 1 is a proposed order, ordering the first respondent to pay to the eighth respondent an amount of R779 820-00 within 10 (ten) days from date of this judgment. The amount of R779 820-00 is said to be the total rental collected from third, sixth and seventh respondents. The calculations of these amounts were based on the TH12, TH13 and TH14 attached to the eighth respondent's supporting or confirmatory affidavit for the period November 2000 to May 2004, that is from the date on which the order by Southwood J was made until up to the date of the institution of the present proceedings. The first respondent did not specifically dispute these figures

although during submissions it was argued that these figures were not correct. I was referred to documents in these proceedings dealing with calculations of rentals received and expenses incurred according to the first respondent. I requested the parties to clearly and properly calculate those rentals received for the period in question.

19. Total rental for the period in question has now been calculated and agreed upon as R743 641-00. Out of this figures I have been requested to deduct in the alternative the first respondent's 10% collection commission. In the main however it has been argued that inasmuch as the first respondent has collected or received these funds contrary to the court order, the first respondent should be obliged to pay R779 820-00 which has now been recalculated and found to be R743 641-00. The essence of this submission was that I should ignore any expense the first respondent might have incurred. In my view the nature of the business and secondly the indication by the first respondent that he had expended some of these monies received in the best interest of the businesses cannot

summarily be dismissed. However whether or not all the expenses were justified is another question which appears not to be capable of being resolved by papers before me. Most, if not all the information pertaining to these expenses fall within the knowledge of the first respondent. Until such time that there has been a proper account by the first respondent of the rental received and expenses incurred for the relevant period herein, it would be difficult if not impossible for the applicant or eighth respondent to ascertain such income and expenses, particularly the expenses. On the other hand the order of November 2000 could have been enforced by either the deceased, or the eighth respondent and later by the applicant after the death of her husband, but because they allowed the first respondent to continue to receive such rentals, although I had already made a finding that this did not justify a defence of estoppel or waiver, in my view the first respondent would have been entitled to incur such expenses insofar as it was necessary to sustain the businesses. However the first respondent also did this with a risk of acting contrary to the court order and whether or not he should have been entitled to

benefit from this apparent unlawful action is another issue. Firstly until such time that the dispute that led to referring the matter for arbitration is resolved, the first respondent remains an interested party and secondly in my view if he acted contrary to the court order although that might be in the interest of the business, he should not be entitled to claim commission.

20. In prayer 3 I was asked to find that the first respondent should be obliged to instruct the lessees of the businesses listed in prayer 3 not to pay rental to him. These lessees were not before me and Mr Pelser argued that it was not necessary for these lessees to have been dragged to court as they were in any event obliged to pay rentals. This might be so, however the first respondent cannot be burdened with such an obligation which cannot be enforced should there be resistance by such lessees. Effectively such an order will be academic as the lessees are not parties to these proceedings. Prayer 3 as I see it, was intended to ensure that there was no further dispute regarding payments of rentals to the first respondent by these lessees. Indeed if a finding is that the order of the 22

November 2000 had not lapsed and that the first respondent was not entitled to receive these rentals, it will serve no purpose to allow the first respondent to continue to receive, keep and or utilise these funds. He needs to be curbed in order to give effect to the court order no matter how limited it might be due to the fact that the lessees are not joined to these proceedings.

21. I now turn to consider the counter application launched by the first respondent. The first respondent in the counter application is asking for several orders to be made against the eighth respondent, amongst others firstly to have eighth respondent be declared a co-applicant and secondly ordering the eighth respondent to account to the first respondent about the monies she had received from several businesses. The eighth respondent was not served with the counter application and therefore no order can validly be made against her. It was submitted on behalf of the first respondent that the applicant should account in detail all the monies she had received from November 2000 to date. To this, counsel on behalf of the

applicant argued that the applicant although not obliged to do, she had accounted insofar as she could and that therefore there was no need to have such an order be made against her. The counter application was aimed at the eighth respondent. The applicant's husband died in July 2002, no suggestions that the applicant was or ought to have been in a position to account for the things that had occurred during the life time of her husband and before her appointment as the executrix of her husband's estate. I therefore can find no basis to make such an order against the applicant.

CONCLUSION

22. I therefore conclude by making the following orders:

22.1 The first respondent is ordered to pay to the eighth respondent the sum of R74 364-10 being 10% commission on the sum of R743 641-00 within ten days from date hereof.

22.2 The first respondent is ordered to pay to the eighth respondent within ten days from date hereof interest at 15,5% per annum

on the amount of which the amount of R74 364-10 is the sum from the date upon which the first respondent received such amounts.

22.3 The first respondent is ordered to account to the eighth respondent in detail, clearly and to the satisfaction of the eighth respondent all the amounts which the first respondent has received and expenses incurred in respect of the second to the seventh respondents since 22 November 2000 to date of this judgment.

22.4 The first respondent is ordered to give such account referred to in 22.3 above to the eighth respondent within thirty days (one month) from date of this judgment.

22.5 The first respondent is ordered to pay to the eighth respondent all rentals received or to be received from the date of this judgment in respect of the lessees of the premises from which the businesses set out in the applicant's prayer 3 are conducted.

22.6 The first respondent is ordered to pay such rentals referred to in 22.5 to the eighth respondent within seven days upon receipt of each such rental amounts.

22.7 The first respondent is interdicted from interfering with the eighth respondent or any of her personnel in the exercising by her or her personnel of her authority granted to her by order of this court on 22 November 2000.

22.8 The first respondent is ordered to pay the costs of this application on a party and party scale.

M F LEGODI
JUDGE OF THE HIGH COURT

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