

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 54224/2014

20/12/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

DARIN WAVELL BOYCE

APPLICANT

and

UTOPIA PROPERTIES (PTY) LIMITED

RESPONDENT

In re:

UTOPIA PROPERTIES (PTY) LIMITED

PLAINTIFF

and

DARIN WAVELL BOYCE

DEFENDANT

JUDGMENT

RANCHOD J:

Introduction

[1] In this matter the applicant (defendant in the action) seeks, firstly, condonation for the late filing of this application, secondly, that he be granted leave to amend his counterclaim as per his notice of intention to amend dated 11 November 2015 and thirdly, costs of the application on the attorney and client scale.

[2] For the sake of convenience I will refer to the parties as they are cited in the action, i.e. Utopia Properties (Pty) Ltd as the plaintiff and Mr Darin Wavell Boyce as the defendant although the defendant is the applicant in this application and the plaintiff the respondent and plaintiff was the applicant in the exception proceeding which was determined before Legodi J.

[3] It is necessary to briefly set out the background to the present application by the defendant.

[4] The plaintiff issued summons against the defendant on 18 July 2014 in which it sought the return of a Ferrari motor vehicle (the car) by the defendant on the basis that it was the owner thereof and that defendant had removed it without the plaintiff's consent or knowledge.

[5] The defendant filed a plea in which he alleged that the plaintiff (as represented by one Jun Zhu) had donated the car to him during the end of 2013 and he had accepted the gift which has been in his possession ever since.

[6] The defendant filed a counterclaim consisting of three claims. Of importance is the fact that in two of the three claims he relied on a cohabitation agreement (the agreement) dated 25 June 2013 which was concluded between him and Ms Jun Zhu (Zhu). The defendant and Zhu were cohabiting and they entered into the agreement - 'to govern, *inter alia*, the relationship, assets, liabilities, termination and the consequences of the relationship.' (Para 2.2 of the agreement).

[7] Paragraphs 5.1 and 5.2 of the agreement are relevant for present purposes:

'5. UTOPIA PROPERTIES (PTY) LIMITED, REGISTRATION NUMBER:

2013/029017/07 (hereinafter referred to as "the Company").

5.1 Subject to the *proviso* contained in clause 5.2 below, upon the termination of the relationship, **Darin** shall be entitled to 20% (IWENTY PERCENT) of the nett profit value, if any, of **the Company**, said value being calculated on the date of termination of the relationship and to be determined by **the Company's** Auditors. The value so determined shall be payable to **Darin** within 30 (THIRTY) days after the aforesaid nett profit value of **the Company** has been determined by the aforementioned Auditors.

5.2 It is recorded that the 1984 Porsche Carrera, the 2007 Lotus 7 replica motor vehicles are registered in the name of **the Company**, and the said vehicles are the gifts of **Darin**, to be retained by him upon the termination of the relationship. It is further recorded that the Landrover Series 3 vehicle, which is also to be registered in the name of **the Company**, is also a gift to **Darin** and is to be retained by him at the termination of the relationship. Said gifts do not form part of the 20% (TWENTY PERCENT) referred to in clause 5.1 above. **Jun** will ensure that all the necessary documentation is in place to give effect t7 the aforegoing.'

[8] The three counter claims, 'A', 'B' and 'C' are:

'CLAIM A:

On 25 June 2013 at Johannesburg the Defendant and Jun Zhu entered into a cohabitation agreement, a copy of which is annexed hereto marked "A". Jun Zhu entered into the agreement in her personal capacity as well as on be9a1f of the Plaintiff.

In terms of paragraph 5.1 of the agreement the Defendant and the Plaintiff (as represented by Jun Zhu) agreed that upon the termination of the relationship between the Plaintiff and Jun Zhu, the Defendant would be entitled to 20% of the nett profit value of the Plaintiff, which shall be calculated on the date of termination of the relationship between the Defendant and Jun Zhu and shall be determined by the Plaintiffs auditors. The said value determined shall be payable to the Defendant within 30 (THIRTY) days after the value of the Plaintiff has been

determined by the said auditors.

The relationship between the Defendant and Jun Zhu was terminated on/about 22 February 2014, but despite oral demand the Plaintiff fails and/or refuses to comply with its obligations in terms of paragraph 5.1 of Annexure "A".

The Defendant is entitled to and hereby claims the following:

5.1 That the Plaintiff be ordered to have over all documentation necessary in order for the Defendant to determine the nett profit value of the Plaintiff;

5.2 Payment by the Plaintiff to the Defendant within 30 (THIRTY) days of an amount equal to 20% of the nett profit value of the Plaintiff as at 22 February 2014.

5.3 Interest on the amount to be paid in terms of paragraph 5.2 above at a rate of 9% per year a *tempore morae*;

CLAIM B:

During the end of 2013 the Defendant received as a gift from the Plaintiff (as represented by Jun Zhu), being a Ferrari F 355 GTS/GTB motor vehicle with registration number RWL891A. The Defendant accepted the gift and has been in possession of the said motor vehicle since.

The said motor vehicle is registered in the Plaintiff's name and the Plaintiff fails and/or refuses to sign the necessary documents for the vehicle to be registered in the Defendant's name.

The Defendant is entitled to an order for the Plaintiff to sign all documents necessary for the registration of the motor vehicle into the Defendant's name.

CLAIM C:

On 25 June 2013 at Johannesburg the Defendant and Jun Zhu entered into a cohabitation agreement, a copy of which is annexed hereto marked "A". Jun Zhu entered into the agreement on behalf of the Plaintiff, as well as in her personal capacity.

In terms of paragraph 5.2 of the agreement the Defendant and the Plaintiff (as represented by Jun Zhu) recorded the donation of the 1984 Porsche Carrera and the Lotus 7 replica motor vehicles by the Plaintiff to the Defendant. It was specifically agreed by the parties that upon the termination of the relationship between the Defendant and Jun Zhu that the Defendant will be entitled to retain

the said motor vehicles.

The relationship between the Defendant and Jun Zhu terminated on 22 February 2014.

The Plaintiff is in possession of the Lotus 7 motor vehicle (with registration number CXD142F) and refuses to hand over the vehicle to the Defendant.

Both the Porche Carrera motor vehicle (with registration number BMS720A) as well as the Lotus 7 motor vehicle is *[sic]* still registered in the Plaintiff's name.

The Plaintiff fails and/or refuses to sign the necessary documentation for the vehicles to be registered in the Defendant's name.

The Defendant seeks an order for the Plaintiff to hand over to the Defendant the Lotus 7 motor vehicle (with registration number CXD142F), and to sign all documents necessary for the registration of this vehicle, as well as the Porche Carrera motor vehicle (with registration number BMS720A) into the Defendant's name.'

[9] On 23 October 2014 plaintiff excepted to the defendant's plea and counterclaim on the grounds that they lacked averments necessary to sustain a defence.

[10] The exception was argued before Legodi J on 8 September 2015 who delivered a written judgment on 18 September 2015. The plaintiff's exception to the defendant's plea was dismissed while the exception to the counterclaim was upheld. The defendant was directed to amend his particulars of the counterclaim within 15 days from date of judgment if he still wished to pursue his counterclaim.

[11] Defendant served and filed a notice dated 2 October 2015 of intention to amend his counterclaim.

[12] On 19 October 2015 the plaintiff filed a notice of objection to the proposed amendment.

[13] The defendant withdrew the notice of intention to amend and served and filed another notice of amendment on 11 November 2015 which was of the same date.

[14] On 23 November 2015 the plaintiff filed a notice of objection to that notice.

[15] The defendant then launched the present application dated 2 February 2016 which was served and filed on 9 February 2016.

The Condonation Application

[16] In this matter before me, the plaintiff opposed the application for condonation in the answering affidavit. However, during the hearing plaintiff's counsel said that the plaintiff opposed the application because the defendant had sought a (punitive) costs order against the plaintiff otherwise it had no objection to the granting of condonation.

[17] In *Ferris and Another v Firststrand Bank Ltd* 2014(3) SA 39 (CC) the applicants sought, *inter alia*, condonation for the late filing of an application for leave to appeal against the refusal of an application for rescission of judgment by the High Court, Moseneke ACJ, in a unanimous decision of the Constitutional Court referred to *Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* 2010(2) SA 181 (CC) at para 14 in which it was held that lateness is not the only consideration in determining whether condonation may be granted. The test for condonation is whether it is in the interests of justice to grant it. The respondent in *Ferris* did not oppose the application for condonation nor was there any indication that the late filing caused any prejudice. Nevertheless, Moseneke ACJ held that -

'the mere fact that there is no opposition and no apparent prejudice does not necessarily warrant granting condonation. Condonation cannot be had for the mere asking.'

[18] Rule 27(3) of the Uniform Rules of Court, provides:

'The court may, on good cause shown, condone any non-compliance with these rules.'

[19] A party seeking an amendment seeks an indulgence from the Court.

[20] There are two principal requirements for the favourable exercise of a court's discretion. The first is that the applicant should file an affidavit satisfactorily explaining the delay. Secondly, the applicant should satisfy the court on oath that he has a *bona*

fide defence or that his action [in *casu* the counterclaim] is clearly not ill-founded, as the case may be. (Erasmus: Superior Court Practice, Revision Service 1, 2016, 01-323).

[21] The defendant provides the following explanation for bringing the application out of time:

'16 AD CONDONATION

I have been advised by my attorney that I was supposed to bring this application within 10 days after filing of the Respondent's notice of objection against my amendment, which I failed to do so. It seems that the delay with the bringing of this application was due to a misunderstanding between my attorney and the counsel who is briefed in this matter. According to my attorney he did enquire from her on the 24th of November 2015 to advise on the way forward. She was however embroiled in a trial at the time and could not attend to the matter until shortly before the Christmas holiday break. She advised the attorney that the next step would be to bring an application to allow the amendment'.

[22] The allegations are bald, sketchy and unconvincing. The applicant says his attorney made an enquiry of counsel on 24 November 2015 and counsel refrained from advising the attorney until shortly before the Christmas holiday break whenever that may be. No details had been furnished by the applicant. No detail is provided as to why the court should grant condonation and it is completely unacceptable that an application of this nature is brought by officers of the court where the high watermark of the application is a "misunderstanding" between attorney and counsel, with no details provided as to what that misunderstanding is. An attorney in the position of the applicant's attorney knows that an application should be brought within ten days after the filing of the Respondent's notice of objection and it was unnecessary to consult with counsel to advise on the way forward when what was clearly required was either to bring the application within the ten day period or to bring a condonation application as urgently as possible. Counsel receives a definite brief from the attorney and cannot be under the impression that the attorney would draft the application.

[23] In my view for these reasons alone the application for condonation should be refused.

[24] However, the excipiability of the defendant's proposed counterclaim merits attention.

[25] In defendant's notice of intention to amend he contends that on 25 June 2013 and at Johannesburg the plaintiff, represented by Jun Zho, and defendant, entered into an oral agreement. The intended amendment further provides:

"3 The terms of the agreement between the Plaintiff and the Defendant are that upon the termination of the relationship between the Defendant and the said Jun Zhu, the Defendant would be entitled to 20% of the nett profit value of the Plaintiff, which shall be calculated on the date of termination of the relationship between the Defendant and Jun Zhu, the 20% nett profit value of the Plaintiff to be determined by the Plaintiff's auditors. The said value determined shall be payable to the Defendant within 30 (THIRTY) days after the value of the Plaintiff has been determined by the said auditors.

4. The relationship between the Defendant and Jun Zhu was terminated on/about 22 February 2014, but despite oral demands the Plaintiff fails and/or refuses to comply with its obligations in terms of this agreement."

[26] The plaintiff's main objection to the amendment is that the allegation at paragraph 3 is a reference to an oral agreement contradicting the written agreement, which is annexure A to the unamended defendant's counterclaim. The cohabitation agreement (Annexure A to defendant's counterclaim) was not concluded between plaintiff (a juristic personality) and defendant as alleged in paragraph 2 of defendant's second notice, but between Jun Zho and defendant.

[27] The terms of annexure A (i.e. the cohabitation agreement) are contradicted by the terms of the alleged oral agreement set out in paragraphs 2 and 3 of the second notice.

[28] The presented defendant before the court in the counterclaim is not Jun Zho but Utopia Properties (Pty) Ltd (the plaintiff). The cohabitation agreement was concluded on 23 June 2013. In the proposed amendment the defendant alleges that on 25 June 2013 and at Johannesburg Utopia Properties and the defendant entered into an oral

agreement in terms whereof they agreed that upon the termination of the relationship between the defendant and Zho the defendant would be entitled to 20% of the net profit value of Utopia Properties, the 20% net profit to be determined by Utopia Properties' auditors. But the cohabitation agreement was not concluded between Utopia Properties and the defendant but between him and Jun Zho hence the allegation at paragraph 3 of the proposed amendment, which is a reference to the oral agreement contradicts the written agreement which is annexure A to the present counterclaim.

[29] The proposed amendment which seeks to introduce a concurrent oral agreement to the written agreement contradicts the express terms of the cohabitation agreement and would be inadmissible and renders the proposed amendment to the counterclaim excipiable. In terms of the parol evidence rule the applicant is precluded from pleading an oral agreement which contradicts the express terms of the written agreement and to allow the amendment to paragraphs 2 and 3 wold render the counterclaim excipiable as disclosing no cause of action.

[30] At paragraph 9 of the proposed amendment (being the second notice), the defendant pleads as follows:

"9 On or about 25 June 2013, and at Johannesburg the Plaintiff (as duly represented by Jun Zhu) donated to the Defendant the following vehicles

9.1 a Lotus 7 replica motor vehicle (with registration number C[...]); and

9.2 a Porche Carrera motor vehicle (with registration B[...])."

[31] In paragraph 5.2 of the cohabitation agreement, it is recorded that the 1984 Porche Carrera and the 2007 Lotus 7 replica motor vehicles are donated to the defendant. However, in the un-amended counterclaim at paragraph C the defendant pleads that the defendant and Jun Zhu entered into the cohabitation agreement and that Jun Zhu entered into the agreement on behalf of the Plaintiff as well as in her personal capacity. Again, the intended amendment is excipiable and fails to disclose a cause of action.

[32] In the premises, the application for condonation is refused with costs.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant : Adv. Vermaak-Hay
Instructed by :Arthur Channon Attorneys

Counsel on behalf of Respondent : Adv. S S Cohen
Instructed by : Tanners & Associates
Date heard : 9 November 2016
Date delivered : 20 December 2016