DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
15/1/2010
DATE
SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION)

18/1/2010

CASE NO.: 41065/2006

In the matter between

MONTIC DAIRY (PTY) LTD + 9 Others	Applicants
and	
MORAITIS INVESTMENTS (PTY) LTD + 6 Others	Respondents
In re:	
MORAITIS INVESTMENTS (PTY) LTD + 3 Others	Applicant
and	
MONTIC DAIRY (PTY) LTD + 9 Others	Respondents

DATE HEARD: 8th September 2009

JUDGMENT HANDED DOWN ON: 18th January 2010

JUDGMENT

EBERSOHN AJ.

[1] In this matter the notice of motion reads as follows (first and seventh prayers not quoted) :

> **"2. The warrant of execution issued by the Registrar of this Honourable Court on 10 June 2009 is suspended in terms of Rule 45A, alternatively set aside pending the institution and finalisation of the proceedings referred to in paragraph 3 below;**
>
> **3. The Applicants are to launch an application, alternatively institute an action within 30 (thirty) days of date of this order for the setting aside and/or rectification and/or amendment of the share valuation performed by the Fifth Respondent in terms of the court order granted by Sapire AJ on 25 October 2007;**
>
> **4. In the event of the Applicants failing to institute the proceedings contemplated in paragraph 3 above within the 30 (thirty) day time period, this order will lapse and the Applicants will be liable to pay the costs of this application;**
>
> **5. The costs of this application are reserved for determination by the Court hearing the proceedings contemplated in paragraph 3 above;**
>
> **6. In the alternative to paragraph 5 above, and only in the event of any of the Respondents opposing the relief sought in this application, that such Respondents, jointly and severally, pay the costs of opposition to this application, such costs to be taxed on the scale as between attorney and own client; "**

[2.] On the 10th October 2007 Sapire AJ issued an order regarding the sale of 20% interest in the Moraitis Group to the Kerbel Group.

[3.] Paragraph 3 of the order reads as follows:

> **" 3. That the purchase prise shall be conclusively and finally determined by**

an independent third party who shall act as valuer and not as arbitrator."

[4.] Paragraph 5 of the order reads as follows:

> " **5. That the valuer shall entertain and consider, but need not necessarily act on representations from both purchaser and Seller as to the value to the placed on the interests bought and sold, and may make all such other enquiries as he may deem necessary including reference to third parties relative to the value of the fixed and movable assets of the companies to enable him to arrive at and determine a fair purchase price."**

[5.] Paragraph 7 of the order reads as follows:

> " **7. That the parties shall render to the valuer all assistance and co-operation which he might reasonably require in order to facilitate his valuation."**

[6.] It is common cause that Ernst & Young Advisory Services, the 5th respondent, was appointed to do the determination.

[7.] Ernst & Young purportedly did the determination and a writ in execution was issued and this application followed.

[8.] A notice of opposition was signed on the 25th June 2009 in Johannesburg.

[9.] The respondents did not file an answering affidavit.

[10.] Heads of argument were filed by the applicant's counsel and by Mr. Bailey on behalf of the respondents. In the heads Mr. Bailey raised certain legal points.

[11.] The respondents didn't file a notice in compliance with rule 6(5)(d)(iii) which subrule reads as follows:

> " **(d) any person opposing the grant of an order sought in the notice of**

motion shall:

(i) ....

(ii) ....

(iii) **if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the proceeding sub-paragraph, setting forth such question."**

The period referred to is 15 days.

[12.] It seems as if Mr. Bailey therefore is not entitled to argue legal points from the Bar.

[13.] In any case sufficient grounds were stated in the founding affidavit and the annexure thereto to warrant the grant ing of the relief sought.

[14.] I accordingly make the following order:

"1. **The warrant of execution issued by the Registrar of this Honourable Court on 10 June 2009 is suspended in terms of Rule 45A pending the institution and finalisation of the proceedings referred to in paragraph 2 below;**

2. **The Applicants are to launch an application, alternatively institute an action, within 30 (thirty) days of date of this order for the setting aside and/or rectification and/or amendment of the share valuation performed by the Fifth Respondent in terms of the court order granted by Sapire AJ on 25 October 2007;**

3. **In the event of the Applicants failing to institute the proceedings contemplated in paragraph 3 above within the 30 (thirty) day time period, this order will lapse and the Applicants will be liable to pay the costs of this application;**

4. **The costs of this application are reserved for determination by the Court hearing the proceedings contemplated in paragraph 3 above;**

P.Z. EBERSOHN AJ
ACTING JUDGE OF THE HIGH COURT

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