

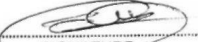


IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

10/1/11
DATE


SIGNATURE

CASE NO: 72560/2009

DATE: 4/02/2011

IN THE MATTER BETWEEN

RICHARD DALBOCK

1ST APPLICANT

(Second respondent in the main application)

CLIVE WILLIAM HOLLERAN

2ND APPLICANT

(Third respondent in the main application)

AND

MAHLOMOLA JAMES NAZO

1ST RESPONDENT

(First applicant in the main application)

MALIBA-MATSO INVESTMENT HOLDINGS (PTY) LTD

2ND RESPONDENT

(Second applicant in the main application)

THE SHERIFF OF KLERKSDORP

3RD RESPONDENT

JUDGMENT

OMAR, AJ

This is an application for an interlocutory interdict suspending the further execution of a writ of execution ("the writ") pending the finalisation of legal proceedings to be instituted by the applicants for an order setting aside the writ.

The applicants initially applied on an urgent basis for the interlocutory interdict and on 29 June 2010 TOLMAY J postponed the application to the opposed motion roll of 16 August 2010 and interdicted the third respondent from selling the applicants' shareholding in Safe-T Pack (Pty) Ltd ("Safe-T Pack") by way of public auction pending the finalisation of this application and reserved the issue of the wasted costs occasioned by the postponement.

The applicants contend that the writ ought to be set aside due to the fact that no amount of money is due by them to the second respondent in terms of the sale agreement which was made an order of court. The sale agreement is marked as annexure "C" to the applicants' founding affidavit. The applicants contend that the condition precedent contained in clause 6.1.1 of the sale agreement (the first condition precedent) was not fulfilled or waived within the time for fulfilment. As clause 6.1.1 of the sale agreement does not contain a time for fulfilment of the first condition precedent, it was submitted by counsel for the applicants that the time for the fulfilment of the first condition precedent can be established on one of the following basis:

- a) an interpretation of the sale agreement;
- b) the rectification of the sale agreement.

Counsel for the applicants further submitted that clauses 3.3.1 and 6.3 of the sale agreement supports the contention that it was the intention of the parties that the first condition precedent had to be fulfilled before 1 March 2010. Clause 6.3 provides for the effective resignation of the first respondent on 28 February 2010 as a further condition precedent.

It was submitted in the alternative that the clauses stated above support the applicants' contention that clause 6.1 falls to be rectified.

Further it was submitted that the applicants do not seek the rectification of the sale agreement in this application and as such the trustees of the Safe-T Pack Share Trust and Safe-T Pack do not have a direct and substantial interest in the relief that is claimed in this application and it is not necessary to join such persons, as contended by the first and second respondent. Further, the non-variation clause contained in the sale agreement does not prevent rectification.

The first and second respondent contends that the time for the fulfilment of the first condition precedent was before payment of the last instalment on 1 April 2011 and that the second respondent waived the fulfilment of the first condition precedent in terms of clause 6.2 of the sale agreement on 23 April 2010.

The applicants contend that the sale agreement falls to be rectified by including a further condition precedent ("the second condition precedent") to the effect that the Industrial Development Corporation of South Africa ("the IDC") had to consent in writing before 1 March 2010 to the sale of the second respondent's shares and loan account in Safe-T Pack to the applicants, which condition was not fulfilled. The applicants further contend that the evidence in support of the applicants' contention that the sale agreement falls to be rectified to include the second condition precedent, are not disputed by the first and second respondent.

The first and second respondent contends that clause 11 of the loan agreement between the IDC and Safe-T Pack does not preclude the sale or disposal of shares between the shareholders of Safe-T Pack and that the IDC indicated that it would not oppose the transfer of the second respondent's shares in Safe-T Pack to the applicants.

Clause 11 of the loan agreement reads as follows:

"The borrower undertakes that until repayment of the loan in full, the borrower will not issue any further shares other than to the shareholders and shall ensure that the shareholders will not sell or in any other way dispose of any of their shares in the borrower without the prior written consent of the lender which consent shall not be unreasonably withheld."

Further, annexure "J1" which is an e-mail dated 26 March 2010 from the IDC to the first respondent, reads as follows:

"2. ... Any change in shareholding is subject to prior IDC consent."

It is very clear from the above that the IDC requires that its written consent must be given to any disposal of the shareholders shares, and it is not limited to third parties. It is also clear from the papers that no prior written consent was given by the IDC to transfer the shares in Safe-T Pack. As such the submission or interpretation of clause 11 of the loan agreement by the first and second respondent is, in my view, untenable.

The applicants further contend that the second respondent failed to comply or tender to comply with its obligations, in terms of the sale agreement, to cede its loan account to the applicants which implied that the second respondent was not entitled to claim payment of the purchase consideration from the applicants. Although the sale agreement does not expressly indicate when performance by the second respondent to transfer the shares and loan account in Safe-T Pack to the applicants has to occur, clause 18.1 of the sale agreement makes provision for the pledge and cession of the second respondent's shares as security for the repayment of the purchase price, implying that performance by the second respondent had to occur at the effective date in terms of clause 7 of the sale agreement ie the latest date of the signature of the sale agreement and the fulfilment of the conditions precedent.

I fully agree with the contentions of the applicants as it accords with the general legal principle in respect of credit sales which was enunciated in the matter of *Mulder v Van Eyk* 1984 4 SA 204 (SE) at 208D-E as follows:

"In a cash sale, payment and delivery are reciprocal and concurrent obligations, and delivery can be delayed until payment has been made or at least tendered ... The position differs, however, in the case of credit sale. The fact that the obligation to pay is postponed to some agreed future date, or may be fulfilled over a period of time, does not relieve the seller of the duty to make delivery either immediately or within a reasonable time unless there is an agreement to the contrary."

The contention by the first and second respondent that the issue of the share certificates reflecting the sale of the shares by the second respondent would be finalised by the secretary of the company and the reversal of the loan account is merely an accounting entry is, in my view, untenable as it is clear from the papers that the IDC refused to re-cede the second respondent's loan account to it and as such it was and remains impossible for the second respondent to transfer the loan account to the applicants in terms of the sale agreement. Further clause 2.2 of the sale agreement provides that the second respondent's shares and loan account in Safe-T Pack were sold in one undivided transaction. It is also clear from the papers that the second respondent neither delivered nor tendered to deliver its shares and loan account in Safe-T Pack to the applicants.

I have perused the sale agreement between the parties and must comment that this was not the best drafted agreement. It is clear that the sale agreement contains certain conditions precedent (or suspensive conditions as it is referred to in clause 1.17.14 of the

sale agreement). It is trite law that conditions precedent suspends the operation of the obligations flowing from the contract until the occurrence of the future uncertain events which may also include the obligation regarding the payment of the purchase price.

It is also clear from annexure "P" which is a letter from the applicants' attorneys to the first and second respondents' attorneys dated 8 April 2010 that it was at all times the contention of the applicants that the conditions precedent were not complied with and they regarded the agreement as null and void. Further no proof of compliance was provided to the applicants' attorneys.

The applicants further contend that the respondents failed to comply with rules 45(7)(a) and 45(8)(c)(i)(a) of the Rules of Court and notwithstanding the alleged non-compliance with the Rules of Court, the first and second respondent failed to cancel the sale in execution and refused to provide an undertaking that the sale in execution would not take place pending the finalisation of this application which necessitated argument before TOLMAY J.

Counsel for the first and second respondent submitted that it is common cause that there has not been compliance with the provisions of the Rules of Court and until there has been compliance, the sale cannot proceed. I am of the view, however, that compliance with rule 45(8)(c)(i)(a) is not a pre-requisite for the relief claimed in this application.

After considering the papers as a whole, I am of the view that the applicants have made sufficient averments in the founding papers in respect of rectification and consequently for the averment that the contract is invalid. It is clear that the applicants do not seek rectification in this application and it is not necessary to join the other contracting parties to the sale agreement in this application or to state and prove the requirements for rectification.

It was further contended by the applicants that the issuing of the writ was irregular in that no sum of money is due by the applicants to the second respondent and that the reference to the first respondent as a judgment creditor is clearly incorrect and further that the applicants are not liable for the first and second respondents' legal costs in the main application.

It was stated by the first respondent (in paragraph 44.3 of the opposing affidavit) that-

"On a proper interpretation of the order of court, the sale agreement was incorporated therein. This means that on 1 March 2010 the sum of R1 222 000,00 became due and payable by the applicants to the second respondent."

This in my view pre-supposes that the Registrar of the Court had to properly interpret the court order and sale agreement when the writ was issued.

I have serious reservations and concerns as to whether the Registrar of the Court (most probably his assistant) had properly applied his mind and properly interpreted the court order and sale agreement incorporated therein, when issuing the writ.

I am of the view that the applicants have made out a case for the relief that is **sought** in prayers 2 to 4 of the notice of motion and that the first and second respondents should pay the costs of this application. The balance of convenience is in favour of the granting of the interim relief to the applicants. I am of the view that the applicants will be severely prejudiced if the sale in execution proceeds and the applicants' shares are sold to a purchaser in good faith and without notice of defect. Further the applicants were **prepared** to agree that the shares remain under attachment thereby preventing any possible prejudice to the first and second respondent.

The applicants have shown that they have a clear alternatively *prima facie* right that the writ be set aside and that the applicants' shares in Safe-T Pack not be sold in execution pursuant to the attachment of the shares in terms of the writ. I am of the view that the applicants have a well grounded apprehension or irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted and do not have any other satisfactory remedy.

As far as the issue of the wasted costs of 29 June 2010 is concerned, it is clear from the papers that the first and second respondent failed to cancel the sale in execution or provide an undertaking that the sale in execution will not take place pending the

finalisation of this application, which prompted the applicants to proceed by way of an urgent application and as such I am of the view that the first and second respondent should pay the wasted costs because of their conduct. However, I am not convinced that they acted totally unreasonably so as to award attorney and client costs.

In the result, I make the following order:

1. The further execution of the writ of execution (annexure "B" to the applicants' affidavit) is suspended pending the finalisation of the legal proceedings to be instituted by the applicants for an order setting aside the writ of execution.
2. The third respondent is interdicted from selling the applicants' shareholding in Safe-T Pack (Pty) Ltd by way of public auction pending the finalisation of legal proceedings referred to in prayer 1 above.
3. In the event that the applicants fail to institute the legal proceedings referred to in prayer 1 above within one month from date of this order, the orders set out in prayers 1 and 2 above will automatically lapse.
4. The first and second respondents are ordered to pay the wasted costs of this application as well as the wasted costs occasioned on 29 June 2010.



S S OMAR

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

72560-2009

HEARD ON:
FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: