IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
14/2/17 DATE   SIGNATURE

CASE NUMBER: 33286/16
(The Restraint application)

14/2/2017

In the matter between:

NEAH GES AFRICA (PTY) LTD	First Applicant
GES AFRICA (PTY) LTD	Second Applicant
and	
DE VILLIERS LAMPRECHT	First Respondent
WELTRACT (PTY) LTD	Second Respondent
LI LOTRIET	Third Respondent
QUEMIC DYNAMICS (PTY) LTD	Fourth Respondent
ANNA MARGARETHA VILJOEN	Fifth Respondent
AMBER BAY INVESTMENTS 19 (PTY) LTD	Sixth Respondent

CASE NUMBER: 31747/2016
(The Liquidation application)

In the matter between:

DE VILLIERS LAMPRECHT	Applicant
and	
NEAH GES AFRICA (PTY) LTD	Respondent

JUDGMENT

MOTHLE J

Introduction

[1] In this matter there are two applications and a counter application, all concerning disputes arising out of an agreement for the purchase/sale of shares in a company. Under case number 33286/2016 (*the restraint application)* Neah Ges Africa (Pty) Ltd *(Neah Ges)* and Ges Africa (Pty) Ltd *(Ges Africa)* as applicants, seek interdictory orders against De Villiers Lamprecht (*Lamprecht),* cited as first respondent and as shareholder in the following companies; Weltract (Pty) Ltd *(Weltract*), the second respondent; Quemic Dynamics (Pty) Ltd (*Quemic Dynamics*); the fourth respondent and Amber Bay Investments 19 (Pty) Ltd *(Amber Bay*), the sixth respondent. The third respondent is Li Lotriet *(Lotriet)*, a

former manager of Ges Africa, having resigned in March 2016 and presently a director, together with Lamprecht, in Weltract. The fifth respondent is Anna Magaretha Viljoen *(Viljoen),* who, in addition to opposing this restraint application, has filed a counter application against Neah Ges for payment of her portion of the outstanding purchase price.

[2] Under case number 31047/2016, Lamprecht is the only Applicant, seeking an order for the liquidation of Neah Ges (*the liquidation application)* for failing to pay the outstanding purchase price in terms of the agreement. Neah Ges, as the only respondent, opposes this application.

[3] The two applications and counter application resulted in documents that are prolix, in excess of 2,100 pages. The restraint application, which is was brought by way of urgency, could thus not be heard in the urgent Court. The parties approached the Deputy Judge President who then gave directives that the applications be consolidated and heard together in a special motion court set down for November 2016.

Background

[4] The disputes in this matter arise from the purchase and sale of shares as a means of acquisition of ownership of a company. The following are the salient facts:

4.1 Neah Ges is an international group of companies that sought to establish business in South Africa. Prior to 2013, Neah Ges established an entity in South Africa known as Neah Gas Africa (Pty) Ltd (*Neah Ges).* It used this entity as a vehicle through which to acquire businesses in South Africa;

4.2 From 2013 Neah Ges became interested in the group of companies in which Lamprecht had shares, which companies were conducting business in the security industry, in particular in Mpumalanga. Neah Ges commenced negotiations to acquire ownership by offering to purchase the shares held by Lamprecht and other shareholders in these companies;

4.3 In July 2015, Neah Ges concluded an agreement for the purchase of shares in acquisition of a company known as Quemic (Pty) Ltd in which Lamprecht had 88% of shares and Viljoen had 12% of shares. This agreement was concluded after extensive negotiations that commenced in 2013;

4.4 In terms of the agreement, Neah Ges had to pay a purchase price for the company shares in the amount of US $2.5 million. The terms of payment were that upon signature of the agreement Neah Ges, as purchaser, would pay an amount of US $2 million to the sellers and thereafter pay the outstanding balance of US $500,000 in 24 monthly instalments starting in January 2016, until the full amount is paid;

4.5 It was a further term of the agreement that should Neah Ges fail to pay any of these instalments the amount outstanding will become due and payable. Neah Ges paid the US $2 million in July 2015 when the agreement was signed;

4.6 After acquiring the ownership of Quemic (Pty) Ltd, Neah Ges changed the name of the purchased company to Ges Africa (Pty) Ltd (*Ges Africa*), a wholly owned subsidiary of Neah Ges;

4.7 In January 2016 when the first instalment of the outstanding US $500,000 became due, Neah Ges failed to effect payment to the sellers, Lamprecht and Viljoen. Instead, Neah Ges launched an urgent application, the restraint application, seeking interim relief pending institution of action

The issues before court:

[5] In the restraint application, Neah Ges seeks an interim order restraining Lamprecht and his companies from soliciting its customers and staff. The interim order sought is pending action proceedings to claim damages, alternatively for a reduced payment of the outstanding balance. In addition, Neah Ges claims that Lamprecht misrepresented certain facts contrary to the provisions of the agreement of purchase and sale of shares, which misrepresentations amounted to fraud.

[6] Neah Ges further contends that by utilising his other companies to do the same business as the company that he sold, Lamprecht placed himself in unlawful competition to the company he had sold. Neah Ges contends further that as a result of Lamprecht's conduct, it then refused to pay the monthly instalment of the outstanding purchase price when it became due and payable. This refusal to pay, according to Neah Ges, is based on the common law principle of *exceptio non adempleti contractus.* I shall return to this principle later in this judgment.

[7] Lamprecht and Viljoen in their answering affidavits denied the claims of misrepresentation as well as solicitation of customers and

unlawful competition. In response, Viljoen counterclaims for payment of the outstanding amount of the purchase price as a former shareholder of the company that was sold. Lamprecht on the other hand claims for liquidation of Neah Ges for failing to pay the outstanding balance of the purchase price. In his defence, he contends that the restraint of competition clause that Neah Ges relies on has become void due to failure by Neah Ges to pay the instalment due on demand, as stated in the agreement.

The restraint application

[8] In this application Neah Ges seeks relief in the form of interim order, essentially on the following grounds:

8.1 An alleged breach of warranties, expressly made by the sellers in the agreement, including alleged fraudulent representation in regard to the non-disclosure of;

(a) the tax liability of the purchased company at the conclusion of the sale of shares agreement. It is alleged that as a result of the loan made to Quemic Ghana, SARS levied a "*deemed dividend tax*") for the 2013 financial year based on the 2012 financial figures;

(b) the inter-company loans that were not fully disclosed;

(c) the purchased company's registration concerning the Compensation for Occupational Injuries and Disease Act, 130 of 1993 ("*COIDA*"). The allegation is that it has become apparent that the purchased company was incorrectly registered with the Workmens' Compensation Commissioner as a risk management consultancy when it should have been registered as providing security services;

(d) the correct employment equity relating to the purchased company. The allegation is that Lamprecht and Viljoen deliberately falsified information submitted to the Department of Labour in relating to the generation of Quemics's employment equity element on the BBEEE score card.

8.2 It is further alleged that Lamprecht failed to disclose a liability pending between the purchased company and one of its clients Shambala Game Reserve which was overbilled to the extent of R550,000, a liability which allegedly is still outstanding.

8.3 There is a further allegation that Lamprecht, through the use of his other companies, solicited staff and customers of the company he sold, Ges Africa, and set up his other companies cited in the restrain application to be in competition with Ges Africa. Further, it is alleged that Lamprecht's companies are using similar advertising and marketing material that is used by Ges Africa, in breach of copy rights of Ges Africa.

[9] In support for the restrain application, Neah Ges contends that the interim relief claimed is required presently, as it may prove impossible to properly quantify the damages in the pending action, due to the continued nature of the breach of the terms of the agreement by the respondents.

Discussion

[10] The trite and tested requirements for an applicant to successfully obtain relief in an application for an interim interdict are stated in the seminal case of ***Setlogelo v Setlogelo,***[1] which was applied with approval and modification in a line of subsequent decisions[2]. Essentially, for the applicant to succeed, he/she or it must allege and prove:

10.1 A *prima facie* right to the relief sought;

10.2 A well-grounded apprehension of irreparable harm, if the interim relief is not granted;

10.3 The balance of convenience must favour the granting of interim relief; and

10.4 There must be no other ordinary remedy that is available to give adequate redress to the Applicant.

[1] 1914 AD 221 at p227,
[2] Some of which are Ericson Motors Ltd v Protea Motors 1973 3 SA 685 (A) at 691 C-E; Webster v Mitchell 1948 1 SA 1186 (W); Ladychin Investments v South African National Roads Agency 2001 3 SA 344 (N) at 353 F-J

[11] It is not in dispute that Neah Ges paid the initial agreed amount of US $ 2,000,000 on signature of the agreement, but failed to pay the first instalment of the outstanding amount of US $500,000 in January 2016 as agreed. Lambrecht contends that as a result of failure to effect this payment, a letter of demand was made in terms of section 345 of the Companies Act[3] thus activating clause 13 of the agreement that provides for the cancellation of the restraint of trade protection for Neah Ges. This contention forms the basis of the opposition of Lamprecht to the restraint order sought in this interim application. In essence, Lamprecht argues that by failing to pay the January 2016 instalment, clause 13 of the agreement, which otherwise protects Neah Ges from trade competition, becomes invalid by its own terms and the protection offered by the restraint of trade clause no longer applies.

[12] Clause 6.1 (b) of the agreement provides for the purchase price and the manner of payment. It concludes as follows:

> "*...The failure by the purchaser to make any payment towards the remaining amount on the due date for the performance thereof will have the effect of the outstanding capital of the remaining amount becoming due and payable on demand. In*

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[3] Act 61 of 1973. This section provides that a company is deemed to be unable to pay its debts if a creditor, to whom the company is indebted, has served a demand requiring the company to pay the sum due.

addition to the acceleration of payment of the remaining amount the working and effect of clause 13 (restraint of trade) shall be cancelled on the date on which such a demand is delivered".

[13] The agreement contains clauses providing for non-solicitation of staff and customers of the company which is the subject of the sale. It was agreed in clause 13 of the contract that should the purchaser (*Neah Ges*) fail to pay the outstanding balance; a formal demand communicated will have the effect of cancelling the protection offered by the restraint of trade (non-solicitation) clauses in the agreement.

The *exceptio non adempleti contractus* principle

[14] Neah Ges contends in essence that its failure to pay the instalment due was induced by a breach of warranties as well as the breach of the non-solicitation and restraint of trade clause of the agreement. It is contended that this breach occurred on the part of Lamprecht, Loriet, Viljoen and the companies cited. Neah Ges further contends that on the basis of the principle of *exceptio non adempleti contractus*, (the *exceptio*) it should be excused from paying the instalments on the balance of the purchase price, pending the institution of an action for recovery of damages *alternatively* a claim

for reduction of the balance of the purchase price in terms of the *actio quanti minoris* principle.

[15] The *exceptio* is aptly described in ***Thompson v Scholtz***[4] as a defence that a party may raise against a demand for performance by the other contracting party, whose own reciprocal performance has not been rendered partly or in full. It applies in instances where there is an obligation for reciprocal performance by both parties. In ***Motor Racing Enterprises (Pty) Ltd (In Liquidation) v MPS Electronics Ltd***[5]**,** the appeal court had this to say about the mutual obligations to perform in the context of the principle:

"Firstly it is well established that the exception presupposes the existence of mutual obligations which are intended to be performed reciprocally and that the parties' intention is to be sought primarily in terms of their agreement..

Secondly, in Rich & Others v Lageway (supra) Wessels JA rightly said that common sense seems to indicate that inter-dependent promises are prima facie reciprocal, unless a contrary intention appears from a consideration of the terms of the agreement..."

[16] In essence Neah Ges contends that it paid the initial amount of US $2 000 000 on signature of the agreement, but refused to pay the

[4] 1999 (1) SA 232 (SCA)
[5] 1996 (4) SA 950 (A).

first instalment of the outstanding balance of US $500 000 when it fell due in January 2016 because by then, it had already realised that the sellers had, in their view, acted and continue to act in breach of the terms of the agreement. Neah Ges is asserting its right to withhold its performance in the form of further payment until the sellers have performed.[6]

[17] Consistent with the requirement that the party claiming payment had to have discharged its obligation to perform prior to or simultaneous with the refusal to pay[7], Neah Ges further contends that it should be excused from making any further payments pending the institution of action proceedings which might result in respondents having to pay for damages or Neah Ges being entitled to a reduction of the payment on the outstanding amount.

[18] I agree with the submission by Neah Ges's counsel that before determining whether Neah Ges should be excused from paying the instalment in terms of the *exceptio non adempleti contractus* principle, the Court has to make a determination whether, as contended, Neah Gas has a *prima facie* claim for damages *alternatively* a reduction of the purchase price in terms of the *actio quanti minoris*.

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[6] B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 416 A.
[7] Motor Racing Enterprise supra

[19] I have considered the respondents' answer to the allegation raised by Neah Ges on which it claims may give rise to claims for damages. It seems to me that of the allegations raised by Neah Ges, there are at least three grounds raised by Neah Ges to which the respondents have either provided no response or provided inadequate response to the allegations. The three grounds raised by Neah Ges in support of this application are the alleged breach of the non-solicitation of staff and customers clause of the agreement; failure to provide the requested financial records and information and the issues relating to non-disclosure of liability to SARS.

[20] I now turn to deal briefly with each of these grounds.

Breach of the non-solicitation clause.

[21] The respondents' defence to this allegation is mainly that the restraint clause has become void as a result of Neah Ges's failure to pay the first instalment due on the outstanding amount. Lotriet does not even make an attempt to deal adequately with the allegations that prior to his resignation in March 2016, he had been in contact with and soliciting Ges Africa's customers and a service provider. It speaks volumes that on his resignation from Ges Africa armed with the confidential information of that company; he joined Weltract as a

director together with Lamprecht. The allegation of solicitation of customers mentioned in annexure "A" to the founding affidavit in particular, would obviously have a direct impact on the ability of Neah Ges to perform by making payment in terms of the agreement. There is, in my view, *a prima facie ground* for a claim for damages.

Non -disclosure of financial records

[22] In regard to non- disclosure of the financial records, the emails exchanged by the parties indicate that the concerns and dissatisfaction with the seller's non- performance in terms of the agreement, had already being raised prior to January 2016 when the instalment was to become due. The demand for financial records, according to correspondence between the parties, predates the conclusion of the agreement and to date have not been properly responded to. Therefore it appears from the reading of the emails that at the time Lamprecht issued a letter of demand for the payment of the outstanding amount, he had been made aware, at the very least, of the allegations of non-performance as a seller in the agreement. It seems to me that failure to supply this information and records as requested is an obligation reciprocal to the payment of the outstanding amount and a *prima facie* breach of the agreement which appears to justify an action for damages.

Liability to Sars

[23] The evidence of communication from Sars demonstrates that the sellers in the agreement did not adequately make a full disclosure. The issue here is not whether there is a plausible explanation of the transactions with Sars. The explanation provided in the answering affidavit in the restraint application, the replying affidavit in the liquidation application and other supplementary affidavits filed by the respondents, fails to deal adequately with the reasons for non-disclosure. Lamprecht offers an explanation of the transactions concerning Sars, which at this stage of the proceedings does not explain the allegation why it was not disclosed. I am of the view that Neah Ges has a *prima facie* right to institute the pending action for damages in this regard.

[24] On these grounds alone, I am of the view that Neah Ges has made out a *prima facie* case that there are prospects of a successful claim for damages, *alternatively*, a reduction of the outstanding amount in terms of the *actio quanti minoris*. Consequently, I find that the defence of *exception non adimpleti contractus,* is at this stage of the proceedings, good in law to excuse Neah Ges from payment of the outstanding balance, pending the institution of an action for

damages alternatively a reduction of the payment due to the sellers, on the basis *of actio quanti minoris.*

[25] The other grounds on which Neah Ges relies, such as unlawful competition and passing off, have evoked the kind of responses that result in numerous disputes of fact, which are not capable of being resolved on the affidavits, and may accordingly be dealt with in the action proceedings. Several persons and entities referred to in the allegations and responses may have to be summoned to present oral evidence in order to subject the versions submitted in support of either the applicants or the respondents, to credibility tests.

The counter application

[26] Viljoen had 12% shares in the company that was sold, Quemic, now renamed Ges Africa. As one of the sellers, she claims to be entitled to a percentage of the outstanding purchase price. Neah Ges, the purchaser, failed to pay the instalments due. Viljoen, as one of the sellers, became entitled to the whole outstanding amount which became due and payable. She therefore instituted a counter application to Neah Ges's application. The counter application has to be adjudicated together with Neah Ges's claim.

The liquidation application

[27] Lamprecht, also as one of the sellers of the shares in Quemic, chose not to institute a counter application. On failure by Neah Ges in January 2016 to pay the first instalment of the outstanding balance, Lamprecht then issued a letter of demand in terms of section 345 of the Companies Act, 1973, instituting liquidation proceedings. Neah Ges in its defence, alleges that it purposefully failed to pay the instalments as a result of the alleged breach of the agreement by Lamprecht.

[28] I am of the view that in light of the findings made in this judgment concerning Neah Ges's interim relief, it will be in the interest of justice that the liquidation proceedings be stayed, pending the prosecution of the claims by Neah Ges. The reason being that should Neah Ges succeed in its claim, this might have a bearing on the outstanding amount to be paid. On the other hand, should Neah Ges fail in the prosecution of their claim, they would have an option to pay the outstanding amount or face liquidation.

[29] Consequent to the findings I made in regard to the interim relief sought by Neah Ges, I will therefore not adjudicate on both the counter claim and the liquidation applications.

[30] In the premises I make the following order:

1. Pending the institution of an action for damages in this Court by the Applicants against the Respondents within 15 days from the date of this order;

   1.1 it is declared that Clause 13 of the Sale of Shares Agreement pertaining to solicitation of clients and staff of the Second Applicant as well as restraints of trade has not become void and is still binding and applicable to all parties to the agreement;

   1.2 that all the Respondents, including the Fifth Respondent, are interdicted from soliciting the customers of the Second Applicant as set out in Annexure "A" to the Applicants' founding affidavit;

   1.3 that the Second and Third Respondents are interdicted from utilising advertising and marketing material and images in competition with the Second Applicant;

   1.4 that the First to the Fourth Respondents are interdicted and prohibited from competing with the Second Applicant by soliciting the business of the clients listed in Annexure "B" attached to the Applicants' founding affidavit;

1.5 All Respondents are interdicted from stating false information in respect of the business of the Second Applicant to the clients mentioned in Annexures "A" and "B" attached to he Applicants' founding affidavit in the restraint application;

2. The liquidation application is stayed, pending the final adjudication of the action for damages or failure by the Applicants to institute such action;

3. The counter application by the Fifth Respondent may be heard together with the action for damages;

4. In the event the Applicants fail to institute proceedings against the Respondents within 15 days from the date of this order, this order shall lapse;

5. The costs of these applications are reserved pending the outcome of the action proceedings or failure to institute proceedings whichever occurs first.

S P MOTHLE

Judge of the High Court

Gauteng Division, Pretoria

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