

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 01/06/2009**CASE: 20738/06****UNREPORTABLE****In the matter between:****DELI CHICKEN (PTY) LTD****Plaintiff****And****T W VAN DEN HEEVER N.O.****1st Defendant****E MOTALA N.O.****2nd Defendant****P D BERMAN N.O.****3rd Defendant****M T MASILO N.O.****4th Defendant****K S MANAMELA N.O.****5th Defendant****J Z H MULLER N.O.****6th Defendant****THE REGISTRAR OF COMPANIES****7th Defendant****RONETTE RALL****8th Defendant****SANGIRO ESTATES (PTY) LTD****(IN LIQUIDATION)****9th Defendant**

JUDGEMENT

MOLOPA J

The Plaintiff issued summons against the defendants on 30 June 2006 for the order set out in paragraph 26 of the Plaintiff's Particulars of claim. The Plaintiff's Particulars of claim comprise a bundle of about 37 pages inclusive of the annexures.

The Defendants excepted to the Plaintiff's Particulars of Claim on the grounds that it is vague and embarrassing and/or that it lacks averments which are necessary to sustain a cause of action.

The Defendants go on to elaborate in what respect are the Particulars of Claim excipiable. This is contained in the Defendant's notice of exception dated 18 July 2006 (p140-145 of the papers). The Defendants afforded the Plaintiff an opportunity of removing the cause of complaint within 15 days of service of the notice aforesaid. The Defendants initially did not respond and/or react to the Defendants' notice of exception, as a result of which the Defendants filed an exception dated 22 August 2006 in which the Defendants prayed that the Plaintiff's Claim be dismissed with costs (p147-153) of the papers.).

Subsequent to receiving the exception aforesaid the Plaintiff filed a notice of amendment dated 26 September 2006, filed at court on 02 October 2006, setting out in what respects it proposes to amend the Particulars of Claim (p1-5 of the papers). The Plaintiff's proposed amendments are set out below.

The Defendants objected to the amendment on the basis that:

- 1) the introduction of the amendment would render the Particulars of Claim excipiable on the grounds set out in the notice of objection aforesaid;
- 2) that the relief claimed in prayers 26.1 and 26.2 is in respect of issues which are *res iudicata* between the parties (based on the judgement of Van Den Heever AJ DATED 11/5/04 at p7 of the papers);
- 3) that the proposed amendment does not address all the issues raised in the Defendant's notice of exception aforesaid;
- 4) that the Defendants will be prejudiced if the amendment is allowed because they will then have to take exception and/or file a special plea, resulting in the wasting of time and costs (p27 of the papers).

The Defendants' objection to the proposed amendment was met by a Notice of Motion filed on 02 November 2006 by the Plaintiff for leave to amend its Particulars of Claim on the lines indicated (p32 of the papers). The

Defendants also filed an Answering Affidavit setting out the grounds/basis for their objection (p40 of the papers).

The issues to be decided on the papers before this court thus involve the two interlocutory applications aforesaid: for the upholding of the Defendants' exception and the other for the Plaintiff's proposed amendment to the Plaintiff's Particulars of Claim.

At the beginning of the hearing the court was informed that the parties had agreed that the aforesaid interlocutory applications be heard simultaneously as both involve the same subject matter and questions of law.

In essence the basis of the Plaintiff's cause of action is that certain shares held by Sangiro Farms (Pty) Ltd, in liquidation, ("Sangiro"), had, prior to Sangiro's liquidation, been pledged to the Plaintiff. The Plaintiff avers that it has loaned and advanced R400 000.00 to Sangiro, and that as security for the repayment of the R400 000.00 aforesaid Sangiro pledged some shares (900 ordinary shares of Sangiro Estates (Pty) Ltd , which shares comprise 90% of the issued shares in Sangiro Estates) to the Plaintiff. That this was done *in securitatem debiti*, and was conditional upon due payment of the R400 000.00 together with interest at the prime overdraft rate, as charged from time to time by Standard Bank of South Africa limited, on or before 31 July 2000 ("the due date").

The plaintiff further aver that prior to the due date Sangiro was provisionally wound up and that the liquidators did not pay the R400 00.00 owed to the Plaintiff. The Plaintiff maintains that the liquidators completely ignored and/or disregarded the pledge aforesaid.

The Plaintiff contends (and this was argued by counsel for the Plaintiff) that, upon liquidation, the previously in *securitatem debiti* pledge, became an “out and out” pledge, entitling only the Plaintiff to exercise voting rights in respect of the shares. But that the liquidators of Sangiro Estates (Pty) Ltd (in liquidation) however took possession of the shares and exercised the voting rights attached to the shares with the effect of placing Sangiro Estates (Pty) Ltd in voluntary winding-up. The Plaintiff contends that this was done unlawfully and thus pleaded this in the Particulars of Claim.

As already stated above, the Defendants excepted to the Particulars of Claim, alleging that it was vague and embarrassing and/or lacks averments which are necessary to sustain a cause of action, on the grounds set out in the Defendant’s notice aforesaid. The Plaintiff now proposes amending the Particulars of Claim.

The Plaintiff seeks to amend the Particulars of Claim by deleting paragraph 16 thereof and substituting it to read as follows:

“16.1 On date of the Deed of Pledge, the Plaintiff transferred the shares *in securitatem debiti* to itself as is apparent from Annexures “E” and “F” hereto.

16.2 On 28 July 2000 the winding-up of Sangiro Farms (Pty) Ltd commenced.

16.3 The aforesaid resulted in Sangiro Farms being in breach of the terms of the Deed of Pledge, **alternatively** constituted a breach thereof *per se* on said date.

16.4 As a further consequence of the aforesaid breach, the Plaintiff irrevocably and *in rem suam* became entitled and authorised to dispose of the shares forming the subject matter of the Deed of Pledge or to cause transfer thereof.

16.5 The Plaintiff acted in pursuance of the aforesaid authority on said date of breach and also perfected the Deed of Pledge.

16.6 The transfer of the shares to the Plaintiff thereupon became a permanent transfer, as the Plaintiff was entitled to effect same”.

By inserting further sub- paragraphs to the existing paragraph 25:

“25.2 The affidavit made by the Eighth Defendant and the contents thereof, which were material to the outcome of the aforesaid application, were, in respect of the contents of paragraphs 3, 4, 5 and 6 of her affidavit delivered in said application, false and untrue.

25.3 The remainder of the contentions of the parties and the basis upon which the prior application of the Plaintiff was opposed, more fully appears from a copy of the judgment, annexed marked Annexure “H” hereto.”

In essence the Plaintiff, contending that it was divested of its 25 shares obtained from Choice holdings, that its 25 shares purchased from one Eric Aspelin (“Aspelin”) was ignored, and that it was in effect divested from the 90% shares which had been pledged to it by Sangiro, also that it was never repaid the R400 000.00 referred to here above, (i.e. that Sangiro was actually in breach, thereby that in terms of the pledge Plaintiff became the full owner), seeks to place the contentions regarding its shareholding before court (through the pleadings) so that it can recover the ownership of its shares, the consequences of which would (if upheld) be that the liquidators of Sangiro could not have taken the special resolution to have Sangiro Estates wound up, the effect of which would be to set aside the winding up aforesaid.

The Defendants contend (and it was argued by counsel for the Defendants) that by virtue of section 341(2) of the Companies Act, after the liquidation of

Sangiro (on 28 July 2000), and afterwards when their debt became due and payable, there could not have been a transfer of shares to the Plaintiff. That therefore the proposed amendment on this aspect introduces an excipiable allegation to the pleadings. This cannot be correct in my view, since, if it were to be shown at trial that the liquidators simply ignored/disregarded the pledge, that might be found to be a repudiation thereof. The proposed amendment, in my view fully addresses this. The Defendant will be able to plead to the Particulars of claim. These are issues to be fully ventilated by the parties at trial.

Basically the Defendants appear to deny the Plaintiff's rights consequent upon a breach of the terms of the pledge and seek to avoid the consequences of an "out and out" pledge. As already stated, this is to be pleaded and decided on at trial and cannot form the subject matter of an exception or opposition to an amendment. There cannot be any merit to the objection.

In the event of the trial court finding that the agreement had been breached, and then it would be consistent with the express terms of the pledge that the Plaintiff then became entitled to dispose of the shares and to perfect its rights in terms of the pledge.

The Defendants further contend that the disputes between the parties regarding the registration of the shares had already been decided by this Honourable Court and is therefore *res iudicata*.

The Defendants contend that the subject matter of this claim was already decided by a competent court on the same questions of law involving the same parties, and relies heavily for this contention, on the judgement of Van Den Heever AJ (p7 of the papers).

In this regard the Plaintiff seeks to plead that subsequent to the finalisation of the prior opposed application, he was informed of the extent of the perjury and fraud committed by, in particular, the previous secretary (the eighth Respondent) on whose evidence the court previously relied. The court notes that the eighth Defendant (Ms Rall) herself is not opposing this application.

The Plaintiff's counsel argued that the Plaintiff has been defrauded and that the court has also been defrauded in prior papers by Ms Rall. That in coming to its judgement the court previously relied on her false and untrue evidence. The Plaintiff pleads this in paragraph 25 of its proposed amendment aforesaid.

From the judgement of Van Den Heever aforesaid it appears that Ms Rall who was a company secretary of Sangiro Estates had deposed to an affidavit wherein she alleged that Aspelin had sold his 25% shares to one Van Der Merwe, a director of the Plaintiff, or his nominee. That

Van Der Merwe had nominated Sangiro (Sangiro farms) as the purchaser of the shares, thus Sangiro was reflected in the share register. **Refer paginated p15 l6-11.** It is noted that reference is made in the judgement that in the share register the name originally/initially was that of the plaintiff (Deli Chicken (Pty) Ltd) but that this was deleted by drawing a line through the name and substituting it for Sangiro Farms Pty Ltd (Sangiro), whereafter Ms Rall affixed her signature next to the alteration. **Refer paginated p14 l14-20.** Van Der Merwe apparently denied Ms Rall's version, contending that the shares aforesaid were issued to Deli Chicken (Pty) Ltd, the Plaintiff herein. **Refer p15 l15-16.**

If one has regard to the judgement of Van Den Heever AJ aforesaid one sees that the judge therein stated that he could not decide the issue pertaining to Ms Rall and the correctness of the information on the share register because of a dispute of facts on the papers. However, on the strength of what was stated by Ms Rall in her affidavit aforesaid, Van Den Heever AJ found that the First Applicant, i.e. Plaintiff herein, failed to prove that it is a member of Sangiro Estates, therefore lacked *locus standi*. **Refer p20 l1-5.**

On what is stated here above and on a proper analysis of Van Den Heever AJ's judgement I do not think that the Defendant can rely on *res iudicata*. Especially when the Plaintiff alleges that the judgement

was allegedly based on fraud. From the judgement it does not look like the issue of fraud and/or false evidence on the part of Ms Rall was ever canvassed. The view therein was that the information in the register was incorrect and/or that it was a mistake .**Refer p15 l18, p16 lines 1 and 9-10.** The Defendants have to plead to the proposed amendment and the issues then have to be fully ventilated at trial.

If one has regard to the grounds set out in the Defendants' notices in conjunction with the Plaintiff's proposed amendment, in my view the Plaintiff's proposed amendments addresses all the issues raised in the Defendants' notices aforesaid.

In the circumstances the exception is dismissed with costs, and the amendment is allowed with costs, such costs to include the costs of two counsel.

L M MOLOPA

JUDGE OF THE HIGH COURT