

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ☒

7/12/09 

DATE SIGNATURE



8/12/2009

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG NORTH DIVISION)

CASE NO. 6118/2009

In the matter between

JANNIE ABRAHAM NEL

Applicant

and

FERRET MINING & ENVIRONMENTAL SERVICES (PTY) LTD.
Respondent

in re:

FERRET MINING & ENVIRONMENTAL SERVICES (PTY) LTD.
Applicant

and

RUDOLF HANS BOER
First Respondent

JOHANNES ABRAHAM NEL
Second respondent

COAL OF AFRIKA LTD.
Third Respondent

GVM METALS LTD.
Fourth Respondent

CORAM EBERSOHN AJ

DATE HEARD 7/12/2009

DATE JUDGMENT HANDED DOWN 8/12/2009

JUDGMENT

EBERSOHN AJ.

[1] In this interlocutory matter the parties will be referred to as Nel and Ferret

respectively. In the main application Ferret applied for the following relief:

- "1. Declaring that the written agreement dated 30 July 2007 entered into between one Boer and Nel ("the Nel agreement") is of no force or effect.
2. Declaring that the transfer of the 26% shareholding (26) shares held by the applicant in the third respondent ("the Ferret Mining Shares") to the third respondent pursuant to the Nel agreement was of no force or effect.
3. Declaring that the subsequent transfer of the Ferret Mining shares from the third respondent to the fourth respondent was of no force or effect.
4. Directing the respondents to take such steps as are necessary:
 - 4.1 to restore ownership of the Ferret Mining shares to the applicant;
 - 4.2 to rectify the register of members of the third respondent so as to reflect the applicant as the shareholder of the Ferret Mining shares."

[2] The fifth prayer is for costs and the sixth is for further and/or alternative relief.

[3] The deed of sale entered into by and between Boer and Nel is to be found on pages 71-74 of the founding papers in the main application.

[4] The preamble to the deed of sale reads as follows:

"Dr. Rudy H. Boer in this agreement has an agreement with Ferret Mining & Environmental Services (Pty) Ltd. to buy and sell the 26% shares that Ferret holds in Coal of Africa Ltd. Dr. Jannie A. Nel the buyer in this agreement, have done a transaction with the David Trust, a contracting party in the original agreement between Ferret and the David Trust. Both parties confirm that they are duly authorised to enter into this agreement."

[5] The agreement was signed by Boer as follows: **"For: RUDY H. BOER & FERRET MINING & ENVIRONMENTAL SERVICES (PTY) LTD."**.

[6] The founding affidavit of the main application was deposed to by one J.C. Ngoma, a director of Ferret. Boer did not make a verifying affidavit and although he gave notice that he was opposing the main application he also didn't file an answering affidavit.

[7] Coal of Africa Ltd. and GVM Metals Ltd., the other two respondents, also filed notices of opposition but have also not filed answering papers.

[8] Nel then caused to be served a notice in terms of Court Rule 35(12) and (14) on Ferret in terms whereof Ferret was to produce for inspection numerous documents. Nel also served a notice in terms of Court rules 35(1)(6)(8) and (10) on Ferret to make discovery under oath of certain stated documents.

[9] Nel, thereafter, caused to be served a notice in terms of Rule 30A on Ferret notifying it that Ferret has failed to comply with a request made in terms of Rule 35(12) and (14) on 12 February 2009.

[10] On the 20th April 2009 Deneys Reits, Ferret's attorneys, wrote a letter to Nel's attorneys stating that Ferret does not have a register of minutes of directors' meetings and of the resolutions passed and that there is no register of minutes of shareholders' meetings and that there have been no shareholders' meetings and that there was no written resolution authorising the acquisition by Nel of a 26% shareholding in Coal of Africa Limited. Besides making copies of certain documents available Ferret declined to make available "the requested documents for inspection."

[11] It is clear that the issue in the main application revolves around Boer's authority or lack of authority to sign the deed of sale and to sell the shares to Nel.

[12] As stated Boer has not come on record with an explanation and Ferret seems to rely on the absence of an empowering resolution, either by the directors and/or the shareholders, which, so went Ferret's argument, Boer needed in order to be able to sell the shares.

[13] It must be noted that when Boer signed the deed of sale he did not rely on a resolution but he caused it to be specifically endorsed in the preamble that he has

an "agreement" with Ferret to buy and sell the 26% shares that Ferret holds in Coal of Africa Ltd..

[14] It is Nel's case in the interlocutory application that Ferret is making it awkward for him to file an answering affidavit in the main application because of Ferret's refusal to make its documents available for inspection and to make proper discovery.

[15] Rule 35(13) reads as follows:

"The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications."

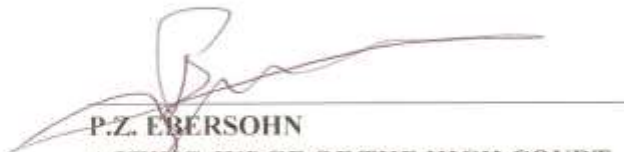
[16] Harms : Civil Procedure in the Superior Courts on p. B-253 states certain guidelines for a court to take into consideration when it has to decide whether "exceptional circumstances" exist, or not, so that the court could grant or refuse an application to make the provisions of rule 35 applicable.

[17] I have considered the said guidelines and have concluded that exceptional circumstances do exist which warrants the granting of relief to Nel so as to protect his interests and to prevent Ferret from hiding behind a corporate veil.

[18] It is clear that costs must follow the event.

[19] I accordingly make the following order:

1. In terms of Court Rule 35(13) it is ordered that all the provisions of Court Rule 35 are applicable to the main application in matter 6118/2009.
2. The period in which the applicant (Nel) may file an answering affidavit in the main application is extended to a period of 15 days after there has been proper compliance by Ferret with any and/or all the notices served by Nel, in the past or the future, upon it in terms of Rule 35 .
3. The respondent (Ferret Mining and Environmental Services (Pty) Ltd.) is to pay the costs of this application which costs will include the costs of two counsel.


P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

Applicant's counsel

Adv. P. Ellis SC
Adv. A.B Rossouw

Applicant's attorneys

Jaco Roos Attorneys
Ref. Mr. Roos/Debbie/H2215

Respondent's counsel

Adv. C.D.A. Loxton SC
Adv. T. Motau

Respondent's attorneys

Deneys Reitz Attorneys
c/o Edelstein Bosman Attorneys
Ref. N. van den Heever/BD001263