

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2420/2007

In the case between:-

BUYING EXCHANGE COMPANY

Applicant

and

J A A ARAUJO

First Respondent

S F R DOS SANTOS Second Respondent

HEARD ON: 18 OCTOBER 2007

JUDGMENT BY: MABESELE, AJ

DELIVERED ON: 1 NOVEMBER 2007

[1] On 5 June 2007 the applicant approached this Court on an urgent basis for an interim order in terms of which the security held by it in terms of a Notarial Covering Bond passed by the respondents in favour of the applicant should be perfected.

[2] The rule *nisi* was issued by Van der Merwe J, calling upon the respondents to show cause and give reasons why, if any,

the order should not be made final on the return date.

[3] The applicant is THE BUYING EXCHANGE COMPANY (PROPRIETARY) LIMITED, registration number 1998/017734/07, a company duly incorporated and registered in terms of the relevant statutes of the Republic of South Africa, with its registered offices at Leppan House, No. 1 Skeen Boulevard, Bedfordview, Johannesburg.

[4] First and second respondents trade in partnership as CENTRAL SUPERMARKET, at 9 Brand Street, Lindley.

[5] The applicant conducts its business as a central purchasing organisation, which purchases commodities in bulk from suppliers and manufacturers on a cash basis, on behalf of its members. This allows businesses to apply for membership to the applicant, which in turn allows the member to purchase stock and materials through the applicant on favourable credit terms. The members of the applicant are general retail dealers and wholesalers such as supermarkets, conducting business throughout the Republic of South Africa. The supplier on one hand invoices the applicant directly and the applicant pays the supplier. The applicant on the other hand invoices the member directly

who is obliged to settle the account within 30 days from date of invoice.

[6] It is common cause that during September 2002, the respondents were admitted as a member of the applicant, pursuant to a membership agreement entered into between applicant and the respondents.

[7] The conditions of the membership agreement were as follows: The respondents would purchase goods through the applicant's buying organisation; the respondents agree to furnish security in the form of a notarial bond in favour of the applicant over the moveable assets of the respondents; the applicant invoices the respondents for the goods supplied and payment is to be effected either within 15 of 25 days from the date of statement.

[8] The salient terms of the Notarial Covering Bond are, *inter alia*, as follows:

- “1. As security for the repayment of the respondents' indebtedness, the respondents bound all its movable property as defined in clause 1.2.1 of the notarial bond, in favour of the applicant.
2. The scope of respondents' indebtedness to the applicant will be determined by a certificate issued under the hand of a duly authorised officer of the applicant.
3. The said notarial bond shall be covering security to the amount of the capital amount, finance charges thereon and for all and any sums of money which shall now or may in future be owing to the applicant by the respondents, from whatsoever cause arising.

4. The applicant is entitled, in the event of the respondents not being able to meet its obligations towards the applicant, or whenever the applicant has good reason to believe that it will be prejudiced by any conduct of the respondents, to take and keep possession of the respondents' business and movable assets without prior written notice to the respondents."

[9] The applicant averred in its founding papers that after full reconciliation of the respondents' account the respondents are indebted to it in an amount of R84 240,50 together with interest thereon at a rate of 16% per annum from 1 February 2007 to date of payment. The certificate of balance marked "CET3" is attached to the papers as proof of indebtedness. But Mr. C.E. Van Tonder, a director of the applicant, stated, in his replying affidavit that the total of the respondents' indebtedness after reconciliation amounted to R74 267,41. He stated that the respondents' account was reduced by R10 000,00 after he had picked up certain valid problems from the invoice which was queried by the respondents.

[10] In paragraph 13.8 of the replying affidavit, Van Tonder stated as follows:

"... Unfortunately, "JA2" is the first indication that I have ever received from the respondents indicating what is accepted by the respondents or not and therefore, upon receipt of that document in the court papers, I was able for the first time to pick

up certain valid problems that the respondents had which resulted in the amount claimed from the respondents reducing by some R10 000,00.”

[11] Notwithstanding the aforementioned reconciliation made by the applicant in February 2007, Van Tonder visited the premises of the respondents to establish from the respondents reasons for failure to settle their debt which exceeded R200 000,00 during the latter part of 2006.

[12] Mr. Fourie, who appeared on behalf of the applicant, contended that the respondents are indebted to the applicant in an amount of R74 267,41. This contention, regrettably, is not in accordance with the relief which the applicant seeks. Mr. Fourie argued also that the discrepancies in the accounts of the respondents came about as a result of certain payments which were made by the respondents directly to the suppliers contrary to the membership agreement.

[13] The respondents dispute that they are indebted to the applicant. They dispute also that they are in financial difficulty. The first respondent stated, in his opposing

affidavit, that they are expanding their existing business operation with a view to take over another business. He stated further that their bookkeeper made a reconciliation of the two accounts which their partnership opened with the applicant. The bookkeeper brought to light that the partnership has a credit of R12 498,73 in the accounts. According to the first respondent, the partnership did deal directly with the suppliers, pursuant to the partnership terminating its membership of the applicant during June 2006.

[14] The applicant initially averred that the respondents are indebted to it in an amount of R84 240,50. This amount is reflected in the certificate of balance by means of which the respondents' indebtedness to the applicant will be determined. After contestation of this amount by the respondents, (the case which the respondents were called to meet) the applicant adjusted its version insofar as it relates to the amount allegedly owed to it by the respondents. Although the applicant advanced reasons for its different versions, it is apparent that a dispute of fact exists, which cannot be resolved on the papers, in my view. The applicant should have realised that a dispute of fact is bound to develop when launching this application. The applicant nevertheless proceeded by way of motion for final relief in a matter where it was obvious that the proper procedure was to proceed by way of action.

[15] The security which is held by the applicant in terms of a notarial covering bond is accessory to the main debt (which

is disputed). Until such time that the dispute is resolved, the security cannot be realised. (See **SA BANK OF ATHENS LTD v VAN ZYL** 2005 (5) SA 93 (SCA).)

[16] For the reasons stated above the applicant is not entitled to the relief sought.

[17] The only remaining question is whether this application be dismissed or the matter be referred for evidence under Rule 6 of the Rules of this Court.

[18] In **ROOM HIRE CO (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD** 1949 (3) SA 1155 (T) it was held that where a dispute of fact is shown to exist the Court has a discretion as to the future course of the proceedings. The Court held that the application may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. Murray AJP (on p. 1162) stated as follows:

“It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy

ascertainment, but in the hope of inducing the Court to apply Rule 9 (now Rule 6) to what is essentially the subject of an ordinary trial action.”

[19] Since the applicant should have realised that a serious dispute was bound to develop, it proceeded with the application at its own peril. This application should be dismissed, therefore.

[20] In the premises, I make the following order:

1. The rule *nisi* issued on 5 June 2007 is discharged.
2. The applicant is ordered to pay the costs.

M.M. MABESELE, AJ

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