

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-084378

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

16 August 2024




In the matter between:

PT PAINT AND PALEL (PTY) LTD

First Applicant

SOLOMON PHUTI MASHITISHO

Second Applicant

and

ANDREW VERIOS

First Respondent

TROY VERIOS

Second Respondent

XANTIUM TRADING 410 (PTY) LTD

Third Respondent

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Fourth Respondent

RBI CHARTERED ACCOUNTANTS' INC

Fifth Respondent

NEDBANK LIMITED

Sixth Respondent

JUDGMENT

Summary:

Civil procedure – urgent application – whether the applicants meet the requirements in respect of urgency as set out in rule 6(12).

Security law – whether the perfecting of the second applicant's shares in the first applicant by the third respondents was legally effected.

Modiba J

[1] This is an opposed urgent application in which the applicants seek the following relief:

“1. That this application be heard on an urgent basis in accordance with the provisions of Rule 6(12) and that the requirements pertaining to service and time periods be dispensed with;

2. ...

PART - A

3. An order declaring that the appointment of the First and Second Respondents as directors of the First Applicant by the Fourth Respondent be declared as invalid and unlawful in terms of section 163(2)(a) read with sections 76(2), 77(3) and 77(10) of the Companies Act No. 71 of 2008 (“the Act”) and the Memorandum of Incorporation of the First Applicant;

4. An interim order interdicting and prohibiting the First and Second Respondents from:

4.1 acting in the name of the First Applicant, signing anything on behalf of the First Applicant, or purporting to bind the First Applicant or authorising the taking of any action by or on behalf of the First Applicant;

4.2 acquiescing in the carrying on of the First Applicant's business; and/or

- 4.3 any act or omission in the name of the First Applicant despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the First Applicant, or had another fraudulent purpose, pending the hearing and determination of Part B of this application;
- 5 That the status of the Second Applicant as the sole director of the First Applicant be restored;
 - 6 That any act taken by the Sixth Respondent to appoint the First and Second Respondent as signatories to the First Applicant's banking account be declared invalid and unlawful and that the Sixth Respondent be directed to restore the Second Applicant as the sole signatory in respect of the First Applicant's bank account;
 - 7 Directing the First, Second and Fourth Respondents to pay the costs of this application on an attorney own client scale;
 - 8 Interest on the aforesaid costs at a rate of 11,75% per annum until date of payment; and
 - 9 Further and/or alternative relief this Honourable Court may deem fit.

PART - B

1. Declaring, in terms of section 163(2) of the Companies Act No. 71 of 2008 read together with section 162 of the Act that the First, Second and Fourth Respondents:
 - 1.1. An order restraining the conduct complained of by the First and Second Applicants (section 163(2)(a));
 - 1.2. An order declaring any person delinquent or under probation, as contemplated in section 162 of the Act (section 163(2)(f)(ii));
 - 1.3. An order directing the First Applicant or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions (section 163(2)(g));

- 1.4. An order varying or setting aside a transaction or an agreement to which the First Applicant is a party and compensating the First Applicant or any other party to the transaction or agreement (section 163(2)(h));
- 1.5. An order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation (section 163(2)(j));
- 1.6. An order directing rectification of the registers or other records of the First Applicant (section 163(2)(k)), where so required;
2. Directing the First, or any other Respondents to pay the costs of this application on an attorney own client scale;
3. Interest on the aforesaid costs at a rate of 11,75% per annum until date of payment; and
4. Further and/or alternative relief this Honourable Court may deem fit.” (sic)

[2] The first, second and fifth respondents oppose the application. I conveniently refer to them jointly as the respondents. Although the respondents took issue with the urgency of the application, during oral argument, their counsel conceded that the alleged urgency of the application is linked to the merits. It is for that reason that I have considered the applicants’ case on urgency and the merits to determine whether they make out a case for the relief sought in respect of Part A.

[3] The background facts are largely common cause. Until 28 July 2021, the third respondent held shares in the first applicant. It sold the shares to the second applicant in terms of a sale of shares agreement (agreement) concluded on the aforesaid date. The first respondent represented the third respondent in this transaction in his capacity as its sole director.

[4] Prior to this acquisition, the second applicant was employed by the first applicant. He was appointed as its director on 30 August 2018. From that date, he became its co-director together with the first respondent. Subsequent to concluding the agreement, these parties also concluded a service agreement and a suretyship. I deal with the latter agreements later in this judgment.

[5] In the agreement, reference to the purchaser is to the second applicant. Reference to the seller is to the third respondent. The material terms of the agreement are as follows:

“2.2 The Seller owns 100% of the Shares in the Company and wishes to sell their Shares to the Purchaser as part of an agreed B-BBEE process and as allowable by the South African company laws and B-BBEE regulations.

2.3 The Purchaser wishes to purchase the Seller’s Shares on the terms and conditions contained herein.”

3 The Purchaser hereby with effect from the Effective Date, purchases the Shares from the Seller, subject to the terms and conditions recorded in this Agreement. ”

4.1 Purchase price

The Purchase price shall be made up as follows:

4.1.1 an amount of R100.00 (One Hundred Rand) for the Shares;

4.1.2 the loan accounts as outlined in the Trial balance, inclusive of the loan between the Seller and the Company in the amount of R2 796 917,70 (Two million seven hundred and ninety-six thousand nine hundred and seventeen Rand and seventy cents) attached hereto as “Annexure E”. For the avoidance of doubt, the aforesaid loan is set to equalise the Nedbank term loan between the Seller and Nedbank, which loan is repayable by the Company monthly to Nedbank on the same terms and conditions as set out therein;

4.1.3 the motor vehicles, which values are as agreed upon between the Parties and as set out more fully in the schedule attached hereto as “Annexure G” and which schedule shall be further subject to verification by the auditors for the time being with the Trial Balance within ten (10) days of the signature of this Agreement. In respect of the motor vehicles:

4.1.3.1 Same are to be transferred to the Company within 30 days of the conclusion of this agreement but not later than 30 June 2021;

4.1.3.2 The loan in respect of the motor vehicles shall be repaid after the Loan Accounts set out in clause 4.1.2 are settled and shall bear interest at the official interest rate:

4.1.3.3 The loan in respect of the motor vehicle shall be repayable within 36 months, on a monthly basis after the Loan Accounts set out in clause 4.1.2 are settled, and

4.1.3.4 The motor vehicles shall remain as security on the loan for the Seller until fully repaid by the Company.

4.1.4 The Nedbank Overdraft in the books of the Company as of 28 February 2021. In relation hereto:

4.1.4.1 The Nedbank Overdraft shall be covered by the Seller's guarantee as contained in the Liberty Policy which is being paid off in the amount of R65 000.00 (Sixty-five thousand rand) per month directly to Nedbank by the Company in order to reduce the Company's monthly overdraft to a level of R2 million.

4.1.4.2 Upon signature of this Agreement and no later than 30 June 2021, the Seller shall transfer Liberty Policy in favour of the Nedbank Overdraft to the Company, to the value of R2 Million.

4.1.4.3 The Company will, on receipt of the Liberty Policy, record the transfer to it as income to the Company and the Seller will expence (sic) the Liberty Policy in its books of account in favour of the Company.

4.1.5 The Purchaser will, however, have the right to settle the Purchase Price and subsequent loans as detailed in this clause 4 for an amount of R15 million which amount shall include the value of the Services Agreement entered into between the Seller and the Company."

4.2 With effect from the Effective Date, the Parties shall:

4.2.1 transfer the Shares to the Purchaser;

4.2.2 deliver, to the Purchaser, duly executed share certificate which comply with the provisions of section 51 of Companies Act;

4.2.3 procure that the Purchaser be registered as a holder of the Shares in the Security Register;

4.2.4 Procure the passing of such resolutions as are necessary to effect all the actions contemplated in this clause 4.2; and

4.2.5 The Seller shall provide a signed fixed asset register confirming that the Company is the owner of the assets as indicated therein which is attached hereto as "Annexure H" and which fixed asset register shall be further subject to verification by the auditors for the time being with the Trial Balance within 10(Ten) days of the signature of this agreement."

4.3 (Ownership, Risk and Benefit)

With effect from the Effective Date [1 March 2021]:

4.3.1 All ownership rights; entitlements, and benefits in and to the Shares shall vest in the Purchaser; and

4.3.2 All risks, obligations, and duties in and to the Shares shall transfer to the Purchaser."

6. Conditions and Options

6.1 This Agreement is conditional upon the implementation of the actions required to give effect to the payment of the Purchase Price, including but not limited to, the transfer of the movable assets, work in progress, funding agreements and sureties as well as a Service Agreement in respect of the services to be provided by the Seller to the Company.

6.2 The Purchaser shall conclude at the same time, a Suretyship Agreement to be attached to this Agreement.

6.3 The Purchaser shall have the option to, at any time, make payment of a once-off amount to be agreed upon by the Parties to fulfil the abovementioned conditions. The Parties have calculated the value to be concluded if the Purchaser can reconstruct the finance as R15 Million. This will be allocated as follows:

6.3.1 Settlement of the Nedbank Overdraft to a maximum R4.3 million or as at the date of the transaction, the value thereof less R2 million as held in surety by the Nedbank and as delivered by the Seller to Nedbank;

6.3.2 Settlement of the Nedbank Loan Account with the Seller in the amount of R2.2 million or the value thereof as at the date of the transaction;

6.3.3 Settlement of the Service Agreement with the Seller, and

6.3.4 The remaining of the funds, to a maximum of R10.5 million less monthly payments made by the Company at the date of the transaction."

- [5] On 15 October 2021, the first respondent resigned as director from the first applicant. From that date, the second applicant became the sole director in the first applicant. He is also responsible for the first applicant's day to day business operations. The parties have since become embroiled in a dispute regarding the sale of shares referred to above in respect of which legal proceedings are pending in this court under case number 2023-053751.
- [6] On 25 July 2024, the first and second respondent were appointed as directors of the first applicant. This change was effected without consulting with second applicant and without his knowledge and consent. The second applicant contends that since he is the sole shareholder in the first applicant, this change of directorship is unlawful because he did not approve it.
- [7] The fifth respondent was the first applicant auditors until October 2022, when the second applicant removed them and appointed NMA Consulting (NMA). He alleges that he effected the change in auditors to avoid a potential and/ or existing conflict of interest between the first applicant and the third respondent. The fifth respondent is alleged to have continued to represent the first and third respondents' interests in the first applicant notwithstanding the sale of shares.
- [8] The first and second respondent have reappointed the fifth respondent as the first applicant's auditors. The second applicant takes issue with this appointment as he did not give instructions or approval for it.
- [9] On 26 July 2024, attorneys for the first and second respondent addressed correspondence to the second applicant:
- (a) Seeking certain information from him, including the suretyship agreement.
 - (b) Alleging that the first respondent shall exercise his right as the sole shareholder in the first applicant to safeguard and protect his security.
 - (c) Threatening to suspend his employment from the first applicant, propose a resolution to have him removed as a director and have the first applicant wound up.

- [10] These events prompted the applicants to seek the relief set out above. They contend that they seek to restrain and put the first and second respondents in probation because their conduct is calculated to trade in the first applicant's business fraudulently, recklessly and negligently.
- [11] The respondents deny these allegations. They allege that after the agreement was concluded; it was anticipated that the second applicant would raise funds to settle the R15 million purchase price. This did not materialise. As a result, the second applicant has not been able to pay the purchase price. To address this, the services agreement was concluded. It makes provision for the second applicant to pay the purchase price in R200,000 monthly instalments over the 60-month service agreement period. The service agreement also makes provision for a suspensive condition in respect of the sale of shares agreement and gives the second applicant an option to pay the purchase price or any balance thereof immediately.
- [12] Together with his wife, the first respondent has provided surety for the first applicant's loan facilities with the sixth respondent (Nedbank). The second applicant had to secure their release from these securities or settle these debts. Approximately 18 months after concluding the sale of shares agreement, the respondents further allege that the second applicant, having assumed control of the business of the first applicant and enjoying its profits, caused the first applicant to fail to honour the services agreement but continued using the Nedbank finance facility under circumstances where the first respondent and his wife remained sureties thereof.
- [13] The respondents also allege that in terms of the suretyship agreement, the second applicant pledged his shares in the first applicant to the third respondent. Owing to the second applicant's breach of the sale of shares agreement as set out in the first respondent's attorney's letter to him dated 26 July 2024, the third respondent exercised its rights in terms of the suretyship agreement and perfected the shares held by the second applicant in the first applicant. It is as a result of the perfection of the pledge that the third respondent's status as sole shareholder in the first applicant was restored.

[14] To establish urgency, the applicants rely on the alleged unlawful perfection of the pledge. The applicants contends that the perfection is unlawful because the second applicant did not consent to it and it was not effected in terms of a court order. As I find below, they fail on both scores, thus failing to establish their alleged case on urgency.

[15] As contended by the respondents, the second applicant's sole reliance on the sale of shares agreements seeks to obscure the first and third respondents' rights in terms of both the service and suretyship agreements, thus creating the false impression that the third respondent has no right to perfect their security. The terms and effect of the three contracts concluded between the first applicant and the first and second respondents (the contracts) are that:

- a. The third respondent sold the shares including certain assets and liabilities in the first applicant to the second for a combined purchase price of R15 million.
- b. When he failed to pay the purchase price, the second applicant undertook to pay it in instalments in the amount of R200 000 per month. He retained the option to at any time pay the full purchase price or balance owing from time to time, immediately. This arrangement enabled the second applicant to pay the purchase price from the profits generated by the business of the first applicant.
- c. In addition to his obligation to make payment of the purchase price, the second applicant undertook to release the first respondent and his wife from their surety-obligations for the debts of the first applicant.

[18] The second applicant does not dispute that he failed to make payment of the instalments as and when they fell due. He is therefore in breach of his obligation to make payment in the amount of R200 000 per month. It is as a result of this breach that the third respondent exercised its rights, set out below in terms of the suretyship agreement.

"5.1. As security for the discharge of its obligations in terms hereof, the [second applicant] ... pledges [his] right title and interest to the shares held in the [first

applicant], constituting 100% (one hundred percent) of the issues share capital in the [first applicant], to the [third respondent].

- 5.2 The [second applicant] irrevocably and *in rem suam* authorises and appoints the [third respondent] with full power to sign and execute all and any documents on behalf of the [second applicant] which may be necessary to give effect to or to enforce the rights afforded to the [third respondent] in terms of this cession.”

[19] A plain reading of these clauses is that the third respondent is entitled to perfect the pledge of the shares without the intervention of a court. The second applicant consented to the perfection in terms of the express terms of the suretyship. To perfect the pledge of the shares, the third respondent does not require a court order. The first and third respondents’ reliance on the authorities and principles set out below is proper. In *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para [7] – [10]:

“[7] The principles concerning *parate executie* (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. Nevertheless, after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court’s imprimatur is required. It is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may

‘seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights’.

Smalberger JA put the proviso in slightly different terms when he said that for validity the private execution clause should not prejudice, or be likely to prejudice, rights of the debtor unduly, meaning that the clause should not contain execution provisions that would be *contra bonos mores*.

- [8] The principles about a *pactum commissorium* have recently been reaffirmed by this Court:

'A *pactum commissorium* in the context of a pledge is an agreement that, if the pledgor defaults, the pledgee may keep the security as his own property.'

Such an agreement is void.

- [9] An agreement whereby a creditor may keep a pledge upon the debtor's default - at a fair price then determined - is similar to a conditional sale. Such an agreement is valid and, in relation to the pledging of shares, known since at least 1892. It does not differ much in kind from a *lex commissoria* or forfeiture clause which, typically, permits a creditor to keep what was received from a debtor in the event of the cancellation of an agreement. The effect of a forfeiture clause may be alleviated under the Conventional Penalties Act."

- [10] The quoted clause in the Nedcor pledge does provide for *parate executie* of the pledged shares, which, for purposes of these rules, are considered to be movables held by the creditor *in securitatem debiti*. But Nedcor did not 'execute' in terms of this right. It had, additionally, the right to exercise the 'option' to purchase the pledged shares at a fair price and it is this right the bank sought to exercise." (footnotes omitted)

- [20] In *Vantage Goldfields SA (Pty) Ltd and another v Arqomanzi (Pty) Ltd and others* 2023 JDR 2275 (SCA) para [32], re-affirming the principles in Block, the Supreme Court of Appeal held that:

"It is accepted that a provision for immediate execution (a *parate executie* clause) in an agreement is valid and enforceable when it relates to movables that are held in pledge. The cession of a personal right *in securitatem debiti* is regarded as a pledge of that right. A debtor may, when the creditor seeks to invoke the *parate executie* clause in an agreement, 'seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights'. The onus, in this regard, would be on the debtor." (footnotes omitted)

[21] The shares have not been transferred to the second applicant. The first and third respondents have established that the third respondent was entitled to exercise their right to perfect the pledge of the shares. Only when the third respondent deals with the shares in a manner that is prejudicial to the second applicant will the second applicant have the right to approach the court. No allegation that the third respondent has so acted has been made. Therefore, the second applicant has not made out a case for the relief sought.

[22] For these reasons, no case is made out in respect of both urgency and the merits in respect of part A. The appropriate order is to dismiss Part A of the application. No reason has been advanced as to why costs should not follow the cause. The first and third respondents contend for costs on scale B. The contention raises no controversy.

[23] In the premises, the following order is made:

Order

1. Part A of the application is dismissed.
2. The second applicant shall pay the first and third respondents' costs and scale B.



MODIBA J
JUDGE OF THE HIGH COURT,
JOHANNESBURG

Appearances

For the Applicant: A T Raselebana

Instructed by: Molai Attorneys

For the Respondent: H A Van Der Merwe

Instructed by: Senekal Simmonds Attorneys

Date of hearing: 08 August 2024

Date of judgment: 16 August 2024

MODE OF DELIVERY: This judgment is handed down electronically by emailing it to the parties' legal representative, uploading on CaseLines and release to SAFLLI. The date and time for delivery is deemed to be 10 am.

