NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 166/2022

In the matter between:

VAVIKA HIGH SCHOOL **(Reg. No. 2020/571161/07)**	First Applicant
MIYOBA KALINDA	Second Applicant
and	
ROBERT SAUNYAMA	First Respondent
CORNELIOUIS TAFARA MAKANDA	Second Respondent
TENDAI MAKIWA	Third Respondent
HILLARY TOMU	Fourth Respondent
TAFADZWA MUTANHAURWA	Fifth Respondent
FIRST NATIONAL BANK	Sixth Respondent
CIPC	Seventh Respondent

JUDGMENT IN RESPECT OF
APPLICATION UNDER PART A
FOR INTERIM RELIEF

HARTLE J

[1] The first applicant is a registered independent school ("the school"). It is a private company, bearing the registration number cited on the face of the notice of motion and other pleadings filed in the matter. The second applicant (not indicated on the face of the notice of motion but mentioned in the founding affidavit) is alleged to have been the founder of the first applicant. He also claims to be its senior operations employee and a current director of the first applicant.

[2] It is both the company and his interests that the second applicant seeks to protect in an urgent application to interdict the first to fifth respondents from appropriating registration and other fees collected from parents of learners due to the school, and basically from running the school or entering its premises to control it, or interfering with "any member of the applicant", pending the determination of Part B of the application in which the applicants seek to set aside a sale agreement concluded between the "school" (sic) and the first to fifth respondents pursuant to which the school's business was sold to them. The primary premise for the interdict is that the sale is null and void *ab initio* because the sale was supposedly actuated by duress, acts of violence and coercion, and for this reason, so the second applicant asserts, the conduct described above must in protection of their interests essentially be restrained pending the determination of the applicants' claim to have the agreement set aside.[1]

[1] The second applicant left the date blank under Part B concerning when the sale agreement was concluded. In his founding affidavit he claimed however that he was coerced on 13 June 2022 to sign over ownership of the first applicant to the first to fifth respondents. On the face of it the sale agreement, put up by the second

[3] The sixth respondent is cited by reason of the fact that funds which are the property of the first applicant have been redirected to a new account held with the bank at the behest of the first to fifth respondents, the gains of which the applicants want this court to freeze pending the determination of Part B.

[4] The CIPC is cited as the seventh respondent for its interest in the proceedings, although for what reason it is not quite clear.

[5] No resolution of the first applicant was put up to show that its "directors" (the first to fifth respondents claim to have been substituted as directors since the sale) authorized the institution of the proceedings or that the second applicant is supposedly authorized to represent its interests. He however claims to have been authorized in a "due and proper manner" to depose to the founding affidavit in support of the relief sought in the application.

[6] Not surprisingly the first to fifth respondents filed a notice in terms of rule 7 (1), together with their notice to oppose, calling on the second applicant to account for his authority to represent the first applicant, which is not borne out in any formal documentation provided by him.

[7] The pretext of the application, according to the second applicant, is that the first to fifth respondents forced him to sell "the company" to them because they had not been able to personally redeem from him their "investments" in a separate money lending business called Vavika Trading Academy (of which he was also the founding director) after that company began to take financial strain due to the economic ravages of the COVID pandemic. (The first to fifth respondents deny lending to Vavika Trading Academy, asserting instead that their loans were made to the second applicant in his personal capacity.)

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applicant himself, is dated 8 June 2022 with the effective transfer date of the business being 9 January 2022.

[8] This culminated, so he claims, in him having been ambushed and held against his will by the first to fifth respondents[2] in a dark shady room at a venue at Falcon College in East London on 13 January 2022. Purportedly the first respondent lured him there under the false pretence of taking a drive with him which he says he acceded to because he thought the first respondent had a business proposal for him (this despite the claimed animosity between them as a result of it having supposedly become clear to the perpetrators that his lending company could not reimburse their "investments" in the company.) He alleges that after the first respondent snatched his cell phone from him, the first to fifth respondents demanded their investment shares from him personally. His explanation that Vavika Trading Academy was unable to pay them was not well received and the situation got heated. The first respondent suddenly assaulted him on his face with a closed fist, and repeatedly thereafter. Thereupon the first respondent prevailed upon him to sign the sale agreement, explaining that this would entail him signing over "ownership" of the first applicant to them. They insisted, against his pleas that this was not possible and against the interests of various stakeholders, that this was the only way to recover the debt(s) owed to them, on his version, by Vavika Trading Company.

[9] They locked him up in a dark closed room after he at first refused to sign the document, whereupon he was held captive until they showed up again. This weakened his resistance and fearing what "more" might come, he "decided to comply with their directives". He did so but had no intention nor desire however to sign over his "ownership" of the school to the first to fifth respondents.

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[2] In a police statement made by him he only accuses four suspects. This is consistent with the fourth respondent claiming in her answering affidavit that she was not even in the country at the time of the sale. This is further borne out by the fact that the copy of the sale agreement put up by the second applicant (which the first respondent agrees was given to the second applicant after the signing) is not signed by the "fourth purchaser", who is also the fourth respondent.

[10] His further experience of the situation was explained in his own words as follows:

> "I could not endure the assault and being kept captive in a closed a dark room and awaiting for what I do not know.[3] I thought of the worst that could happen to my life.[4] My logic dictated that I should succumb to the illegal order to ease myself from the beatings. I then signed over the ownership of the first applicant to the first to the fifth respondents under those conditions. I have been informed by those I instructed that such a contract is therefore concluded under duress. I was only let go after signing that illegal contract." (Sic)

[11] This resulted in him signing the impugned sale agreement which he envisages being ultimately set aside by this court under Part B of his claim.

[12] The purportedly "illegal" sale agreement put up by him on the face of it appears to be an authentic regular agreement, typed, reflecting proper names with ID references, significant dates and figures and details comprising the necessary elements of a sale and acknowledgment of a substantial debt owing which is being set off in lieu of the sale price of the school as a going concern. It bears the second applicant's signature as seller authorized by a resolution which was not attached to the second applicant's annexure "VHS 2", although the sale agreement imports it by reference as forming part of the deed of sale. The first to third and fifth respondents have signed the copy put up by the second applicant, which the first respondent in his answering affidavit concedes he furnished the second applicant with on 8 January 2022 after its signing.[5]

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[3] In his police statement he claims he was held for 7 hours against his will but this allegation was not repeated in his founding affidavit.

[4] In his police statement he claimed that the perpetrators threatened to kill him, a far cry from just feeling like he was at risk of losing his life which is what he averred in his founding affidavit.

[5] It makes sense on the first to fifth respondents' version that the second applicant would have the copy not yet signed by the fourth respondent because she was not in the country on the date of their pre-arranged meeting, but the second applicant's case to the effect that all five respondents coerced him to sign an agreement on the one single occasion is not borne out from the copy put up by him.

[13] The second applicant avers that "immediately thereafter" he reported the claimed incident to the Fleet Street Police Station and that a charge of robbery and assault common was laid against the first to fifth respondents. Snippets from the docket provided by him do not unequivocally indicate his earliest interaction with the police, although it appears from his own statement made to them that he only lodged a complaint on 25 January 2022. He further attached the cover pages of the constitutional warning statements of the alleged perpetrators (the first to third and fifth respondents) no doubt to paint them as criminals, but it appears from a statement deposed to by the investigating officer, Detective Constable Mzukisi Mja, that the four suspects implicated by him co-operated by coming to his office and making warning statements in which they all denied the allegations against them. He omitted to disclose to this court what they alleged in those statements.

[14] It is further notable from the docket contents in fact disclosed by the second applicant that he complained to the police that the incident happened at 10am on 13 January 2022. This was no doubt meant to coincide with the document attached to his founding affidavit marked "VHS 4" which reflects a clinical appointment at the Frere Hospital on the same date to give colour to his allegation that he had to receive treatment for his injuries sustained at the hands of the first respondent.

[15] Also attached (unmarked) is a random "attendance record" of the Frere Hospital (with no header or identification of any patient's details) under which reference is made to "J88" opposite a recorded date of 8 January 2022.

[16] The note attached in support (Annexure "VHS 4") however indicates that he visited the ENT Clinic at the Frere Hospital at *7am* on 13 January 2022. Even if the incident purportedly happened on the 13th, the time (of the hospital

visit) self-evidently precedes the claimed meeting with four of the respondents at 10am that morning on his version during which he was allegedly assaulted, and his rights violated. In his statement made to the police he put the incident at 10am that morning and claimed that he had been held for 7 hours against his will.

[17] The court was not taken into the second applicant's confidence concerning the exact nature of the injuries sustained by him, neither why he attached the random document referencing a J88 without the report itself.

[18] Be that as it may, this alleged criminal event is the foundation for his contention that the sale falls to be set aside and underpins the relief he intends to pursue under Part B.

[19] The relief claimed under Part A is interim relief pending the setting aside of the sale agreement.

[20] Urgency (also challenged by the first to fifth respondents because of the second applicant's delay in acting on the supposed coerced agreement of sale) is premised on the fact that until he can be heard by the court in respect of Part B, consequences (which would otherwise naturally arise after the successful conclusion of a valid sale agreement) have been flowing from the impugned sale that are purportedly compromising the first applicant. *Inter alia* this entails the respondents taking the lead at the school and approaching the Department of Education to "change the details of the Viva Trading Academy to themselves" (sic)[6] as a prelude to "gain control of the monies or fees paid by parents to the school account". This the first to fifth respondents have purportedly done by "altering the banking details of the school into one of their own" and re-directing the payment of registration and school fees to this new account. The

[6] It appears that the second applicant meant to refer here to the first applicant.

second applicant further relies on claimed prejudice to the learners who are "supposed to benefit from the school" but are allegedly not because of this coerced takeover. The second applicant complains too (but without any substantiation) that the fees paid by the parents are not being applied towards the payment of the school's rental obligations, possibly resulting in the school being evicted from its premises.

[21] The second applicant hangs its case on the premise of this conduct posing "serious threats not only to the first applicant but the children's future and the Department of Education" (Sic). It is this conduct that he hopes to "quell" by the interim relief sought as well as to "preserve the status quo". A complaint is uttered that unless the relief is granted the first to fifth respondents will "squander" the funds which "may cause pandemonium between the parents and (himself)". Also expressed is the fear that unless the first to fifth respondents are restrained from their machinations in this respect, they will succeed in their plan, which is "not to operate the school but to suck as much money as they could get until their debt is paid in full".

[22] Far from accepting that they are up to no good and/or do not have the interests of the school, its learners, and parents at heart, the first to fifth respondents explain that the first applicant needed rescuing from the second applicant (a close friend and business associate of theirs) who is putting the school at risk because of his dangerous addiction to gambling and his growing personal debt to so many which has caused him to give up valuable assets for next to nothing to other debt collectors.

[23] They claim quite openly to have consciously embarked upon an "intervention" to safeguard their collective interest in the first applicant. Moreover, they felt themselves compelled to take over the reins of the school

because the second applicant was compromising the school and its assets. In this respect the staff at the school had not been paid for eight months and rent had gone unpaid, giving rise to litigation and property of the first applicant having been attached in execution. Monies intended for the school had been put to the second respondent's gambling habit rather than for the purposes which these funds were being paid.

[24] According to them the second applicant at a pre-arranged meeting on 8 January 2022 (which lasted around two hours only) voluntarily signed an acknowledgement of debt and agreed with their proposals for the sale of the school (or the second applicant's shares in the company) to them. A photograph depicting the second applicant signing the impugned agreement on the date indicated in the sale document, in a well-lit room and self-evidently not under any manifestation of duress, was also put up to prove that nothing untoward had happened. An independent witness further lent support in a confirmatory affidavit to the second applicant's un-coerced signature of the agreement. The second applicant was furnished with a signed copy of the agreement pursuant to his signing, co-incidentally evidenced by his attachment of it as an annexure to his own founding affidavit, albeit without reference to any resolution signed by him.

[25] The applicant in effect seeks an interdict to stop the implementation of the sale agreement pending determination of his application under Part B as indicated above on the pretext that he was a victim of a serious crime perpetrated by the first to fifth respondents against him who forced him against his will, under assault and deprivation of his freedom and liberty, and under threat of his life and liberty, to sign over ownership of school to the first to fifth respondents.

[26] The clear right which he asserts is his standing as “director” and “owner” of the first applicant which I will assume for present purposes is a residual right since on his own showing the business was in fact sold to the first to fifth respondents, albeit on his version under duress. The so-called injury to the right is that the first to fifth respondents have “successfully gained access (to the school) and are now owning the company” and stand “to cause inconvenience in the smooth running of the school in that school fees will now be channeled to a different direction (than) school activities”. (This is another way of saying - again on his case, that the farce of sale has been given effect to as if it were a regular sale untainted by any criminality.) In respect of the requirement of absence of “alternative remedy”, the second applicant alludes to the fact that the South African Police service have fobbed off the criminal charges as a civil matter to be resolved between the parties on a basis other than a resort to a criminal prosecution and that unless this court intervenes an illegal situation will prevail until he can get redress under Part B entailing the setting aside of the sale. As for the financial requirement of “balance of convenience” the first applicant amorphously alleges that this “favours the *first applicant* and there is no greater loss to be suffered by the respondents due to the granting of the interdict”.

[27] The supposed *prima facie* right and other contentions highlighted above stand or falls on the pretext that the first to fifth respondents made themselves guilty of the violent criminal conduct relied upon by the second applicant.

[28] In order to decide whether an applicant for an interlocutory interdict has *prima facie* established his right the court is obliged to look at the respondent’s affidavit as well.

[29] The approach to be adopted to establish a *prima facie* right where there is a dispute of fact was laid down in Webster v Mitchell[7] as follows:

> "[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough. …
>
> The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities,[8] the applicant could on those facts obtain final relief at the trial. The facts set out in contradiction by the respondent should then be considered. **If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt"**. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."
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> (Emphasis added.)

[30] This test was modified in Gool v Minister of Justice[9] as follows:

> "With the greatest respect, I am of the opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts its: *Should (not could) the applicant on those facts obtain final relief at the trial*.[10] Subject to that qualification, I respectfully agree that the approach outlined in Webster v Mitchell … is the correct approach for ordinary interdict applications."

[31] In this instance the first to fifth respondents emphatically deny the claimed criminal and forceful pretext and have pointed to peculiar

[7] 1948 (1) SA 1186 W at 1189.
[8] And in the ultimate onus (Godhold v Tomson 1970 (1) SA 61 (D) at 63C-D).
[9] 1955 (2) SA 682 (C) at 688 D – E.
[10] Author's italics.

circumstances, firstly to support their contention that the second applicant has perverted the truth, secondly to emphasize that the sale agreement was not signed under duress, and thirdly to explain why they claim that the intervention was necessary in all the circumstances in their own interests as well as those of the learners, their parents and of the school.[11] The fourth respondent co-incidentally also asserts that she was not even present whereas the second applicant has indiscriminately averred in his founding affidavit that she was among the perpetrators who employed violence against him when the sale agreement was concluded.

[32] Significantly the second applicant has not refuted any of the respondents' allegations detailed in the answering affidavits which raise serious doubt about the circumstances under which the second respondent claims the sale was concluded or the reasons for it. Mr Skoti who appeared on his behalf consciously elected to argue the application on the papers as they were when the matter was called before me.

[33] The case on the second applicant's own showing was only reported to the police on 25 January 2022 despite him supposedly being forced to sign over his interest in the first applicant on 13 January 2022 already on his version. (The written agreement of sale put up by the second applicant however self-evidently suggests that it was signed on 8 January 2022 an anomaly he did not try to

[11] For example, a transcript of the first respondent's WhatsApp conversation with the second applicant evidencing an arrangement to give the latter a lift to the venue where the sale agreement was signed on 8 January just before the pre-arranged meeting time at 10am,a photograph of the second applicant signing the agreement without any manifestation of duress, CCMA referrals by staff of the school preceding the sale complaining that the second applicant was not paying their salaries despites promises to them to do so and proof of the second applicant giving substantial assets as collateral for loans at huge interest rates. The respondents have also put-up copies of minutes of meetings and transactions of the school reflecting that they had naturally gone about the business of the school as its new owners and of having to have taken steps against the second applicant to interdict him, under the provisions of section 2 (1) of the Protection from Harassment Act, 2011, from perpetrating hooliganism at the school and intimidating and harassing its staff and learners. Also, quite significant is proof that he managed to persuade a parent to pay school fees to a "temporal account" after the date of transfer in the name of Silver Solutions 956 CC. Even on his own version, he would have no business diverting monies owed to the school into the account of another entity.

explain at all.)[12] The claimed criminal incident which on his version happened at 10am on 13 January 2022 followed his supposed visit to the hospital allegedly to receive treatment on that date at 7am.[13] He furnished no J88 medical report in substantiation of the injuries claimed to have been sustained by him despite a random annexure supposedly confirming such a scenario. Obvious discrepancies exist between his statement made to the police and the one made to support his allegations in the present application. Most notably he failed to disclose in his founding affidavit that each of the respondents denied the charges against them immediately upon being criminally charged, no doubt seeking to avoid drawing attention to the serious dispute of fact between the parties which he must plausibly have anticipated.

[34] It appears to me that the second applicant could hardly succeed on such a doubtful basis to set aside the legal effect of a sale of the school's business to the first to fifth respondents pending the determination of Part B on the basis of the claimed coercion which to my mind seems contrived as were the criminal charges ostensibly to serve as a belated basis to negate the fact that he had agreed voluntarily, though begrudgingly, to hand over the reins of the school to his friends and associates. The fact that he co-incidentally owed them money is neither here nor there. This in itself would not constitute a basis to set aside the sale.

[35] I need not consider the other requisites for an interim interdict in all the circumstances or the respondents' contention that no urgency existed. As I said before, the matter in my view stands or falls on the supposed pretext of the first

[12] The impression is gleaned that he contrived to bring the date closer to the date of the launch of the urgent application so that he would not have to explain why he did nothing to vindicate his complaint of coercion from 8 January 2022 until that date.

[13] On his version in his police statement, he would only have been released from the venue at 5pm after been held for 7 hours. Conversely, if he had reported to the Frere Hospital that morning he would unlikely have been at a venue across town by 10am. Indeed, in his police statement he said that he was coming from his brother that morning before he was waylaid by the first respondent.

to fifth respondents claimed thuggery which purportedly induced the second applicant to part with his interest in the first applicant. I mention however that the school appears to be flourishing under the new ownership and that it would be counter-intuitive and against the interests of all concerned to keep its running in limbo, pending the doubtful determination of Part B in the second applicant's favour.

[36] As for the question of costs, the second applicant has patently not taken the court into his confidence, has contradicted himself and in fact sought to gild the lily, if not to mislead the court concerning the supposed criminal conduct on the part of the first to fifth respondents to gain an advantage by affording interim relief. To my mind he should be censured for his conduct by a punitive costs order. It follows most logically that no costs order can be made against the first applicant of which the first to fifth respondents are directors and shareholders which did not authorise nor seek the protection of this court.

[37] In the result I issue the following order:

1. The application under Part A for interim relief is dismissed.

2. The second applicant is directed to pay the costs of the application on the scale of attorney and client.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 10 February 2022

DATE OF JUDGMENT: 30 June 2022*

*Judgement delivered by email to the parties on this date.

APPEARANCES:

For the applicants: Mr. D Skoti and Mr. L Rusi instructed by I C Clark Inc., East London (ref. Mr. Klaas).
For the first to fifth respondents: Mr. F Kunatsagumbo instructed by Precious Muleya Attorneys, East London (ref. Ms. Muleya).
For the sixth & seventh third respondents: No appearance.