IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A24/2022

In the matter between:

CHEETAH FIRE SERVICES CC	1st Appellant
DORAH MOSILI NTSIKA	2nd Appellant
And	
BELINDA KOORSEN	1st Respondent
GERHARD JACOBUS KOORSEN	2nd Respondent
LEONI SNYMAN	3rd Respondent

CORAM:	NAIDOO, J, DANISO, J, *et* POHL, AJ
JUDGMENT BY:	POHL, AJ
HEARD ON:	02 DECEMBER 2022
DELIVERED ON:	22 DECEMBER 2022

INTRODUCTION:

[1] This is an appeal to the Full Bench of this Division against a judgment of Boonzaaier, AJ delivered on 18 June 2021. Leave to appeal to the Full Bench was granted by Mathebula, J on 11 February 2022.

[2] The Appellants however failed to timeously apply for a date for the hearing of this appeal as envisaged by Rule 49(6)(a) of the Uniform Rules of Court and that caused the appeal to lapse. The Appellants thereafter applied for condonation and the reinstatement of the appeal in terms of Rule 49(6)(b), which was not opposed by Respondents. This Court found that the Appellants have shown good cause for the reinstatement of the appeal. In the premises, and at the outset of the arguments before this Court, condonation was granted to the Appellants for the non-adherence to the time period for the filing of their application for leave to appeal and the Appellants were ordered to pay any costs occasioned thereby.

THE BACKGROUND:

[3] In essence, this appeal involves an application which was launched by the Appellants in the Court *a quo* seeking to enforce a restraint of trade, the protection of confidentiality and the sale of goodwill. This followed the sale of the business referred to below.

[4] In this Court, the Appellants were represented by Advocate Paul Zietsman SC and the Respondents were represented by Advocate A Sander.

[5] The relevant portion of the Notice of Motion that served before the Court *a quo* reads as follows:

"2. *That a rule nisi be hereby issued, calling upon the Respondents to show cause, if any, on or before 29 April 2021 at 09h30 why an order in the following terms should not be made final:*

2.1 *Ordering the Respondents to return all confidential information of the Applicants, including but not limited to the First Applicant's documentation as particularised and listed in annexure "NOM1" appended hereto and any other documentation of the Applicants which is currently in the Respondents or any of the Respondents' individual possession, or stored on the data base of the respective Respondents, to the Applicants with immediate effect.*

2.2 *Ordering the Respondents to thereafter, destroy and/or delete in the presence of the Applicants' representatives, any confidential information of the Applicants, as particularised and listed in annexure "NOM1" appended hereto and/or any other documentation of the Applicants which is currently in the possession or on the data base of the Respondents or any of the Respondents' individual possession.*

2.3 *Ordering that Third Respondent to provide the Applicants with a signed copy of the employment agreement entered into between herself and the Applicants within 24 hours' of this order having been granted.*

2.4 *That the Respondents are interdicted and restrained from issuing any correspondence, placing any orders or acting in any manner on behalf of the First Applicant.*

2.5 *That the Respondents are interdicted and restrained from acting forthwith under the name and style of the First Applicant.*

2.6 *That First, Second and Third Respondent be interdicted and/or restrained from utilising in any manner, the confidential information and trade connections of the Applicants.*

2.7 *That the First, Second and Third Respondents be interdicted and/or restrained from contacting or soliciting or continuing to deal with the Applicants' clients, agents and suppliers.*

2.8 *That the Respondents are interdicted and restrained from directly or indirectly using or disclosing the confidential information and/or proprietary interests of the First Applicant, in any manner or for any reason or purpose whatsoever.*

2.9 *That the First Respondent is interdicted and restrained from:*

2.9.1 *making available any document and/or information pertaining to the First Applicant and any person or the general public without the written consent of the Second Applicant;*

2.9.2 *conducting business in either direct or indirect competition with the First Applicant for a period of ten (10) years with effect from 25 May 2020 and in the Free State or Northern Cape, in any capacity whatsoever, directly or indirectly.*

2.10 *That the Second Respondent is interdicted and restrained from:*

2.10.1 *conducting business in either direct or indirect competition with the First Applicant for a period of ten (10) years with effect from 2 March 2021 and in the Free State or Northern Cape, in any capacity whatsoever directly or indirectly;*

2.10.2 making available any document and/or information pertaining to the First Applicant or any person or the general public without written consent of the Second Applicant.

2.11 That the Third Respondent is interdicted and restrained for a period of one (1) year with effect from 1 March 2021 and in the Free State, in any capacity whatsoever, directly or indirectly, from:

2.11.1 involved as a shareholder, partner or member of any close corporation or director of a company carrying on or in any other capacity whatsoever in any business conducted in competition with the First Applicant in any manner whatsoever, whether directly or indirectly;

2.11.2 making public any of the confidential information of the First Applicant, without the consent of the Applicants.

3. That the orders set out in paragraph 2 above shall operate as an interim interdict pending the finalisation of this application."

[6] The First and Second Respondents built-up a business over some 14 years which was operated as Cheetah Fire Services CC (the First Appellant). This business was then sold to the Second Appellant as a going concern. The member's interest in the First Appellant was sold to the Second Appellant by the First Respondent in terms of a written sale agreement concluded at Bloemfontein on 25 May 2020 (hereinafter referred to as "*the sale agreement*"). The sale agreement was concluded between the Second Appellant, personally, and the First Respondent, personally. A copy of the sale agreement is appended to the founding affidavit as annexure "FA4". It is important to note that the Second Respondent and the Third Respondent were not parties to the sale agreement.

[7] In terms of clause 7 of the agreement of sale, the purchase price for the business amounted to R100.00 which was payable on or before 1 June 2020.

[8] What is of extreme importance in this matter is that in clause 20 of the sale agreement, which contains the suspensive conditions and, more particularly, clause 20.2.1, the parties agreed that the Second Appellant would employ the Second Respondent for a period of ten (10) years on the basis that he would be remunerated at a rate of R65 000.00 per month.

[9] In the said clause 20 the parties agreed that the First and Second Respondents would be subject to a restraint of trade for a period of ten (10) years in the area of the Free State and Northern Cape. The Second Respondent on the basis that he is, as indicated above, remunerated for his employment at the said rate of R65 000.00 per month.

[10] In paragraph 20 of the Respondents' answering affidavit, attested to by the First Respondent, she declared that the purchase price sought for the business by her was R7.8 million. In paragraph 22 of the said answering affidavit the Second Respondent declares that the Appellants' attorney, Willers, advised that due to the Second Appellant, not being able to pay the purchase price in one lump sum and for purposes of capital gains tax, the business should be sold for R100.00 to the Second Appellant and that the First Appellant (seller) then pay the Second Respondent a salary for ten (10) years and that payment of the salary would constitute payment of the purchase price. The Second Respondent had to be paid R65 000.00 per month. R65 000.00 x 12 months x 10 years = R7,8 million. This aspect was not contradicted by the Appellants in the replying affidavit and the contract itself reflected this in clause 20.2.1.

[11] Clause 20.9 of the sale agreement, which forms part of the abovementioned suspensive conditions, placed an obligation on the Second Appellant to take

out an income protection policy in favor of the Second Respondent. The Second Appellant failed to do so.

[12] After the sale of the business, the Appellants fell into arrears with the payment of the Second Respondent's salary. The Second Respondent then resigned from his employment on **2 March 2021.** His letter of resignation appears at page 59 of volume 1 of the record of appeal. In this letter of resignation, the Second Respondent indicates that the reason for his resignation is the fact that he was not paid his salary for two months. At the time the Appellants were thus in arrears with the payment of the Second Respondent's salary in the amount of R130 000.00. Put differently, only R390 000.00 (or 5%) of the true purchase price of R7.8 million was paid by the Appellants by then.

[13] The abovementioned application with the *rule nisi* first served before Mhlambi, J. After arguments on behalf of both the Applicants and the Respondents at that stage, he granted the *rule nisi* with the said return date. Boonzaaier, AJ thus dealt with the matter on the eventual return day.

[14] Boonzaaier, AJ ordered as follows on 27 May 2021:

> "*1. The application against the First, Second and Third Respondent is dismissed.*
>
> *2. Costs to follow suit on a party and party scale.*"

[15] She then gave her reasons for the order on 18 June 2021.

THE APPLICABLE LEGAL FRAMEWORK:

[16] It is trite that in appeals, the appeal lies against the order and not the reasons therefor.

[17] It was submitted on behalf of the Appellants that it is common cause that the sale agreement was *perfecta* and that the business was therefore sold. It was however contended on behalf of the Respondents that the abovementioned clause 20 of the written contract, contained a number of suspensive conditions and that these suspensive conditions were not fulfilled. The submission was further that the resultant effect of the non-fulfilment of the suspensive conditions is two-fold, firstly, it avoids the contract being validly concluded and secondly, if validly concluded, there was a material breach of the terms of the agreement by the Appellant preceding the alleged breaches by the Respondents.

[18] The first question that falls for decision is whether or not the contract was indeed *perfecta* as submitted by Mr. Zietsman. In the decision of *Starways Trading 21 CC (in liquidation) and others v Pearl Island Trading 714 (Pty) Ltd and another* **2019 (2) SA 650** (SCA) the following *dicta* is found at page 654 paragraph [9]:

> "*[9] It is trite that at common law the risk and benefit in respect of the thing sold pass to the purchaser when the contract of sale becomes perfecta, even though delivery may take place thereafter. A contract of sale becomes perfecta when agreement is reached on the two (2) essential elements for the thing sold and the price, and the contract is not subject to a suspensive condition.*(my emphasis) *See: Glover Kerr's Law of Sale and Lease, 4th Edition (2014) pp. 306 and 310; Hackwill, Mackeurtan's Sale of Goods in South Africa, 5th Edition (1984), p. 180.*"

[19] The relevant portion of the abovementioned clause 20 of the written contract of sale, *inter alia* reads as follows:

> "*Hierdie ooreenkoms is onderhewig aan die volgende, gesamentlike opskortende voorwaardes, naamlik:*

20.1.1 Die verkoper onderneem en stem toe dat hy nie in direkte of indirekte kompetisie met die koper sal handeldryf in die area soos gespesifiseer hieronder nie vir 'n periode van tien (10) jaar na die bepaalde datum nie.

20.1.2 Die gebied soos hierbo genoem is as volg:

20.1.2.1 Vrystaat en Noordkaap.

20.2.1 Die koper kom ooreen om Mnr Gerhard Jacobus Koorsen aan te stel vir 'n periode van tien (10) jaar teen vergoeding van R65 000.00 per maand netto.

20.2.4 Mnr Gerhard Jacobus Koorsen se aanstelling is ook onderworpe daaraan dat hy homself ook bind aan die handelsbeperking en stilswyende klousule op dieselfde terme en voorwaardes vermeld in paragraaf 20.1 hierin.

20.9 Die koper sal toesien dat 'n inkomstebeskermingspolis of ander soortgelyke produk uitgeneem word tot voordeel van Mnr Koorsen indien hy ongeskik raak om welke rede ookal as sleutel werknemer.

[20] It is therefore, in my judgment, clear that the contract was subject to suspensive conditions. On a proper reading of the contract, it is to my mind clear that the enforceability of the restraint of trade and the payment of the Second Respondent in the amount of R65 000.00 per month were part and parcel of the "gesamentlike opskortende voorwaardes". The Second Appellant (purchaser) did not honor her obligation to pay the Second Respondent's monthly remuneration of R65 000.00. The policy referred to in clause 20.9 was also never taken out. The suspensive conditions were thus not fulfilled. In the clear wording of Clause 20, the whole agreement was subject to the "joint"

("gesamentlike") suspensive conditions. The agreement thus never came into being, including the restraint of trade relied on by the Appellants. The same applies to the sale of the goodwill and the confidentiality applicable to the sale of the business because it is inextricably linked to the validity of the agreement and whether or not it came into being. In this Court's judgment, the agreement of sale thus never became *perfecta.*

[21] Even if this Court is wrong with regards to accepting the abovementioned suspensive conditions as such, then at the very least, the contract is a simulated contract with regards to the purchase price. The purchase price was never R100.00 but instead it was R7,8 million as indicated above. If the actual purchase price amounts to a factual dispute, it should in my judgment be dealt with by applying the so-called **Plascon-Evans**-rule. It is trite that this rule emanates from the well-known case of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* **1984 (3) SA 623** (A). In essence, it entails that the relief an Applicant claims should only be granted if the facts stated by the Respondent, together with the admitted facts in the Applicant's affidavits justify such an order. In applying this rule, it follows that since the Respondents, as alluded to above, clearly stated that the R65 000.00 monthly payment over a period of ten (10) years constitutes the purchase price, and given the fact that the Appellants did not dispute that in reply, justifies the inference that the true purchase price was in fact R7,8 million. This is furthermore fortified by the clear provisions of clause 20.2.1 of the contract. The true purchase price was thus never R100.00.

[22] It is trite that when parties enter into a simulated transaction, the Court must give effect to the true intention of the parties. In this regard this Court in the decision of *Long Oak Ltd v Edworks (Pty) Ltd,* **1994 (3) as 370** (SE), dealt with this aspect when it quoted, with approval, the decision of *Zandberg v Van Zyl* **1910** AD 302 at 309*:*

"*Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not frequently, however (either to secure some advantage which otherwise the law would not give or to escape some disability which otherwise the law would impose), the parties to a transaction endeavor to conceal its real character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies plus valet quod agitur quam quod simulate concipitur. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that the contract still have effect in accordance with its tenure, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general law can be laid down.*"

It is in my judgment clear that if one applies this test to the facts *in casu*, it justifies the inference that the parties intended to disguise the true purchase price of R7.8 million, as stated in the answering affidavit, for purposes of avoiding capital gains tax and mainly because the Second Applicant was not able to pay the purchase price in one lump sum.

[23] What is however patently clear is that the contract has reciprocal obligations. See in this regard Van Der Merwe, Van Huyssteen, Reinecke, Lubbe, Contract, General Principles, Third Edition at p388 to p398. What the Appellants were attempting to do in this application that served before the Court *a quo*, was to enforce the restraint of trade on the Respondents, without honoring their own

reciprocal obligations, namely to pay the Second Respondent the R65 000.00 per month remuneration for a period of ten (10) years. Put differently, the Second Appellant paid the Second Respondent the monthly remuneration for a short period of time but now wants the Court to sanction the restraint of trade for the full ten years and this despite paying only 5% of the purchase price.

[24] In this Court's judgment, the Appellants are not entitled to claim enforcement of the contract (the restraint, confidentiality and goodwill), when they themselves are in breach thereof. The Court *a quo* was therefore correct to dismiss the application, even though it was for different reasons. In view of this Court's finding with regard to the true nature of the contract as indicated in paragraphs [18] to [23], supra, it matters not whether the Appellants' claims relate to confidentiality, goodwill, or restraint of trade. The Appellants have not made out a case for the relief sought for one or more or all of the abovementioned reasons.

[25] Insofar as the relief sought by the Appellants against the Third Respondent, it is clear that this relief had become moot as the restraint of trade sought to be imposed against the third Respondent was for a period of one (1) year effective from 1 March 2021, which period would have expired on 1 March 2022.

CONCLUSION:

[26] In this Court's judgment the Court *a quo* was correct in not confirming the *rule nisi*. It should however have discharged the *rule nisi* and then dismissed the application, and to that limited extent the appeal succeeds. The Respondents were however substantially successful in the appeal and there is no reason why the order as to costs should not follow suit.

ORDER:

[27] The following order is thus made:

1. The appeal is dismissed with costs.

2. The order of the Court *a quo* is set aside and substituted with the following order:

"1. The rule nisi issued on 29 March 2021 is discharged.

2. The application is dismissed, with costs."

L LE R POHL AJ

I concur:

S NAIDOO, J

I concur:

NS DANISO, J

On behalf of the Appellants:	Advocate Paul Zietsman SC
Instructed by:	Stander & Associates, Bloemfontein
On behalf of the Respondents:	Advocate A Sander
Instructed by:	Hill, McHardy & Herbst, Bloemfontein