



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DIVISION**

CASE NO: 11250/21

In the matter between:

DARYL MANN

APPLICANT

and

AERO NATAL (PTY) LTD

FIRST RESPONDENT

BLACK SHEEP CAPITAL (PTY) LTD

SECOND RESPONDENT

ORDER

The following order is granted:

1. Clause 14 of the second sale of shares agreement concluded on 1 December 2021 is amended by inserting the words "*and or the purchaser*" immediately after the phrase "*by the company*".
 2. The balance of the relief sought by the applicant is dismissed.
 3. The applicant is to bear the costs of the application on a party and party scale.
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JUDGMENT

TUCKER AJ

[1] The applicant brought what was initially an urgent application to protect his contractual rights under an agreement of sale of shares. Envisaged as security for the obligations towards the second respondent's payment obligations in respect of the shares was three aircraft and an immovable property.

[2] At the hearing of the urgent application on 25 January 2023 an order was taken by consent where the respondents gave an undertaking not to dispose of the aircraft and the immovable property without giving prior notice. As will become relevant later, the applicant was also given leave to file a supplementary founding affidavit.

[3] The relief sought by the applicant on the opposed roll on 16 April 2024 was the relief under Part B of the amended notice of motion comprising of a claim for rectification of the second shareholders agreement,¹ together with relief declaring the applicant's entitlement to ownership of the aircraft and the immovable property and corollary relief thereto directing the second respondent to pass transfer of the assets.

Background

[4] The first respondent Aero Natal (Pty) Ltd is a company specialising in aircraft maintenance and trades from Virginia Airport in Durban North. The second respondent is an entity that wished to purchase the shareholding in the first respondent.

[5] On 26 October 2021, the Fairways Trust (a trust to which the applicant is affiliated) signed a sale of shares agreement in terms of which the total shares held by the Fairways Trust were to be transferred to the second respondent.

¹ Annexure "B" to the founding affidavit.

[6] The difficulty that subsequently arose is that it came to the parties' attention to that agreement that it was in fact the applicant who owned such shareholding in his own name rather through the Fairways Trust.

[7] Subsequent thereto and on 1 December 2021, two further agreements were concluded:

- (a) a "cancellation of agreement" signed by the Fairway Trust and the respondents; and
- (b) a second sale of shares agreement which is signed by the applicant and a representative of the second respondent.

[8] The terms of the first and second sale of shares agreements are nearly identical, save that the applicant has been substituted as seller of the shareholding in the first respondent, and certain suspensive conditions of the first sale of shares agreement were removed.

[9] For the purposes of the present determination the following clauses of the second sale of shares agreement are relevant:

- (a) clause 2.1 which inserts suspensive conditions that all the annexures are to be signed by both parties, the necessary changes to CIPC and appointments stay as they had been registered as at 30 November 2021 until such time as the Civil Aviation Authority approves the change in ownership, the applicant resigns as a director, and the applicant concludes a 12-month consultancy agreement;
- (b) clause 2.3 where it is recorded that the suspensive conditions were inserted for the benefit of the purchaser;
- (c) clause 2.4 of the agreement states:
'The suspensive conditions may be waived by written notice to the seller by the purchaser by no later than 5 November 2021 except for 2.1.2 that will automatically be waived within a maximum period of twelve months or as soon as Civil Aviation Authority consent to the change in ownership, whichever the sooner'.
- (d) the purchase price would be a total amount of R8,2 million payable by an initial amount of R1,4 million on signature, R1,6 million by 15 January 2022,

and the balance of R5,2 million within 30 days of the fulfilment of the suspensive condition of the approval by the Civil Aviation Authority of the sale;

(e) clause 14 of the agreement provides:

‘Should the purchaser breach of this agreement by not performing to pay as per clause 4 more specific to clause 4.1.3 and fail to remedy such breach within 14 (fourteen) days of written notice requiring the breach to be remedied, then the seller be entitled to attach for his own benefit and ownership the following assets owned by the company up to the value outstanding for the purchase consideration and retain such monies as an offset to the amount due under 4.1.3:

- ZA-MOL Cessna 172
- ZA-LXA Piper Sennica 2
- ZS-KCR Beach Craft Sundowner
- Erf 9074, Secunda, Extension 57.’

[10] The usual *Shifren* clauses are also present in the agreement.

[11] The applicant’s contention is that the second respondent had paid the initial amount of R1,4 million, together with a further payment of R150 000. Thereafter the agreement had been breached by the second respondent by failing to pay the balance owing of R6,65 million.

[12] Prior to delving into the defences raised by the respondents, there are two further matters arising from the papers that need to be briefly discussed.

[13] Firstly, and in terms of the amended notice of motion, a claim for rectification has been brought to insert the words “*and or the purchaser*” after the word company in the abovementioned clause 14 of the agreement. It was stated in the supplementary affidavit delivered on behalf of the applicant that this omission was as a result of a mutual error between the applicant and the representatives of the respondents.

[14] The respondents have elected not to deliver an answering affidavit to the allegations contained in supplementary founding affidavit. Accordingly, there is no

dispute that clause 14 does not in its current state reflect the true intention of the parties as a result of a mutual error.

[15] Secondly, there appears to be no dispute by the applicant, that the three aircraft are owned by the first respondent whereas the immovable property is owned by the second respondent.

Defences raised by the respondents

[16] The defences raised by the respondents to the application require varying degrees of interrogation.

[17] The respondents firstly contended that, considering that the agreement concluded between the parties contained a consent as envisaged in terms of s 45(1) of the Magistrates' Court,² this Court accordingly did not have jurisdiction to entertain any complaint that arose pursuant to such contract.

[18] Apart from the difficulties the Magistrates' Court would have in entertaining the declaratory relief sought in the notice of motion and the claim for specific performance under the contract, it is a matter of recently reaffirmed law that the fact that jurisdiction may be conferred (whether by contract or statute) to deal with an issue in the Magistrates' Court that such provisions would not oust the High Court's jurisdiction.³

[19] The second defence raised is that clause 14, albeit conditionally on breach, constitutes a disposition of the greater part of the assets of the first respondent and consequently the conclusion of any such agreement would have had to have complied with the requirements of ss 112 and 115 of the Companies Act ('the Companies Act').⁴

² Magistrates' Court Act 32 of 1944.

³ *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA), as subsequently confirmed by the Constitutional Court in *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* 2023 (3) SA 36 (CC).

⁴ Companies Act 71 of 2008.

[20] As was correctly raised by Mr *van Huyssteen* for the applicant, the difficulty with this argument raised by the respondents was that the sole shareholder was a signatory to the second sale of shares agreement, being the applicant at the time of the signature (and the prospective sole shareholder being the second respondent on fulfilment).

[22] In the decision of *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*,⁵ specifically at paragraph 37, Wallis JA writing for the Supreme Court of Appeal in a unanimous decision stated as follows:

‘The purpose underpinning the requirements of ss 112 and 115 is to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or the greater part of its assets or the undertaking itself. In the case of a special resolution ss 65(9) and (10) stipulate the majority that must be achieved for such a resolution to be passed. Where the company only has a single shareholder, these requirements become a mere formality. In those circumstances it seems to me that the principle of unanimous consent can be invoked in answer to the appellants’ contention. That principle, long recognised in English company law, from which our courts have received much guidance, was accepted as part of our law relating to companies, under both the 1926 and the 1973 Companies Acts. I can see nothing in the current Act to suggest that the principle no longer finds application. The problems that this court identified in *Quadrangle Investments* and those identified by Professor Beuthin in his article on the topic do not arise here to preclude the invocation of the principle.’ (Footnotes omitted.)

[23] The contention by the respondents that the formality of special resolution needed to have been complied with accordingly, on the principle about, must fail.

[24] The further defences raised by the respondents, however, require a more detailed investigation.

Suspensive conditions

[25] The respondents contend that the suspensive conditions in the agreement were not fulfilled, in particular clause 2.1.8 which specifies:

⁵ *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2017 (5) SA 508 (SCA).

‘That Mr Daryl G Mann ID number ... entered into a 12 months consultancy agreement with “the company” and to be the responsible accounting person on the AMO and all other licences.’

[26] This clause clearly envisages two separate acts to be fulfilled – the conclusion of the consultancy agreement and the appointment of the applicant as the responsible accounting person.

[27] The predominant focus of the answering affidavit appears to be challenging the fulfilment of the first part of the suspensive condition. This criticism is misplaced on the common cause facts.

[28] The respondents agree in the answering affidavit that such agreement was concluded, but thereafter alleges breach of the consultancy agreement and premature termination.

[29] The reason for the termination of the consultancy agreement forms a dispute of fact on the papers, though one that need not be delved into further. This is because where a suspensive condition is fulfilled, but later the basis for such fulfilment is withdrawn (for example, a financier granting a mortgage bond to a purchaser of an immovable property, and thereafter withdrawing such approval), this does not have the effect in law of undoing an already met suspensive condition.⁶

[30] As a consequence of this, and even if (without making any such finding) the subsequent conduct of the applicant constituted a breach of the consultancy agreement, this would not have the effect of undoing the fulfilment of the first part of suspensive condition contained in clause 2.1.8.

[31] The second part of the suspensive condition in clause 2.1.8, being that the applicant was to “*be the responsible accounting person on the AMO and all other licences*”, is more contentious.

⁶ *Dharsey v Shelly* 1995 (2) SA 58 (C) at 64B-E.

[32] Annexed to the answering affidavit is a letter sent by the Civil Aviation Authority dated 12 November 2021, where it notes the change in directorship of the first respondent and the failure to register a new accountable manager, the same constituting an offence.

[33] The approval from the Civil Aviation Authority to the transfer of the shareholding appears to have been later obtained on 30 June 2022.

[34] In response to the allegations relating to the failure to appoint an accountable manager as envisaged by the Regulations to the Aviation Act, the applicant himself states:⁷

'28 This is not a process that can be undertaken unilaterally by a person. There has to be an application to the Civil Aviation Authority by the relevant aircraft maintenance organisation and not by the individual.

29 It was therefore up to Aero Natal to process the documents for me to become a responsible person but at the very least, from the day my consultancy agreement was terminated, any steps that were being taken in that regard simply, fell away.'

[35] These are the difficulties with this argument:

- (a) Clause 2.3 of the agreement expressly records that the suspensive conditions are for the benefit of the purchaser, being the second respondent; and
- (b) clause 2.4 of the agreement seems to restrict the ability of the second respondent to waive fulfilment of the suspensive conditions save if written notice is given by the second respondent to the applicant by no later than 5 November 2021 (save for suspensive condition 2.1.2, which is uncontentious).

[36] Whether a suspensive condition is met or not is a factual enquiry. That it may have been up to the first respondent to assist in this process does not change that on the applicant's own version the suspensive condition was not fulfilled.

⁷ Supplementary affidavit, page 297 paras 28 and 29.

[37] There is further no suggestion made, nor could there be, that fictional fulfilment would apply in the circumstances considering the first respondent is not a party to the second sale of shares agreement.

[38] The contention that the suspensive conditions must be regarded as having been met, as was presented in the heads of argument, because both parties are seeking the enforcement of the agreement would be to ignore the express wording of the contract.

[39] Considering it is common cause that the applicant was not so appointed as the responsible accounting person as envisaged by clause 2.1.8 of the agreement, the suspensive condition was not met and consequently the agreement is void.

[40] On the strength of this finding, the remainder of the applicant's relief must fail.

[41] That said, and for the sake of completeness, the balance of the contentions between the parties shall nonetheless be dealt with.

Who are the parties to the second sale of shares agreement?

[42] Clause 14 of the second sale of shares agreement detailed above, being the foundation of the applicant's claim to the entitlement of ownership of the three aircraft and the immovable property, will state in its rectified form that in the event of breach, the aircraft and the immovable property may be taken for the applicant's own benefit and ownership up to the value of the amounts stipulated in clause 4.1.3 being an amount of R5,2 million.

[43] Again, there is no dispute that the three aircraft listed in the agreement are owned by the first respondent, whereas the immovable property is owned by the second respondent.

[44] One of the disputes that has arisen between the parties, is whether the second sale of shares agreement is enforceable against the first respondent. The challenge by the respondents is that the first respondent is not a party to the second sale of shares agreement and, consequently, it does not create any obligations for

the first respondent, including the obligation to deliver the aircraft in the event of default by the second respondent with its payment obligations owed to the applicant.

[45] As stated at the outset, the agreement of cancellation was signed by the respondents and the Fairways Trust on 1 December 2021. On that same date, the second sale of shares agreement which belies the present dispute was concluded. Crucially, however, the signatories to that agreement were only the applicant and the second respondent's representative.

[46] Submission was made in argument for the applicant that, considering it appeared that the cancellation agreement was concluded simultaneously with the second sale of shares agreement, that the first respondent must equally have been agreeing to the contents of the second sale of shares agreement.

[47] The argument cannot be sustained and is also a proverbial double-edged sword.

[48] If the first respondent's representative was available, ready and willing to be party to the agreement then there is no reason why their signature would also not appear on the second sale of shares agreement. An inference could equally be drawn that the failure to sign was a purposeful act.

[49] Moreover, and while the definition of "parties" is not included in the second sale of shares agreement, the following clauses are of relevance:

- (a) clause 2.1.1 makes reference to the annexures "to be completed and signed by *both* parties";
- (b) clause 18.2.2 refers to "to which *either or both* of the parties are subject";
- (c) clauses 18.2.3 and 18.2.4 both further make use of the word "either"; and
- (d) clause 18.2.6 makes reference to the phrase "by the other party".

[50] Each of these phrases supports the notion of there only being two parties to the agreement, and that that agreement is not a tripartite agreement as contended

for by the applicant. To suggest for a tripartite agreement having come into effect would be to do violence to the wording of the second sale of shares agreement.

[51] Furthermore, clause 1.2.17 of the second sale of shares agreement has the definition of “signature date” as being “the date of signature of this agreement by the party last signing”. This clearly envisages that the agreement should be signed by the parties thereto in order to be effective. Consequently, the conclusion that the sale of shares agreement was a tripartite agreement with the first respondent being a party, cannot be sustained.

[52] Privity of contract is a fundamental pillar of our law of contract. As stated in *Christie’s The Law of Contract in South Africa*⁸ the basic idea of contract being that people must be bound by the contracts they make with each other. Strangers cannot sue or be sued on contract to which they are in no way connected. The doctrine that prevents this situation arising is usually known as the doctrine of privity of contract; parties who are not privy to a contract cannot sue or be sued on it.

[53] The applicant would accordingly not be able to enforce any claim for the declaratory or delivery relief in respect of the aircraft when those aircraft are owned by the first respondent, who is not a party to the contract.

[54] Furthermore, and considering the express wording of the agreement that any amount of value derived from the aircraft would be credited towards the outstanding balance owing under clause 4.1.3 of the agreement for the acquisition by the second respondent of the applicant’s shares in the first respondent, this arrangement would in any event be contrary to s 44(3) of the Companies Act. This is because there is no evidence that the board completed the requisite solvency tests and were so empowered, and the clause places the first respondent in the position where it would be financing the acquisition of its own shares.

Further considerations

[55] The difficulties mentioned above relating to the aircraft specifically and the agreement being bilateral rather than tripartite would have no impact on the

⁸ R H Christie and G B Bradfield *The Law of Contract in South Africa* 8 ed (2022) at 317 para 6.3.

immovable property. That said the further hurdle (though by no means insurmountable) for the applicant is that the request for the transfer of the immovable property would trigger the requirements of s 97 of the Deeds Registries Act.⁹ The Registrar of Deeds has not been given the requisite seven days' notice and afforded the opportunity to make such report as may be deemed fit.

[56] The declaratory relief of entitlement to ownership, (which was not strongly persisted for in argument) would have in any event been inappropriate. The papers before the Court did not provide sufficient evidence to exclude potential real rights of third parties in respect of the aircraft and the immovable property that could interfere with the entitlement for declaratory relief relating to ownership.

[57] Without delving into these aspects in great detail, there are further debates relating to clause 14 of the second sale of share agreement, including:

- (a) whether clause 14 constitutes an unenforceable *pactum commissorium*; and
- (b) whether the phraseology of clause 14 itself confers automatic rights on default and therefore is a *parate executie* clause and possibly unenforceable.

[58] Tied with these potential difficulties *pactum commissorium* and *parate executie*, and despite both the applicant and the respondents having proffered approximate values for the aircraft and the immovable property, there is no admissible evidence before the Court relating to the value of the aircraft and the immovable property. This is owing to neither side having employed the services of a suitably qualified expert, and value being evidence of the nature of an opinion.

[59] Considering clause 14 of the agreement would only permit the applicant to take ownership of the immovable property “**up to the value outstanding for the purchase consideration**”, this would have constituted essential evidence. It is not sufficient that it has merely been stated in the replying affidavit that these assets may be sold and applied towards the outstanding purchase consideration, and any excess tendered. This is because what is being requested is a conferral of ownership in the relief, not an entitlement to execute against.

⁹ Deeds Registries Act 47 of 1937.

[60] For these reasons, and apart from the undefended claim for rectification, the applicant's application must fail.

[61] Turning to the aspect of costs and while:

- (a) the applicant was successful in its claim for rectification (though that part was essentially undefended);
- (b) the applicant will nonetheless gain control of the aircraft again through the finding that the second sale of shares agreement did not come into existence; the applicant has been predominantly unsuccessful relief sought.

[62] Consequently the applicant should pay the costs of the application.

Order

[63] In a result of the above the following order is made:

1. Clause 14 of the second sale of shares agreement concluded on 1 December 2021 is amended by inserting the words "*and or the purchaser*" immediately after the phrase "*by the company*".
2. The balance of the relief sought by the applicant is dismissed.
3. The applicant is to bear the costs of the application on a party and party scale.

TUCKER AJ

Appearances

Counsel for Applicant: K J Van Huyssteen
Instructed by: Fluxmans Attorneys

Counsel for the Respondent: No Appearance
Instructed by:

Date Judgment Reserved: 16 April 2024

Date Judgment Delivered: 24 April 2024