

SOUTH AFRICA / JUDGMENT

Eayrs NO obo The Daku Trust v Strydom NO and Others (3704/11) [2012] ZAECPHC 4 (31 January 2012) [2012] ZAECPHC 4

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Mageza

CASE / FILE NUMBER

3704/11

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE, PORT ELIZABETH)

CASE NR: 3704/11

Heard: 15 December

2011

Delivered:

31 January 2012

In

the matter between:

MICHAEL

BRADLEY EAYRS N.O. obo THE DAKU TRUSTApplicant

and

STEPHANUS

JOHANNES STRYDOM N.O.

DEAN

ALAN HOLDSTOCK N.O.

ADELE

KATHLEEN HOLDSTOCK N.O.

(In

their capacity as Trustees for the time being
of

the Holdstock Family Trust IT1102/99)

.....First

Respondent

BARRY

NEIL CARTER N.O.

LINDA

CARTER N.O.
of
the Barry Carter Family Trust IT1099/99)
.....Second
Respondent
PICK
'N PAY RETAILERS (PTY) LTD
.....Third
Respondent

JUDGMENT

MAGEZA AJ

[1] This matter came before me by way of urgency with the principal relief sought being:

“1...;

2. That the First and Second Respondents be interdicted from transferring their shares in Carter Trading (Pty) Ltd to the Third Respondent or any other third party until such time as they have adhered to the terms of the Articles of Association of Carter Trading (Pty) Ltd pertaining to the procedures set out for the sale of shares in such company;
 3. That the Respondents opposing the application be ordered to pay the costs of the Application on an attorney and client basis, jointly and severally, the one paying the other to be absolved;
 4. ...”
- [2] The background to the matter offers a history of intractable disputes between the parties and these have to date culminated in two Court Judgments of this Division, one of which has since been confirmed by the Supreme Court of Appeal. In light of the relief sought, I intend to confine myself to this appeal ruling having regard to its relevance to this dispute.
- [3] The nub of the current dispute revolves around competing pre-emptive rights in favour of Applicant on the one hand, and the Third Respondent on the other, to shares held by the First and Second Respondents in Carter Trading (Pty) Ltd, owned in the following proportions:

First Respondent owns 7.5% of the issued shares, and

Second Respondent owns 42.5%, thus collectively making up a total of

50% of the issued share capital in the Company.

The pre-emptive rights at issue are those admittedly contained in,

(i) The Articles of Association of the Company detailed therein in favour of the Applicant,

The Terms and Conditions of a franchise agreement concluded between the Company and the Third Respondent as franchisor, which terms provide, inter alia, a pre-emptive mechanism triggered in the event of the occurrence of particularised contingencies.

Applicant's case.

- [4] Applicant is a Trustee of the Daku Trust (IT658/2005) and litigates on behalf of the Daku Trust as owner of the balance of the 50% share block in Carter Trading (Pty) Ltd. This Company in turn operates a Pick 'n Pay supermarket franchise licenced to it by Third Respondent. The genesis of the Supreme Court of Appeal ruling commenced with an application by Applicant (Daku Trust) under case number 2145/2010, in which application it sought an Order that First Respondent (Holdstock Family Trust), Second Respondent (Barry Carter Family Trust) and Carter Trading comply with the terms of a Sale of Shares agreement concluded on 22 April 2010, and to take all steps necessary to ensure transfer of the shares referred to in the said agreement. The matter came before Eksteen J, who found therein for Applicant, concluding that Pick 'n Pay had been afforded its pre-emptive right (detailed in the Franchise Agreement) in respect of the said shares but had failed to exercise the same within the stipulated 30 day time period, thereby declaring the right of the Daku Trust to the shares as constituting a stronger right, based on the *qui prior est tempore potior est iure* common law rule, than the rights afforded Third Respondent by an addendum agreement extending the period. An appeal was lodged against the judgment and the Supreme Court of Appeal later confirmed the Judgment of Eksteen J on 26 September 2011.
- [5] Pursuant to the favourable ruling and no doubt galvanised by the same, Applicant caused his legal representatives (Goldberg & de Villiers Inc.), to direct a letter dated 28 September 2011 to the legal representatives of the First and Second Respondents (Rushmere Noach Attorneys), in which letter it tendered payment of the purchase price against transfer of the shares to it. A separate letter was simultaneously dispatched to the accountants of Carter Trading, Fanie Strydom of Strydom and Partners, requesting preparation of the appropriate company secretarial documentation to give effect to the share transfer.
- [6] On 3 October, Applicant advised First and Second Respondent's attorneys that, as a 50% shareholder, it was entitled to appoint a Director in the Company. The response of the First and Second Respondents, by means of a letter of same date, was to deny the existence of this alleged right, asserting in addition that this demand is viewed as an introduction of new terms to the sale of shares agreement and amounted to Applicant repudiating the aforesaid agreement, a contention denied by Applicant. Ironically, Respondents simultaneously advised Applicant that, despite First Respondent having sold the majority of its shares in Carter Trading to Applicant, its Trustee Mr Alan Holdstock, would remain a Director even though its remaining shares were only 7.5% in total.

- [7] With the disputes beginning to mount and Applicant insisting on timeous implementation of the Supreme Court of Appeal ruling, a shareholders meeting was eventually held on 6 October 2011. At this meeting, Applicant discovered that shortly after the decision of the Supreme Court of Appeal, a meeting of Shareholders and Directors of the Company had, unbeknown to it, been convened on 2 October 2011 at which meeting certain material resolutions were taken and agreed. In Applicant's view, these resolutions were clearly intended to thwart the longer term plans agreed to in the 22 April 2010 agreement with the First and Second Respondents to convert the business of Carter Trading to a Spar.
- [8] In addition, again unbeknown to Applicant, Mr Alan Holdstock representing First and Second Respondents, had on 4 October travelled to Johannesburg to meet with the representatives of Third Respondent, Pick 'n Pay. Applicant was then handed a letter from the legal advisors of the Third Respondent, directed to Carter Trading and stating that, in spite of the Supreme Court of Appeal decision, Third Respondent persisted in the view that it would not approve the taking up of the shares by Applicant in Carter Trading and furthermore called upon the Company to give an indication of how it intended resolving the issue. In addition, that pending a resolution of the difficulty:

"...the franchisor seeks an undertaking from the franchisee that neither the Daku trust, nor trustees, nor Mike Ayers will have any access to the franchisor's proprietary interests. The franchisor requests either the resolution of this issue or the requested undertaking to be received by the franchisor by close of business 7th October 2011."

- [9] This shareholders meeting finally resolved that Mr Barry Carter, as Managing Director of the Company, would appoint independent attorneys and Counsel to advise Carter Trading on how to deal with Third Respondent's demand and that Third Respondent would be advised of this as having been a resolution taken at the said meeting. Advocate Rorke SC was briefed and in due course, provided a comprehensive Opinion advising as to the appropriate steps that should be taken by Mr Carter as sole Director of Carter Trading. These included that:

- 9.1 the notice to terminate the Franchise Agreement with Third Respondent not be withdrawn;
- 9.2 steps be taken to secure alternative finances so as to discharge Carter Trading's obligation to Third Respondent and thereby removing the threat of the perfection of Pick 'n Pay's notarial bond;
- 9.3 a new notice of termination be given to Pick 'n Pay terminating the Franchise Agreement;
- 9.4 Carter Trading investigate alternative franchisors;
- 9.5 steps be taken to appoint other directors.

The Opinion of Counsel having been finalised on 21 October 2011 and the Company having received the same, Applicant requested confirmation that Mr Barry Carter would take all steps suggested in Counsel's Opinion. As we shall see, this did not materialise.

- [10] Some three days after the Opinion was received and considered, and at a meeting on 24 October 2011 attended by the parties' respective legal advisors, Applicant admits that the legal representatives of First and Second Respondents first mooted that their clients now wished to dispose of their respective share interests in the Carter Trading.
- [11] In tandem with the foregoing and on 26 October 2011, First and Second Respondents' attorneys confirmed that Mr Barry Carter had held discussions with, and was taking steps to settle the amount owing to Pick 'n Pay in terms of the Notarial Bond. They further confirmed the view that once the Notarial Bond was settled, appropriate steps could then be taken. The shareholders then approached Nedbank to apply for loan funding and a further shareholders meeting was scheduled for Monday, 31 October at the offices of Applicant's attorneys.
- [12] At this meeting, First and Second Respondents advised that they wished to dispose of their shareholding in the company. Applicant states in its papers that both its legal advisors and those of the Respondents, were of the view that such a conversation was premature and could only be dealt with once the issues raised in Counsel's Opinion had been dealt with. An agreement was, according to it, reached that the said discussion be regarded as "off the record" and not be minuted. Applicant says he had in general terms advised Respondents that at that stage, he was not in a position to purchase the full 50% shareholding but could consider purchasing a portion thereof. He says he did not apply his mind to this discussion and considered it a "side conversation" that would be dealt with in a more formal manner and that the purchase price was not even mentioned.
- [13] First and Second Respondents' attorneys, on 4 November 2011, sought to place this conversation on record as having been a formal conversation where an offer was made for the sale of the said shares and that Applicant had formally rejected the offer. On the same day, Applicants attorneys responded and advised that it was premature to discuss the alienation of the shareholding until such time as the Notarial Bond application was disposed of and the Franchise Agreement terminated. Three days later, on 7 November 2011, Applicants attorneys received a letter from Respondents attorneys advising that they had disposed of their respective shares in the Company to the Third Respondent.
- [14] Applicant says there being no binding shareholders agreement, it regarded this as an exercise in contravention of the Articles of Association of the Company, which Articles provide as follows (paragraphs):
- "21. If a member of the company desires to sell all or any of his shares of the company he shall give notice, in writing, of his intention to sell, to the directors of the company, and state the price he requires for the shares.*
22. The directors shall within one month of the date of receipt of the notice referred to in Article 21 advise every member of the company of the contents thereof and each such member shall be entitled to acquire the shares so offered within one month after the date of receipt of such advice. Provided that if more than one member makes an offer for all of the

shares so offered, the shares shall be sold to each such member in equal proportions, and where fractional proportions of shares remain, such members shall become joint holders of such fractional proportions of the shares.

23...

24..."

First and Second Respondents answer.

[15] In papers deposed to by Mr Barry Neil Carter on behalf of both the First and Second Respondents, their common position is, crisply put, the following:

- (a) They challenge that Applicant has substantiated its basis for urgency and assert that it has not provided adequate reasons why it could not be afforded substantial redress at a hearing in due course.
- (b) The First and Second Respondents collectively hold 50% of the issued share capital in Carter Trading and Applicant holds the other 50%. That First and Second Respondents are obliged to afford the Third Respondent a pre-emptive right to their shares.
- (c) The First and Second Respondents have sold their shares in the company to Third Respondent.
- (d) First and Second Respondents furthermore contend that the right of pre-emption in favour of the Third Respondent contained in the Franchise Agreement enjoys precedence over the rights of shareholders, inter se, contained in the Articles of Association.

They state in their papers that:

"The Franchise Agreement primarily regulates the rights of the company to trade as a Pick 'n Pay store, which rights are fundamental to the company's business. Third Respondent required that the First and Second Respondents bind themselves to the pre-emptive

rights contained therein as a condition of granting the franchise. Failure on the part of First and Second Respondents to comply

therewith could give rise to the cancellation of the Franchise Agreement by the Third Respondent or the exercise by it of its rights

under a notarial bond held by it over the movable assets of the company as security for an operating loan provided it to the company.

Should the First and Second Respondents dispose of their shareholding without affording the Third Respondent the rights contained in annexure BNC1, they would be in breach thereof with the consequences that would flow therefrom in law."

[16] First and Second Respondents in addition, contend that the provisions of the Articles of Association, regulate the basis upon which the Company conducts its business and in particular, arrangements among the shareholders themselves. That it is open to the shareholders to depart from or amend the provisions of the Articles of Association. They are of the view that the overall interests of the Company must trump the rights of shareholders among each other when faced with potentially conflicting rights. They explain how they dealt with the matter as follows in paragraph 19 of their papers:

“On 24 October 2011, Mr Holdstock and I met with the attorney for First and Second Respondent, Ms Theron, to advise her that both of the First and Second Respondents wished to dispose of the whole of their respective shareholding in the company and instructed her to advise both the Third Respondent and the Applicant accordingly. Ms Theron telephoned Mr Eugene Bester, the Third Respondent’s attorney, and informed him of our intention. She then contacted the Applicant’s attorney, Mr Moodliar, and arranged to meet him. The said meeting duly occurred as reflected herein. On our instructions, Ms Theron provided the Applicant’s attorneys with a copy of a valuation of the shares and advised that it reflected the price that the First and Second Respondent sought for their shareholding... The Applicants attorneys undertook to revert to Ms Theron with a response from the Applicant, but never did so, as is recorded in the letter annexed as MBE37 to the Founding Affidavit.”

[17] At paragraph 20 deponent goes on to state that:

“On 25 October 2011, pursuant to our instructions, Ms Theron wrote to the Third Respondent’s attorneys and confirmed her earlier

telephonic advices that the First and Second Respondent wished to sell their shares.”

Further that:

“... It must be mentioned however that also on 26 October 2011, Mr Holdstock and I met Mr Eayrs at the store, when we enquired from him as to his response to our indication that we wished to dispose of the First and Second Respondents’ shareholdings. He stated that the Applicant would like to purchase the shares, but could not afford to do so and speculated whether he could bring in a third party purchaser to acquire the shares. We advised him that the share valuation had been handed to his attorneys and he enquired whether that reflected our price, or whether we were negotiable. We confirmed that the valuation reflected the price we wished to achieve and further confirmed that we wished to dispose of the First and Second Respondents’ shareholding in their entirety.” (paragraph 22)

[18] On 31 October 2011, a shareholders meeting was duly convened at which Respondents state they tabled their intention to sell at the valuation price which had been handed to Applicants attorneys on 24 October. Respondents say Applicant advised that whilst it was interested in acquiring the shares, it did not have the resources to acquire the full block of shares on offer as it was still repaying funds relating to the purchase of the first 50% share block and countered by suggesting that he could possibly purchase a portion thereof.

[19] The Respondents then, having alluded to what in their view was a difficulty occasioned by:

“...an apparent conflict between the rights arising from the provisions of the Articles of Association of the company on the one hand and from the terms of the Franchise Agreement on the other...”

later state that;

“The First and Second Respondent were willing and remain willing to dispose of their respective shareholdings in the company for value to either of the Applicant or the Third Respondent.” (my emphasis).

First and Second Respondents do not explain how this would still be achieved in light of their clear contention that the shares have since been sold to Third Respondent, a contention that is also made by the Third Respondent.

Third Respondent's answer.

[20] Third Respondent admits that it held a meeting with Mr Holdstock in Johannesburg and had subsequently addressed to Carter Trading, the letter referred to above.

[21] Whilst acknowledging that Applicant's right to the transfer of 50% of the shares on payment of the purchase price to Applicant, was as a consequence of the lawful Order of the Supreme Court of Appeal, Third Respondent says it informed Carter Trading that Applicant had not been approved by it, a position which it viewed as resulting in breach of the terms of the Franchise agreement. In the same vein, Third Respondent communicated that it regarded the Franchise agreement as continuing to be of full force and effect, but emphasised that Applicant would never be approved as a shareholder in the Company and furthermore that Third Respondent would in no way waive the provisions of clause 15.1.12 as access to confidential information, trade secrets, price structuring, advertising and promotional activities would then be addressed and become known to the opposition in the retail trade as Applicant has interests in opposition retail businesses.

[22] Third Respondent also points out its pre-emptive rights set out in paragraph 25 of the Franchise agreement set out as follows:

“25.1.2.1 If the franchisee intends to sell or otherwise dispose of or transfer the business or any part thereof... it shall deliver to the franchisor a written notice offering to sell the business or the relevant part thereof the franchisor at a price which is sounding in money in South African currency and on such remaining terms as may be stipulated in the written offer...”

25.1.2.2 The franchisor shall be entitled within 30 days after receipt of the written offer to accept it, in whole but not in part by giving written notice to that effect to the franchisee...”

[23] Third Respondent recounts that First and Second Respondents were made aware of their obligations in terms of clauses 28 read with clause 25 of the franchise agreement as is evident from a letter dated 27 October

2011. The letter from Third Respondents attorneys, Cliffe Dekker Hofmeyer, alludes at paragraph 3 to this that:

“Our client requires a written offer from the (perspective) shareholders concerned offering to sell their shares at a price sounding in Rands. On receipt of such an offer our client will consider its options.”

In response to this letter and on 2 November 2011, the First and Second Respondents’ attorneys forwarded to Third Respondent a valuation from the auditors of the franchisee confirming the value of the shares held by them in the franchisee. No mention is made whether the “written offer” was availed by First and Second Respondents and none has been produced despite the alleged sale of shares. Third Respondent says it exercised its pre-emptive right in terms of the provisions of the franchise agreement on 3 November 2011 and purchased the shares.

[24] It denies that there exists any contravention of the Articles of Association and states that there being no new Shareholders Agreement, the Shareholders are bound by the Shareholders Agreement concluded between the founding shareholders, prior to the Applicant acquiring the 50% shares. It states at paragraph 18.9 of its papers that:

“On becoming a shareholder in the franchisee on or about 4 October 2011, the applicant became subject to the terms of the shareholders’

agreement as the shares were transferred to it by an existing shareholder, the first respondent. The sale was conditional upon the applicant undertaking in writing to be bound by all of the provisions of the shareholders’ agreement. This condition has not been met and accordingly it is doubtful whether the applicant is a shareholder in the franchisee.”

[25] Finally, that as the provisions of the franchise agreement prevail over the provisions of the Articles of Association of the franchisee, there is no basis for the Applicant to seek the relief as set out in the notice of motion.

Applicant’s reply.

[26] Applicant in reply;

- (a) Denies that the history of his dealings with the Respondents is irrelevant and points out that the Respondents have continuously attempted to thwart all proper implementation in respect of agreements between them and this includes undermining the effect of the Supreme Court of Appeal decision.
- (b) Challenges the assertion that First and Second Respondents are obliged to afford the Third Respondent a pre-emptive right to their shares in precedence to the right that it is given in terms of the Articles of Association of the Company.
- (c) Any purported sale would be subject to the approval of the Competition Commission and is thus not “a done deal” as purported by the collective Respondents. None of the Respondents have made available to this Court a copy of a document (notice) setting out the full terms of their alleged sale agreement.

- (d) The relief sought by the Applicant is based on a clear right as determined in terms of the Articles of Association which governs the relationship between Applicant and the Respondents in the absence of a Shareholders Agreement governing the relationship of the parties.
- (e) Denies any suggestion by Respondents that it had at any stage agreed to depart from the provisions of the Articles of Association.
- (f) That generally, the interests of the Company would have been well protected had Mr Carter as Managing Director of the Company, had chosen to follow the advice of Advocate Rorke SC, which advice, sourced by the Company, had proposed and Respondents had agreed to, that steps be taken to formally terminate the Franchise Agreement insofar as same may not have already terminated and settle any amounts due to Third Respondents, if any.
- (g) Applicant repeats that he viewed the discussions of the possible sale as being “off the record” and could not be seriously entertained before the validity of the Franchise Agreement had been resolved. Applicant insists that if he regarded these as formal, he would have insisted on compliance with the Articles of Association in order to properly consider the position and have sufficient time to consider whether to raise additional finances to purchase the shares. Applicant says it at no time waived its rights which it enjoyed in terms of the Articles of Association.
- (h) The Third Respondent refers to a Shareholders Agreement entered into in April 2001 when Applicant was not a Shareholder. That a new Shareholders Agreement was discussed and drafts prepared and ultimately signed by Applicant on the understanding that the terms were agreed with First and Second Respondent. That the Third Respondent makes bold to say that the sale of shares of shares to the Applicant was premised on an undertaking in writing to be bound by all the provisions of the Shareholders Agreement. Applicant knows of no such sale conditional upon such a condition and no legal or factual basis is provided to support this averment.
- (i) It is apparent that none of the Respondent’s wish to take this Court into their confidence regarding the exact terms and conditions of the Sale of Shares Agreement concluded between them by discovering the alleged written offer.

The Legal position.

[27] Applicant has formulated the relief sought in the form of an Interim Interdict restraining the Respondents from transferring the disputed shares until such time as they have adhered to the terms of the Articles of Association governing the procedures for the sale of shares in the Company.

[28] In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F, Corbett J, as he then was, articulated these requirements as follows:

“Briefly these requisites are that the Applicant for such temporary relief must show-

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
- (b) that, if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the Applicant has no other remedy”.

[29] In *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC at 730-731, the Court commented:

“An interim interdict is by definition a ‘court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect the final determination.’ The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court’s jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.”

- [30] Once an Applicant has shown a prima facie right, and an apprehension that such right is threatened, the consideration as to balance of convenience becomes decisive. See: *S A Motor Racing v Peri Urban Areas Health Board* 1955 (1) SA 334 (T).
- [31] In ‘The Law and Practice of Interdicts’ by Prest at p 50 it is said, “Where the right asserted by the Applicant is, in the terminology of Innes JA (*Setlogelo v Setlogelo* 1914 AD 221), ‘prima facie established ... (though) open to some doubt’, the Applicant may be granted an interim interdict if the continuance of the thing against which an interdict is sought would cause irreparable harm”. In this regard it becomes necessary for the Court to take account of the balance of convenience. The Court must then consider the nature of the injury to Applicant if the interdict is not granted, as opposed to the injury to Respondent if the interdict is granted.

Analysis.

- [32] The real dispute between First and Second Respondents can be stated as centred on the following, that is, whether:

it is open to the shareholders to depart from or amend the provisions of the Articles of Association, something which the First and Second Respondent contend did occur in this instance.

the right of pre-emption in favour of the Third Respondent contained in the Franchise Agreement enjoys precedence over the rights of shareholders, inter se, contained in the Articles of Association;

First and Second Respondent have, as contended by them, complied with the Articles of Association and have afforded Applicant an opportunity to acquire their shares but that Applicant has waived or elected not to exercise its rights as aforesaid;

[33] Departure from Articles of Association:

It is common for the Articles of Association of private companies to provide that, when a member wishes to sell his shares, such member must first offer them for sale to the other members. In other words, the other members have a right of pre-emption. The memorandum and articles of association, once registered, binds the company and the members to abide by all the provisions of the memorandum and articles. In other words, the memorandum and articles have the effect of a contract. – See RC Williams “Concise Corporate Law” – Butterworths page 51-2; *De Villiers v Jacobsdal Saltworks (Pty) Ltd* 1959

(3) SA 873 (O). The contract is between each member and the company and also between the members inter se. The articles can be altered by means of a special resolution. – See the comments of Vaisey J in *Rayfield v Hands* [1958] 2 All ER 194.

Applicant herein is not a founding member of the company, but has acquired the shares from existing shareholders. Applicant is also not itself a signatory to the existing shareholder’s agreement. In fact, prior to the Respondents putting in train the events that led to the current dispute, Applicant was expending all its efforts in, inter alia, ensuring agreement on a new shareholders agreement to govern the new community of shareholders in *Carter Trading (Pty) Ltd*. During all times prior to the conclusion and signature of the said agreement, the Articles of Association enjoyed supremacy as between the shareholders inter se. See *LSA UK Ltd* (formerly *Curtainz Ltd*) and *Others v Impala Platinum Holdings Ltd and Others*

[2000] JOL 6308 (A). The first observation to make therefore is that First and Second Respondents were not free to ‘depart’ from the Articles or ‘amend’ the relevant provision, save by way of a special resolution. Secondly, the Applicant denies any suggestion that he entered into an agreement with the Respondents to deviate from the prescripts of the Articles in relation to the pre-emptive procedures set out therein.

[34] Do the rights of Third Respondent enjoy supremacy?:

I accept that there exists some form of protective (or defensive) right of pre-emption in favour of the Third Respondent triggered in an event where a franchisee seeks to dispose of shares to a third party. No doubt prior to the conclusion of a sale to an outsider (third party), the pre-emptive rights in favour of Third Respondent would be capable of less contentious implementation as such an outsider would have no claim for reliance on the Articles of Association of the franchisee. The difficulty with which the Respondents are confronted with in the present matter is that Applicant’s acquisition of the shares has been perfected and its claim to a right of pre-

emption as between shareholders admits of no doubt. In these circumstances, I am unable to follow the First and Second Respondents argument that Third Respondent's rights "enjoy precedence over the rights of shareholders among each other". It may be so that were the First and Second Respondent to dispose of their shareholding without affording the Third Respondent the rights contained in the franchise agreement, they would put the business at risk, but firstly this is precisely why they had at a shareholders meeting agreed to seek the opinion of eminent Counsel, which opinion they neglected to implement. It appears Mr Barry Carter was attending to ensuring settlement of the debt in favour of Third Respondent and had to that end with the other shareholders, approached Nedbank for loan funding. This course seems to have been abruptly abandoned by the First and

Second Respondents without a plausible reason. All appeared to be proceeding for once, on the basis advised in the opinion. There was no need to create conditions that could militate towards breach.

In addition, if they intended to put up their shares for sale in a transparent and bona fide manner all they needed to do was to simply follow the austere process outlined in the Articles and to present both the Applicant and Third Respondent with a notice of such offer in writing at a specified price sounding in Rands. This would have rendered them

compliant and provided Applicant with enough time to weigh and consider his position, whilst Third Respondent would also be apprised

of the developments.

[35] Did the First and Second Respondents adhere to the Articles?:

From a perusal of the papers it appears safe to say that by the time the ruling of the Supreme Court of Appeal was handed down, First and Second Respondents had lost their earlier commitment to the April 2010 agreement with Applicant including the prospect of the conversion of the store to a Spar. From 28 September 2011 and in the lead up to 24 October when the first verbal intimation was made by their legal representatives that they were considering selling their shares, a discernible degree of reluctance was evident. These indicators include delays at implementing the share transfer and the refusal to avail Applicant a Directorship in Carter Trading. The Respondents visited Third Respondent in Johannesburg and took material decisions in a shareholders meeting just prior to the share transfer to Applicant. There were delays in convening meetings whilst discussions were ongoing with Third Respondent without Applicant's knowledge. The sole positive step taken by agreement was sourcing Counsel's Opinion, an Opinion which should have put everyone at ease and duly implemented to avoid risk to Carter Trading.

Whilst it is not necessary for this Court to go into all the foregoing, it appears to me important as in my view, what followed in the verbal intimations that the Respondents were looking to sell was consonant with this earlier reluctant stance to openly and transparently engage all concerned in the matter of the future of the business. It must have been confusing that at the time Mr Barry Carter was negotiating with Nedbank on 26 October the attorneys were orally making these overtures to sell.

The bona fides of the exercise are further undermined by the remarkable developments that;

Although the legal representatives first sought to put this conversation in writing on 4 November 2011, the Third Respondent in fact says it had by then bought the shares the day before on 3 November 2011.

Although Third Respondent alleges a purchase on 3 November, it was only on 7 November that First and Second Respondents' attorneys conveyed the news that the shares had been sold to Third Respondent.

Even more remarkable is the fact in the answering papers they contradict this by stating that they are still willing to sell the shares to Applicant.

The final dramatic correspondence between the Respondents legal advisors alluding to this that "the fight" would shift to Applicant and Third Respondent in lieu of the (contentious) sale, is another clear indicator of the probable collusion and lack of desire to deal with the Applicant in a bona fide and transparent manner, with due deference to its rights.

Despite various requests and in any event until to date, the Respondents have collectively been unable to produce the written notice or offer containing all the terms and conditions to which the putative sale to Third Respondents is subject.

[36] Third Respondents position.

Third Respondent raises a separate and novel contention. According to it, no new shareholders agreement had, as at the time of transfer of these shares been concluded between Applicant and the First and Second Respondents. This being the case, so the argument proceeds, no contravention of the Articles of Association has occurred in that the sale of shares to Applicant was conditional upon the Applicant undertaking in writing to be bound by all the provisions of the old shareholders agreement. It furthermore contends that this condition has not been met and that accordingly, it is in its view, "doubtful" whether Applicant is a shareholder in the Company.

I do not intend to dwell at length into this contention for the simple reason that it is evident on the papers that First and Second Respondents concede that Applicant is a 50% shareholder in Carter Trading and these shares have been transferred to it. First and Second Respondents contradict the Third Respondent in its view that Applicant acquired the shares on the conditions alleged by it and accept the sale of shares has been perfected. They correctly accept that the Applicant has lawfully acquired the stated shares and is the beneficial owner thereof.

Furthermore, First and Second Respondents also correctly acknowledge the fact that Applicant, qua shareholder, does enjoy the rights enshrined in the Articles of Association.

Urgency.

[37] In short, the Applicant relies for the stated urgency primarily on the fact that it has called upon the Respondents to provide it with an undertaking that it will not transfer the shares owned by First and Second Respondents to the Third Respondent pending the resolution of the dispute pertaining to the demand for proper compliance with its pre-emptive rights set out in the Company's Articles of Association. It sets out that the Respondents have refused to provide the requested undertaking. It is thus concerned that its rights and commercial interest will be prejudiced should the transfer of shares to Third Respondent take place.

Whether a matter should be enrolled as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules. The sub-rule allows the Court to dispense with the forms and service provided for in the Rules and to deal with such matter in accordance with such procedure as to it seems meet. The Rules allow for the Court to come to the assistance of a litigant if the latter would in an application in due course not obtain substantial redress. The unrelenting conduct of Respondents is the basis for the risk that Applicant seeks to arrest pending compliance. It is also so that there are varying degrees of urgency: See *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977(4) SA 135 (W).

Furthermore,

"The urgency of commercial interest... may justify the application of Rule 6(12) no less than other interests and, for purposes of deciding upon urgency, I must assume that the applicant's case is a good one and that it has a right to the relief which it seeks." – See Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd 1982(3) SA 582 (W) approved in Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001(2) SA 203 (SE) at 213E-F.

[38] On the facts before me, I am persuaded the matter is sufficiently urgent so as to entitle the Applicant to a hearing out of the ordinary course. The Applicant requires the relief solely to ensure the proper lawful procedure is followed. A hearing in due course may not be of practical value given the Respondents continued cooperation in their efforts to carry out this charade.

[39] I am of the view that in this matter the right that the Applicant seeks to protect is established and there is a well grounded apprehension of irreparable harm if the relief is not granted. A refusal to confirm this Interim Interdict pending adherence to the terms of the Articles of Association will militate detrimentally against Applicant's interests.

[40] In the result:

1. The Application succeeds and the First and Second Respondents are interdicted from transferring their shares in Carter Trading (Pty) Ltd to the Third Respondent or any other third party until such time as they have adhered to the terms of the Articles of Association of Carter Trading (Pty) Ltd pertaining to the procedures set out for the sale of shares in such company.
2. First, Second and Third Respondents are ordered to pay the costs of this Application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

MAGEZA AJ

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