

SOUTH AFRICA / JUDGMENT

Koekemoer and Another v Virtual Benefit Solutions Tech (Pty) Ltd and Another (2023/082132) [2023] ZAGPJHC 997 (7 September 2023) [2023] ZAGPJHC 997

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2023/082132

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023 – 082132

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the application by

KOEKEMOER, HENDRIK LAMBERT First Applicant AMILKE HOLDINGS (PTY) LTD Second Applicant And VIRTUAL BENEFIT SOLUTIONS TECH (PTY) LTD First Respondent AMILKE SOUTH AFRICA (PTY) LTD Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Reconsideration of interim interdict in terms of Rule 6(12)(c) – de novo hearing

No case made out by applicants – application brought on behalf of applicant that was not a party to the agreement relied upon and not entitled to cancel the agreement

Order

[1] In this matter I make the following order:

1. The order granted on 18 August 2023 is discharged;
 2. The application is dismissed;
 3. The applicants are ordered to pay the costs of the first respondent, jointly and severally the one paying the other to be absolved.
- [2] The reasons for the order follow below.

Introduction

- [3] This matter came before me in the Urgent Court and in terms of rule 6(12)(c) of the Uniform Rules on 28 August 2023. I was called upon to reconsider an interim interdict granted in the Urgent Court.

The interim interdict was granted ex parte on 18 August 2023,[1] with a rule nisi calling on the respondents to show cause on 4 October 2023 why an order declaring that the agreement between the second applicant and the first respondent had been cancelled on 10 August 2023 should not be made together with orders for the delivery up of goods, stock and records, and intellectual property, and ancillary relief. The interim interdictory relief provided inter alia that the first respondent be interdicted from disposing of the second respondent's assets, accessing the second respondents premises, accessing, and copying or using any of the second respondent's incorporeal assets including the intellectual property. The second respondent was in turn interdicted from disposing of its assets. The Sheriff of the High Court was authorised to enter the business premises of the second respondent. As will be shown below, it is a mystery why the applicants sought an interdict to permit the Sheriff to access the second respondent's premises as the second applicant is the sole shareholder of the second respondent and the first applicant is the guiding force behind the second respondent. The second respondent was at all times at liberty to allow the Sheriff into its premises.

- [4] The first respondent filed an affidavit in support of an application in terms of rule 6(12)(c) for a reconsideration of the order. The rule provides that "a person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter

for reconsideration of the order." The sub-rule envisages a rehearing of the application[2] and a court will have regard to all the papers filed of record and not only to the papers filed by the applicant in the initial

application.

The rehearing is not a review of the initial order. The application is heard de novo and the onus is not affected by the fact that the initial order was granted. The court now has the benefit of argument on behalf of respondents as well as in most cases answering affidavits and replying affidavits.

[5] While preparing this judgment I extended an invitation to all parties to submit written argument by 5 September 2023 on the subject of locus standi as it became apparent that neither side dealt with his aspect sufficiently in argument. The applicant accepted the invitation and

filed written argument on 5 September 2023, together with a notice by the second respondent abiding the relief sought by the applicants and a resolution by the second respondent in support of the application and appointing the applicants' attorneys to also act for the second respondent. I do not find it necessary to decide whether these two documents are properly before me and would not allow the documents without entertaining argument from the first respondent.[3]

[6] The first applicant and the two respondents entered into a tripartite written sale of business agreement[4] on 15 March 2023. On 3 April 2023 they entered into a second agreement[5] (styled the 'restated and amended agreement') with a view to amending certain clauses of the agreement. I refer in this judgment to the agreement as it was amended.

The second applicant is referred to as the sole shareholder of the second respondent in the agreement.[6]

[7] As will be shown below the applicants misconstrued the agreement. It is alleged in paragraph 20[7] of the founding affidavit that the first respondent and the second applicant concluded the agreement. The agreement was in reality

concluded by the second respondent and not by the second applicant. What was sold, was the business of the second respondent as defined, not the ownership of the second respondent i.e. its shares.

[8] The second applicant does not have locus standi to sue on the agreement. The first respondent would have locus standi but it is not seeking any relief and is not cited as an applicant.

The first applicant was not the seller and was a party to the agreement because the agreement contained restraint of trade provisions binding on the first applicant as well as the second respondent.

[9] The applicants approached the Urgent Court on an ex parte basis in reliance on an agreement that simply does not exist. In the draft order handed up in court on 18 August 2023 the applicants sought and obtained an interim order aimed at a final order declaring that the agreement "between the second applicant and the first respondent" was validly cancelled. The second applicant was however not a party to the agreement and the seller was not the second applicant as alleged, but the second respondent.

[10] On reading the agreement it is clear that it was the second respondent and not either of the applicants that was potentially entitled to cancel the agreement because of non-payment. It is not alleged or shown that the first respondent breached the agreement in respect of any obligation owed to the first applicant and no right to cancel accrued to the first applicant to cancel the agreement. The second applicant could never have the right to cancel the agreement as it was not a party to it.

The two applicants therefore lacked locus standi to bring the application and the application must fail for this reason.

[11] The agreement provided for the sale[8] of the business conducted by the seller (the second respondent) to the purchaser (the first respondent). The business is described[9] as the operation of a medical technology company specialising in the manufacture of portable medical technology devices. The business is comprised of sale assets defined in the agreement.[10] It is important to note that the sale was not a sale of shares and that ownership of the shares in the second respondent did not change hands.

[12] The first respondent was already in possession of the sale assets by 1 December 2022.[11] The agreement records that the purchaser had already been placed in possession and control of the business at signature date as a means of familiarising the purchaser with the operation of the business.[12]

The agreement provided for the second respondent's liability for debts incurred prior to the transfer of the business.[13]

[13] The agreement became effective on the closing date, being the first business day following the date on which the last of the conditions

precedent were fulfilled.[14] These conditions had to be fulfilled by 3 April 2023.[15] it is common cause that the conditions were fulfilled and the closing date was therefore Tuesday, 4 April 2023. One of the conditions was that the second applicant as sole shareholder of the second respondent pass special resolutions as required by section 112 and section 115 of the Companies Act, 71 of 2008.

[14] In terms of the agreement the seller (the second respondent) and the first applicant who was the guiding force behind the second

respondent were bound by a restraint of trade clause.[16] During the restraint period of three years the first applicant and second respondent were restrained from working in the same industry

and competing with the first respondent.

- [15] The purchase price of \$5,563,000[17] was payable in 18 equal monthly instalments[18] commencing on 4 April 2023.[19] No party had the right to defer, adjust or withhold any payment due to the other in terms of or arising out of the agreement or set off or by way of a counterclaim.[20]
- [16] It is common cause that the first respondent made some payments but did not pay all amounts as they fell due. It is also common cause that the first respondent was in breach of the agreement. On 6 May 2023 the first respondent's attorneys addressed a letter to the applicants' attorneys indicating that the first respondent "would make up for the missed payment at the end of the term of the contract by adding an extra month thereto." [21] This was of course an attempt to amend the agreement.
- [17] Clause 25 provides that in the event of a breach of obligations by either party the aggrieved party shall have the right after giving seven days' notice in writing and if the breach is then persisted with to cancel the agreement, to seek specific performance, to claim damages, or to exercise other rights available to it in law.[22]

The reference to "either party" in clause 25 would seem to be a reference to the first and second respondents as purchaser and seller as it is difficult to see how the first applicant would be entitled to give notice of a breach by the first respondent. The first respondent's obligations were to the second respondent and not to the first applicant, and the second applicant was not the party to the agreement and could not act in terms thereof.

- [18] On 1 August 2023[23] the applicants' and second respondent's attorney wrote to the first respondent's attorney on behalf of the second respondent, recording that only \$30,000 had been paid towards the indebtedness. The attorney demanded that the breach be rectified within seven days failing which the second respondent would institute legal action for an order of specific performance and damages, or cancel the agreement and claim damages. The confusion in the minds of the applicants in respect of the identity of the seller appears from paragraph 26 of the founding affidavit[24] where it is alleged that the demand was made on behalf of the second applicant. It is clear from the letter itself that the attorney's

client is identified as the second respondent.

- [19] Payment was not forthcoming and on 10 August 2023 the second respondent purportedly cancelled the agreement in writing[25] and reserved the right to claim damages. I need not decide whether the first respondent could remedy its default within 7 days by paying the outstanding instalments or whether the full purchase price was now payable as stated in the letter of demand, and nor would it be proper to make an obiter comment on the question whether the second respondent was now entitled to cancel.
- [20] In the founding affidavit it is alleged[26] that the second applicant cancelled the agreement. It bears repetition that the second applicant had no right to cancel the agreement as it was not a party to the agreement.

[21] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 7 SEPTEMBER 2023.

COUNSEL FOR THE APPLICANTS: M H NIEUWOUDT INSTRUCTED BY: COETZEE ATTORNEYS
COUNSEL FOR THE FIRST RESPONDENT: K M BOSHOMANE INSTRUCTED BY: LANHAM-LOVE
GAILBRAITH VAN REENEN ATTORNEYS DATE OF ARGUMENT: 28 AUGUST 2023 (additional written argument filed by applicants on 5 September 2023) DATE OF JUDGMENT: 7 SEPTEMBER 2023

[1] Caselines 01-126.

[2] See Van Loggerenberg Erasmus: Superior Court Practice RS 20, 2022, D1-86D to 89 and Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkiers A/S (in liquidation) [2019] 3 All SA 321 (SCA) paras 12 to 14.

[3] The second respondent now makes common cause with the applicants.

[4] Caselines 01-25. The agreement provides for arbitration in terms of the expedited rules of the Arbitration Foundation of Southern Africa in clause

24. The clause contains the 'usual' proviso that the arbitration clause does not preclude any party from access to court for interim relief in respect of urgent matters, and there is a second proviso in terms of which the parties shall have the right to approach the High Court in the ordinary course in order to utilize the provisions of rule 6 and rule 8.

[5] Caselines 01-82.

[6] Clause 2.2.2, Caselines 01-29.

[7] Caselines 01-13.

[8] Clause 3, Caselines 01-33 and clause 6, Caselines 01-38.

[9] Clause 2.2.4, Caselines 01-29.

[10] Clause 2.2.33, Caselines 01-32.

- [11] Clause 3.3, read with clause 2.2.38, Caselines 01-33 and clause 8.1, Caselines 01-40.
- [12] Clause 3.2, Caselines 01-33.
- [13] Clause 9, Caselines 01-41. These liabilities are referred to as retained liabilities.
- [14] Clause 2.2.7, Caselines 01-29.
- [15] Clause 5 as amended, Caselines 01-36 and 01-85.
- [16] Clause 20, Caselines 01-53.
- [17] Clause 7.1, Caselines 01-38.
- [18] In other words, \$309,056 per month.
- [19] Clause 7.2, Caselines 01-39.
- [20] Clause 7.8, Caselines 01-40.
- [21] Para 31 of founding affidavit, Caselines 01-102 and 01-141.
- [22] Clause 25, Caselines 01-59.
- [23] Caselines 01-87.
- [24] Caselines 01-16.
- [25] Caselines 01-90.
- [26] Para 29 of founding affidavit, Caselines 01-16.
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Prepared on 11 October 2026 · Esheria