REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 34408/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

11/12/2012
DATE

SIGNATURE

In the matter between:

ASH, CHANAN MOSHE Applicant

and

MANNERING, LAWRENCE HENRY First Respondent

EASTERN SUBURBS MEDICINE SUPPLIES Second Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The present proceedings had their origin in the Urgent Court.

THE RELIEF SOUGHT

[2] The applicant seeks an interim order in terms of Part A of the notice of motion in the following terms:

(a) Dispensing with the forms and service prescribed by the Rules of this honourable court and permitting this application to be heard as one of urgency;

(b) Pending the final determination of the relief set out in Part B below, the first respondent be:

(i) interdicted and restrained from directly or indirectly interfering with the applicant in the exercise of the applicant's member's interest in the second respondent;

(ii) directed to recognise the applicant's 95% membership interest in the second respondent;

(iii) directed to grant the applicant full access to all books, records and other documents of and relating to the second respondent and its business and affairs;

(c) Directing that the costs be reserved for determination with the relief in Part B below;

(d) Granting further and/or alternative relief.

From the papers described above, the applicant effectively seeks to interdict the first respondent from interfering with the exercise of the applicant's 95% member's interest in the second respondent, and to recognise the applicant's 95% membership interest in the second respondent; and directing the first respondent to grant applicant access to information and records of the second respondent and its business and affairs.

[3] At the conclusion of the argument on 5 December 2012 I granted an order as sought by the applicant. At the same time I undertook to furnish reasons for the granting of the order, if required. What follows hereafter constitute such reasons.

THE PARTIES

[4] The applicant is a businessman trading from Sydenham, Johannesburg. The first respondent, the only opponent to the present application, is a professional pharmacist practising as such at the second respondent's address, i.e. Rietfontein Road, Primrose, Germiston, Gauteng. The second respondent is a close corporation duly registered and incorporated in terms of the Close Corporations Act 69 of 1984. Prior to 1 July 2012 the first respondent was the sole member of the second respondent. Prior to the discussions and negotiations leading to the conclusion of the sale agreement, the first respondent had resolved to divest

himself of the business of the Corporation. To this end, he sought somebody who was interested in taking over the business as a going concern. Alternatively, somebody to purchase his entire member's interest in the Corporation, the second respondent. The first respondent proceeded to make his intention public. The applicant is one of the persons who responded to this invitation. The applicant seeks no relief against the second respondent in these proceedings.

THE COMMON CAUSE FACTS

[5] The papers are rather voluminous since both parties each filed two sets of supplementary affidavits. I am, however, prepared to adjudicate the matter on the basis of all these affidavits. The papers reveal that the following can safely be regarded as common cause. The first respondent had been operating the pharmacy business of the second respondent since about 1970. The second respondent was initially a private company but later converted to a close corporation. The first respondent at all times conducted the business of the Corporation/or the second respondent as a sole proprietary. On 1 July 2012 the applicant and the first respondent concluded a written sale agreement in terms of which the applicant acquired from the first respondent 95% of the member's interest in the second respondent ("*the Corporation*"). The remaining 5% member's interest is held by the first respondent. The sale agreement was attached as annexure "FA1" to the founding affidavit. It is further common cause that pursuant to the sale agreement, 95% of the member's interest in the Corporation was transferred from the first respondent

to the applicant. It is also not in dispute that the parties engaged in certain negotiations prior to the conclusion of the agreement. These negotiations were crystallised in both a memorandum, annexure "RA19", ("*the memorandum*"), and an oral agreement which recorded certain of the salient terms to be included in the envisaged written sale agreement. The memorandum was signed by both parties on 27 June 2012. The applicant is not a pharmacist by profession.

[6] The applicant, whilst contending particularly that the first respondent misled him on certain issues pertaining to the Corporation, during the negotiations, however, seeks to enforce the sale agreement. The applicant who also conducts a pharmacy business in Yeoville, Johannesburg, further contends that the first respondent has since changed his attitude pursuant to the signing of the agreement. More particularly, the applicant alleges that the first respondent has refused to permit him to exercise his rights as a 95% member of the Corporation. These complaints include the exclusion of the applicant from the business and affairs of the Corporation by the first respondent; the refusal to permit the applicant access to information, books and records of the Corporation; the denial or refusal to allow the applicant insight into the Corporation's financial affairs or information and the failure of the first respondent to comply with the provisions of clause 1.18.2 of the sale agreement. The latter clause provides that:

> "*The purchaser is irrevocably reflected as the sole signitor of the banking accounts of the Corporation as also all other accounts which the Corporation might have, including inter alia, the business's account*

with Messrs Nedbank and the internet banking and all other banking, investments accounts or deposit with financial institutions."

THE APPLICANT'S CASE

[7] Based on the above and other supplementary concerns, the applicant contends that he is vulnerable to the first respondent's conduct as well as the risk of the first respondent causing financial losses to the Corporation. The applicant is apprehensive that in the event of the present relief not being granted, he will in all probabilities suffer irreparable harm, the loss whereof he would be unable to quantify due to the conduct of the first respondent. According to the applicant, the granting of the relief sought can occasion no harm to neither the respondent nor the Corporation.

THE FIRST RESPONDENT'S CONTENTIONS

[8] In the initial answering affidavit filed in the Urgent Court, the first respondent contended that the applicant was unable to comply with his obligations in terms of the sale agreement. The essence of the first respondent's opposition to the instant application is that he is not bound by the sale agreement and now wishes to resile therefrom. Several reasons are advanced for this contention. He says that on the date of the signing of the agreement, i.e. 1 July 2012, he was busy at work at the Corporation when the applicant arrived with the prepared sale agreement. At that time, he was under severe emotional pressure in addition to the normal pressures of work.

[9] The applicant was rather in a hurry to have the agreement signed. Further that the applicant represented to the first respondent that the written agreement fully accorded with the provisions of the parties' prior oral agreement, and did not contain any terms which were at variance with previous discussions and negotiations. The first respondent had wished to first have his son, a candidate attorney, peruse the agreement prior to signing it. However, due to the circumstances described above, the first respondent on that date proceeded to sign the sale agreement without reading same. This was allegedly based on the assurances and representations made by the applicant to the effect that the written agreement was in accordance with the previous oral discussions. After the signing of the agreement, the first respondent alleges that the applicant undertook to provide him with a copy of the signed agreement but never did so until much later.

[10] There were discussions and a meeting between the parties in the interim. However, on 27 July 2012, some four days after the signing of the agreement, the firs respondent says that the applicant arrived at the Corporation business with a copy of the signed agreement. The first respondent later handed the copy of the agreement to his candidate attorney son, that same evening to study. I must mention at this stage that the first respondent also raised in the opposing papers certain contentious issues which, in my view, are not strictly relevant to the determination of the present relief sought by the applicant. These issues, in the main, are about the Corporation's bank overdraft facilities at Nedbank Limited; the alleged release of the first respondent from suretyships given by the first respondent on behalf

of the Corporation to Nedbank Limited and to suppliers; the alleged amendment of clause 5.1 of the agreement by the applicant; the seemingly excessive stock to the value of R500 000,00 already bought by the applicant from a company called Proctor and Gamble on behalf of the Corporation; and the payment by the applicant of the deposit of R150 000,00 in terms of the sale agreement. On the basis of these and other contentions, the first respondent, rather lamely, contends that there are present in this application genuine disputes of fact which are incapable of resolution on the affidavits. To this end, so the argument proceeds, the Court is urged upon to dismiss the application. I deal later hereinafter with this argument.

[11] On 26 July 2012, the first respondent was advised by his son and his attorney principal, pursuant to them studying the agreement, that the agreement in fact contained no terms that the first respondent should be released from his suretyships. It is significant that even at that stage the first respondent, on his own version, had not yet read the agreement. The first respondent thereafter made certain enquiries by visiting the applicant's pharmacy at Yeoville, Johannesburg, and by contacting various pharmaceutical suppliers regarding the applicant's standing in the pharmaceutical profession. The results of the inquiries, in my view, are of no consequence to the determination of the pertinent issues in this application.

[13] In the light of the above events, the first respondent instructed his attorneys of record to address a letter to the applicant conveying that he, "*was no longer prepared to implement the agreement of sale ...*". The letter,

annexure "FA2" to the founding papers, was dated 2 August 2012. It is necessary to reproduce in full the contents of this letter. It reads as follows:

> *"We act on behalf of Lawrence Henry Mannering on whose instructions we address this letter to you. We are instructed that on 1 July 2012 and at Primrose, you and our client entered into an agreement in terms whereof our client purported to sell to you his 95% of his member's interest in Eastern Suburbs Medicine Supplies CC. The agreement furthermore provided that our client shall grant you sole signing powers on the bank account of the Close Corporation, and control over all other banking, investment accounts or deposits with financial institutions. It was an implied, alternatively a tacit term of the aforesaid agreement that you will release our client as a surety in respect of all liabilities owing by the Close Corporation to a third party including the bankers of the Close Corporation. Our client entered into the agreement based on the representation that you would be in the financial position to indemnify our client against all such claims of a contingent nature including his release as surety in respect of any liability owing by the Close Corporation to a third party. Based on information that has come to our client's attention, it appears that you do not have the financial wherewithal to procure our client's release as a surety or to indemnify him against any claims by third parties. Had our client known the true facts, he would not have entered into the agreement with you at all. In the circumstances, no consensus was reached between the parties as a result of the aforesaid misrepresentation which representation was material to our client when he entered into the agreement with you. In the circumstances, our client has elected to resile from the agreement and we hereby wish to inform you that our client will not implement the agreement of sale. We trust that you find the above in order."*

[14] The first respondent, in short, contends that there was no agreement based on the alleged misrepresentations made by the applicant when he signed the agreement on 1 July 2012. In this regard, the first respondent alleges that it was only when he read the agreement on 7 August 2012 that he realised that the terms of the written sale agreement were at variance with what had been discussed and agreed previously. For this reason, the allegation is that the first respondent had been "*tricked*" into signing the

written agreement. He says that he did not read the agreement when he signed it. He wants to resile from the agreement. The applicant in the replying papers denies strongly the version of the first respondent in this regard.

SOME APPLICABLE LEGAL PRINCIPLES

[15] The above contentions of the parties, which are plainly at variance, require to be considered against the applicable legal requirements. From the papers it is clear that the applicant seeks an interim interdict. In *Setlogelo v Setlogelo* 1914 AD 221 at 227 Innes JA said:

> *"So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."*

See also *V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) para [21]. The requirement of the balance of convenience, a discretionary matter, also comes into play, as is the granting of an interdict. In *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D&CLD) at 383C-F:

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate*

ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

See also *Admark (Recruitment) (Pty) Ltd v Botes* 1981 (1) SA 860 (W) at 861C-D. It is trite law that the *onus* is on the applicant for an interdict to make out a case for such relief on a balance of probabilities.

[16] The legal principles applicable to the granting of interim relief or final relief somewhat overlap. In the instant matter the applicant seeks interim relief only. In *Johannesburg Municipal Pension Fund and Others v City of Johannesburg* 2005 (6) SA 273 (W) at para [8] Malan J (as he then was) said:

"*[8] The requirements for the granting of an interim interdict are set out in Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 372E-G. They are (a) that the right which is the subject-matter of the main application and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt; (b) if such case is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and the applicant ultimately succeeds in establishing his or her right (Bester v Bethge 1911 EDL 18; Malan v Dumas 1920 CPD 357; Collett v Priest 1931 EDL 27; Ncongwane v Molorane 1941 OPD 125; Stern and Ruskin NO v Appleson 1951 (3) SA 800 (W); Meyer NO v Netherlands Bank of SA Ltd and Another 1961 (1) SA 578 (GW); Steenkamp v Steenkamp 1966 (3) SA 294 (T); Bricktec (Pty) Ltd v Pantland 1977 (2) SA 489 (T)); (c) there is no other satisfactory remedy; and (d) the balance of convenience favours the granting of interim relief. There are different formulations of the approach to be taken in granting interim relief. In Van Woudenberg NO v Roos 1946 TPD 110 Malan J held at 114 that it was sufficient for an applicant in interdict proceedings pendente lite to satisfy the Court that he had a reasonable prospect of*

success in the main action although there was no definite preponderance of probabilities in his favour:

> *'Such a view appears to be in accord with the language of Innes JA in Setlego's case [1914 AD 221], namely, "in cases where the right asserted by the applicant though prima facie established, is open to some doubt". ... In the vast majority of cases it would be difficult to determine on application where the probabilities lie without resorting to viva voce evidence which, in most cases, would be co-extensive with the evidence which would be led in the main action. Such hearing may involve protracted proceedings. The granting of interdicts on application will be virtually restricted to cases where the facts are not in dispute, which obviously appears to me to be undesirable.'*

In Mariam v Minister of the Interior and Another 1959 (1) SA 213 (T) Roper AJ (as he then was) accepted the traditional approach as set out in Webster v Mitchell 1948 (1) SA 1186 (W) (but see Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688) and said, while dealing with the construction of the word 'hold' as used in specific legislation, that he did not have to make a final decision on the meaning of the word:

> *'I have merely to consider whether the applicant has made out a case sufficiently strong to apply the rule in the case of Webster v Mitchell; therefore when I express a view in regard to the interpretation in part of the statute, I am expressing a prima facie view; it would be impossible to express anything else. In view of the fact that this case will come to trial at some time, when the Court which tries the case will have to make a final decision as to the meaning of the phrase as set out by the Legislature, if I were to purport to give a final decision as to the meaning of any part of the Act, I would be taking upon myself to pre-judge the trial, and I certainly have no intention of doing so. It is sufficient to say that I have expressed my view upon the legal argument put before me ... namely, that prima facie there is substance in the argument.'*

(At 218C-E.)"

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

[17] In applying the above legal principles to the facts of the present matter, I now turn to the pertinent question whether the applicant has established a

clear right. In the process, regard is to be had to the first respondent's version.

[18] Indeed, the common cause facts reveal the following. The applicant, by virtue of the sale agreement, acquired 95% member's interest in the Corporation, the second respondent. The first respondent has, since the conclusion of the sale agreement, been in physical control and running the business of the Corporation to the exclusion of the applicant. It is plain that by acquiring 95% member's interest in the Corporation, the applicant has established a clear right. It is the right to the benefit of the sale agreement. It is a right to participate unfettered in the conduct of the business of the Corporation. The 95% member's interest has already been transferred to the applicant. The applicant, as a result, is entitled to have access to the Corporation, including unqualified access to all the books, records and other documents of and relating to the Corporation and its business affairs as claimed in the notice of motion. In my view, this amounts to more than a *prima facie* right.

[19] The applicant has no alternative remedy. The question of damages as an alternative relief would be unsatisfactory. The persistent exclusion of the applicant from exercising his right as a 95% member in the Corporation exposes the applicant to continued suffering and prejudice. In any event, any claim for damages later will be difficult to quantify. See *Vendomatic (Pty) Ltd v J T International South Africa (Pty) Ltd* reported on SAFFLI as [2008] ZAWCHC 98 (on 24 December 2008) at para [26]. In an unreported judgment

of *Bottom Line Solutions (Pty) Ltd v F P T Group (Pty) Ltd* (WCC) Case No 18171/11, handed down on 26 November 2011, at para [50], Gamble J said:

> "*The applicant's election to hold the respondent to the main agreement is a right which is only available to the applicant to exercise. The respondent does not enjoy the right to choose to pay damages instead of being required to render specific performance.*"

[20] It is plain that on the facts of this matter, the well-grounded apprehension of irreparable harm that the applicant will suffer if the interim relief is not granted is that he will be precluded from enjoying the benefit of his 95% member's interest in the Corporation (*cf Maroudus v Curich* 1924 (W) 249). It is trite law that the Courts are expected to enforce agreements unless they are offensive or unlawful or immoral or against public policy. See *Afrox Health Care Bpk v Strydom* [2002] 4 All SA 125 (SCA). The threatened invasion of a party's right under an agreement is proof of reasonable apprehended injury for purposes of an interdict. See *V & A Waterfront Properties (Pty) Limited and Another (supra)* at paras [20] to [22]. It is truly not equitable and just to expect the applicant to await the final determination of the matter before taking effective control of the Corporation. The balance of convenience equally favours the granting of interim relief. The argument advanced on behalf of the first respondent that there will be no prejudice to the applicant, as matters stand presently and in future, is without merit at all. So too, is the submission made in closing argument that there are present on the papers material disputes of facts that make the matter incapable of resolution. The issues raised by the first respondent in this regard, namely

the terms of the agreement; the terms of the oral agreement; the circumstances under which the agreement came to be signed; the financial status of the second respondent; and the supply of documentation and information to the applicant by a Mrs Sue Johnstone of the second respondent, are all matters to be fully and properly ventilated at the main hearing. In any event, the version of the first respondent on some of these issues, as shown briefly below, seems highly improbable. The test in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634H-I, is inapplicable in the present proceedings. The applicant does not seek a final interdict.

THE ANALYSIS OF THE FIRST RESPONDENT'S VERSION

[21] The version of the first respondent for present purposes, is discreditable for a number of good reasons. At the heart of his version is the first respondent's assertion that he was "*tricked*" into concluding the sale agreement on 1 July 2012 by the applicant. In this regard the contention is that the applicant falsely misrepresented to him that the written agreement was in the same terms to what had previously been discussed. The first respondent did not read the agreement when he signed it due mainly to his alleged emotional state of mind. He only did so on 7 August 2012 when he discovered the issues forming the subject-matter of his present unhappiness. This is also the basis for the first respondent wanting to resile from the agreement.

[22] On his version, the *onus* rests on the first respondent. See *Da Silva v Janowski* 1982 (3) SA 205 (A). In *Afrox Health Care Bpk (supra)* the Court held that the fact that a party (the respondent) had not read the contents of the document prior to signing it did not mean that he was not bound thereby. A person who signs a contract without reading it does so at his own risk and is bound by the contents as if he was aware thereof. See also *Burger v Central South African Railways* 1903 TS 571. See also *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A-B.

[23] The first respondent, a businessman and a pharmacist from at least 1970, has not advanced credible reasons why he only read the sale agreement some thirteen days after he received it. In addition, his version that the written agreement was at variance with the prior discussions, is contradicted by the contents of the memorandum which the parties signed on 27 June 2012. The contents of the memorandum appear to corroborate substantially the terms of the written agreement in several respects. I need not detail these for present purposes. Furthermore, the version that the first respondent was "*tricked*" into concluding the written sale agreement was never mentioned in the first letter written on his behalf by his attorneys to the applicant. The letter, as stated before, is annexure "FA2", quoted earlier in this judgment and was dated 2 August 2012. It is equally significant on his version that the second respondent only read the agreement on 7 August 2012. This implies that when annexure "FA2" was prepared by his attorneys of record on his behalf on 2 August 2012, neither the applicant nor his attorneys knew the contents of the written agreement. I find this highly

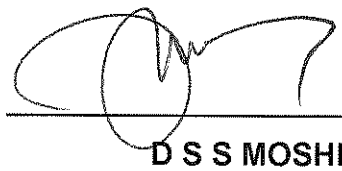
improbable. The submission made by counsel for the applicant in closing argument that the first respondent's version is not only fanciful and far-fetched, but in fact false and inherently improbable, was not without merit.

THE FIRST RESPONDENT'S APPLICATION TO STRIKE OUT

[24] The first respondent also brought an application to strike out certain paragraphs of the replying affidavit. This, on the basis that such affidavit introduced new matter. The first respondent also argued that in the event that such new matter was not struck out, he sought leave to introduce a fourth set of affidavits dealing with such new matter. The application to strike out has no merit at all as it does not meet the required tests. (Compare *Titty's Bar and Bottle Store v A.B.C. Garage and Others* 1974 (4) SA 362 (T).) The applicant plainly did not possess the information in the replying affidavit when the founding papers were filed. In fact no justifiable reason has been advanced for the granting of leave to file a fourth set of affidavits. See *Transvaal Racing Club v Jockey Club of SA* 1958 (3) SA 599 (W) at 604A-E. In any event, such set of affidavits are unlikely to prevent the granting of the relief under discussion. I deem it unnecessary to deal with the first respondent's counter-application wherein he seeks that the 95% member's interest in the second respondent, currently registered in the name of the applicant, be transferred back to him. The counter-application was not pursued in closing argument, and for good reason, in my view.

CONCLUSION

[25] Having considered all the circumstances and facts of the matter, I conclude that the applicant has satisfied the requirements for the granting of interim relief as prayed for in Part A of the notice of motion dated 11 September 2012. These constitute the reasons for the order which I granted on 5 December 2012. It has become necessary to order that the applicant is to institute the proceedings under Part B of the Notice of Motion within one month of these reasons, which I hereby do.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	5 DECEMBER 2012
DATE OF REASONS	11 DECEMBER 2012