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/IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 1S256/2012

In the matter between:

HARTBEES BRICK WORKS (PTY) LTD

Plaintiff

and

SZAMOSVARI D S

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] In terms of a written sale agreement concluded on 21 February 2012, the plaintiff, a private company, sold its brick-making business to the defendant.

[2] Although the defendant took possession of the business, he failed to make payment of the total purchase price in the amounts and on the times agreed upon between the parties.

- [3] As a result, the plaintiff instituted the present action, claiming payment of an amount of R 800 000, 00 and certain ancillary relief.
- [4] The defendant has raised three special pleas and I was informed at the inception of the trial that, by agreement between the parties, only the second special plea will proceed.
- [5] I consequently granted an order separating the issues pertaining to the second special plea from the remainder of the issues between the parties.

AMENDMENT

- [6] After evidence and closing argument pertaining to the special plea was finalised, I reserved judgment in order to afford the parties an opportunity to file further heads of argument.
- [7] With its heads of argument and on 29 January 2014, the plaintiff filed an application of intention to amend its reply, which application was opposed by the defendant. The subsequent application to amend was argued on 25 February 2014 and I reserved judgment in the application. I will deal with the merits of the application in due course.

SECOND SPECIAL PLEA: SECTION 228 OF THE COMPANIES ACT, 61 OF 1973

- [8] The provisions of the, now repealed, Companies Act 16 of 1973, is applicable to the dispute and the Act will herein after be referred to as the 1973 Act. For

purposes of the special plea, it is common cause between the parties that the sale of the plaintiffs brick-making business constitutes a sale of the whole or the greater part of the undertaking of the plaintiff *alternatively* the whole or greater part of the assets of the plaintiff.

- [9] In the aforesaid circumstances, the provisions of section 228 of the Act applies. The provisions read as follows:

“(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by special resolution of its members, to dispose of-

- (a) The whole or greater part of the undertaking of the company; or*
- (b) The whole or greater part of the assets of the company.*

(2)

(3) A special resolution of a company shall not be effective in approving a disposal described of in subsection (1) or (2) unless it authorises or ratifies in terms of the specific transaction. ”

- [10] Ms Dreyer, counsel for the defendant, submitted that compliance with the provisions of section 228 is, in itself, not sufficient. In support of the aforesaid submission, she stated the following in her heads of argument:

"6. special resolution so passed:

6.1 *must be registered with the Registrar of Companies within one month of the passing of the special resolution; [section 200]*

6.2 *which is not lodged with the registrar in register within six months from the date of the passing of the resolution shall lapse and be void;*

[section 202]

6.3 *shall not take effect until it has been registered by the registrar.*

[section 203]"

- [11] It is clear from the pleadings and the evidence of Mr. Lau, who testified on behalf of the

plaintiff, that the plaintiff did not comply with the provisions of section 228.

[12] Although it was at all relevant times the plaintiff's stance that the plaintiff did not need to comply with the provisions of section 228 due to the fact that Mr Lau is the sole shareholder and director of the plaintiff, the plaintiff sought to amend its . reply to include an alternative to its aforesaid position.

[13] In paragraph 5 of the defendant's plea, the defendant averred that the sale agreement is not enforceable in law and in the subsequent paragraphs he deals with the requirements of section 22 which were not complied with.

[14] The proposed amendment of the plaintiff's its reply to the aforesaid averments reads as follows:

"5.1 The content of this paragraph is denied and the Defendant is put to the proof thereof.

*5.2 In the event that the Honourable Court may find that the Sale Agreement is not enforceable at law, which is still denied, then and in that event the plaintiff pleads that on or about 21 January 2014 and at or near Pretoria, a special resolution, authorizing and ratifying the Sale Agreement between the Parties, was adopted by the Plaintiff. A copy of the resolution is attached hereto and marked **ANNEXURE "PA1".**"*

[15] Mr Carstensen, counsel for the defendant in the application to amend, submitted that the proposed amendment will have no legal effect and should for this reason alone be dismissed.

[16] His submission is premised on the following:

- i) the plaintiff does not aver that the special resolution has been registered by the Registrar as envisaged in section 200 of the Act;
- ii) section 203 of the Act provides that a special resolution is not effective until it had been registered by the Registrar in terms of section 200;
- iii) consequently the proposed amendment to the plaintiffs reply will not cure its non-compliance with the Act and has no effect.

[17] I agree and consequently the plaintiffs application to amend its reply cannot succeed.

EVIDENCE

[18] Mr Lau was the only witness on behalf of the plaintiff.

[19] He testified that, although he is the sole shareholder and director of the plaintiff, ■ his wife, Laura Lau, run the plaintiffs brick making business. He was approached by the defendant, who indicated that he wishes to purchase the brick making business.

[20] During January 2011 he had a meeting with his attorney, at which meeting both

his wife and the defendant was present.

[21] Subsequent to the meeting, he signed a document titled "*Special resolution*" at the offices of his attorney. The document was signed to enable Mrs Lau to conclude the negotiations and enter into a written agreement with the defendant.

[22] The document reads as follows:

*"I, CHUN KAU LAU (ID: 6.....), as a director of HARTEBEES BRICK WORKS, gives Mrs YUE GUI LAU (ID: 7.....) permission and mandate to Sell HARTEBEES BRICK WORKS and sign all the necessary documentations.
You can contact me directly if you have any enquiry."*

[23] Mr Lau signed the document in his capacity as director of the plaintiff.

[24] The document was not registered with the Registrar of Companies.

LEGAL POSITION

[25] It is clear that the plaintiff did not comply strictly with the provisions of the Act.

[26] The question then arises whether the steps taken by the plaintiff satisfy the purpose of section 223 of the Act.

SUBSTANTIAL COMPLIANCE

[27] In *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 SCA, Olivier JA dealt with the issue of substantial compliance of a provision of an Act and held as follows at 659B-F:

"It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirements in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434A-B). "

- [28] It is of importance to determine which legal interests an enactment achieves to protect. This much was confirmed by Trollip J in *Du Preez and Another v Garber: In Re Die Boerebank Bpk* 1963 (1) SA 806 W at 814 D-F

"As in the present case the opposing creditors have strenuously contended that those formalities were not fully complied with in several respects, it is necessary, I think, to affirm at the outset that the Court will not insist upon absolute or meticulous observance of all those terms and requirements, but will generally act on a substantial compliance therewith, if no prejudice or possible prejudice to anyone's legal interests has resulted from the non-observance of the prescribed formalities."

[29] In the premises, it is necessary to determine whose legal interests section 228 read with section 203 seek to protect.

[30] In *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd and Another v Gobel NO and Others* 2011 (5) SA 1 SCA, Lewis JA dealt with the person/s legal interest, section 228 aims to protect and held as follows as para [13]:

"Section 228 (and s 70dec(2) of the Companies Act 46 of 1926, which was in the same terms) was introduced for the protection of shareholders who have given general control of the company to its directors. It is the shareholders themselves who should exercise control over the disposal of the company's major assets." and at para [14]:

*"Van Zyl J said that there was no indication that 'that the public interest or public policy played any part in the intention of the Legislature when it enacted s 228'. 'Accordingly there w/as no reason why a party to a contract, in good faith, need be adversely affected should the company's internal procedures not be followed.'" [Also see: *Simcha Properties 6 CC v San Marcus Properties (Pty) Ltd* [2011] 1 All SA 287 SCA]*

[31] It is clear that Mr Lau, as sole shareholder of the plaintiff, was fully aware of the sale of the plaintiff's assets. To this end, Mrs Lau was specifically mandated to conclude the sale with the defendant.

[32] The defendant has not been prejudiced by the plaintiff's failure to observe the exact provisions of section 228 and the intention of the legislature in enacting

section 228, i.e. to protect shareholders' interests, has substantially been complied with.

[33] This submission cannot be upheld in view of the express finding in *Stand 242 Hendrik Potgieter Road fcuimsig (Pty) Ltd and Another v Gobel NO and Others*,
* ,
supra.

[34] Ms Dreyer submitted that the plaintiffs failure to register the "*special resolution*" is fatal, in that the failure prejudiced the creditors of the plaintiff. According to Ms Dreyer, creditors have the right to know that a company has disposed of the greater part of its undertaking or assets.

[35] In the premises, the defendant's second special plea cannot succeed ORDER:

I make the following order:

1. The plaintiffs application to amendment is dismissed with costs.
2. The defendant's second special plea is dismissed with costs.

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