IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

24/11/14.

CASE NO: 22212/11

In the matter between:

ALUWANI MASALA LUKOTO Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

21/11/14
DATE

SIGNATURE

PRAESCRIPTO (PTY) LIMITED First Respondent

MASALA LUKOTO ENTERPRISES (PTY) LIMITED Second Respondent

IMPERIAL CROWN TRADING (PTY) LIMITED Third Respondent

PRICE WATERHOUSE COOPERS Fourth Respondent

JUDGMENT

Tuchten J:

1 The applicant applied by notice of motion for orders compelling the respondents to procure the delivery of and deliver certain deeds of pledge and cession and CM42 forms held by the fourth respondent (PWC) in trust and compelling the second respondent (MLE) and the third respondent (ICT) to do what was necessary to have certain of

their shares registered in the name of the applicant. During the course of oral argument, counsel for the applicant abandoned the claim in relation to the shares of ICT so I need say no more about it. The case is essentially about whether the applicant is entitled to have the pledged shares in MLE registered in his name.

2 The applicant's cause of action arises from a written agreement (the 2009 agreement) under which he sold 50% of his shares in and loan accounts against MLE to the first respondent, at all times represented by one Du Raan. MLE was at that time the owner of a property, almost 7 ha in extent, in Thohoyandou (Erf 1). The applicant had at one stage held all the shares in MLE but had sold 50% of these shares to Du Raan personally in 2007. The purpose of the 2009 agreement was to divest the applicant of his remaining 50% interest in MLE in favour of the first respondent.

3 The sale of shares in MLE to DU Raan personally is uncontroversial. It is the 2009 agreement which has given rise to the present proceedings.

4 At the time of the sale of shares to Du Raan personally in 2007, Du Raan planned to develop Erf 1, which in 2007 was undeveloped, into a shopping mall, offices, restaurants and a petrol station.

5 The shares and loan accounts sold under the 2009 agreement were described as the "sale equity". The purchase price under the 2009 agreement was R5 500 000. This was to be paid by way of a deposit of R550 000 on transfer or 31 August 2009, whichever was the earlier, R950 000 by 31 July 2010, R2 million by 30 June at the latest and the balance within four months of the payment of the R2 million I have just mentioned.

6 Clause 3.2 of the 2009 agreement provided for certain pledges and cessions of the shares sold under the 2009 agreement as well as of certain shares in ICT, together with blank form CM42 documents to be lodged with PWC. The first respondent at the time held shares in ICT. The same clause expressly provides that the cessions and pledges were to operate

> ... as security for payment by the [first respondent] of the full purchase price payable in respect of the sale equity.

The deeds of pledge and cession and the forms CM42 were to be held by PWC, similarly

> ... as security for payment of the sale equity.

7 Pursuant to clause 3.2, the first respondent executed a deed of pledge and cession (the MLE share pledge) in favour of the applicant in respect of 50 ordinary shares in MLE. But in its terms, the pledge conferred pursuant to the MLE share pledge is wider than that envisaged in clause 3.2 of the 2009 agreement. Clause 1 of the MLE share pledge provides that the pledge is given

> As continuing security for the *obligations* which [the first respondent] owes to [the applicant] ... [my emphasis]

8 Clause 4 of the MLE share pledge provides:

> If at any time during the pledge and cession the [first respondent] commits a breach of any of its obligations set out herein or in the [2009 agreement] and/or if the [first respondent] becomes entitled to claim payment from the [first respondent] in respect of any of the obligations for which this pledge and cession has been given, the [applicant] shall be entitled, and the [first respondent] authorises the [applicant] irrevocably, and in *rem suam*, in his sole and absolute discretion without reference to the [first respondent] and without, if he is able to do so, first obtaining an order of Court:
>
> 4.1 ...
>
> 4.2 ...
>
> 4.3 ...
>
> 4.4 to procure the registration of all or any of the pledged shares into his name ...
>
> 4.5 ...

9 The first respondent did indeed commit a breach of the 2009 agreement. It failed to pay any part of the balance of the purchase price. The applicant says that on about 7 February 2011, he met with Du Raan and an oral agreement was reached in terms of which the 2009 agreement was "declared to be cancelled" and the applicant became entitled to 25% of the shares in ICT together with certain other benefits. This is denied by Du Raan.

10 By letter dated 17 February 2011, the first respondent, through its attorneys, stated that the 2009 agreement had been subject to a "tacitly implied" term that the "development company" would purchase and take transfer of Erf 2 Thohoyandou, which was adjacent to Erf 1. It was also alleged that the applicant had acted in bad faith towards the first respondent and Du Raan and had not only frustrated the development project but had sought to gain personal and untoward advantage by himself trying to acquire Erf 2.

11 The applicant instituted the present proceedings by notice of motion dated 11 April 2001. The first respondent opposed the application on the two grounds stated in the first respondent's attorney's letter dated 17 February 2011.

12 The matter came before Baqwa AJ in the opposed motion court. The learned judge decided that the matter had to go to evidence and ordered, on 5 December 2011, that the matter be referred to oral evidence on two questions:

12.1 whether the purchase consideration due to the applicant and in terms of the agreement was subject to the successful finalisation of the acquisition of Erf 2 ... for development purposes; and

12.2 whether the applicant breached the warranty clauses of the 2009 agreement to the extent that it absolved the first respondent and/or ICT from making payment of the balance of the purchase price at the time as contemplated in terms of the payment clause of the 2009 agreement.

13 By notice dated 29 November 2013, the first to third respondents gave notice that they intended at the hearing of the application to argue, as a point *in limine*, "only the following question of law". The point raised in the notice was that the 2009 agreement

> and accordingly also the ancillary pledge and cession agreements were cancelled by mutual agreement between

the parties on 7 February 2011 and replaced by another agreement.

14 In those circumstances, so ran the argument, the applicant could no longer claim specific performance of the (cancelled) 2009 agreement and as there was no claim in terms of the new agreement, no relief under the notice of motion was competent.

15 When the matter was called before me on 18 November 2014, the applicants, on the one hand and the first to third respondents jointly on the other, were represented by counsel. The fourth respondent, which was not represented before me, abides. Counsel for the opposing respondents proceeded to move a application under rule 33(4) for the separation of the issue raised in the notice dated 29 November 2013 separate from and before the adjudication of all other issues.

16 It did not seem to me convenient to separate the legal issue raised and I dismissed the application under rule 33(4). I then proceeded to hear the evidence on the two issues I have described, as directed by Baqwa AJ in the order of 5 December 2011.

17 The applicant gave evidence. He is a businessman active in the territory of the former Republic of Venda. He denied that the purchase

consideration was subject to the acquisition of Erf 2. He gave cogent reasons for his denial. The applicant denied the allegations of impropriety on his part underlying the second issue referred to evidence by Baqwa AJ. He demonstrated that far from seeking any personal benefit from the proposed acquisition of Erf 2, he had been appointed by Du Raan as Du Raan's or the first respondent's agent and at the specific request of Du Raan, had tried to buy Erf 2 as an undisclosed agent for Du Raan.

18 The opposing respondents adduced no evidence on the two issues referred for evidence. The applicant was a good witness. I have no hesitation in accepting his evidence. The two questions referred for evidence must be answered as follows:

18.1 The purchase consideration due to the applicant and in terms of the agreement was NOT subject to the successful finalisation of the acquisition of Erf 2 for development purposes;

18.2 The applicant did NOT breach the warranty clauses of the 2009 agreement. Neither the first respondent nor ICT was absolved from any liability to make payment of the balance of

the purchase price as contemplated in terms of the payment clause of the 2009 agreement.

19 In the result, the opposing respondents' opposition to the relief sought was ultimately confined to the legal issue raised in the notice dated 29 November 2013. Counsel for the opposing respondents presented a lucid and well researched argument in support of the point taken. It is however regrettable that the matter was protracted by oral evidence which was foreshadowed in the affidavits and which the opposing respondents did not intend to challenge.

20 There can be no doubt that the mere fact that the applicant has been successful in having the factual issues sent to evidence resolved in his favour does not mean that the applicant is without more entitled to the relief which he sought. Nor is there any doubt that subject to considerations of fairness, a party is entitled to raise such an issue, notwithstanding the reference to evidence. No issues of fairness arise in the present case. The applicant has had ample notice of the issue raised in the notice dated 29 November 2013. The duty of the court, after hearing the evidence and resolving the issues raised in the reference to evidence, is to decide the application. This I shall proceed to do.

21 The crux of the argument advanced by counsel for the opposing respondents is that having elected to cancel the 2009 agreement, the applicant cannot avail himself of remedies directed at enforcing the 2009 agreement. The applicant cannot, when he has cancelled the agreement, claim specific performance of the very agreement he has cancelled. In the language of a bygone era, once the applicant has reprobated (by rejecting the agreement through his cancellation), the applicant is no longer entitled to approbate (by assenting to its terms and invoking remedies designed to compel performance by another party to the agreement).

22 But that, as I see it, is not what the applicant is doing in these proceedings. He is seeking neither to enforce performance under the agreement nor to invoke any remedy which may lie as a result of his cancellation of the agreement for breach by the first respondent. What the applicant is seeking to do is to take a further step to entrench or perfect the pledge of shares which he enjoys as security for the fulfilment by the first respondent of its obligations towards him.

23 This is a right which the applicant enjoys under clause 3.4 of the 2009 agreement, which reads:

> In the event of the purchase price or any portion thereof not being paid on the due date, and subsequent to written demand from the [applicant] in terms of clause 17 hereunder, the [applicant] shall then, at his discretion, and without prejudice to any of his other rights in terms of this agreement or in law, be entitled to exercise his rights in terms of the pledge and cession.[1]

24 To determine the scope of the applicant's rights under the MLE share pledge, one must further have regard to the provisions of that instrument. Clause 4.4 of the MLE share pledge provides expressly that if at any time during the currency of the MLE share pledge, the first respondent commits a breach of any of its obligations set out in the ME share pledge or in the 2009 agreement, the applicant shall be entitled to procure the registration of all or any of the pledged shares into his name.

25 Has the MLE share pledge been cancelled? Counsel for the first respondent submitted that it had been cancelled. But there is no factual foundation for this submission. The applicant does not allege that the MLE share pledge was cancelled and the defendant's case is that the 2009 agreement itself has never been cancelled. Cancellation of the MLE share pledge can only be found to have been

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[1] It is not in dispute hat the necessary notice was given and elicited no response which would preclude cancellation.

effected if it is an inevitable consequence of the cancellation of the 2009 agreement.

26 Answering this question requires an interpretation of the 2009 agreement and the MLE share pledge as well as the other agreements to which reference is made in the 2009 agreements designed to provide security to the applicant.

27 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the modern approach to the interpretation of documents, whether contractual or statutory or otherwise was articulated:

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. [Footnotes omitted]

See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 17-26.

28 In terms of the MLE share pledge, the pledge it reflects was given expressly as security for the *obligations* which the first respondent owed the applicant under the 2009 agreement, not merely for payment of the purchase price. Under clause 17.4 of the 2009 agreement, upon the cancellation of that agreement for breach, the applicant is entitled to claim damages from the first respondent. In its terms clause 4 of the MLE share pledge gives the applicant the right to have the pledged shares registered in his name simply upon a breach by the first respondent of its obligations under the 2009 agreement. So the language of the measures supports the conclusion that the pledge was intended to survive any cancellation of the 2009 agreement itself. The terms of the 2009 agreement and the security agreements, read together, support the conclusion that the pledges were given not merely for payment of the purchase price but as security for all the first respondent's obligations arising from the 2009 agreement.

29 The 2009 agreement provides expressly in clause 2.3 that MLE intended selling Erf 1 to ICT and in clause 8.3 provisions are found which were designed to give the applicant further security arising from

the practical problem that would arise because on a cancellation of the 2009 agreement, a re-transfer to the applicant of the shares in MLE would not give the applicant any interest in or rights of control over the property.

30 In these circumstances the more businesslike interpretation of the scheme effected by the conclusion of the 2009 agreement and the security agreements is that the MLE pledge of shares and the other securities were designed to survive the cancellation of the 2009 agreement. Indeed, clause 14 of the 2009 agreement provides for PWC to release the CM 42 forms to the first respondent on payment of the purchase price and clause 15 provides that the pledges and cessions are to be deemed to be cancelled upon proof of payment of the purchase price. Until those events happen, the securities remain in place.

31 It therefore follows, in my view, that despite the cancellation of the 2009 agreement itself, the security agreement provided by the MLE share pledge is still of full force and effect. The same would appear to apply in relation to the pledge of ICT shares but as relief in relation to the pledge of ICT shares has been abandoned, I make no finding in this regard.

32 The application must accordingly succeed in relation to the claim for registration of the MLE shares. Costs must follow the result. In addition I was asked to make an award in relation to the costs reserved by the court on 14 September 2012. Those costs too should follow the result. I must add that if I had found for the opposing respondents, I would have disallowed all their costs because of their entirely unsubstantiated attacks on the applicant's character, their conduct in raising spurious defences and persisting with such defences rather than abandoning them and relying on the only defence ultimately argued on their behalves before me.

33 I make the following order:

1 The first, second, third and fourth respondents are hereby directed to deliver to the applicant the following original signed documentation, ie:

1.1 deed of pledge and cession concluded between the first respondent and the applicant and dated 6 July 2009 under which the first respondent pledged to the applicant 50 ordinary shares in the second respondent ("the MLE shares);

1.2 CM 42 form enabling the applicant to transfer the MLE shares to the applicant.

2 The second respondent is hereby directed to do everything necessary to give effect to the transfer of 50% of its total issued share capital to the applicant.

3 If the respondents, or any of them, fail to comply with this order, the sheriff of the court is hereby directed and authorised to seize the documentation described in 1 above wherever it may be found and to take all steps on behalf of the first and second respondents to give effect to the transfer of 50% of the second respondent's share capital to the applicant.

4 The first, second and third respondents, jointly and severally, must pay the applicant's costs, including those reserved by this court on 14 September 2012.

NB Tuchten
Judge of the High Court
21 November 2014

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