IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 59732/2016

Date: 22 September 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

22/9/2016 .....
DATE SIGNATURE

In the matter between:

ANTON FRANCOIS BOOYSEN

FIRST APPLICANT

WILHELMUS PETRUS VAN RHEEDE VAN OUDTSHOORN

SECOND APPLICANT

CP DE LEEUW (PRETORIA) (PTY) LTD

THIRD APPLICANT

And

MAGDALENA VASTI KOHRS

FIRST RESPONDENT

CAREL RUDOLPH SERFONTEIN

SECOND RESPONDENT

ENSO CONSULTING (PTY) LTD

THIRD RESPONDENT

JUDGMENT

PRETORIUS J,

(1) In this urgent application the applicants seek an interim order preventing the first and second respondents from carrying on their profession as quantity surveyors, through the third respondent, for a period of two years.

(2) The matter was set down as an urgent application for a day. The length of time required for the hearing resulted that the court had to set it down for a special hearing.

(3) The respondents launched a counterclaim for the following relief:

> *"1. That the applicants be compelled to provide the first and second respondents with written consent as envisaged in paragraph 24.2 of annexure "AB9" to the founding affidavit to carry on business as quantity surveyors within a 100km radius from the main place of business of the third applicant.*
>
> *2. That the applicants be ordered to pay the costs of this counter-claim on the scale as between attorney and client."*

(4) In the nature of things restraints of trade challenges are normally regarded as semi-urgent. This court decided to hear the application as an urgent matter after hearing counsel.

(5) It is common cause that the first and second respondents are co-shareholders with the first and second applicants in the third applicant. It is further common cause that the first and second respondents are the sole directors of the third respondent and are practising as quantity surveyors within a 100km radius of the first applicant. There is no dispute that the first and second respondents had signed restraint of trade agreements. The applicants and the first and second respondents had concluded a Sale of Shares Agreement, a Delegation Agreement and the Shareholders Agreement.

(6) Both the first and second respondents resigned as directors and employees of CP De Leeuw (Pretoria) (Pty) Ltd ("De Leeuw") on 28 June 2016. It is conceded that, as directors of De Leeuw, the first and second respondents were able to build a personal relationship with De Leeuw's clients.

(7) The respondents argue that although the applicants are only seeking interim relief, the granting of such relief will be final in effect as it will prohibit the respondents from practising as quantity surveyors and will lead to destruction of their business, the third respondent.

BACKGROUND:

(8) The third applicant is one of the oldest quantity surveying firms in the country and has as such built up, through decades, a considerable national and international reputation and standing. Most of the third applicant's contracts with its clients are executed within a 100km radius of the third respondent's business premises at Corporate Place, Block B, Ashlea Gardens, Pretoria.

(9) According to the applicants the intellectual property of the company consists of a building economics manual, building economics software which the company has developed, building contract manual, cost manager developed by the company, model bill of quantities, customised cost plan – Microsoft Excel Template, customisation to the WinQ's programme used by quantity surveyors and a reference library of historical bills of quantity set up over years of executed tenders.

(10) Both the first and second respondents had made extensive use of the model bill of quantities and the further intellectual property of the company. The first respondent was employed by the company from 1 April 2005 to 31 March 2008, but was re-employed on 1 July 2009. The second respondent joined the company on 1 May 2010. On 8 May 2012 the first and second respondents signed the shareholders agreement, the sale of share agreement and the delegation

agreement. As shareholders and directors the first and second respondents were granted access to all the intellectual property of the third applicant. They were allowed to liaise with all the company's clients without supervision and oversight.

(11) On 26 November 2014 the first and second respondents became entitled to a dividend of R490 384.71, as per the agreement. Both respondents were paid 30% of the dividend and in accordance with the delegation agreement the balance of 70% was paid to the first and second applicants as part payment of the purchase price of the shares. After this payment the first and second respondents were still indebted to the first and second applicants in an amount of R2 206 730.72.

(12) The Sale of Share agreements, concluded with the first and second respondents, provided for the sale of 102 shares by Mr Booysen, the first applicant, and Mr van Rheede van Oudtshoorn, the second applicant, at a purchase price of R2 550 000 to the first and second respondents respectively. The agreement provided that it would be paid by the respondents by paying a deposit of an amount of R255 000 and the balance would be payable over a five year period. On the same date a delegation of payment was signed, which provided for the delegation of first and second respondents' payment obligations in terms of the Sale of Share agreements to the company.

(13) The delegation agreement records that the first and second respondents are each indebted towards Mr Booysen and Mr van Rheede van Oudtshoorn in the amount of R2 295 000. The board of the company resolved to assist the respondents in the acquisition of the shares and that the first and second respondents delegate their obligations in terms of the Sale of Share agreement to the company. The agreement provides that 70% of a declared dividend will be used to settle the outstanding purchase price and will be paid over a period of five years. Should the dividends paid to the first and second respondents not suffice to pay off the debt within five years, the first and second respondents would become personally liable for the debt.

(14) On the same date a Shareholders agreement was concluded between the first and second applicants and the first and second respondents. This agreement provided for the declaration of dividends and how it would be distributed. According to the applicants, it was concluded with the understanding that all parties contemplated staying at the firm until the age of retirement.

(15) At present the shareholding in the company is Mr Booysen – 186 shares, Mr van Rheede van Oudtshoorn – 130 shares and the first and second respondents 102 shares each. Both the first and second respondents resigned on 28 June 2016. It must be noted that on 8 May 2012 when all the relevant agreements were signed by all the

parties, the parties were under the impression that the old **Companies Act**[1] was still applicable. In fact the 2008 **Companies Act**[2] commenced on 1 May 2011 and was thus applicable.

(16) I cannot agree with counsel for the respondents that the provisions of clause 24.2 of the shareholders agreement is vague and embarrassing. It is clear from the reading of the relevant clause that the respondents are prohibited to engage in practice, directly or indirectly, and/or from executing contracts as quantity surveyors within a 100km radius of the company's business premises. This point *in limine* is thus dismissed.

(17) On 28 July 2016 a meeting was held between the first and second applicants and the first and second respondents. The main thrust of the meeting was to explore whether the first and second respondents could continue to work with the company's clients and to finalise the projects that they were working on in the name of the company. This was a follow-up meeting of the meeting on 27 July 2016 where it was discussed how the projects could be completed and how the outstanding fees would be divided between the third applicant and the third respondent. There is a dispute between the applicants and the respondents whether they had reached an agreement to this effect. It was, according to the applicants, agreed that a written proposal would

[1] Act 61 of 1973
[2] Act 71 of 2008

be prepared on 1 August 2016 by the applicants.

(18) If regard is had to the correspondence between the second respondent and Mr Anastasiadis, one of the clients effected by the respondents' resignation, then the court cannot find that an agreement had been reached. The second respondent replied to a query from Mr Anastasiadis on 2 August 2016 as to who he should pay and whether his contracts must be terminated, as follows:

> *"Yanni*
>
> *We are busy formalizing it and I will send to you ASAP.*
>
> *Regards,*
>
> *Rudy"*

(19) It is clear that on 2 August 2016 nothing had yet been formalized, but that negotiations were ongoing. The second applicant denies granting permission to the two employees, Claassens and Snyman, who had resigned to join the third respondent, to do so.

(20) The respondents dealt in detail with the events from 27 July 2016 until 2 August 2016. The first and second applicants chose not to respond to these detailed averments apart from denying that they had seen the document setting out the outstanding projects and denying any permission that Claassens and Snyman were permitted to start work at the third respondent. These disputes of fact are material in the

counterclaim. In any event the counterclaim does not only deal with the unfinished projects as contended by the respondents, but go much further.

***LOCUS STANDI*:**

(21) The respondents attack the *locus standi* of the first and second applicants. The respondents rely on clause 24.2 and 24.3 of the shareholders agreement when arguing that the first and second applicants cannot rely on these clauses to cloak them with *locus standi*.

(22) Clause 24.2 and 24.3 provides:

> *"The shareholders and directors in their personal capacities as directors,* ***undertake to the company that****, for so long as they are shareholders or directors in the company and for a period of 2 (two) years from any of them ceasing to be a director or shareholder of the company (the "CEASING DATE") they and any of the directors, will not anywhere within a 100 (one hundred) kilometre radius from the main place of business of the company, whether directly or indirectly, in any manner whatsoever and whether alone or jointly with or as agent for any other person, body corporate, partnership, association, firm or undertaking of any nature whatsoever, be engaged, interested or involved, in any way whatsoever, in or with any entity*

carrying on the business or similar business activity of the company or any of its subsidiaries, except with the written consent of the majority of the shareholders of the company, which consent shall not be unreasonably withheld." (Court emphasis)

And

"The shareholders and directors ***undertake to the company*** *that they will not at any time whilst they are shareholders or directors of the company and for a period of 1 (one) year from the CEASING DATE, directly or indirectly, solicit, offer employment to, entice or endeavour to entice away, or employ or procure the employment of any person who are or may be in the employ of the company as at the CEASING DATE, or who was employed by the company within twelve (12) months immediately prior to the CEASING DATE."* (Court emphasis)

(23) It is clear from the wording of these clauses that the directors and shareholders are not included as the restraint clauses relate to the company, which is the third applicant. However the third applicant has *locus standi* and I will deal with the matter on this basis.

(24) The further argument in this regard is that according to clause 19 of the shareholders agreement no resolution will be passed or action taken in respect to various matters unless 75% of the shareholders

agree to the terms of the resolution. Both the first and the second respondents are still shareholders in the third applicant and therefore 75% of the shareholders holding the company's issued capital did not agree to institute legal proceedings.

(25) I must agree with the applicants' argument that in the present circumstances it would have been impossible to obtain the first and second respondents' permission to institute proceedings against themselves. I will deal with the application bearing in mind that the first and second respondents would not have granted permission under these circumstances.

FINANCIAL ASSISTANCE:

(26) Section 44 of the **Companies Act**[3], 2008 provides:

> *"(1) In this section, "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.*
>
> *(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company*

[3] *Supra*

or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

(3) Despite any provision of a company"s Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless-

(a) the particular provision of financial assistance is-

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) ***pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category****; and*

(b) the board is satisfied that-

(i) ***immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test****; and*

(ii) ***the terms under which the financial assistance is proposed to be given are fair and reasonable to the company****.*

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4)."

(27) It is common cause that the share agreement, the purchase and delegation agreements were signed simultaneously. It is quite clear that section 44(1) is not applicable in the present circumstances as it did not land *"money in the ordinary course of business"*. It is common cause that no Memorandum of Incorporation existed at the time.

(28) The respondents had from the outset argued that the agreements were void as they were intrinsically tied with one another and that the delegation agreement constituted the giving of financial assistance with regard to the purchase of the shares. This is disputed by the applicants as according to them, the direct purpose of the delegation was not the provision of financial assistance by the company for the purpose of or in connection with the purchase of its shares by the first and second respondents, but to effect direct payment by the company of the purchase price to the first and second applicants out of the declared dividends which would be due to the first and second

respondents. According to the applicants this was a mere mechanism utilized so that the company could pay the first and second applicants. The argument is that the first and second respondents were still ultimately responsible for the purchase price to the company.

(29) In the agreement of delegation it is set out:

> *"In execution of and pursuant to the CONTRACT it is common cause between the parties that Serfontein is indebted to Booysen in an amount of R2 295 000.00 (two million two hundred and ninety five thousand rand)."*

And

> *"The payment obligations and liabilities of Serfontein to Booysen as contained in the CONTRACT shall pass to the Company on the effective date."*

The agreement of delegation pertaining to the first respondent is exactly the same, except that the first respondent's liabilities to the second applicant *"shall pass to the company on the effective date"*.

(30) In clause 6.1 of the delegation agreement it was recorded that the first applicant consents to the second respondent's delegation of his obligations in terms of the purchase agreement to the company with immediate effect. The same applied in the case of the second applicant.

(31) In clause 6.2 of the delegation agreement, it was stated that from date of signature of the agreement the payment obligations of the respective first and second respondents in favour of the respective first and second applicants shall be deemed to be the payment obligations of the company.

(32) In clause 6.3 it is recorded:

> *"The company undertakes in favour of Booysen to be bound by and to perform the obligations in terms of the CONTRACT in accordance with its terms and conditions."*

Once more the same applies in respect to the second applicant.

(33) Christie, The Law of Contract in South Africa, 6th edition, page 480 makes it clear that a delegation so accepted leads to a substitution of the debtor as is stated by the learned author that *"Delegation is a form of novation by which, by agreement between all concerned a third party is introduced as debtor in substitution for the original debtor, who is discharged"*. In this instance the company stepped into the shoes of the first and second respondents respectively.

(34) Section 44(2) provides that the board may authorise the company to provide financial assistance for the purchase of the shares in the

company subject to the provisions of subsections 3 and 4.

(35) In **Gardner and Another v Margo**[4] Van Heerden JA found:

> *"In Lipschitz NO v UDC Bank Ltd,26 this court appears to have accepted the distinction drawn by Schreiner JA in Gradwell (Pty) Ltd v Rostra Printers Ltd between the 'ultimate goal' of the transaction in question and its 'direct object, and* ***to accept that it is only the direct object of the transaction that is relevant****. If the direct object is not the provision of financial assistance by the company for the purpose of or in connection with a purchase of its shares, then it is irrelevant that the ultimate goal of the transaction was to enable a person to purchase such shares.* ***Moreover, financial assistance within the meaning of s 38(1) is given only when the direct object of the transaction is to assist another financially – the s 38 prohibition is not contravened when the direct object of the transaction is merely to give another that to which he or she is already entitled****."* (Court emphasis)

(36) This court has to decide what the direct object of the transaction was. In the present case the direct object falls outside the scope of the legitimate operations of the company. Here the company became surety to the sellers, the first and second applicants, for the

[4] 2006(6) SA 33 (SCA) at paragraph 47

purchasers, the first and second respondents' obligations to pay the price to secure the obligation. I find that in this instance the direct object of the transaction was to assist the first and second respondents financially and therefor section 44(2) applied.

(37) Section 44(3) provides, *inter alia*, that the board may not authorise any financial assistance unless the particular provision of financial assistance was pursuant to a special resolution of the shareholders, adopted within the previous two years approving such assistance to specific recipients generally. In this case no resolution was taken to comply with section 44(3)(a)(ii) and the applicants fall foul of this provision.

(38) It has, in any event, been shown that the board could not and did not satisfy the solvency and liquidity test immediately after providing financial assistance. It must be mentioned that actual (objective) solvency and liquidity is not the test. The test is, as set out in Henochsberg on the Companies Act, 71 of 2008 in the commentary to section 44(3) *"The test is also as to the solvency and liquidity immediately after providing the financial assistance. Insolvency (factual) or illiquidity outside this moment would be irrelevant"*. Section 44(3)(b) further provides that in addition thereto the board must be satisfied that immediately after granting the financial assistance, the company was solvent and liquid and that the terms of

the financial assistance are fair and reasonable to the company.

(39) Section 44(5) provides, *inter alia*, that an agreement for financial assistance is void to the extent that the provision of any such assistance is inconsistent with section 44 or falls under a prohibition in terms of section 44(4).

(40) Furthermore the respondents set out in the answering affidavit that the company failed the solvency and liquidity test as the financial statements for the year ended 29 February 2012 showed an accumulated loss of R904 716.00 and at the end of the financial year ended on 28 February 2013 had an accumulated loss of R1 518 208.00. The applicants' response is set out by the first applicant where he states: *"I deny that the Shareholders Agreement is void either on the basis alleged by the Respondents or at all"* and *"The further allegations are noted"*. One would have expected the applicants to reply to the allegations and arguments related to the provisions of section 44. At the time the company's liabilities exceeded its assets and the position of the company did not comply with the provisions of section 44(2) and section 44(3)(b). The applicants do not even attempt to deal with the respondents' averments that the company did not comply with the provisions of section 44(3). The court finds that therefore section 44(5) applies. Under the circumstances section 44 is applicable and the result of the

applicants' not complying with section 44 as set out above is that the agreements are all void. As the restraint of trade is part of the shareholders agreement it has to be declared void.

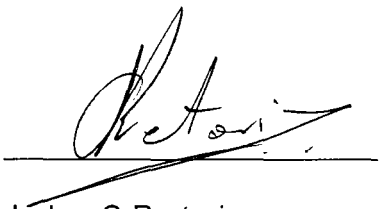
(41) Due to my finding that the agreements are void it is not necessary for me to deal with the enforceability of the restraint of trade as it forms part of the shareholders agreement. I will not deal with the question of unlawful competition, as the applicants did not pursue this.

COUNTERCLAIM:

(42) It follows that if the shareholders agreement is void, that the court cannot deal with the counterclaim and compel the applicants to consent as referred to in paragraph 24.2 of the shareholders agreement.

(43) In the result I make the following order:

1. The application is found to be urgent;
2. The application is dismissed with costs;
3. The applicants to pay the costs jointly and severally, the one to pay the other to be absolved;
4. The counter-application is dismissed with costs.



Judge C Pretorius

Case number	: 59732/2016
Matter heard on	: 5 September 2016
For the Applicant	: Adv. BC Stoop SC
Instructed by	: KR Attorneys
For the Respondent	: Adv DM Leathern SC
Instructed by	: Friedland Hart, Solomon & Nicolson
Date of Judgment	: 22 September 2016