**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case No: 13753/2010**

In the matter between:

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| **CEDRIC WINSTON JANSEN** | **Applicant** |
| and | |
| **SONJA LYNNE PLANTE FÊVURE DE VILLENEUVE N.O.** | **First Respondent** |
| **ANDREW MARALACK N.O.** | **Second Respondent** |
| **PETER CAROLUS N.O.** | **Third Respondent** |
| **CHRISTOPHER PETER VAN ZYL N.O.** [Cited in their capacities as Joint Liquidators of Eraco Boat Builders CC (In Liquidation)] | **Fourth Respondent** |
| **THE MASTER OF THE HIGH COURT** | **Fifth Respondent** |
| **CLAREMART AUCTION GROUP** | **Sixth Respondent** |

In re:

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| **SONJA LYNNE PLANTE FÊVURE DE VILLENEUVE N.O.** | **First Applicant** |
| **ANDREW MARALACK N.O.** | **Second Applicant** |
| **PETER CAROLUS N.O.** | **Third Applicant** |
| **CHRISTOPHER PETER VAN ZYL N.O.** | **Fourth Applicant** |
| and | |
| **CEDRIC WINSTON JANSEN** (Joint Liquidators of Eraco Boat Builders CC (In Liquidation) | **First Respondent** |
| **THE MASTER OF THE HIGH COURT** | **Second Respondent** |
| **CLAREMART AUCTION GROUP** | **Third Respondent** |

**JUDGMENT DELIVERED ON 10 DECEMBER 2010**

**ALLIE, J**

[1] The applicant in the interim interdict is referred to as the applicant in this judgment and the respondents in the interim interdict will be referred to as the respondent.

[2] Applicant obtained on, 22 June 2010 on an *ex parte* basis, as a matter of urgency a *rule nisi* interdicting and restraining respondents, as joint liquidators of Eraco Boat Builders CC, (Eraco) from selling certain movables by public auction pending the final determination of proceedings that applicant should institute within 21 days of the order.

[3] On 20 August 2010 respondents brought an application for the reconsideration and setting aside of the order in terms of Rule 6(12)(c) of the Uniform Rules of this court. The application was postponed to 13 October 2010 and the interim interdict was extended to that date. The matter came before me thereafter.

[4] It is common cause that applicant in the *rule nisi*, did not institute proceedings within the requisite 21 days or any time thereafter.

[5] Rule 6(12)(c) reads as follows:

*"A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."*

[6] In the case of **ISDN Solutions (Pty) Ltd v CSDN Solutions CC & Others 1996 (4) SA 484 (W) at 486H – 487C** the court dealt with the underlying reason for the rule as follows:

*"The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.*

*Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.*

*The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular*

*order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."*

[7] In view of the fact that the applicant brought the interim interdict on an *ex parte* basis and as a matter of urgency, this court is entitled to entertain the respondents' application for the reconsideration and setting aside of the interim order granted on 22 June 2010.

[8] At the time when Deon Erasmus was the sole member of Eraco CC, the close corporation was awarded the tender by the South African Police Services (SAPS) to manufacture, supply and deliver four speed patrol vessels.

[9] As a potential investor in Eraco, applicant obtained a loan for it from the Industrial Development Corporation (IDC). The loan was however granted to Planet Waves 498 (Pty) Ltd during August 2008.

[10] On 30 November 2007, Erasmus purported to sell the assets of Eraco, including its movables to Planet Waves 498 (Pty) Ltd. Mr Erasmus is also a director of Planet Waves.

[11] Eraco was finally wound up during February 2010. Applicant alleged that the partly constructed vessels for SAPS are the movable assets that Eraco sold to Planet Waves.

[12] Respondents alleged that to the extent that applicant relies on an agreement of sale between Eraco and Planet Waves, Planet Waves ought to have been an applicant or it ought to have been joined as a party.

[13] It is common cause that the money that Planet Waves obtained from its loan with IDC was used by Eraco in the conduct of its business. Applicant alleged that of the intention of the directors of Planet Waves was that it would take over the business of Eraco. The auditors of Eraco reflect in their note on the financial statement that the IDC was in the process of reflecting Eraco as the entity to whom the funds are lent.

[14] The agreement of sale between Eraco and Planet Waves contains the following conditions precedent in paragraph 3:

> *"3.1 The whole of this agreement is subject to the fulfilment of following conditions precedent:*

3.1.1 the PURCHASER, should it so require, having completed to its satisfaction, a due diligence investigation into the affairs of the Corporation and the business and having delivered a written notice to the SELLER after completion of such due diligence investigation confirming its intention to abide by this agreement;

3.1.2 the conclusion of a 3 (three) years written service agreement between the PURCHASER and the executive and such other members of the SELLER'S management as the PURCHASER may require;

3.1.3 the SELLER entering into comprehensive written restraint of trade agreement in favour of the PURCHASER and its subsidiaries;

3.1.4 the conclusion of a written agreement of lease between the SELLER and the PURCHASER in respect of the premises, where the factory is situated, on terms and conditions acceptable to the PURCHASER.

3.2 The parties shall use all reasonable endeavours to procure the fulfilment of the conditions.

3.3 Unless the conditions are either fulfilled or (where appropriate) waived, by no later than close of business on January 31, 2008, or such later date as may be agreed in writing between the parties, the provisions of this agreement shall be of no further force and effect after such date. No party shall have any claim against the other as a result of the failure of the conditions precedent.

*3.4 All the conditions are inserted for the benefit of the PURCHASER who is entitled to waive fulfilment of any of those conditions by written notice to the SELLER."*

[15] Applicant failed to allege that the purchaser i.e. Planet Waves waived the fulfilment of the conditions precedent nor was a written notice by the purchaser annexed to the papers. The owner of the immovable property from which the boat manufacturing business was conducted before and after November 2007 is Eraco Property Holdings (EPH) (Pty) Ltd which is owned by Mr Erasmus. Applicant alleged that it was envisaged that Planet Waves would acquire the shareholding in EPH for a nominal amount. Applicant's allegations fall short of stating that Planet Waves in fact did acquire the shares in EPH. It is undisputed that Planet Waves did not enter into an agreement of lease with EPH even though applicant alleged that Planet Waves conducted the boat manufacturing business from EPH's premises.

[16] Applicant submitted that the failure to comply with or waive the conditions precedent was only brought to his attention in respondent's affidavit in this matter. The correspondence of the jointly appointed attorneys dated 18 August 2009 annexed to the replying affidavit make it clear that respondents considered the agreement of sale to be of no force and effect because the conditions precedent were not met and the seller is stated on the agreement as being Deon Erasmus in his personal capacity as opposed to Eraco Boat Builders CC. Applicant alleged that the error occurred due to a mistake common to the parties.

[17] Respondents allege that Planet Waves is a dormant company that is in the process of being deregistered.

[18] Eraco's annual financial statements for the year ended 28 February 2009 reflect that it operated the boat manufacturing business for that financial year and for the previous financial year i.e. March 2007 until February 2008.

[19] Respondents point out that applicant failed to disclose the following facts to the court dealing with urgent interim interdict brought on an *ex parte* basis:

20.1 That on 25 May 2010, respondents' attorney sent him a letter stating that the purported sale agreement could not be implemented because Mr Erasmus was the seller and not Eraco and because the conditions precedent had not been fulfilled.

20.2 Applicant failed to attach a copy of the purported agreement of sale of the assets of Eraco.

20.3 Applicant failed to disclose that an application was heard in court for auction of the vessels in terms of Section 386(5) of the Companies Act on 4 March 2010.

20.4 The agreement between Eraco and SAPS provided that Eraco could not assign its obligations to perform under the contract without the written consent of SAPS.

20.5 That on 18 August 2009 an attorney jointly appointed by Mr Erasmus and applicant sent applicant a letter in which she explained why she believed that the agreement of sale was invalid.

[20] The shareholders of Planet Waves on 15 August 2007 were Deon Erasmus, C Gouws, Aquarella Investments 512, Mr K J Minton and applicant. Erasmus is also a director of Planet Waves. It is significant to note that none of the other shareholders have filed affidavits in support of applicant's case.

[21] In reply, respondents allege that applicant who held himself out as being an attorney drafted the purported agreement of sale of Eraco's assets to Planet Waves and the shareholders agreement between Planet Waves, The Eraco Boat Builders Worker's Trust and the applicant. Applicant was employed by Eraco in March 2008. During April and May 2008, Ormans Auditors pointed out that the sale agreement had lapsed due to non-fulfilment of the suspensive conditions. It was then agreed that the sale agreement be revived. By February 2009, applicant had not effected transfer of the business and assets of Eraco to Planet Waves. Ormans then resigned as auditors. On 31 July 2009, Erasmus and applicant agreed that Erasmus would submit to an attorney of his choice the letter written by applicant in which he opposed the issuing of shares to James Fischer, a prospective investor and the appointment of Fischer as a CEO of Eraco. The attorney was to be paid by Erasmus and applicant.

[22] Applicant was later dismissed from his employment with Eraco after a disciplinary hearing for his failure to attend to the restructuring of Eraco, failure to

reflect Minton as a shareholder in Planet Waves, failure to supply Orman accountants the with requisite information, failure to supply the new accountant with information, failure to provide sub-contractors, suppliers and clients with appropriate contracts, failure to render monthly management accounts to the IDC and his failure to implement suppliers' guarantees which resulted in unnecessary delays.

**Validity of the Agreement of Sale**

[23] The real dispute of fact, namely the ownership of the assets that were to be sold by public auction hinges on the interpretation of the purported agreement of sale between Eraco and Planet Waves. As this is a question of law, the court can determine it on the papers before it.

[24] The first issue that requires determination is whether the parties to the contract were indeed Eraco and Planet Waves as alleged by applicant.

[25] The copy of the agreement of sale annexed to respondents' papers is an unsigned copy. As neither side have taken the point that it was not signed, I will accept that the original was signed. On the first page the seller is described as follows:

> *"Deon Erasmus*
> *Identity Number: 4805285150080*
> *Acting in his personal capacity"*

[26] Thereafter the purchaser is correctly described as Planet Waves 498 (Pty) Ltd. The signature line contains the following description for the seller: *"Deon Erasmus SELLER."* In the preamble the following is stated:

> *"A. The SELLER owns 100% of the equity in Eraco Boat Builders CC, registration no. 1996/11917/23 and in addition has certain claims in the said Eraco Boat Builders CC.*
>
> *B. The PURCHASER is desirous of taking over the business of the said Eraco Boat Builders CC as a going concern subject to certain conditions precedent ..."* (my emphasis).

[27] It is clear that what the purchaser intended to purchase and the seller intended to sell was the business of Eraco. The question then arises whether Deon Erasmus could sign the agreement in his personal capacity. Clearly he cannot. He ought to be described as acting as a duly authorised representative of the close corporation. I have searched the agreement in vain and found no description of Deon Erasmus acting in that capacity.

[28] The conditions precedent have clearly not been fulfilled nor are there any allegations to the effect that the purchaser waived the conditions precedent expressly in writing as required by the agreement. The purported ratification of the agreement does not assist applicant as Planet Waves was already incorporated by then.

[29] The agreement of sale was not entered into with the owner of the boat building business, Eraco Boat builders CC and can accordingly not be binding on that entity.

[30] At best for Planet Waves, it may have a claim against Eraco for the monies advanced to Eraco from the loan with the IDC. That claim had to be lodged with the liquidators and is not the subject of deliberation in this matter.

[31] Clause 13 of the agreement of sale is a warranty by Erasmus that he has title to all the assets, he will discharge all liabilities listed, he has complied with all the statutory requirements relating to the business and the business is not bound by any employment or service agreement to provide any employee with more than one month's notice of termination.

[32] Applicant relied on Clause 13 to allege that Erasmus had represented that he had title to the assets. In this allegation, applicant misconceives the legal position which is that the assets of the close corporation are owned by that close corporation and the preamble to the agreement says as much. Clause 13 cannot bind the close corporation.

**The Derivative Action**

[33] The **Foss v Harbottle** general rule laid down is that where a company has been prejudiced, it must seek the legal remedy. It is stated as follows in **Wallersteiner v Moir (No. 2); Moir v Wallersteiner & Others (No. 2) [1975] ALL ER 849 (CA) at 857d:**

*"It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which it alone is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in* ***Foss v Harbottle****."*

[34] The exception to the rule in **Foss v Harbottle (1843) 2 Hare 161 (67 ER 189) at 492** (Hare) is as follows:

*"If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character, the protection of these rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in* ***Wallworth v Holt*** *... and other cases would apply ..."*

[35] Section 266(1) of the Companies Act 61 of 1973 provides for the derivative action in certain circumstances. The section reads as follows:

*"Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of*

*the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto."*

[36] On the allegations before me, apart from an unsupported allegation based on hearsay evidence that Mr Erasmus intends buying the movable assets of Eraco at the public auction, there is no evidence that the directors of Eraco or the liquidators are trying to appropriate to themselves an advantage that belongs to Planet Waves.

[37] Applicant has in any event not even overcome the hurdle of showing that the assets belong to Planet Waves for a derivative action presupposes that the subject matter of the dispute involves a dissipation of corporate property, money or advantage.

**Applicant's Locus Standi**

[38] For the reasons set out above, applicant has accordingly not established that he has the *locus standi* to bring the interdictory relief sought and obtained on 22 June 2010.

**Prima Facie Case**

[39] To succeed, applicant has to show that he possesses a *prima facie* right. Once he failed to establish *locus standi* he also failed to establish a *prima facie* case although open to some doubt. There is no need for the court to inquire into issues such as the balance of convenience.

**Common Mistake**

[40] The applicant held himself out to be a lawyer with accounting and business experience, to such an extent that he was entrusted with drafting the purported agreement of sale and the shareholder's agreement. He cannot be heard to say now that the incorrect description of the seller in the sale agreement was a common mistake because applicant in the preamble and in the definition of the name of the business stated that the business belonged to Eraco.

[41] Once the auditors of Eraco alerted applicant to some alleged errors in the sale agreement during April or May 2008, the respondent's predecessor in title had voiced its objection to the errors in the sale agreement. Applicant cannot claim that Erasmus had misrepresented the true position regarding the identity of the owner of the business as this identity is clearly set out in the sale agreement.

**Pendente Lite Nature of Relief**

[42] Applicant has failed to avail himself of the opportunity to institute the action within 21 days of the order granted on 22 June 2010 and in so doing has disregarded the condition upon which the court granted the interim interdictory

relief. As the relief was granted *pendente lite* it should ordinarily lapse on the applicant's failure to institute the contemplated action (see: **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at paragraphs 17: Juta & Co Ltd v Legal & Financial Publishing Co (Pty) Ltd 1969 (4) SA443 (C) at 445 C – F].**

[43] In this matter the costs should follow the cause.

**It is ordered that:**

1. The order granted by this Court on 22 June 2010 is hereby reconsidered and set aside.

2. Applicant shall pay the costs including the costs of two counsel.

**ALLIE, J**