[REPORTABLE COVERSHEET]

REPUBLIC OF SOUTH AFRICA

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

Case No.: **8609/2011**

In the matter between:

NOBLE CREST CC Applicant

(Registration number: 1998/057381/23)

and

KADOMA TRADING 15 (PTY) LTD Respondent

(Registration number: 2005/003729/07)

Judgment by	:	N Saba, AJ
For the Applicant	:	Adv. EJJ Spamer
Instructed by	:	Louw Coetzee & Malan Inc
For the Respondent	:	Adv. P S De Waal
Instructed by	:	Cronje, De Waal-Skhosana Inc
Date(s) of Hearing	:	Wednesday, 26 October 2011
Judgment delivered on	:	Tuesday, 24 April 2012

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JUDGMENT DELIVERED: TUESDAY, 24 APRIL 2012

Saba, AJ

Introduction

[1] In this application the applicant seeks the confirmation of a rule *nisi*. The respondent on the other hand seeks an order for the setting aside of the rule *nisi* and the dismissal of the application. The respondent also seeks, by way of a counter-application, a declarator that both the Sale and Franchise Agreements are null and void and an order that applicant pays R1 500 000, 00 back to the respondent while respondent returns what it received from the applicant in terms of the void agreements. Alternatively; an order directing the applicant to pay R1 500 000, 00 into a trust account pending the final

determination of an action to be instituted. The applicant is represented by Mr Spammer and the respondent is represented by Mr de Waal.

The Parties

[2] The applicant is a close corporation duly registered and incorporated in terms of the laws of the Republic of South Africa and having its registered address at 75 Mani road, Diepriver, Cape Town. The respondent is a company duly registered and incorporated in terms of the laws of the Republic of South Africa, having its principal place of business at 56 Marine Drive, Paarden Island, Cape Town.

[3] On 26 April 2011 the applicant sought and obtained on an urgent basis an order in the following terms:

"1. A *rule nisi* is hereby issued calling upon the respondent to appear and show cause, if any, on THURSDAY 26th May 2011 at 10h00 or as soon thereafter as the matter may be heard, why a final order should not be granted in the following terms:

1.1 Authorising and directing the Sheriff of the Honourable Court to:

1.1.1. Attach from the respondent at 56 Marine Drive, Paarden Island, Cape Town, 7405, or wherever they may be found, the items as listed in annexure "TE10" to the founding affidavit, which annexure is also attached to this order; and

1.1.2 Take possession of the aforementioned items and to remove same to a safekeeping appointed by the applicant's attorney, upon the applicant's instructions, the costs whereof are to be borne by the applicant;

Pending the final determination of

(a) An action to be instituted by the applicant against the respondent for the return of all of the items listed above and further/alternative relief within 30 days of the date of this order.

1.2 Directing the respondent to pay the costs of the application on the scale as between attorney and own client.

2. Pending the return day herein:

2.1 The provisions of paragraph 1.1 above shall operate as an interim interdict with immediate effect;

2.2 The respondent be interdicted and restrained from trading under the name and style of "Dents 'N All or any name and style materially similar thereto;

3. The respondent is granted leave to anticipate the return day by giving 24 hours notice to the appellant's attorneys of record

4. The applicant is granted leave to apply on the same papers already filed of record under this case number, duly supplemented to the extent necessary, for a final interdict against the respondent".

[4] On 25 May 2011 (a day before the return day), the respondent filed an answering affidavit and two notices of motion in respect of counter-applications against the applicant that were to be heard at the date of hearing.

The first Notice of Motion sought an order:

(a) Declaring the agreements between the parties to which the dispute relates, to be null and void;

(b) Ordering the Applicant to pay an amount of R1 500 000.00 to the Respondent;

(c) Directing the Respondent, after receipt of the aforementioned payment, to deliver the movable property received from the applicant to the Applicant at its business premises; and

(d) Directing the Applicant to pay the costs of the application on the scale as between attorney and client.

The Second Notice of Motion sought an order:

(a) That it operate together with the interim interdict obtained by the Respondent and be made on the return day;

(b) Directing the Applicant to pay an amount of R1 500 000.00 into the trust account of independent attorneys and that the monies be kept in trust "pending the final determination of an action to be instituted by the Applicant against the Respondent within 30 (thirty) days from date of this order in which action the Respondent may institute its counterclaim";

(c) Authorising the independent attorneys to pay out the monies in accordance with the directions of the trial court at the time.

[5] In his founding affidavit, Thorsten Louis Harald Eggert ("Eggert") avers that he is a sole member of the applicant and is the owner of Dents 'N All, an established panel beating business. He avers further that the applicant is an entity through which he conducts the franchising business of the Dents 'N All brand and is the owner of certain intellectual property.

The following facts are in the main common cause:

[6] On 21 October 2010 an agreement of sale was entered into between the applicant (duly represented by Thorsten Eggert and Johan Henderson Smit) and respondent (duly represented by Paul Johann Van Wyk). On the 13th of January 2011 a further agreement, namely a franchise agreement was entered into between the parties duly represented by the same persons mentioned above. In terms of the franchise agreement the respondent would be entitled to utilize the intellectual property of the franchisor within a territory comprised of a significant portion of Cape Town. Paul Johahn Van Wyk ("Van Wyk") and his partner Lukas Petrus Bakkes ("Bakkes") financed the acquisition of the business jointly and signed the franchise agreement as joint principals. They paid R1 500 000, 00 of the purchase price. A further R 250 000, 00 was still to be paid to the applicant upon the respondent reaching a benchmark of R100 000, 00 profit per month.

[7] On 9 March 2011 respondent delivered a notice alleging that applicant had breached certain obligations of the Franchise agreement and as a result it was terminating the Franchise agreement. The relevant clauses alleged to be breached are as follows: 10.2.7; 10.2.10; 10.2.11; 10.1.3; 10.1 4 and 10.1.8

"FRANCHISOR'S OBLIGATIONS AND RIGHTS:

10.1 Franchisor's initial obligation:

Provide or make available to the Franchisee at the Franchisee's costs: and expertise shop fitting design and expertise.

10.1.3 assistance in the development of financial projections;....

10.1.4 recruitment and selection criteria and processes for staff....

10.1.8 the prescribed equipment requirements, which include, but are not limited, to the hardware requirements....

Franchisor's Ongoing Obligatios:

The Franchisor undertakes, on an ongoing basis, to ....

10.2.7 provide advice in respect of a formal operating plan, management and Marketing....

10.2.10 advice on regional/local marketing, promotion and advertising together with a national advertising initiative....

10.2.11 policies and procedures for all stationery to be used by the Franchisee for purposes of starting and sustaining a business as an DENTS 'N ALL Franchise....".

The applicant denied breaching the above terms of the Franchise agreement and undertook to fully comply with the concerns raised by the respondent.

[8] On 13 April 2011 the applicant received another correspondence from the respondent alleging that applicant had made fraudulent misrepresentations pertaining to its ownership of the Dents 'N All trademark. The allegation was based on a report from the Companies and Intellectual Property Registration Office ("CIPRO") stating that Noble Crest was deregistered on 16 July 2010. In the same letter respondent stated that the sale agreement and the franchise agreement were therefore *ab initio* null and void, alternatively voidable and that respondent was cancelling both agreements. It further tendered to deliver all the equipment at its business premises against payment of R1, 5 million (plus Vat). Applicant rejected the tender on the basis that the respondent is not entitled to the purchase price.

[9] In correspondence dated 18 April 2011 the applicant denied making any fraudulent misrepresentation to the respondent. It stated that it was not aware of deregistration at the time it entered into the two agreements with respondent. It rejected the contention that the contracts are void *ab initio,* stating that the defect caused by deregistration was cured by the restoration of the applicant to the register of Close Corporations on 12 April 2011. It accepted the respondent's repudiation of the agreement and cancelled both the agreement of sale and the franchise agreement and demanded the

respondent to provide an undertaking to comply with clauses 16.4 and 16.5 of the franchise agreement.

[10] The relevant information in the above clauses is as follows:

> "Upon termination, the Franchisee shall forthwith deliver to the Franchisor:
>
> *16.4.1.1 All and any manuals or other written information relating to the systems, all advertising material and paper goods or other items bearing the Franchisor's marks subject however to the Franchisor paying the cost of any such items which may be capable of being used by any other Franchisee;*
>
> *16.4.1.2 the computer software contemplated herein*
>
> *16.4.1.3 the client information of all clients served by the Franchisee is deemed to also be client information of the Franchisor and said client information will be provided to the Franchisor upon cancellation of this agreement for whatever reason.*
>
> *16.5 Upon the termination or expiration of this agreement, all rights granted to the Franchisee in this agreement will be terminated immediately. The Franchisee will immediately cease to use the intellectual property, the Marks and System and to sell or provide the Products or Services. The Franchisee shall immediately remove and return to the Franchisor all building and vehicle signage, displays, marketing materials, literature, business cards, stationery and any other materials which contain the Marks".*

[11] The following facts are not in dispute:

11.1 The applicant was deregistered by the Registrar for Close Corporations on 16 July 2010;

11.2 The restoration of the applicant to the Register of Close Corporation occurred on 12 April 2011, one day before the

respondent's notice to the applicant in which it relied on the applicant's deregistration as a basis for demanding restitution of the purchase price prior to "delivery of all the equipment, etc" at its business premises to the applicant;

11.3 The items which the respondent had to return to the applicant in terms of the franchise agreement were attached by the Sheriff in terms of a court order dated 26 April 2011.

The parties are *ad idem* that the agreements were cancelled and no further performance would take place.

[12] Mr de Waal submitted that since the applicant had been deregistered at the time the two agreements in question were concluded, as a juristic person it had ceased to exist and could not conclude a contract. He contended that both the Sale and the Franchise Agreements were null and *void ab initio.* He submitted further that there is no indication in the Act that the re-registration of a close corporation has the effect of curing nullities committed during the non-registered phase of the Close Corporation, while it was not authorised to act within the provisions of the Act. He relied for this proposition on **Miller & Others v Nafcoc Investment Holding Co. Ltd & Others**, 2010 (4) All SA 44 (SCA).

[13] In rejecting the contention that the two agreements are void *ab initio*, Mr Spammer relied on the following submissions:

13.1 there is no authority whether in terms of statute or common law for respondent's proposition that an agreement concluded by a deregistered close corporation is void if the registration of the close corporation is restored before the agreement is validly cancelled or lawfully terminated by one or both parties.

13.2 the provisions of section 26 (7) of the Close Corporation Act 69 of 1984 (**"the Act**") have the effect that a void agreement is transformed into an enforceable contract upon the restoration of the registration of the Close Corporation by the Registrar.

Mr Spanner relied on the following authorities in support of his submissions. **Ex Parte Sengol Investments (Pty) Ltd** 1982 (3) SA 474 (T) and **Mouton v Boland Bank Bpk** [2001] 3 All SA 485 (SCA).

[14] The issues to be decided are as follows:

14.1 the validity of the two agreements entered into while the applicant was deregistered;

14.2 whether the subsequent re-registration of the applicant validated the two agreements. (Both counsel submitted that there are no authorities on this point).

14.3 whether the respondent is entitled to the R1 5000 000, 00 it paid as a purchase price to the applicant.

[15] In **Mouton v Boland Bank Bpk** [2001] 3 All 485 (A) at 488a-c, the following was stated:

> "...**Ex Parte Sengol Investments (Pty) Ltd** 1982 (3) SA 474 (T) at 477C-D is deserving of mention, as to the general effect of the restoration of a company (and, no doubt, also a corporation) to the roll:
> The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become *bona vacantia* and as such accrued to the state. Likewise debtors and creditors of the company at the time of deregistration may upon restoration find their obligations or rights resuscitated".

[16] In **Sengol** the company sold all its properties before deregistration. The remaining assets in the form of mineral rights were written off as they were considered to be worthless. On realising that these mineral assets had value, the applicant brought an application for the name and the registration of the company to be restored. The court held that a notice in the form of a *rule nisi* calling all interested parties to show cause why the company's registration should not be restored had to be issued. The aim was to protect the parties who had acquired rights to the assets (including those which had become

bona vacantia) of the company upon deregistration, which rights they would lose if they reverted to the company on the restoration of the registration of a company.

In **Mouton** the corporation was deregistered whilst it owed money to the respondent. In suing the appellant, the respondent relied on section 26 (5) which states that, '*if a corporation is deregistered while having outstanding liabilities, the persons who are members of such a corporation at the time of deregistration shall be jointly and severally liable for such liabilities*'. The court held that section 26 (7) does not extinguish the liability imposed upon a member under section 26 (5).

In my view the facts in **Sengol** and **Mouton** (supra) are distinguishable from those of the current case in that in both cases no agreements were entered into while the company or the close corporation was deregistered.

Legal Position

[17] In terms of section 1 of the Act deregistration is defined as the cancellation of the registration of the founding statement of a close corporation. **Henochsberg** (Vol 3 Com 55) **on the *Close Corporations Act*** states that the effect of deregistration of a corporation is that its existence as a legal person ceases.

[18] Section 2 of the Act provides:

> *"2 (1)...*
>
> *(2) A corporation formed in accordance with the provision of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person...until it is in terms of this Act deregistered...*
>
> *(3) ...*
>
> *(4) A corporation shall have the capacity and powers of a natural person of full capacity insofar as a juristic person is capable of having such capacity or of exercising such powers".*

In **Miller and Nafcoc Investent Holding Company Ltd and others** [2010] 4 All SA 44 (SCA) the court said the following at paragraph 11:

> "Deregistration...puts an end to the existence of the company. Its corporate personality ends in the same way a natural person ceases to exist on death Once there has been deregistration there is obviously no purpose in a corporate post mortem and no-one would have the authority to conduct one".

[19] On the other hand, section 26 (7) of the Act dealing with the effect of restoration provides:

> *"The Registrar shall give notice of the restoration of the registration of a corporation and the date thereof in the prescribed manner and as from such date the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered".*

In Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd 2007 (4) SA (SCA) at 475 the following was said:

> "Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order seems to validate, restrospectively, all acts done since deregistration – including, for example, the institution of legal proceedings – on behalf of company that did not exist....It is an oversimplication to regard a restoration order as no more than an 'as you were'. It can cause severe prejudice to third parties".

Evaluation

[20] Section 26 of the Close Corporation Act makes provision for the enforcement of liabilities which were outstanding at the time the close corporation was deregistered. It is silent on the validity of the agreements concluded after deregistration but before the close corporation's registration is restored. In terms of section 73 (6) (b) of the Companies Act 61 of 1973 (currently section 83 of the new Companies Act 71 of 2008), the court ordering a restoration of a company to the register of companies is empowered to give directions which would safeguard or place the company or

other persons in a position they would be if the company had not been deregistered. Section 26 (7) does not empower the Registrar to give any directions with regard to the rights and obligations of a close corporation and/ or other parties on restoration. The fact that there is no such provision does not mean the Legislature had intended to disregard the rights of innocent parties who concluded agreements in circumstances similar to those of this case.

[21] It is a well-known rule of construction that words used in a statute should be read in the light of their context. The best approach under these circumstances is to look at was the intention of the Legislature when it enacted section 26 (dealing with deregistration and re-restoration of a close corporation) of the Act. **In Jaga v Donges N O and Another** 1950 (4) SA 653 (A) at 677 D – G Schreiner JA:

> "Certainly no less important than the oft repeated statements that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within its limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the firs instance, on the finding out whether the language to be interpreted has or appears to have one clear meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together".

[22] In my view, the intention of the Legislature in incorporating the following wording in s 26 (7) of the Act – '*and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered*', was to ensure that the obligations of a close corporation which could not be enforced because of deregistration are revived on restoration and can be

enforced. Personal liability imposed on members of the close corporation after deregistration in terms of section 26 (5) of the Act is, in my view, another indication that the Legislature had intended to protect parties against any prejudice which could result as a result of deregistration.

[23] It is my considered view that the purpose and object of the deeming provision in section 26 (7) is to validate agreements concluded on behalf of a close corporation while it had been deregistered. I therefore conclude that the defect in the validity of the two agreements entered into on behalf of the applicant while it had been deregistered was cured by the later re-registration of the applicant on 12 April 2011. Had that not been the case, the purpose of the deeming provision in section 26 (7) would be defeated. The argument that the two agreements are void *ab intio* should fail in the circumstances

[24] In the light of the above conclusion, it follows therefore that the counter-claim based on *condictio indebiti,* (payment of the purchase price in the mistaken belief that the respondent did so in terms of a valid contract), should also fail.

Cancellation of Agreements

[25] Mr De Waal submitted that since both agreements have been cancelled, *retitutio in integrum* should follow as a matter of law. In response, Mr Spamer submitted that the respondent was not entitled to summarily cancel the Sale Agreement and then claim full restitution without giving the applicant a period of seven days (upon receipt of a written notice), within which to remedy the breach and as required by clause 12 of such agreement. Clause 12 of the Sale Agreement reads as follows:

> "12. BREACH
>
> In the event of either party committing any breach of the terms and conditions of this agreement and failing to remedy such breach within 7 (seven) days of receipt of written notice calling upon it to do so, then the party giving notice shall be entitled;

13.1 If it is the Purchaser either to cancel this agreement and claim full restitution or to claim specific performance without prejudice to a right to claim damages;

13.2 If it is the Seller to cancel the agreements retake possession of the "business: and retain all payments made as pre-estimated and liquidated damages alternatively to claim immediate payment of the full balance owing at the time of such default together with all interest in terms of this agreement".

[26] In Godbold v Tomson 1970 (1) SA 61 (D) at 65C – D, the following is stated:

> "The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled. (Rautenbauch v Venner, 1928 T.P.D. at p31). The purpose of such notice is to inform the recipient of what he is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what is required of him, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbauch's case supra at p 31)".

[27] In terms of clause 12 referred to above, the respondent could only exercise its right to cancel the agreement and claim restitution if the applicant had failed to remedy the breach within seven days after receiving a written notice calling it to do so. In *casu*, it is clear that the respondent failed to comply with clause 12 above. I am therefore persuaded by Mr Spamer's submission that the respondent is not entitled to claim full restitution in the circumstances as the contract was not validly cancelled. in the event the failure on the part of the applicant

[28] It is not necessary to deal with the effect of the cancellation of the Franchise Agreement due to the fact that the items referred to in clause 16 of that agreement have already been attached by the Sheriff in terms of the interim order dated 26 April 2011.

[29] With regard to the second counter application based on, firstly; the respondent's lack of confidence that the applicant might not be deregistered in

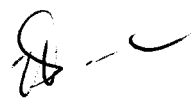
future, thereby leaving its claim unenforceable against it. Secondly; that the respondent could easily dissipate the R1 5000, 00 (which is the subject matter of the respondent's counter-applications), to the detriment of the respondent. I find both arguments to be misplaced for reasons that follow.

[30 The respondent's fear that applicant might be deregistered in future is based on speculation because there is no evidence on the papers to support that. In addition, section 26 (5) imposes a liability on members on deregistration of a close corporation, therefore the respondent's rights are safeguarded. With regard to the second allegation, (based on the decision of the court in **Knox D'arcy Ltd v Jamieson 1994 (3) SA 700 (W) and 1996 (4) SA 348 (A),** the respondent has failed to show that the applicant is attempting to get rid of the funds (R1 5000, 00)in order to defeat the respondent's claim on the funds. In fact, no conduct on the part of the applicant has been shown to warrant the granting of this relief. In the circumstances, the second counter-application should also fail.

[31] In the result, I make the following order:

31.1 The rule nisi granted on 26 April 2011 is hereby confirmed.

31.2 The respondent's counter-applications are both dismissed with costs.



N SABA

(Acting Judge of the High Court)