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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 8709/02

2002-05-29

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

DATE 6/6/2002 SIGNATURE

In the matter between

STRICKLAND, BRIAN NEVIN Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD AND OTHERS Respondents

JUDGMENT

WILLIS, J: The applicant has approached the court by way of urgency. It sought to amend the relief initially sought in its original notice of motion. The amendment was not opposed by the respondents and accordingly is granted.

The relevant portion of the relief sought by the applicant reads as follows:

1. That pending the outcome of the application in terms of Part B hereunder

   (1) the first respondent be and it is hereby interdicted and restrained from acquiring any of the second respondent's shares in or claims against the eighth respondent;

   (2) the second respondent be and is hereby interdicted and restrained from selling or otherwise disposing of any of its shares in or its claims against the eighth respondent to either the first respondent or the second respondent;

   (3) the first respondent be and is hereby interdicted and restrained from selling or otherwise disposing of any of its shares in or its claims against the eighth respondent to either the third respondent.

2. Reserving the costs of this application for determination by the court hearing the application under Part B hereunder.

The applicant, the first respondent, the second respondent, the fourth respondent, the fifth respondent, the sixth respondent and the seventh respondent are all shareholders in the eighth respondent, the second respondent having acquired its shares in the eighth respondent from one of its subsidiary companies, Teamcort (Pty) Ltd.

The shareholders in the eighth respondent are all bound by the terms of a shareholders' agreement which was annexed to the founding affidavit. The third respondent is the managing director of the eighth respondent. The third respondent offered to purchase the second respondent's shares in the eighth respondent which offer was accepted by the second respondent. The agreement concluded

between the second respondent and the third respondent in relation to the aforesaid purchase was reduced to writing and was signed by both parties on 12 April 2002. This agreement, annexed to the founding affidavit, was subject to the suspensive condition that *inter alia* the remaining shareholders, in writing, waive their pre-emptive right in terms of the shareholders' agreement. The aforesaid suspensive condition was not fulfilled and this agreement lapsed.

On 23 April 2002 the second respondent, in accordance with the provisions of clause 17 of the shareholders' agreement, offered to sell to the remaining shareholders and the eighth respondent its shares in and loan account against the eighth respondent. The second respondent's offer was accepted by the applicant on 6 May 2002. The first respondent accepted the second respondent's offer. The fifth and sixth respondents intend to accept the second respondent's offer.

On 3 May 2002 the third respondent offered to purchase the entire issued share capital in the eighth respondent which offer was premised on the first respondent having acquired the second respondent's shares in and claims against the eighth respondent.

On 6 May 2002 the applicant offered to purchase the first respondent's shares in and claims against the eighth respondent. The first respondent decided to accept the third respondent's offer and consequently rejects the applicant's offer.

The applicant has some 1,2% of the shares in the eighth respondent. The rand value of the offer in respect of the shares amounts to some R200 000 for his 1,2% shares. The applicant

values these shares at approximately R280 000. According to the answering affidavit of the first respondent, the nett asset value of the shares in the eighth respondent is in fact negative by reason of the fact that it has a considerable amount of debt. It would appear to be common cause that the eighth respondent is indeed a company that is struggling financially. It is alleged in the answering affidavit that the evaluation placed by the respondents on the shares was derived from an estimate of future earnings.

Although not part of the papers before me, during the course of argument it became common cause that in draft agreements prepared for the shareholders to sign, as shareholders agreements, before preparation of that which was indeed signed by the parties, provision was made in the pre-emption procedures for an insider (in other words, a person who was an existing shareholder) to be able to match any offer received for the purchase of the shares by outsiders.

The first respondent is the Industrial Development Corporation of South Africa Limited. I believe I may fairly take cognisance of the fact that it is a major corporation involved in the giving of assistance for the development of enterprise in South Africa. It has supported the share sale which the applicant seeks to stop. The fourth respondent is Nedcor Bank Limited. It too has accepted the offer which the applicant seeks to stop. Both the first respondent and the fourth respondent are owed several millions of rand each by the eighth respondent.

During the course of argument Mr Medalie, who appears for the applicant, rested his case on two main points. The first is that the

the offer which the applicant seeks to stop or have set aside is not a *bona fide* offer within the meaning of clause 18.1 of the relevant shareholders' agreement. The second argument of Mr Medalie is that there was a tacit term in this shareholders' agreement which would have entitled an insider such as the applicant to match any offer that was made for the purchase of shares in the eighth respondent by anyone else. I shall deal with these two points in turn. Clause 18.1 of the relevant shareholders' agreement reads as follows:-

> "Notwithstanding the provisions of 17, should the shareholders at any time receive a *bona fide* offer to purchase the entire equity of all the shareholders ("the outside offer") and should shareholders who hold at least 80% of the total voting rights of all the shareholders elect to accept the outside offer ("the accepting shareholders") the shareholders who do not wish to accept the outside offer ("the declining shareholders") shall be obliged notwithstanding anything to the contrary contained in this agreement to accept the outside offer together with the accepting shareholders who shall be entitled to accept such offer and in which event the declining shareholders do hereby irrevocably appoint the accepting shareholders as their attorney and agent to do all such things as may be necessary in order to comply with the provisions hereof."

The essence of the argument of Mr Medalie with regard to the fact that the offer in question is not *bona fide* is that if one has regard to the antecedent share transactions preceding it, it would be clear that this could not be a *bona fide* offer.

In my view this argument is defeated by the fact that the applicant himself values his shares at some R280 000. He will receive, as I have already indicated, some R200 000. The discrepancy between these two figures is not so great as to cause any person any sense of disquiet. It is, after all, notoriously difficult to place a fair value upon shares in private companies, especially when the company in question is in financial difficulties. The answering affidavit, as I have already indicated, estimates the nett asset value of the shares in the eighth respondent as being negative. It values the shares on an estimate of future earnings. Future earnings in particular are notoriously difficult to estimate with any degree of accuracy.

Furthermore, as I have already indicated, the transaction to which the applicant has objection, is supported by the first respondent, the Industrial Development Corporation of South Africa Limited and the fourth respondent, Nedcor Bank Limited, both of which, as I have already indicated, are owed several millions of rands each by the eighth respondent. Their support for this particular transaction is a further pointer, in my view, to the fact that this was a genuine commercial transaction. But even if I am wrong in this regard, it is not as though the applicant is remediless. The applicant can always claim in the magistrate's court the difference between the amount that he will receive in terms of this transaction and the amount at which he fairly values the shares if he believes that there has been any breach of the shareholders' agreement entitling him to such relief. Furthermore, if one has regard to the balance of convenience, if one balances the applicant's purported "short change"

of some R80 000 as against a major share transaction involving several millions which would interfere with the internal government of the eighth respondent, then I believe that the applicant clearly must fail. In my view, therefore, the argument that the transaction in question is not a *bona fide* one and should therefore be interdicted against, has no merit.

With regard to the so-called tacit term of the agreement, I concede that it is often the case that a shareholders' agreement will provide for an opportunity for an insider to match any other offer. It is certainly not always the case that shareholders' agreements contain such clauses and indeed there may well be sound reasons why this should not be the case. Pre-emption procedures can be cumbersome and complex. Affording a particular shareholder or groups of shareholders rights to match outside offers can frustrate and scupper an offer which is made and which may well be attractive to the rest. It seems to me that there may well be sound commercial reasons in any particular instance why parties would decide not to agree to include in their pre-emption procedures a right to match other offers. Furthermore, given the facts of this particular case, it seems the fact that it is common cause that original drafts with regard to the shareholders' agreement included a provision that insiders would be able to match outside offers and was subsequently dropped, indicates clearly that the parties did make a sound commercial decision not to provide for this particular option for existing shareholders.

As I am delivering a judgment in the urgent court, I trust that I may be forgiven for relying in terms of authority in the law on that

well-known and well found case *Reigate v Union Manufacturing Co* (Ramsbottom [1918] 1 KB 592 at 605. The quote to which I shall refer has been described by Christie in the third edition of *The Law of Contract* as a great favourite of our courts. It has indeed recently been referred to, with approval, by the Supreme Court of Appeal in the as yet unreported case of *Dirk Samuel Botha v Coopers and Leibrand* (Case No. 514/2000):

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' They would both have replied: 'Of course so and so will happen; we did not trouble to say that; it is too clear'." (emphasis added)

In my view the facts upon which the applicant relies are a far cry from it being inferred that the term was necessary in the business sense to give efficacy to the contract. I certainly do not believe that it can be confidently be said that all the parties affected by this application would have replied "of course so and so will happen, we did not trouble to say that, it is too clear". As I have already indicated, and at the risk of being repetitive, I wish to emphasise that there may well be sound commercial reasons why such a clause would deliberately be excluded from a shareholders' agreement. Accordingly, in my view there is no merit in this particular argument of the applicant.

The first and second respondents have both been represented

by two counsel. The matter affects a major share transaction worth several millions of rands. The implications for the respondent in the event that the applicant were to have succeeded in this matter would be serious indeed. In my view, it was not rash or unduly cautious of the first and second respondents to engage the services of two counsel and in all the circumstances of this particular matter I am satisfied that it is appropriate that the costs of two counsel be awarded.

In the result the application is dismissed with costs, which costs are to include the costs of two counsel.