IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case Number: 29976/2001

UNREPORTABLE

In the matter between:

18/8/05

B & P GROUP FINANCIAL SERVICES

(PTY) L TD **INTERVENING PARTY**

DR R PATHER **APPLICANT**

and

P L KOTECHA **1ST RESPONDENT**

B & P GROUP LIMITED **2ND RESPONDENT**

C F ELOFF N.O. **3RD RESPONDENT**

THE SOUTH AFRICAN FUTURES EXCHANGE 4TH RESPONDENT

JUDGMENT

F DU TOIT AJ

DELETE WHICHEVER IS NOT APPIICA6LE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

SIGNATURE

[1] Before I proceed to deliver judgment in this matter I wish to express my sincere apologies to both parties for the delay of approximately five months in delivering judgment since the matter was heard by me on 4 March 2005. In mitigation I may, however, mention that I heard the matter on the last day of service as an Acting Judge and I had to return to a practice, as I warned both counsel when reserving judgment, that needed urgent attention. Unfortunately I was unable to attend to the judgment before the midyear recess.

[2] B&P GROUP FINANCIAL SERVICES (PTY) L TD (the "*Intervening Party)* applies that it be substituted for the B&P GROUP LIMITED, the Second Respondent in the main application, alternatively that the Intervening Party be given leave to intervene as Fifth Respondent in the review proceedings instituted by the Applicant (Pather) in the main application.

[3] On 23 December 1999 the Applicant, Dr Pather, instituted action, together with six other persons, against **inter alia** the Second Respondent out of the Durban and Coast Local Division. By agreement the parties converted that action into arbitration proceedings and on 30 August 2001 the arbitrator delivered his

award which was against the Applicant and **inter alia** in favour of the Second Respondent. Thereafter, during about November 2001, the Applicant, dissatisfied with the arbitration award, took the award on review before this Court (jurisdiction was not an issue in the present application or, apparently, also not in the main application being the review application).

[4] During the arbitration proceedings B&P GROUP LIMITED was an external company registered as such in the Republic of South Africa with registration number 1997/006964/10 in terms of the South African Companies Act 61 of 1973. Its country of origin was the British Virgin Islands (" *BVI"*) where it was incorporated and registered with registration number BVI207045. However, shortly before the main application was to be heard in this Court on 26 January 20P4 the following facts, which are not in dispute, pertaining to B&P GROUP LIMITED came to the knowledge of the Applicant:

4.1 It was struck off from the register in the BVI on 1 May 1998 due to non-payment of its 1997 licence fee.

4.2 It was restored to the register in the BVI on 22 June 1998.

4.3 It was again struck off from the register in the BVI on 1 May 2001 due to non-payment again of its licence fee.

4.4 The company was again restored to the register in the BVI on 30 October 2001 and remained so registered until it was dissolved on 16 May 2003 in the BVI.

4.5 It was finally deregistered as an external company in the Republic of South Africa on 3 November 2003.

Although the aforesaid facts are cursorily dealt with in the papers which served before me, it appears to be common cause that B&P GROUP LIMITED, despite its intermittent deregistration in the BVI, remained registered as an external company in the Republic since its. registration as such on 9 May 1997 until it was finally deregistered as an external company on 3 November 2003. The aforesaid facts necessitated the Applicant to apply for a postponement of the main application on 26 January 2004 which was granted, costs reserved in the main application. Hence the present application by the Intervening Party applying for the relief referred to in paragraph [2] above.

[5] The underlying facts to those enumerated in paragraph [4] above are the following:

5.1 The deponent to the affidavits filed on behalf of the Intervening Party and B&P GROUP LIMITED (Second Respondent) is one PARESH LAXMIDAS KOTECHA (*"KOTECHA"*) who was at all relevant times hereto a director of and shareholder in B&P GROUP LIMITED and is presently also the majority shareholder in and a director of the Intervening Party.

5.2 After the award had been delivered in the arbitration proceedings KOTECHA decided to give effect to a decision he had made earlier namely to deregister the B&P GROUP LIMITED in the BVI and to register a local company in South Africa. This decision, according to him, was reached as the business of the external company was virtually exclusively conducted within the Republic of South Africa.

5.3 Instead of registering a new company KOTECHA, together with his wife and three other persons, purchased the

entire shareholding in an existing company (which was originally a shelf company) and changed the name thereof to B&P GROUP FINANCIAL SERVICES (PTY) LTD, the present Intervening Party. On 3 September 2001 the B&P GROUP LIMITED (Second Respondent) entered into an oral agreement with the Intervening Party in terms whereof the Intervening Party would acquire the business of B&P GROUP LIMITED. (The fact that KOTECHA erroneously referred to the date as 1 September 2001 in his answering affidavit in the previous application for a postponement by the Applicant, is, in my view, without consequence). This agreement was reduced to writing and signed on 1 November 2001 by KOTECHA in his capacity as authorised representative of both companies. The agreement is annexed to the papers and I shall revert to the relevant terms thereof hereunder.

5.4 KOTECHA subsequently proceeded to have the B&P GROUP LIMITED deregistered in the BVI on 16 May 2003 and as an external company in the Republic of South Africa on 3 November 2003.

[6] In paragraph 5.3 of his answering affidavit in the application for a postponement (to which reference is **inter alia** made in the founding affidavit in the intervening application) KOTECHA says the following:

> *"I did not contemplate for one moment that the deregistration of the external company which necessitated the deregistration of the external company in South Africa as well would have an effect on these proceedings. To be frank I gave it no thought."*

Although I did not read the voluminous papers in the main application (it was of course not necessary and I was also kindly and properly advised beforehand by the legal representatives not to do so) I notice that that application was launched on 14 November 2001 and the answering affidavit on behalf of the First Respondent and the Second Respondent (KOTECHA and the B&P GROUP LIMITED respectively) was delivered on 5 December 2002. (I do not know the reason for the inordinate delay in filing the answering affidavit but as it is no issue in the present proceedings I need not concern myself therewith any further). Despite the date of the filing of the answering affidavit in the main application, I accept the explanation of KOTECHA

quoted above as such a technical mistake in the ordinary course of events is humanly possible and there is no indication of any ulterior or fraudulent motive on the part of KOTECHA. Further, that explanation stands unchallenged.

[7] Confronted with the objective facts regarding the intermittent deregistration of the B&P GROUP LIMITED in the BVI at highly relevant times, the Intervening Party sought to rely on the provisions of the BVI International Business Companies Act, 1984. In his affidavits KOTECHA contends that this Act specifically provides that where the name of a company has been struck off the register for reasons of non-payment of the licence fee that company may be restored to the register by the Registrar in the BVI, upon payment of all fees due by it. Upon such restoration of the company to the register, the name of the company is deemed never to have been struck off the register. All legal proceedings which continued during the period that the company was struck off the register are unaffected and are of full force and effect. During argument the Intervening Party's counsel elaborated on this contention. Lengthy argument by both counsel ensued whether the foreign law of the BVI was proved and whether I was entitled to take judicial notice thereof

and to apply it to the facts of the present case. Various authorities were referred to by both counsel in their heads and during argument. However, on the view I hold, it is, on the facts of the present matter, not necessary to decide this issue and it is therefore also unnecessary to refer to the various authorities relied on by counsel.

[8] At the commencement of argument I enquired from counsel for the Intervening Party why it was necessary to revert to the law of the BVI and whether the problem should not be addressed with reference to the provisions in the South African Companies Act No 61 of 1973 dealing with external companies contained in Chapter XIII of that Act. Maybe I diverted counsel's attention from finding the solution in South African Company Law by specifically referring to the implications of section 334 of the Companies Act which deals with the transfer of the undertaking of an external company and exemption from transfer duty. According to counsel this section is only applicable when immovable property and the payment of transfer duty are involved with a transfer of the undertaking of an external company. Applicant's counsel agreed that, on the facts of the present matter, section 334 was not applicable. I am satisfied

that section 334 does not prescribe a peremptory procedure to be followed when an external company transfers the whole of its undertaking to an *"internal"* South African company formed for that very purpose as happened in the present matter. The basic purpose of section 334 (as with its predecessor in its amended form, section 203 of the 1926 Companies Act) is to facilitate such a transfer and the saving of the costs of the transfer of the business and property of a foreign company to a South African Company (Dage Properties (Pty) Ltd v General Chemical Corporation Ltd and Another 1973 (1) SA 163 (A) at 172A175H).

[9] During argument I put the proposition to Applicant's counsel that the determining factor was the registration of the external company as such under the provisions of the South African Companies Act regardless of whether that company was at the relevant time deregistered in its country of origin. According to counsel it must automatically follow that when the external company is deregistered in its country of origin it cannot continue to exist as a legal persona in South Africa despite its continued registration as an external company under the South African Companies Act. In this regard he referred to ex parte

Jacobson: In re Alec Jacobson Holdings (Pty) Ltd 1984 (2) SA 372 (W) at 376-377. That case, however, dealt with the consequences of the deregistration of a South African company registered under the Companies Act. The problem of a dual registration of an external company and the deregistration only in the country of its origin did not present itself in that decision.

[10] Applicant's Counsel further argued, with reference to Rainbow Diamonds (Edms) Beperk v Suid-Afrikaanse Nasionale lewensassuransiemaatskappy 1984 (3) SA 1 (A) at 10-12 that the *effect* of such deregistration is that the company's property becomes **bona vacantia.** With reference to the commentary on section 332 of the Companies Act in Meskin, Henochsberg on the Companies Act, Vol 1 p656, counsel submitted that the same consequence applies to the deregistration of external companies. The passage referred to by counsel reads: "*In the case of the deregistration of an internal' company its property becomes bona vacantia. Deregistration of an external company terminates its existence as a body corporate registered in South Africa; but it does not terminate its existence as a body corporate in the country of its incorporation. It is accordingly submitted that if at the time it is deregistered it has in fact*

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ceased to exist as a body corporate in the country of its incorporation its property in South Africa will become bona vacantia ... ; but if at such time it still exists as a body corporate in such foreign country its property will remain owned by it."

[11] I do not think that the passage quoted from Meskin supports counsel's argument. On the contrary, in my view it supports the conclusion that as long as an external company remains registered as such under the Companies Act legal effect and recognition must be given to such registration regardless of the fact that the company was deregistered in its country of origin. For purposes of its economic activity an external company registered as such under the Companies Act does not derive its legal capacity from its registration in its country of origin but from its registration as an external company in terms of section 322 of the Companies Act, 1973. My aforesaid conclusion is supported by what was said in paragraph [13] at 356I-357C in Sackstein N.O. v Proudfoot SA (Pty) Ltd 2003 (4) SA 348 (SCA):

"*The first is that it is common cause, but essential to emphasize, that the company Tsumeb Corporation Ltd, registered as such in Namibia, subsequently obtained registration as an external company under the same name*

in the Republic of South Africa in terms of s322 of the Companies Act, and not under s335 of that Act. In such a case, s323 provides that

> *'the external company shall be a body corporate in the Republic subject to the applicable provisions of this Act'.*

An external company may be wound up by the Court like a domestic company, because s337 of the Companies Act defines a company as including an external company.

From this it follows that an external company registered as such in the Republic of South Africa may be liquidated as if it were an independent entity even if the foreign company to which it is 'related' is not liquidated or dissolved, and vice versa: If Tsumeb was liquidated or dissolved in Namibia, Tsumeb could carry on its business here and could not be wound up unless the grounds for wounding-up specified in s344 were proved to be present."

Applying this Sackstein principle to the facts of the present case, it means that B&P GROUP LIMITED remained a registered

external company in terms of s322 of the Companies Act on 9 May 1997 until it was deregistered as an external company on 3 November 2003 regardless of its intermittent deregistration during this period and its final dissolution in the BVI on 16 May 2003. It follows that the B&P GROUP LIMITED, duly represented, as an external company had full legal capacity to enter into the oral transaction in terms whereof it sold its entire undertaking to the Intervening Party despite its intermittent deregistration in the BVI on that date. In any event, when this oral transaction was reduced to writing on 1 November 2001 the B&P GROUP LIMITED was already restored to the register in the BVI on 30 October 2001.

[12] For the aforesaid reasons I therefore conclude that it is not necessary to refer to the law of the BVI to determine the legal capacity of B&P GROUP LIMITED to enter into the transactions in South Africa but that the external company had full legal capacity to enter into that transaction under the provisions of the South African Companies Act relating to external companies.

[13] However, the Applicant further opposed the present application for a substitution of parties on the basis that the Intervening

Party has no **locus standi in judicae** in relation to the claim B&P GROUP LIMITED has against the Applicant in terms of the award of the arbitrator on the ground that such claim is not included as part of the assets sold by the B&P GROUP LIMITED to the Intervening Party in terms of the agreement dated 1 November 2001. For this submission Applicant's counsel referred to the following clauses in the sale of business agreement and I quote the contents thereof:

> *"1.* ***INTRODUCTION***
>
> *1.1 The parties entered into an agreement of sale, whereby the Seller would sell and the Purchaser would purchase the business defined in clause* 2.1 *below.*
>
> *1.2 The purchase and sale of the business was approved by the shareholders of both parties and recorded in resolutions signed by the shareholders of the Purchaser and Seller on the 19th October 2001.*
>
> *1.3 This written agreement records the terms and conditions of the agreement of sale*

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between the Purchaser and Se//e~ verbally agreed to on or about the 3rd of September 2001.

2. INTERPRETATION

In this agreement the following words and phrases bear the meanings assigned to them below: -

2.1 'The business' means the broking of agricultural commodities ... under the name of B & P Group Financial Services, carried on by the Seller as a going concern as at the effective date, including the business assets, the business name and liabilities;

2.2 'The business assets" means all the assets of the Seller used in, or in connection with, the business."

Clause 3.1 which reads:

"The Seller sold to the Purchaser who purchased the business as a going concern with effect from the effective date."

Applicant's counsel argued that on a proper interpretation of the aforementioned clauses the claim against the Applicant was not included in the sale. According to counsel's argument, this is so because *"business assets"* is so defined so as to include only the movable corporeal assets of the business such as office fittings, furniture and equipment and that the claim of the Second Respondent against the Applicant does not fit this description.

[14] In his affidavits KOTECHA contends that it was the intention of both parties to the sale agreement that the claim was included in the sale and in the alternative that on the same evidence the agreement must be deemed to be rectified to that effect. Applicant's counsel referred to the non-variation and non-waiver clause (clause 13) but in my view this clause is not applicable. The Intervening. Party is not seeking to vary or add to the agreement but is only relying on evidence to prove, in the case of ambiguity, what the true intention of the parties was or in the alternative to say that the agreement must be deemed to be rectified. The argument by the Applicant's counsel that rectification can no longer be invoked because of the final deregistration both in the BVI and in South Africa of the B & P GROUP LIMITED, is without merit and may safely be rejected.

I am in any event not going to decide this issue on the ground of rectification.

[15] It is trite law that when interpreting a contract to ascertain the true intention of the parties, words must not be looked at in isolation but the agreement as a whole must be looked at to determine the true intention of the parties as expressed in the words used by them.

[16] As I read the contract I have no doubt that it was the intention that the claim was included in the sale. In defining "*the business"* in clause 2.1 it is recorded that it is carried on by the Seller as a going concern as at the effective date, including the business assets. In clause 3.1 it is recorded that the Seller sold and the Purchaser purchased the business as a going concern. According to clause 3.2 all risk and benefit in and to the business passed from the seller to the purchaser. The fact that the business was sold as a going concern in my view necessarily implies that it was the intention of the parties to the sale agreement that B & P GROUP LIMITD would retain nothing but deliver all assets, rights and benefits to the Intervening Party. (Compare **General Motors SA (Pty) Ltd v Besta Auto**

Component Manufacturing (Pty) Ltd and Another 1982 (2) SA 653 (SECLD) at 656H-658E).

[17] But even if I am wrong in my interpretation of the language used in the agreement, then the present matter presents a case where I am entitled to look at the background facts and the surrounding circumstances to arrive at the true intention of the parties. It is abundantly clear from the affidavits of KOTECHA that it was the intention that B & P GROUP LIMITED was selling the business in its entirety and with the purpose of transferring the whole of the business to the newly established B & P GROUP FINANCIAL SERVICES (PTY) LTD and that after the effective date B & P GROUP LIMITED would be deregistered in the BVI and also deregistered as an external company in South Africa. There is simply no room for an intention that B & P GROUP LIMITED would retain the claim which would become **bona vacantia** on its deregistration. I say this despite the fact that KOTECHA did not apply his mind to the effect of deregistration on the claim as is said in the passage quoted in paragraph [6] above. To decide otherwise will be to close one's eyes to the reality and the true nature of the transaction.

[18] Having found in favour of the Intervening Party on all the issues it follows that the application must succeed. The alternative relief in the notice of motion granting leave to the Intervening Party to intervene as Fifth Respondent in the review proceedings does not enter the picture. This is not a case where the Intervening Party is claiming a legal interest in the subject-matter of the litigation which could be prejudicially affected by the judgment of the Court. The present proceedings also do not involve a change of status giving rise to the necessity for a substitution of parties as contemplated in rule 15. The present application for substitution involves the introduction of a new *persona.* B & P GROUP LIMITED (the Second Respondent in the main application) was deregistered and no longer exists. The Intervening Party by agreement took over the entire business of the deregistered company, including the claim the deregistered company had against the Applicant. Such an application may be granted if no prejudice will be caused to the opposite parties. No such prejudice was argued and I see none.

[19] As far as costs are concerned the Intervening Party in its notice of motion tenders the costs of the application on an unopposed basis but seeks the costs occasioned by opposition. I see no

reason to reserve the costs for determination in the main application. The main application was postponed on 26 January 2004 on application of the Applicant when it had learned that the Second Respondent had been deregistered. Although there was a delay of about some seven months before the Intervening Party launched the present application on 24 August 2004 the Applicant elected to oppose the application for substitution thereby causing further delay which could have been avoided if he had elected not to oppose the application and there would have been no prejudice for him by such substitution. In my view the Intervening Party, being the successful party, is entitled to the costs occasioned by such opposition.

[20] I make the following order:

1. The Intervening Party (B & P GROUP FINANCIAL SERVICES (PTY) LTD) is hereby substituted for the B & P GROUP LIMITED as the Second Respondent in the main application under case number 29976/2001.

2. The Applicant (Dr RAJENDRAN PATHER) is ordered to pay the costs occasioned by his opposition to the present

application.

F DU TOIT AJ
Acting Judge of the High Court
Transvaal Provincial Division

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