IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE Date: 2008-04-02

Case Number: 11693/2008

In the matter between:

UNIVERSAL EQUIPMENT (PTY) LTD First Applicant

UKUVULA INVESTMENT HOLDINGS (PTY) LTD Second Applicant

and

BABCOCK AFRICA SERVICES (PTY) LTD Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an urgent applicant for an order interdicting and restraining the respondent from unlawfully terminating the agency agreement entered into between the first applicant and the respondent on 1 August 2004 ('the agreement') and that the notices of termination given by the respondent to the first applicant by way of an undated letter, purportedly in terms of clause 2.2 of the agreement, and by way of a letter dated 6 March 2008, purportedly in terms of clause 5ii of the

agreement be declared to be unlawful and of no cause and effect pending the final determination of an action to be instituted by the applicants against the respondent for final orders declaring that the notices of termination are unlawful and of no cause and effect, such action to be instituted within three weeks of the date of the grant of the interim relief.

[2] During argument it emerged that this is not the only relief which could be granted. The parties agreed that should the court find that a final order declaring either of the notices unlawful and of no force and effect could be granted on the papers the court should grant such final relief.

[3] Final relief in application proceedings can be granted in the circumstances outlined in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd and Others*** **1984 (3) SA 623 (A)** at 634D-635C. Where the applicant seeks interim relief the applicant must establish:

(1) a clear right, or if not clear, that it has a *prima facie* right;

(2) that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;

(3) that the balance of convenience favours the grant of an interim interdict; and

(4) that the applicant has no other satisfactory remedy. (***LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd*** **1969 (2) SA 256 (C)** at 267B-E.)

When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed. (***Webster v Mitchell*** **1948 (1) SA 1186 (W);** ***Gool v Minister of Justice and Another*** **1955 (2) SA 682 (C)** at 688C-E; ***LF Boshoff Investments (Pty) Ltd v Cape Town Municipality (supra)*** at 267E-G; ***Beecham Group Ltd v B-M Group (Pty) Ltd*** **1977 (1) SA 50 (T)** at 55B-E).

In ***Beecham Group Ltd v B-M Group (Pty) Ltd (supra)*** the court said with regard to the various factors which must be considered:

> '"I consider both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general discretion to be exercised by the court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of a grant or a refusal of a temporary interdict"'

Where the applicant's right is clear and the other requisites of the interdict are present no difficulty presents itself about granting an interim interdict. Where, however, an applicant's prospects of ultimate success are nil, obviously the court will refuse an interdict (***Olympic Passenger Services (Pty) Ltd v Ramlagan*** **1957 (2) SA 382 (D)** at 383C-D; ***Beecham Group Ltd v B-M Group (Pty) Ltd (supra)*** at 54H-55B.)

[4] The following facts are common cause:

(1) On about 1 June 1999 Universal Components (Pty) Ltd ('Universal Components') and the respondent entered into a written agency agreement in terms of which the respondent appointed Universal Components as its agent to sell JCB, Bomag and Winget construction machinery on behalf of the respondent. (It should be noted that the terms of this agency agreement are similar, if not identical, to the terms of the agreement.) Clause 2.2 gave the parties the right to terminate the agreement, which was of indeterminate duration, on not less than 90 days written notice. In terms of clause 5ii Universal Components agreed not to sell or to be concerned directly or indirectly in the sale of machines, other than used machines, which in the reasonable opinion of Babcock are competitive with Babcock machines unless it has received the prior written agreement of Babcock. In terms of clause 13 Babcock had the right to terminate the agreement on notice in certain defined circumstances.

(2) During 2000 the respondent acquired the right to distribute Volvo construction equipment ('Volvo CE') and in November 2000 the respondent confirmed Universal Components' appointment to sell and service Volvo CE products in accordance with the existing agency agreement. At the same time the respondent issued an updated schedule which reflected Volvo CE in the

range of products covered by the existing agency agreement. From that date Universal Components was entitled to market, sell and service both JCB and Volvo construction equipment.

(3) On 18 September 2003 the respondent informed Universal Components that the respondent and JCB had agreed that the respondent would relinquish its JCB dealership.

(4) Since Universal Components did not wish to lose its right to market, sell and service JCB products Universal Components entered into an agreement with Kemach Equipment (Pty) Ltd ('Kemach') which held the right to distribute JCB construction machinery, in terms of which Kemach appointed Universal Components to promote, sell and service JCB construction machinery in the Eastern Cape.

(5) From the correspondence which passed between Universal Components and the respondent after Universal Components entered into the agreement with Kemach it appears that Universal Components continued to promote, sell and service JCB construction machinery.

(6) During July 2004 Universal Components and the respondent

agreed that the existing agency agreement should be terminated and a new agency agreement concluded as a matter of urgency. The parties commenced negotiations regarding the terms and conditions of the new agency agreement to be concluded. In July 2004 the respondent submitted a draft agreement to Universal Components. The subsequent correspondence dealt with the terms of the agreement and in particular the parties' right to terminate on notice and Universal Components' right to continue to promote, sell and service JCB products in terms of the new agreement. On 30 July 2004 the respondent addressed an e-mail to Universal Components in which, after referring to the draft agreement and Universal Components' comment thereon, it said the following with regard to the two issues –

'Appointment and term

We need to ensure that our agreement is a back-to-back with the main agreement between Babcock and our principals i.e. 180 days. Please be assured of my personal commitment to you Chris that our intention is to enjoy a long relationship with both you and your company going forward. This is the only way in which we can expect you to make the required investments in the business in order to ensure the required growth. Obviously and as you correctly pointed out, performance remains the key to any distributor relationship.

JCB

In terms of the agreement, we will permit Universal to sell the competing brand JCB up until 31 December 2004. As an interim measure up until 31.12, it is required that UE afford each of the main brands i.e. Volvo/Bomag/Winget and JCB individual focus through the appointment of dedicated sales staff. After 31.12, one of three things need to happen:

(1) UE give up either JCB or Volvo/Bomag/Winget, thus ensuring a dedicated focus to the remaining brand.

(2) UE split their business into two separate businesses representing each of the two brands.

(3) UE restructure their existing business in a way that is acceptable to each of the brand principals, and in so doing, ensures proper focus on the two brands.'

(7) On 1 August 2004 Universal Components and the respondent entered into the agreement. The agreement contains the following relevant provisions:

(i) Clause 2.2 which reads as follows –

'This agreement shall commence on the 10th day of August 2004 and shall remain in force until terminated in either of the following ways.

i either party giving to the other not less than 180 (one hundred and eighty) days written notice;

ii either party exercising its respective powers of termination hereinafter contained.'

(ii) Clause 5ii which reads as follows:

'The agent hereby agrees as follows:

ii not to sell or be concerned directly or indirectly in the sale of machines, other than used machines, which in the reasonable opinion of Babcock are competitive with Babcock Machines unless it has received the prior written agreement of Babcock.'

(iii) Clause 13ii which reads as follows:

'Babcock shall have the right to terminate this agreement upon 30 (thirty) days notice in writing in the event of the following:

(a) Any material breach of the Agent of any of the terms of this Agreement and it is expressly agreed without limitation that a breach of any terms of clauses 5, 6, 7, 8(i), (v), (xi), 9, 12 and 21 of this Agreement shall constitute a material breach of this Agreement;

(b) Any breach by the Agent of any of the terms of this Agreement which is not capable of remedied;

(c) Any breach by the Agent of any terms of this Agreement which is capable of being remedied by the Agent but which has not been remedied by it within 30 (thirty) days of written notice of Babcock to the Agent requiring it to remedy such breach.'

(iv) Clause 17 of the agreement which reads as follows:

'Any indulgence granted by Babcock to the Agent

and any neglect or failure by Babcock to enforce any of the terms of this Agreement shall not be construed as a waiver of or prejudice any of the rights of Babcock hereunder.'

(v) Clause 18 of the agreement which reads as follows:

'All (if any) previous arrangements, agreements or contracts between Babcock or the Manufacturer and the Agent are hereby revoked and superseded by this Agreement and this document and its schedules contain the entire Agreement between the parties hereto and no addition to or deviation from this Agreement shall be considered valid or effective unless the same shall have been mutually agreed upon in writing.'

The agreement is silent as to whether Universal Components may or may not promote, sell and service JCB products.

(8) After the agreement was concluded Universal Components proceeded to implement option 3: i.e. it attempted to structure its

existing business in a way that was acceptable to each of the brand principals to ensure proper focus on the two brands. Later, at the request of the respondent, Universal Components was required to act in terms of option 2.

(9) At all material times JCB accepted Universal Components' dual agency for the products. Although the respondent from time to time expressed concern about the manner and expedition with which Universal Components implemented the two options the respondent did not inform Universal Components that it no longer consented to Universal Components promoting, selling and servicing JCB products. Nor did the respondent purport to place Universal Components on terms regarding the manner or expedition with which Universal Components implemented the two options.

(10) When Universal Components and the respondent concluded the agreement on 1 August 2004 Universal Components' representative, Mr Chris le Roux, requested that the agreement incorporate the consent referred to in paragraph (6) but the respondent's representative, Mr Mark Hughes, considered that the consent referred to was sufficient and need not be incorporated in the agreement.

(11) In terms of the agreement –

(i) the respondent appointed Universal Components as its agent for the sale of Babcock products in the Eastern Cape for the duration of the agreement;

(ii) the Babcock products included Volvo CE, Bomag and Winget construction machinery and parts ancillary thereto;

(iii) the agreement would commence on 10 August 2004 and would remain in force until terminated in either of the following ways:

(a) by either party giving to the other not less than 180 days written notice as specified in clause 2.2i thereof; or

(b) by either party exercising a right of termination arising from a breach by the other of a term or terms of the agreement as specified in clause 13 thereof.

(iv) the respondent undertook to sell Babcock products in the Eastern Cape and to use its best endeavour to promote the sale of Babcock products and the service of Babcock machines in the territory. It also undertook not to sell or be concerned directly or indirectly in the sale of machines, other than used machines, which in the reasonable opinion of the respondent are competitive with Babcock machines unless it had received the prior written agreement of the respondent.

(12) On or about 1 November 2006 Universal Components and the first applicant entered into a written agreement in terms of which the first applicant purchased Universal Components' business for R26 240 000 ('the sale agreement'). The sale agreement was subject to a number of suspensive conditions which had to be fulfilled or waived no later than 30 November 2006, failing which the sale agreement would be of no force or effect. These suspensive conditions included a condition –

(i) that the first applicant conclude a loan agreement with Firstrand Bank Ltd in the sum of R17 million; and

(ii) that Universal Components' rights and obligations in

terms of the agreement be assigned to the first applicant.

They did not include a condition that the respondent agree not to exercise its right to terminate the agreement in terms of clause 2.2i of the agreement during the subsistence of the loan agreement with Firstrand Bank Ltd.

(13) The first applicant entered into a loan agreement with Firstrand Bank Ltd which required that the second applicant stand surety for the first applicant's obligations to the bank. Because of these obligations the applicants considered it essential that the first applicant remain an agent of the respondent in terms of the agreement for the five year period in which the first applicant was required to repay the loan to Firstrand Bank Ltd. They were concerned about the dire financial implications if the respondent exercised its right to terminate the agreement on 180 days notice.

(14) On 3 and 4 October 2006 the second applicant's representatives, Messrs George Yerolemou and Alfred da Costa, and Universal Components representative, Mr Le Roux, met the respondent's representative, Mr Hughes, to discuss the assignment of the contract from Universal Components to the first applicant

and the provisions of clause 2.2i of the agreement. Mr da Costa raised Universal Components' concern about the clause. At the meeting it was orally agreed that the agreement would be assigned to the first applicant. On 4 December 2006 Hughes on behalf of the respondent addressed a letter to the first applicant in which he confirmed that the parties had agreed to the assignment of the agreement from Universal Components to the first applicant.

(15) After this meeting in October 2006 and until the respondent's letter of 4 December 2006 neither Universal Components nor the first applicant nor the respondent addressed any correspondence to the other party to confirm the assignment or to confirm that agreement had been reached that the respondent would not exercise its right to terminate the agreement in terms of clause 2.2i of the agreement for five years while the first applicant was indebted to Firstrand Bank Ltd. The first time the applicants alleged that the parties had agreed that the respondent would not exercise its right to terminate the agreement in terms of clause 2.2i was on 8 February 2008 when these proceedings were imminent.

(16) On or about 15 December 2006 the first applicant and Firstrand

Bank Ltd entered into a loan agreement and the second applicant signed the deed of suretyship securing the loan with Firstrand Bank Ltd.

(17) All the suspensive conditions in the sale agreement were fulfilled and that agreement became of full force and effect and binding as from 15 December 2006.

(18) Representatives of the first applicant and the respondent met on a number of occasions to discuss the organisation of the first applicant's business to ensure a proper focus on the respondent's products.

(19) From about April 2007 the relationship between the first applicant and respondent deteriorated.

(20) On or about 19 December 2007 the respondent sent by registered post the undated letter in which the respondent notified the first applicant that in accordance with clause 2.2i of the agreement the respondent was terminating the agreement on 180 days notice as from 1 January 2008. The first applicant received this letter on 24 January 2008.

(21) After receiving this letter the first applicant and the respondent attempted to resolve the issue without resorting to litigation and on 8 February 2008 the applicants' attorney addressed a letter to the respondent alleging that it was a material term of the agreement between the first applicant and the respondent that the respondent would not terminate the agreement in terms of clause 2.2i until the first applicant had discharged its obligation to Firstrand Bank Ltd.

(22) On 6 March 2008 the respondent's attorney replied to the applicants' attorney's letter of 8 February 2008 and pertinently denied that the parties had varied or amended clause 2.2 of the agreement. On the same day the respondent addressed a letter to the first applicant in which the respondent alleged that the first applicant was acting in breach of clause 5ii of the agreement by selling Vibromax and JCB machines which in the respondent's opinion compete with the respondent's products and the respondents gave notice to the first applicant that if it did not cease to act in breach of clause 5ii as alleged, within 30 days of the notice, the respondent would terminate the agreement.

(23) On 7 March 2008 the applicant launched this application seeking the relief already referred to.

[5] The applicants' case –

(1) with regard to the first undated notice (purporting to terminate the agreement on 180 days' notice) is that the parties orally agreed that during the five year period during which the applicant would be required to discharge its funding obligations to Firstrand Bank Ltd the respondent would not exercise its right to terminate the agreement in terms of clause 2.2i of the agreement;

(2) with regard to the second notice dated 6 March 2008 (purporting to give the applicant 30 days notice to rectify its breach of clause 5 of the agreement) that the respondent consented in writing to the first applicant's predecessor promoting, selling and servicing JCB products.

[6] The respondent disputes both contentions. Regarding the first notice, the respondent denies that it entered into the oral agreement alleged and contends that even if it did, such oral agreement would not vary clause 2.2 of the agreement because it did not comply with the formalities prescribed by clause 18 of the agreement – see ***SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere***

1964 (4) SA 760A and ***Brisley v Drotsky*** **2002 (4) SA 1 (SCA).** Regarding the second notice the respondent contends that it gave limited consent, subject to conditions that have not been complied with.

[7] For present purposes it will be accepted, but not decided, that an applicant may obtain interim relief pending the outcome of an action for a declarator and that interim relief may be granted on a *prima facie* view of a disputed legal point – see ***Tony Rahme Marketing Agencies (SA) (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council*** **1997 (4) SA 213 (W).**

[8] The applicant's counsel argued that this case involves a difficult point of law: that when the parties entered into the oral agreement relied upon (i.e. to assign the agreement and that the respondent would not exercise is right in terms of clause 2.2i) they were not obliged to comply with the formalities prescribed by clause 18 because they were novating the agreement. As I understood the argument it was that the parties were not purporting to amend clause 2.2.

[9] I cannot agree. The issue is not described in this way in the applicants' founding affidavit – which constitutes both the pleadings and the evidence – and it requires a straightforward application of the non-variation provision in clause 18 of the agreement. In my view the oral

agreement alleged purports to vary the terms of clause 2.2i of the agreement and this cannot be done effectively unless the formalities set out in clause 18 have been complied with. Furthermore, the overwhelming probability is that the parties did not enter into such an oral agreement. If, as the applicants contend, this restriction on the respondent's right to terminate was of vital importance, and the parties had entered into the agreement alleged, there was very good reason for the applicants to confirm that the agreement had been entered into if not comply with clause 18. Yet this did not happen. One would have expected a contracting party to confirm all the important matters agreed upon at the first opportunity yet when the respondent confirmed the assignment it did not confirm this vital term. Similarly, when the first respondent received the letter confirming the assignment it did not immediately reply and confirm the agreement relating to clause 2.2i. It was argued that this is not improbable or unusual. I cannot agree. When such an important matter is agreed after being pertinently raised it is inconceivable that it would not be referred to by either party for a period of more than one year and then only because the other party seeks to exercise the right in question.

[10] The applicants' therefore have no chance of succeeding on this issue and on this ground alone the interim relief should be refused. It is contended that damages is not a satisfactory remedy because of the

difficulty of proof. In my view this difficulty is exaggerated and damages is a satisfactory remedy. That is a second reason to refuse the interim relief sought.

[11] The validity of the second notice requires consideration of the question whether consent was given for the first applicant to promote and sell JCB equipment. (It is not contended that Vibromax is not JCB equipment.) The document reflecting this consent is not in dispute and the relevant paragraph has been referred to. The respondent contends that this consent was valid only until 31 December 2004. In my view this is not correct. In its terms the consent was unconditional until 31 December 2004 whereafter the first applicant was entitled to adopt either option 2 or 3. Initially, the first applicant adopted option 2. Later, it seems, option 3 was required.

[12] Clearly consent was given for the first applicant to promote and sell competing equipment. While the consent remains in force the first applicant is not in breach of clause 5.5ii of the agreement. A notice calling upon the first applicant to remedy that breach is therefore premature and cannot be valid.

[13] It is argued that this notice by implication withdraws the consent. I do not agree. The agreement is silent as to how and in what

circumstances the consent can be withdrawn. In view of the right conferred by the consent it seems to me that before the respondent can withdraw the consent it must place the first applicant on terms: it must call upon the first applicant to comply with the conditions of the consent within a stated period, which would have to be reasonable taking into account all the relevant circumstances, failing which the respondent would withdraw its consent. In my view the contractual rules relating to the acquisition of a right to cancel where none is stipulated in the agreement are applicable – see ***Nel v Cloete*** **1972 (2) SA 150 (A).** A notice calling upon the first applicant to comply with the conditions of the consent failing which it would be withdrawn must be clear and unambiguous – see ***Ponisammy and Another v Versailles Estates (Pty) Ltd*** **1973 (1) SA 372 (A)** at 385B-H: i.e. this cannot be implied. The consequences of a withdrawal of the consent are so serious that it cannot be otherwise. I did not understand the respondent's counsel to disagree.

[14] The respondent was therefore not entitled to give the notice on 6 March 2008 because the first applicant was not in breach of the agreement. It was selling the competing products with the respondent's consent. The notice was therefore invalid.

[15] The applicants are therefore entitled to a declarator that the letter dated

6 March 2008 in which the respondent purports to rely on the provisions of clause 5ii of the agency agreement is unlawful and of no force and effect. The applicants are also entitled to the costs of the application. While the relief sought in respect of the first notice was important the relief sought in respect of the second notice is also important and it precipitated the application. In my view that is substantial success. The costs order will include the costs of two counsel. Both parties were represented by two counsel.

The order

[16] (1) The notice of termination furnished by the respondent to the first applicant by way of its letter dated 6 March 2008 in which it purports to rely on the provisions of clause 5ii of the agency agreement is declared to be unlawful and of no force and effect.

(2) The other relief sought by the applicants in prayers 2, 3 and 4 of the notice of motion is refused.

(3) The respondent is ordered to pay the applicants' costs which costs shall include the costs consequent upon the employment of two counsel.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 11693/08

HEARD ON: 26 March 2008

FOR THE APPLICANTS: ADV. A.P. JOUBERT SC
ADV. S.C. RORKE

INSTRUCTED BY: Mr E van Kerken of Stegmanns Attorneys

FOR THE RESPONDENT: ADV. R. STOCKWELL SC
ADV. S. STRYDOM

INSTRUCTED BY: Ms J. Foxcroft of Hack Stupel & Ross

DATE OF JUDGMENT: 2 April 2008