IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES NO
(2) OF INTEREST TO OTHER JUDGES: NO

23/02/18
DATE

SIGNATURE

28/2/18

CASE NUMBER: 91403/16

T R EAGLE AIR (PTY) LTD — 1ST APPLICANT
PERCIVAL RAYMOND THEODORE RUDMAN — 2ND APPLICANT

And

ROBERT WILLIAMSON THOMPSON — RESPONDENT

JUDGMENT

RANGATA AJ

INTRODUCTION

INTRODUCTION

[1] This is an application in which the following orders are sought:

(a) That the respondent be ordered to comply with the warrantees recorded in clauses 11.10 and 11.11 of the sale of share agreement, attached to the founding affidavit.

(b) The respondent be ordered to pay to the applicants the amount of R728 310.66, alternatively R655 150.66 plus interest, *a tempore morae*, calculated from 1 June 2016 to date of payment.

[2] The applicants seek to enforce the terms of the agreement, wherein the respondent furnished certain guarantees and warranties to Mr Rudman and T R Eagle as contained in the abovementioned clauses. The respondent opposed the application. The respondent filled its opposing affidavit out of time and applied for condonation. The applicants withdrew their opposition to the application and condonation was granted.

BACKGROUND

[3] The first applicant is T R EAGLE AIR (PTY) LTD (T R Eagle).The second applicant is Mr Percival Raymond Theodore Rudman (Mr Rudman), a director and a shareholder of the first applicant. Mr Rudman deposed to the affidavit on behalf of the first applicant. The respondent is Mr Robert Williamson Thompson (Mr Thompson) conducted a business in flight training operation, wherein he trained prospective pilots in the civil aviation industry. He conducted the business in his personal capacity, as a sole proprietorship, under the name, Eagle Aviation. Mr Thompson agreed to sell the business to Mr Rudman.

[4] On 5 and 6 February 2015, Mr Rudman, Mr Rudman Jnr and Mr Thompson concluded a written memorandum of understanding, the terms of which are summarised herein below:

(a) A shelf company, Questra Trading 306 (Pty) Ltd (Questra) was acquired, which company was to take all of Mr Thompson's income from the business.

(b) 49% shares of Eagle Aviation were to be allocated to Olympic Park Trading 52 (Pty) Ltd (Olympic) or the nominees of that company. Mr Rudman was the sole director in Olympic. Mr Thompson would then retain 51% of the shares in the company.

(c) The purchasers were to pay to Mr Thompson an amount of R1 200 000.00 for the shares. The company was to retain the name Eagle Aviation and the name Questra was to be changed to that of Eagle Aviation (Pty) Ltd which was not successful as similar names were already recorded on the database of CIPC. The name of T R Eagle was confirmed and used. No shares were issued to Mr Rudman, his son Mr Rudman Junior or Olympic Park Trading 52 (52) Ltd from this transaction.

[5] On 21 April 2016, Mr Rudman and Mr Thompson entered into a written sale of shares agreement and it is this agreement that is the issue in the application. The sale of shares agreement is not the same as the memorandum of understanding. The acquisition of the shares was recorded in the terms of the sale of shares agreement concluded between the parties are summarized below:

(a) The purchaser will acquire 51% of the issued shares and the claims against T R Eagle as well interests in the business.

(b) The agreed price of sale was R1.7 million

(c) The completion date was initially envisaged to be the 30th June 2016, but was amended to 31 May 2016.

[6] The respondent furnished to T R Eagle and Mr Rudman, various warranties relevant to this application, as contained in clauses 11.10 and 11.11. Save for the recorded warranties and undertakings in clause 11, Mr Thompson and Mr Rudman would have no further claims against each other. The shareholding in T R Eagle was

issued to Mr Rudman during October 2016. Mr Rudman paid the agreed sale price to Mr Thompson.

[7] Clause 11.10 of the sale agreement provides that "*The Seller will also make available to the Purchaser recent statements of account pertaining to students, reflecting the balances due or in favour of students and the Seller warrants that if there is any shortfall; such shortfall will be paid into the banking account of the Company before the completion date*".

[8] Clause 11.11 provides that "*The Seller also warrants that there is sufficient money in the banking account of the company to cover all monies held to the credit of students and should there be a shortfall between the bank balance as reflected in the bank statements of the company and the monies held in trust on behalf of students, the Seller will immediately rectify the situation by making transfer of any shortfall into the account of the company*".

[9] Mr Rudman averred that Mr Thompson breached his contractual obligations by breaching the taxation warranties, student warrantees and the attempt to breach the restraint warranties as detailed below:

(a) **Breach of Taxation warranties**

According to Mr Rudman, the applicants do not intend to enforce the warrantee provisions relating to tax, they deemed it fit to mention that the respondent breached the tax warrantees in respect of payment of PAYE as well as UIF obligations. They averred that the newly appointed auditors, SG Smith & Company confirmed with SARS that TR Eagle has outstanding VAT returns. They further averred that even after the registration of TR Eagle, Mr Thompson continued to submit tax returns in respect of the business under the registration number of the business which was allocated to it when he still traded the business as Eagle Aviation in his personal capacity. He continued to submit, PAYE and UIF declarations as if no change had taken place. It is further averred that PAYE and UIF payments in respect of March, April and May 2016, to the amount of R21 192.48 have not been paid. Mr Thompson averred that Mr Rudman

was aware of the tax status of the company and had not at any stage objected to the running of the business. He averred that it was agreed in a meeting held on October 2015 that the business would be operated under the sole proprietorship up to the end of the financial year 2016 with the submissions for VAT and PAYE. Further that there was no need to register PAYE and VAT immediately.

(b) **Breach of the student Warrantees**

Mr Rudman averred that Clauses 11.10 and 11.11 make provision for the warranty that there will be sufficient money in the bank account to cover all monies held to the credit of students: should there be a shortfall, Mr Thompson will immediately rectify the situation by making a transfer of any shortfall into the bank account of the company. He further averred that Mr Thompson's bookkeeping assistant presented the age analysis for monthly customers, as at 31 May 2016 to his auditors. The age analysis reflected all particulars of the students, their deposits and the value at which they still have a claim or demand against T R Eagle for the rendering of flight training, and the value stood at R1 157 076.66. The business bank account does not support the age analysis as it indicated that substantial payments were made to several entities, leaving a balance of R428 788.00.

(c) **Breach of restraint warrantee**

Mr Rudman averred that Mr Thompson operated a business similar to that of the first applicant, known as Thompson Aviation which has premises approximately 450 metres away from the premises of the first applicant's business. He further averred that Thompson Aviation is in direct competition with the business of T R Eagle, in violation of clause 11.8 of the sale agreement. Clause 18.1 provides that "*the Seller agrees, as a restraint of trade , that the Seller will not commence with the conducting of a similar business for a period of 6(six) months in a radius of 50 kilometres from company's current premises , which business activities include , but is not limited to, flight training and charter services*". Mr Thompson contended this allegation that he is in violation of

clause 11.8 as averred by Mr Rudman. He further averred that this averment is not relevant to the application and should be struck from the papers.

[10] Mr Thompson raised the following points *in limine*:

(a) **Lack of *Locus Standi* of the first applicant and/or authorisation of the Mr Rudman to act on behalf of the first applicant.**

(i) He averred that the first applicant is a private company which had three directors as at the date of instituting the application, namely Mr Rudman, his son, Mr Percival Raymond Theodore Rudman Junior and Mr Jurgens Johannes Bekker. This is confirmed by the CIPRO report attached to the papers. He averred that there is no resolution of all the directors consenting to the launching of the application.

(ii) Mr Rudman averred that he deposed to the founding affidavit in his personal capacity and in his capacity as the sole shareholder of the first applicant. In his reply he averred that he is a direct party to the sale of shares agreement containing the undertakings upon which he and the first applicant rely for the relief set forth in the notice of motion. Further that he is in control of the first applicant and it is not required of him to obtain a resolution from the first applicant. He further averred that at the time of filling of the application, Mr Jurgens Johannes Bekker , who was then one of the directors in the first applicant had resigned and was subsequently removed from the company's public records as a director.

(b) **Striking out certain paragraphs in the founding papers**

Mr Thompson averred that paragraphs14, 20 –37, 42, 61 and 65 to 68 in the applicants' founding affidavit should be struck out on the basis that they are of no relevance, in that they are scandalous and/or vexatious and were included to create an atmosphere to embarrass him. He contended that the information that was not necessary in the application would seriously compromise him in the conduct of the case. Mr Rudman explained in his reply that the basis upon which the impugned paragraphs were included in the founding papers is that they were necessary and relevant in the

determination of the application. Furthermore, that the respondent has not demonstrated that he would suffer prejudice as a result of the historical and other factors given by the applicants. Mr Rudman himself stated that he did not intend to enforce the warrantee provision relating to tax.

(c) **Foreseeable and irreconcilable factual disputes**

If the striking out application is not granted, Mr Thompson contended the following factual disputes:

(i) The discrepancies in the analysis and the business bank statement. The discrepancies amount to a factual dispute emanating from the difference in the amounts as it appears on the age analysis and the balance in the business bank account as at 31 May 2016.

(ii) The indebtedness of the other companies of Mr Rudman , the quantum of those claims and whether he was entitled to retain those monies in the business bank account.

(iii) Whether there is a breach or not (if not struck out) of the restraint of trade clause

(iv) The quantum of the applicant's claim.

Issues

[11] The issue in this application is whether the respondent has failed to comply with the warranties contained in clauses 11.10 and 11.11 of the sale of shares agreement, referred to above. And if so, whether the respondent should be ordered to pay any monies to ensure that the warranties are complied with.

Analysis

(a) **Lack of *Locus Standi* in iudicio of the first applicant and/or authorisation of Mr Rudman to act on behalf of the first applicant.**

[12] He submitted that the applicants have not remedied this anomaly despite the point being raised in the answering papers. Mr Rudman in response stated that the dispute is premised on an agreement between him and Mr Thompson for the acquisition of the shares. He contends that he brought the application in his personal capacity and in his capacity as a shareholder of first applicant. He averred that he is authorised to act on behalf the first applicant in the proceedings.

[13] Section 66 of the Companies Act 71 of 2008 ("the Act") provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company except as otherwise provided by the Act or the company's Memorandum of Incorporation. The duty for directors of a company to administer its affairs is a statutory duty under Section 66 of the Act.

[14] The duty of directors referred to above is premised amongst others, on the doctrine of separate legal personality which is a basic tenet on which company law is premised. This doctrine dates as far back as SALOMON v A SALOMON & Co Ltd [1896] UKHL 1, [1897] AC 22 in which the foundation of how a company exists and functions was expounded. There is not much which turns around the directors' role in the dispute before the Court. I am therefore satisfied that the second applicant has discharged his onus and that he is authorised to act on behalf of the first applicant in this proceedings.

(b) **Striking out certain paragraphs in the founding papers**

[15] The application to strike out certain averments will however be granted only if it is shown that the applicant requesting the striking out will be prejudiced should they remain open for consideration by the Court. In the case of Golding v Torch Printing and Publishing co (Pty) LTD and Others 1948 (3) SA 1067 (C) at 1090, the Court stated that "*a decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded*": In addition the Court

remarked that "*for the sake of clarity the history of a case is often permissible as an introduction to allegations founding the cause of action*". Therefore, I am of the view that there is no need to order the striking out of any paragraphs in the founding affidavit.

(c) **Foreseeable and irreconcilable factual disputes**

[16] In the case of Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at para13, the Court stated that

"a real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter".

[17] The applicants submitted that considering clause 11.10 of the sale agreement, the seller had not made available the correct statements of accounts pertaining to students which include all monies paid by them and any such monies payable by them to the first applicant for Aviation training services to be offered by first applicant. The applicants further submitted that the seller had failed to ensure that there was sufficient money or funds in the first applicant in line with what has been paid by the aviation students for training, meaning that there was a lesser amount of funds than which was paid by the aviation students. Furthermore that the respondent should be ordered in terms of clause 11.11 to rectify the situation pertaining to the shortfall in the bank account.

[18] Counsel for the applicant stated that the Court should order payment of an amount of R728 310.66, alternatively, payment in the sum of R665 150.66 to cater for the shortfall payable by Mr Rudman. It is submitted by the applicants that the amount claimed is on the basis of the balance from the age analysis i.e. R1 157 076.66 as at 31st May 2018 and that the closing balance reflected from the bank statement was R428 747.60.

[19] Mr Thompson averred that the applicants should have been aware that the matter is not appropriate for motion proceedings and should have approached the court by way of action proceedings. Mr Rudman averred that there is no merit in Mr Thompson's contention that there were foreseeable factual disputes in the matter. Further that Mr Thompson had not indicated in his answering affidavit issues that indicate that there will be a real and genuine bona fide dispute of fact. The applicants concede that the only issue that had a potential dispute is the one relating to the taxation, hence it was stated that it would not be dealt with in this application. Regarding the alleged indebtedness of the other companies under the control of the first applicant, he referred to clause 18.7 of the sale of share agreement, which states that:

"The seller and the purchasers hereby agree that the parties will have no claim against each other or the company as at the completion date, save for the possible claims by

the purchaser against the seller pertaining to warrantees and undertakings as alluded to in clause 11 above"

[20] In addition to the points in limine raised above the respondent averred that the age analysis document which was provided to the applicants' auditor by the respondent's bookkeeper only reflected credits and not all the debits of the various accounts as at 31 May 2016. Furthermore, it does not create an accurate picture on the financial position, as there may have been some advance payments that needed to be properly allocated and explained. He averred that it is not correct that the applicants had an obligation towards students to provide flight training to the value of R1 157,076.66. He averred that there are facts which would need to be fully ventilated and which cannot be dealt with on application proceedings. Further that there is a schedule of costs and expenses which will have a bearing on the final determination in the matter.

[21] Having considered the facts in this matter, it is my view that the matter cannot be properly adjudicated as there is indeed a dispute of fact. The applicants have not provided with certainty the formula to determine any quantum due to them. The amount prayed for in the alternative i.e. R665 150.66 gives the possibility that the initial amount of R728 310.66, initially relied upon might not be the correct amount.

[22] I cannot give an order that Mr Thompson has not complied with warranties in terms of clause 11.10 and 11.11 of the sale agreement without first establishing what constituted the said warranties and establishing the exact shortfall in the amount payable by him, if any. In this instance the applicant had information before launching the application that there was a discrepancy between the age analysis and the bank statement and failed to state the facts in the affidavit as to the reasons for the discrepancies. I am of the view that there is a factual dispute as to whether there is indeed a shortfall and if so, how much it is and that this cannot be resolved in motion proceedings. A piecemeal litigation approach is not appropriate for the reasons stated above. The debatement of the account and monies related to the credits in favour of the students registered for aviation training is more appropriate to resolve the dispute between the parties.

[23] Counsel for the respondent addressed the court on the issue of the applicants having employed the services of two Counsel, i.e. Senior and Junior Counsel. He stated that the application is not of a complex nature to warrant the services of two Counsel and such costs should not be allowed. In reply Counsel for the applicants stated that the application is of a complex nature and that the costs of two Counsel should be allowed. The court found in favour of the applicants and the application was dismissed.

[24] I therefore make the following order:-

1. The application is dismissed with costs.

B RANGATA
ACTING JUDGE OF THE HIGH COURT