IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 21/8/2006
CASE NO: 30767/2005

UNREPORTABLE

In the matter between:

DEREK HUGO BOUWER Plaintiff

and

ZAHEER CASSIM NO First Respondent

PETRUS JACOBUS CORNE VAN STADEN NO Second Respondent

JUDGEMENT

MURPHY J

1. The plaintiff has issued summons against the defendants, the joint liquidators of the company Wild Break 65 (Pty) Ltd (in liquidation). In terms of the particulars of claim he seeks rectification of an agreement between himself and the purchasers (Lara and Werner Bekker) whereby he sold to them, in their capacity as the trustees for a company to be formed, a business carried on under the name of Lowveld Fruit and Veg.

He further seeks return of the *merx*. The defendants have excepted to the particulars of claim on various grounds.

2. The agreement of sale was concluded between the plaintiff and the Bekkers on 3 January 2003. The *merx* is described in clause 1 of the agreement, annexed as Annexure A to the amended particulars of claim, to be:

> "The sellers hereby agree to sell and the Purchasers hereby agree to purchase as a going concern the goodwill business (sic) being carried on by the sellers under the name Lowveld Fruit and Veg at Farm Alwynsrus, district White River, together with the business assets and contracts, being:
>
> 1.1 accounts receivable to the value of R1 899 475.00 ..... listed in Annexure "A" hereto;
>
> 1.2 the business name, "Lowveld Fruit and Veg Wholesalers";
>
> 1.3 contracts to the value of R1 438 696.00 ..... listed in Annexure "B" hereto;
>
> 1.4 fixed assets to the value of R1 917 137.00 listed in Annexure "C" hereto;
>
> 1.5 goodwill;
>
> 1.6 stocks to the value of R205 005.00 ....
>
> but specifically excluding all and any assets listed in Annexure "D" hereto."

3. The purchase price is stipulated in the agreement to be the total of various amounts reflected in clause 4 of the agreement, being an amount in settlement of the seller's debts owing to a financial institution and various other creditors, a lump sum payment, 24 monthly instalments and a salary for 24 months.

4. The plaintiff maintains that as the result of a *bona fide* mutual error the agreement failed to reflect a common intention to include a *pactum reservatio dominii*, reserving ownership in the entire *merx* until such time as the total purchase price and interest was paid to him. Thus, he alleges that the following two clauses should have been included in the agreement:

> "Such assets shall become the property of the Purchasers when the full purchase price in terms of clause 4 above is paid to the Seller together with the full release of all such assets from their respective encumbrances."
>
> Notwithstanding the delivery and transfer by the Seller to the Purchaser of possession and control of the business, the Seller's title in and to the fixed assets will not pass to the Purchaser, this agreement being subject to the fundamental condition that ownership of the business and the fixed assets remains vested in the Seller until the purchase price consideration, together with interest thereon, has been paid in full in accordance with the provisions of this agreement."

5. In the alternative the plaintiff alleges that the representative of the purchaser without his knowledge advised the drafter of the agreement to exclude the reservation of ownership clause and that he signed the agreement in the mistaken belief that it had been included in its terms.

6. The plaintiff thus claims that he is entitled to rectification of the agreement.

7. On 9 December 2004, Wild Break 65 (Pty) Ltd, ("the company"), on whose behalf the Bekkers had acquired the business, was liquidated, resulting in the appointment of the defendants as liquidators on 19 January 2005. At the time the plaintiff issued summons, the liquidation process had not been finalised. On 3 June 2005 the defendants gave the plaintiff notice that they were terminating the agreement, which the plaintiff considered to be a repudiation of the agreement and which he claims to have accepted. He thus seeks to vindicate the *merx* in terms of his rights under the alleged *pactum reservatio dominii*.

8. The plaintiff further alleges in the particulars of claim that the defendants remain in possession of the *merx* and refuse to return it to him. Somewhat contradictorily he also pleads that the defendants, without his permission, have sold certain parts of the *merx* (he fails to specify which) that they are in possession of the receipts engendered by such sales, and that they have failed to disclose any information to him concerning the

merx and the said receipts in respect of the sales. Accordingly, besides rectification and return of that part of the *merx* still in possession of the defendants, he claims payment of the total of the amounts received by the defendants in respect of the sale of any parts of the *merx*.

9. As I have said, the defendants have delivered an exception objecting to the particulars of claim on four grounds.

10. The first ground of exception is that there is no allegation in the particulars of claim that the plaintiff has complied with section 359(2) of the Companies Act of 1973. The provision deals with certain of the consequences of the liquidation of a company in relation to legal proceedings by or against the company. It reads:

> "(2)(a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks notice in writing before continuing or commencing the proceedings.
>
> (b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs."

11. Section 359(1)(a) of the Companies Act provides that on winding up all civil proceedings against the company shall be suspended until the appointment of a liquidator.

12. In the present instance the plaintiff had not instituted legal proceedings against the company as at the date of winding up. The question then, in part, is whether he falls into the category of persons "who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding up.." If he is, the defendants contend, the failure to allege that he gave three weeks notice in writing before commencing proceedings within the four week period after the appointment of the defendants renders the particulars excipiable because they lack an averment which is necessary to sustain the action. Alternatively, a further necessary averment is required, namely that the proceedings ought not to be considered abandoned because a court has directed otherwise in terms of section 359(2)(b).

13. The defendants argue that the claim against the company for rectification arose before the commencement of the winding up. The plaintiff, on the other hand, submits that the claim for rectification arose together with the *reivindicatio* only once the defendants gave notice of their intention to terminate the agreement on 3 June 2005.

14. In my opinion, the claim for rectification arose at the time the plaintiff became aware that the contract was incorrectly reduced to writing and signed. Moreover, the claim of *reivindicatio*, in its proposed amended form, would have arisen once the purchaser breached the contract by not making timeous payment of any part of the purchase price. Although such claims may or may not have been contingent upon the plaintiff following the cancellation procedure stipulated in the agreement, the substantive rights (claims) to rectification and payment arose respectively on or before the default in payment of the purchase price, which in the nature of things occurred before the commencement of the winding up.

15. The purpose of a provision similar to section 359 has been described as being:

> "to ensure that when a company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company"
>
> - *Langley Constructions (Bixham) Ltd v Wells* [1969] 2 All ER 46 (CA) at 47

16. Hence, creditors with claims arising before the commencement of the winding up have a choice either to proceed with litigation in keeping

with the time limits and notice periods of section 359, or they may seek to prove a claim in the ordinary course of winding up in terms of section 366. Where a creditor pauses, as perhaps in the present case, in the hope that the liquidator may within his or her discretion decide to abide by the terms of an executory contract, and is then disappointed, his or her failure to give notice or to prove a claim will not necessarily be fatal in that he or she may approach the court for relief in terms of section 359(2)(b) in the form of a direction that proceedings in respect of the claim be commenced or continued.

17. From the wording used in the formulation of the time limit and notice requirement in section 359(2)(a) it could be argued that the intention of the creditor and not the time of the claim arising is determinative. Thus, if the creditor only forms an intention to institute legal proceedings some months after the appointment of a liquidator, a literal interpretation of section 359(2)(a) would support the submission that it is not applicable. On the face of it, the sub-section applies only to persons who have already instituted legal proceedings and those who have formed an intention to do so before the appointment of a liquidator in respect of claims arising beforehand. Those who formulate an intention to institute legal proceedings to enforce claims against the company some time after the appointment of the liquidator (or at least beyond the four week period)

arguably could be exempt from the requirement, were one to rely exclusively upon the wording of the provision.

18. To accept this interpretation, in my opinion, would defeat the object of the section read as a whole. As already intimated, the object of the provision is to prevent the liquidator being inundated with legal proceedings without sufficient time within which to consider whether or not the company should resist them, to prevent costs and to bring finality to the process of liquidation. Taking a more purposive or contextual approach, it can be said that for the purposes of section 359(2)(a) a "person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of winding up" would include a person who foresees or should foresee the possible need to enforce a claim of some entitlement by the one process or the other but does not actually formulate a specific intention in that regard. Where such person allows the time limit in section 359(2)(a) to lapse and subsequently considers the claim procedure under section 366 to be inappropriate, he or she may proceed by way of ordinary civil proceedings only with leave of the court in terms of section 359(2)(b), which when adjudicating the matter will be called upon to balance considerations of any injustice to the applicant against the need for expeditious finality in the liquidation.

19. Accepting this interpretation means that the particulars must allege that the plaintiff gave three weeks notice within the four week time frame or that the proceedings are not to be deemed abandoned by reason of a court direction to the contrary. Absent such allegations, the particulars are excipiable on the grounds that they lack an averment necessary to sustain the action.

20. I am also persuaded that there may be merit in the defendants' objection that the summons fails to describe the *merx* sought to be recovered. The plaintiff clearly appreciates, as is evident from the particulars of claim, that the defendants do not remain in possession of all the assets making up the *merx*. Thus, the plaintiff, as with any party seeking to vindicate, should allege with precision the assets sought to be recovered. However, because of the effect of upholding the exception on the first ground, I do not consider it necessary to rule upon this ground or the other grounds which the plaintiff may or may not be able to cure if he is able to overcome the obstacles posed by the first ground of exception.

21. In the result, I make the following order:

    1. The exception that there is no allegation in the particulars of claim that the plaintiff has complied with section 359(2) of

the Companies Act of 1973 is upheld and the plaintiff's particulars of claim are accordingly set aside.

2. The plaintiff is directed to pay the costs occasioned by the exception.

JR MURPHY
JUDGE OF THE HIGH COURT
TRANSVAAL PROVINCIAL DIVISION

Counsel for the plaintiff, Adv. MM Snyman, Pretoria and counsel for the Defendants, Adv JA Pieterse, Pretoria.

Attorney for the plaintiff, Doman & Kolbe, c/o Griesel & Breytenbach Attorneys, Pretoria and Attorney for the 1st Defendant, Dyason Attorneys, Pretoria.