REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13/16424

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

EACB STUDIO (PTY) LIMITED Applicant

and

SUPER GROUP TRADING LIMITED First Respondent

RAZISPACE (PTY) LIMITED Second Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The applicant launched an application against the two respondents for an order –

1.1 declaring that the applicant is the owner of the goods referred to in Annexes “FA3” and “FA4” of the applicant’s founding affidavit and which are shaded or colour-coded in red therein;

1.2 directing the second respondent to return to the applicant the goods as identified in Annexes “FA3” and “FA4”;

1.3 that any of the respondents who opposes this application be directed to pay the costs thereof; and

1.4 for further and/or alternative relief.

[2] The application is only opposed by the first respondent.

[3] The facts and circumstances inherent in this application will be set out when the history and factual matrix hereof is dealt with hereunder.

THE PARTIES

[4] The applicant, EACB STUDIO (PTY) LTD, is a limited liability company duly registered and incorporated in accordance with the company laws of South Africa (“*RSA*”). It carries on business as a designer, manufacturer and distributor of high fashion clothing, shoes and related accessories. Its registered office is situated at 18 Hope Street, Gardens, Cape Town.

[5] The first respondent, SUPER GROUP TRADING LIMITED, is a company registered and incorporated in Mauritius in accordance with the company laws of Mauritius, represented in this matter by Attorneys Darryl Furman & Associates whose offices are situated at Rosebank law Chambers, No 4 Glenhove Road, Melrose Estate, Johannesburg.

[6] The second respondent, RAZISPACE (PTY) LIMITED, is a limited liability company duly registered and incorporated in accordance with the company laws of the RSA and whose registered office is situate at 21 The Broads, Mulbarton, Southern Johannesburg.

[7] The deponent of the applicant's founding affidavit, Mr Casper Badenhorst ("*Badenhorst*") is the sole director of the applicant. He (Badenhorst) and Mr Eliyahu Saig ("*Saig*") are joint directors of the second respondent.

[8] The applicant conducts business as a retailer of women's clothing and footwear. Initially it conducted four retail outlets at, respectively, Maponya Mall in Soweto; Rosebank; Eastgate and Cresta. The Maponya Mall and Cresta outlets were closed due to them not being financially viable. Only the Eastgate and Rosebank stores continue to conduct business.

RELEVANT BACKGROUND HISTORY AND FACTUAL MATRIX

[9] According to the applicant, the clothing in the second respondent's outlets (hereinafter referred to as "*Razispace*") at Rosebank and Eastgate are predominantly sourced from the applicant, and are of the make or branding or label, "*Errol Arendz*" and "*Errol Arendz Dusud*". According to the applicant further, this stock was purchased by Razispace from it pursuant to a credit application submitted by it to the applicant. The applicant accepted the credit application and allowed Razispace to purchase goods on credit from it. The express and relevant provisions of the credit application (and agreement) provided, *inter alia*, as follows:

9.1 Razispace's credit terms were 30 days from date of statement; and

9.2 Until such time as Razispace had paid the purchase price in full in respect of any purchase of goods, the ownership in and to the goods remain vested in the applicant. The applicant would be entitled in its sole discretion and without notice to Razispace, take possession of the goods which had not yet been paid for in full and in respect of which payment is overdue. When such goods are taken back due to non-payment, a credit note would be passed in favour of Razispace in respect of such goods.

[10] According to the applicant further, "… *the stock that was sold to Razispace was all manufactured at the applicant's manufacturing facility in China and on-sold to Razispace* …"[1]

[11] The above highlighted words have been relied upon herein by the respondent in support of its case as would be demonstrated later. What is material at this stage is that the applicant is adamant and categoric that it remains the owner of all the stock that was sold to Razispace as long as it is not yet fully paid for.

[12] According to the applicant further, Razispace is currently indebted to it in respect of goods sold and delivered to it by the applicant at the latter's usual price, which indebtedness is capitalised at the sum of R1 976 263,75 as at the time this application was launched. The applicant attached a statement from it given to Razispace in respect of its indebtedness as Annexure "FA2" to its founding affidavit. This statement or series of statements span a space of ten pages at folios 18 to 27 of the paginated record herein. This statement(s) lists all the invoices in respect of which stock was sold and delivered to Razispace Eastgate and Rosebank stores. It is so that most of the stock according to the applicant, which it sold to Razispace has been on-sold by it (Razispace) to customers notwithstanding the fact that it (Razispace) has not yet paid for it in full or at all. That in any event would have been in the course and/or scope of the normal conduct of business.

[1] Applicant's founding affidavit paragraph 12 at page 7 of paginated record of this application.

[13] The procedure of sourcing and on-selling stock to Razispace is as follows: When the applicant delivers goods to Razispace, the latter scans the goods in-store onto its computer stock control system. The system allows for a report to be generated at any time relating to the goods that have not been sold and which are still in the relevant store.

[14] The applicant has attached Annexures “FA3” and “FA4” being Razispace store control computer system lists in respect of the stock at the two respective stores. The schedules form part of the paginated papers herein: Annexure “FA3” is in respect of stock at the Rosebank store and it is at folios 28 to 55 of the paginated record. “FA4” is in respect of stock at the Eastgate Mall store and is at folios 56 to 65 of the paginated record. The lists or annexures are colour-coded green and red. The stock or goods shaded in red in the annexures represent the goods that were sold by the applicant to Razispace and in respect of which it has reserved ownership. Those shaded in green were not sourced by Razispace from the applicant and may thus be dealt with by the respondent or any creditor(s) at their discretion.

[15] The lists in Annexures “FA3” and “FA4” were obtained from or emanate from Badenhorst who is director to both the applicant and Razispace.

[16] The applicant states that it is contemplating bringing liquidation proceedings against Razispace.

[17] According to the deponent of the applicant's founding affidavit, Razispace has effectively been hijacked by Saig (co-director with Badenhorst) who Badenhorst accuses of having changed the credit card facilities at the Rosebank store, enabling him (Saig) to channel the proceeds of sales from the store to an entity controlled by him.

[18] On 14 May 2013 and under the aforesaid case number the first respondent (hereinafter cited herein as "*Super Group Trading*") obtained an order against Razispace pursuant to which it was authorised and mandated or empowered to attach the movable assets of Razispace. Razispace is indebted to Super Group Trading and an attachment was granted and/or made to Super Group Trading pursuant to a general notarial bond granted by Razispace to Super Group Trading.

[19] On 22 May 2013 the applicant's attorneys had a meeting with Saig's attorneys in the person of Jonathan Stockwell from Werkman's Attorneys. The applicant's attorneys were represented by attorney Atonino Lazzara. Badenhorst was also present. This meeting was to discuss the attachment of the applicant's goods at Razispace. The problem identified by the applicant was that despite the judicial attachment of the goods at Razispace, including the applicant's goods, Razispace continued to sell all the stock at the stores, including the attached goods. Saig and Stockwell explained to the applicant's attorneys and Badenhorst that they had reached an agreement with Super Group Trading in terms of which Super Group Trading agreed to allow and

was allowing Razispace to continue trading in order to pay over part of the proceeds towards the reduction of the debt due to Super Group Trading.

[20] The problem with this was that some of the stock being sold in that manner was that which still belonged to the applicant as they had not yet been paid for or paid for in full. More-so that Razispace was not paying anything to the applicant to reduce its indebtedness to it or had attempted to engage the applicant with a view to clearing out the aspect of how it (Razispace) proposed to deal with its indebtedness to the applicant.

[21] The parties have differing stories as to whether or not Super Group Trading has furnished the applicant, at its request, with a copy of the sheriff's return. The applicant submitted that Super Group Trading has been dilly-dallying over this aspect whereas Super Group Trading submitted that it faxed a copy thereof to the applicant's attorneys on 13 June 2013.

[22] The applicant has called upon the Super Group Trading people to provide it with an undertaking that it will not allow Razispace to sell any of the stock that belongs to it which was identifiable from the red-shaded portions in Annexures "FA3" and "FA4" on pains of legal proceedings, more-so that the stock at Razispace was being sold by Saig with the consent of Super Group Tading.

[23] The first respondent (Super Group Trading) has refused to provide such undertaking. It is upon that basis that the applicant submitted and argued that the prevailing situation was extremely prejudicial to its rights: Razispace went ahead and entered into the above agreement with Super Group Trading without taking it (applicant) on board or sounding their views hereon in spite of the fact that it (Razispace) was holding those goods not yet fully paid for or paid for at all for the benefit of the first respondent (Super Group Trading) – a situation in which Super Group Trading is acting to benefit itself alone above and/or to the exclusion of other creditors of Razispace, which include the applicant.

[24] The first respondent (Super Group Trading) while not convincingly denying the applicant's allegations that it owned some goods at Razispace, still insisted the application should be dismissed with costs, claiming that the case the applicant gave in its replying affidavit is different from the one it gave in its founding affidavit.

[25] The applicant vehemently denied this.

[26] In addition to Super Group Trading setting out what procedures it followed to grant Razispace credit facilities, the former alleged that the applicant was not the only designers or business concerns sourcing Dusud clothing lines for clients. However, the first defendant (Super Group Trading) did not deal with or have a counter-argument to the applicant's case that the goods in "FA3" and "FA4" had a distinctive code germane to it (applicant)

which distinguished them from those supplied to Razispace by it and/or other suppliers.

[27] Instead of dealing with this very important aspect dispositive of the issue of the identity and ownership of the goods attached at Razispace, the Super Group Trading went on to point to an issue which in my view is neither here nor there when such identity and ownership is at stake: It queried why the applicant said in the founding affidavit that the goods it supplied to Razispace were manufactured at its factory in China whereas in the replying affidavit it stated that it only sourced the goods from a factory in China.

[28] I took up this issue with counsel for Super Group Trading: Was it not so that what concerned us in this application was not what happened in China or elsewhere outside South Africa but what actually did happen after the goods were already in South Africa.

[29] The response I received was in my view very incoherent and inconclusive.

[30] I find that what happened to the goods when they were actually delivered to Razispace is what is material to us. The applicant's explanation of how the clothes were coded upon receipt and how such goods can be tracked through the computers in my further view adequately identify the goods the applicant is complaining about.

[31] The first respondent argued that the applicant's failure to include purchase and sale invoices in its papers should lead to this Court rejecting the applicant's version.

[32] That, in my view and finding, would be going rather too far: The applicant has adequately identified which goods it claims as it is from the goods attached at Razispace as well as those still in that store(s). The first respondent has not challenged this sufficiently. I find that the ramblings by the Super Group Trading people through their counsel do not help. Super Group Trading submitted among others that the apparent bad blood between the directors of Razispace, to wit Badenhorst and Saig, should be regarded as the motivation, which is improper in their view, for Badenhorst to falsely start these proceedings on behalf of the applicant to spite his co-director at Razispace.

[33] There is evidence tendered by the applicant, of some two shipments of goods from outside suppliers ordered by Saig, which never reached the two operative Razispace stores. Those goods are alleged to have been taken to another entity controlled by Saig and the proceeds of their sale are being received at or by another entity which is not Razispace.

[34] The first respondent (Super Group Trading) did not refute these allegations or allude to them during the exchange of papers or during argument. As such, these allegations stood unadulterated at the end of argument.

[35] I consequently cannot disagree with the applicant's submission that these goods are the ones that ought to have been attached, not those at Razispace.

CONCLUSION

[36] It is not in dispute that Razispace is indebted to both the applicant and the second respondent. It is also not in dispute on the facts herein that some of the goods placed under attachment at Razispace at the instance of Super Group Trading (first respondent) belong to the applicant. It is also clear that the applicant has paid for the goods shaded in red in Annexures "FA3" and "FA4" and that the coding on them as they stand at Razispace point, as the applicant submitted, that they still belong to it as they are not yet fully paid for.

[37] The first respondent attached commercial invoices to its answering affidavit at pages 211 to 212; 232 and 241 to 243 pertaining to Dusud Inc. The coding on those invoices differ from those on the goods identified and claimed by the applicant.

[38] This Court is thus satisfied that the stock forming part and subject matter of this application could not have been financed by Super Group Trading, i.e. the first respondent on behalf of Razispace. This Court thus finds that such stock (as in Annexures "FA3" and "FA4") was financed by the applicant. It has not been disputed that the stock as identified by the applicant on Annexures "FA3" and "FA4" were not yet paid for in full when

they were attached at the instance of Super Group Trading. This Court thus accepts it as a "*fact*" that they were not yet paid for in full, thus, in terms of the agreement between the applicant and Razispace, still the property of the applicant until such time that they are fully paid for.

[39] In terms of the abovementioned agreement between the applicant and Razispace, the applicant can demand that they be returned to it, as they are doing so in this application.

[40] In an application such as the current matter where a party seeks a declaratory order, the following principles[2] are applicable, among others:

40.1 The applicant must be an interested person, not *in vacuo*, but interested in the right or obligation enquired into. The interest must be a real interest and not merely an abstract or intellectual interest;

40.2 There must be a right or obligation which becomes the object of enquiry, which may be existing, future or contingent. However, much more, it must be more tangible than the mere hope of a right or mere anxiety of a possible obligation;

40.3 A party is not entitled to approach the court for what would amount to a legal opinion upon an abstract or academic matter;

[2] *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (TPD) at 124G to 126C.

40.4 A court will not make a declaration of rights unless there are interested persons upon whom the declaration would be binding. It follows thus, that the interested persons against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard before the ruling is made; and

40.5 When a court has to determine whether it should exercise its discretion in favour of a declaratory order, considerations of public policy come into play.

[41] It is the finding of this Court that the applicant has satisfied the above requirements substantially. The order to be made at the end hereof will be binding on both the first and second respondents (i.e. Super Group Trading and Razispace respectively).

[42] Both parties abandoned their challenges on the late filing of the necessary or relevant affidavits. As such it is not necessary that this Court rule on that aspect.

[43] The parties herein also half-heartedly in my view, dealt with the aspect of whether or not a dispute of facts should be declared to exist. I agree with their inner convictions, as evidenced by their scraping on the surface on this aspect, that that issue does not arise in this instance. Even if it had arisen (which in fact did not), it would not have been accommodated.

[44] As held among others in *Law Society, Northern Provinces v Mogami and Others,*[3] Harms DP put it as follows as paragraph [23]:

> "… *The appellant submitted that in these circumstances we should refer those disputes for oral evidence. We cannot comply with the request. An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (De Reszke v Maras and Others 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32 - 33). In a case such as this a law society might be able to apply in part A of its application for an order ordering the respondent to appear before its council for an oral enquiry.*"

[45] Fortunately or unfortunately, as already alluded to, there is no need to deal with this aspect in depth. It may be mentioned however that since the applicant had not alluded to this aspect in its papers, had there been a need for it to arise, such an application would have failed.

[46] When all is considered, it is the finding of this Court that the applicant has made out a case for the grant of the orders it seeks.

COSTS

[47] None of the parties made any out-of-the-ordinary application for a specific costs order. I have independently assessed the issue of costs and

[3] 2010 (1) SA 186 (SCA).

have come to a conclusion that an ordinary party and party cost order is appropriate in this case. The costs should follow the suit.

ORDER

[48] The following order is made:

1. It is ordered that the applicant (EACB Studio (Pty) Ltd) is the owner of the goods referred to in Annexures “FA3” and “FA4” of the applicant’s founding affidavit and which are shaded in red therein;

2. The second respondent (Super Group Trading Limited) and/or the second respondent (Razispace (Pty) Ltd) is/are ordered and directed to return to the applicant the goods identified in Annexures “FA3” and “FA4”.;

3. The first respondent (Super Group Trading Limited) is ordered to pay the costs of this application.

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N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	28 APRIL 2014
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