THE HIGH COURT OF SWAZILAND

Civil Case No.53/04

In the matter between:

FARMERS (PTY) LTD And **Applicant**

MOSES B. MOTSA **Respondent**

CORAM **: MASUKU J.**

For Plaintiff **: Mr P.M. Shilubane**
For Defendant **: Mr N. Kades (S.C. Instructed by Sibusiso B. Shongwe & Associates)**

JUDGEMENT
7th April 2004

By Notice of Motion, in the long form and dated 15 th January, 2004, the above named Applicant applied for relief in the following terms: -

1. Compelling the Respondent to pay Applicant the sum of E2, 200,000-(Two Million Two Hundred Thousand Emalangeni) against Applicant furnishing the Respondent with all the certificates in respect of the issued shares in Applicant together with signed share transfer forms in blank negotiable form in respect of the shares sold and a duly completed Deeds of Cession in respect of loan accounts in Applicant in favour ofthe Respondent resignation of the directors ofthe Applicant delivery of the books, records and other documents of the company to the Respondent.

3. *(sic)* That the Respondent pays the costs of this application.

4. Granting such further and/or alternative relief.

It is common cause that the Applicant is a company duly registered and incorporated under the laws of Swaziland and having its place of business situate at Plot 180, King Sobhuza Avenue, Matsapha. The Applicant is represented by one of its Directors Mr Panagoitis Dinos. The Respondent, on the other hand, is described as a Swazi male adult businessman of Siteki, District of Lubombo.

The Applicant's Case

The Applicant, in its Founding Affidavit, claims that on the 13th November, 2003, it received a facsimile transmission from the Respondent, who offered to purchase the Applicant as a going concern for the sum of E2,200 000.00. A copy of the said facsimile transmission is annexed to the Applicant's papers.

The said letter reads as follows: -

> *"Attention Mr Dinos*
>
> *Dear Sir,*
>
> *I hereby offer to purchase Farmers (PTY) LTD for E2.2O0.00O.O0 as a going concern.*
>
> *Yours faithfully*
>
> *MOSES B. MOTSA"*

On the following day, the Applicant accepted the offer by virtue of a letter dated 14th November, 2003. The said letter reads as follows:-

> *"To Moses B. Mots a*

Att: Mr Mots a

Dear Sir,

Hereby this letter wish to confirm in writing that we as Farmers Pty Ltd do accept the offer of E2,200.000.00 (two million and two hundred thousand emalangeni which was made on the 11th November 2003 by you.

Yours faithfully For
Farmer Pty Ltd

Dinos "

The Applicant states further that on the 1st December, 2003, Mr Lambros Dinos, the father to the Deponent of the Founding Affidavit, went to meet with the Respondent at Siteki to discuss how the purchase price would be paid. The Applicant alleges that the agreement reached was that the Respondent would pay a deposit of E200,000.00 before the 24th December, 2003 and the balance on delivery of the business to the Respondent, together with the transfer of shares in the Applicant. According to the Applicant, the agreement regarding payment was recorded in a letter dated 22nd December, 2003. The letter, from the Applicant to the Respondent, reads as follows:-

"To: Moses B. Motsa Siteki

Re: Farmers Pty Ltd - Sale

Dear Mr Motsa,

Hereby this letter, we wish to inform you that until today 22nd December, 2003, Regarding our company's sale to you (FARMERS PTY LTD), we still have not Received the deposit of (£200,000.00 - two hundred thousand emalangeni) Against the total amount of E2,200,000.00 (two million and two hundred thousand Emalangeni) that was verbally agreed on the O f December, 2003 at your offices in Siteki.

We would appreciate if you would keep up with out agreement. We will be waiting for the deposit of E200.00.00 (two hundred thousand emalangeni) until the 06'h January 2004. If we have not received the deposit by then we

will have to pass the matter to our legal department.

We wish you all the best for the New Year.

Yours faithfully For
Farmers Pty Ltd

Dinos "

The Respondent's Case

In limine, the Respondent took the view that the application did not disclose a cause of action and therefor prayed that it be dismissed. Furthermore, the point was taken that prayer 1 of the Notice of Motion, was not supported by the Founding Affidavit. The Respondent further alleged that the Applicant approached the Court with "unclean hands" because the sale of the business the Court was being asked to enforce was inconsistent with the provisions of the law relevant to sale of businesses.

I was hasten to add that the points raised by the Respondent are not the mode of clarity. No particulars are furnished for reaching the conclusions prayed for e.g. the grounds upon which the Court must find that the application does not disclose a cause of action have not been disclosed nor is the Court and the Applicant informed what law governs the sale of business, what that law states, together with the infractions of the law allegedly committed by the Applicant.

Mr Kades fairly and readily conceded that the necessary averments were lacking in the above points. It behoves me to point out that each party must put its case clearly, thereby leaving the Court and the other side in no doubt about what the case to be met is. There must be "no hide and seek" game played in the papers filed in Court. The case to be met must be fully, exhaustively and clearly canvassed, with no obscurities whatsoever.

On the merits, the Respondent states that Dinos, whom he has known for more than five (5) years approached him with a view of selling him the Applicant's business and this was allegedly done on more than twenty separate occasions. Dinos, according to the Respondent, disclosed that the business was being sold because it was performing poorly financially and

that local banks were refusing to deal with him, leaving him the only option of dealing with South African banks. '

The Respondent further states that he eventually agreed to purchase the business as a going concern, but insisted that it was necessary for Dinos to advertise the sale of the business in accordance with the law in order to avoid inheriting debts, particularly in view of the information that the local banks were unwilling to deal with the Applicant.

The Respondent states further that he was assured that the Applicant had not encumbrances nor debts and that the sale of the business would be advertised in terms of the law. The Respondent advised that for him to secure finance, it was necessary for the Applicant to make an offer to sell the business to him, whereafter the Respondent would take the letter containing the offer to his financiers. It is the Respondent's further contention that the.sale of the business was contingent upon him obtaining finance.

The Respondent thereafter received advice from his financiers that it would be difficult to obtain finance in the absence of a deed of sale in respect of the business and when he contacted the Applicant with a view to negotiate and finalise the deed of sale in accordance with the financiers' advice, the Applicant started breathing threats, including litigation, which would be premised the letter of offer, marked "Fl".

Finally, the Respondent denies that it was ever agreed that he would pay the deposit alleged or any other amount. He further denies receiving annexure "F 4", the letter dated 22nd December, 2003. He denies that the contents thereof were known to him nor that they were "ever agreed or discussed by him and Dinos.

Amendments of the Notice of Motion

Two days after the receipt of the Respondent's Affidavit, particularly the contents of paragraph 4.2 thereof, which states that the Notice of Motion is not supported by the Founding Affidavit, the Applicant filed a Notice of Intention to Amend dated 19th February 2004. The said Notice reads as follows: -

*"**TAKE NOTICE THAT** the applicant intends to amend its notice of motion dated 15th January 2004'as follows: -*

By inserting an alternative prayer to prayer 1 of the notice of motion and adding a Prayer for mora interest on the amount claimed in the following terms: -

1. *"Compelling the respondent to pay the applicant the sum of E2 200.000 (Two Million Two Hundred Thousand Emalangeni) against the applicant delivering to the respondent the business of the applicant."*

2. *Interest on the sum E2 200 000 at the rate of 9%per annum a **tempore morae** from the date of service of the application to date offinal payment*

***TAKE FURTHER NOTICE THAT** unless the respondent objects in writing to the proposed amendment within 10 days **of** receipt of this notice, applicant will amend its notice of motion Accordingly. "*

The Respondent does not appear to have objected to the proposed amendment within the ten (10) day period allowed. On the 5th March 2004, the Applicant filed an amended Notice of Motion, and which reads as follows: -

"BE PLEASED TO TAKE NOTICE THAT farmers (proprietary) Limited (hereinafter called the Applicant) intends to make application to the above Honourable Court on the.....day of March 2004 at 09.30hrs or so ' soon thereafter as Counsel may be heard for an order in the following terms :-

I. Compelling the respondent to pay to the applicant the sum of E2,200.000 against the applicant delivering to the respondent the business of applicant.

3. *Interest on the sum of E2,200,000 at the rate of 9% a tempore morae*
4. *Costs of the applicant*
5. *Alternative relief*
6. *Granting such further and/or alternative relief. "*

A simple reading of the Amended Notice of Motion shows that there"was no alternative prayer inserted as intimated in the Notice of Intention to Amend. It would appear that Prayer 1 of the original Notice of Motion was removed and replaced by prayer 1 of the Notice of Intention to Amend. There clearly was not added any alternative prayer but the effect was to substitute the initial prayer 1 and to insert in its place, a new prayer 1. The only prayer consistent with the tenor of the Notice of Intention to Amend is the addition of prayer 2, which introduces the element of interest, which was clearly lacking in the initial Notice of Motion.

Issues for Determination

The Respondent has raised two basic issues for determination and these **are the** following:

7. That the application ought to be dismissed for it raises material disputes of fact which cannot be determined in the present proceedings and

8. That there was no consensus *ad idem* between the parties herein and by logical reasoning, there was no valid and binding contract entered into *inter partes.*

I now proceed to address the above issues.

(a) Material Disputes of fact

It is clear, from a reading of the papers in this matter that there are disputes of fact. I will enumerate the disputes as I see them below:-

(i) "The Respondent, on the other hand, alleges that it was the Applicant who approached the Respondent with a vie to selling the business of the Applicant. This does not appear to be denied by the Applicant in the Replying Affidavit but serves to give an accurate background that there was more to the background to this issue than just the letter of offer from the Respondent marked Annexure F 1"

(ii) There is a dispute regarding what the terms of the sale were. Firstly, it is not clear whether the contract was in regard to the business of the Applicant or the Applicant's shares. Different considerations apply to each of the above issues. The

confusion is exemplified by the Applicant's a amended Notice of Motion, showing that what was Sold is unclear.

(i) There is also a dispute regarding the nature of annexure "F 1" and "F 3". According to the Respondent's annexure "F 1" was required for the purposes of soliciting a loan from the Bank. The Applicant on the other claims that it was the offer and to which the Applicant respondent positively through annexure "F 3". It is well to mention in this regard that whereas the Respondent alleges that the sale was subject to him obtaining finance, which eventually did not materialise, the Applicant denies this vehemently.

(ii) There is the element of the deed of sale that the Respondent claims was necessary on the advice of his financiers. The Applicant does not deny this but claims that it was unnecessary because the offer and acceptance were both in writing. This must be viewed against (i) above.

(iii) There is also dispute regarding the nature and contents of annexure "F 4". In that letter, it is alleged that an agreement was reached on the 11th December, 2003, in terms of which the Respondent was to pay a deposit of E 200,000.00. The Respondent denies receiving the said letter nor such discussions and agreement and also denies knowledge its contents.

In the celebrated case of ROOMHIRE CO. (PTY) LTD VS JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T.P.D.) at 1162, Murray A.J.P. stated the following lapidary remarks regarding disputes of fact in motion proceedings:-

"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated infra) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way either on the affidavits as constituting the pleadings, or with a direction that pleadings be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when

launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action. "

It is clear that some of the disputes in this case, cannot be resolved on the papers as they stand. This points to one direction and one direction only, that motion proceedings were not appropriate in this matter and it would be undesirable to attempt to resolve them in this forum. Trial proceedings were the natural choice and which the Applicant either foresaw or ought to have foreseen, regard had to the material averments later presented before Court by the Respondent. He clearly must have been aware of the Respondents position in this matter before launching these proceedings.

It would be remiss of me not to quote with approval the timeless trenchant remarks of Price J. in GARMENT WORKERS UNION VS DE VRIES AND OTHERS 1949 (1) SA 1110 (W) at 1133, where the following is recorded:-

"It is becoming a habit to bring applications to Court on controversial issues and then to endeavour to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before the Court. Such applications -cum-trials interpose themselves, occupying the time ofJudges and still further delaying the hearing of legitimate trials. Applications for the hearing of ***viva voce****-evidence in motion proceedings should be granted only where it is essential in the interests of justice."*

See also ELMON MASILELA VS WRENNING INVESTMENTS (PTY) LTD AND ANOTHER CIV. APPEAL 1768/02 (per Masuku J.) unreported at pages 4 and 6 and the cases therein cited.

I am of the view that the point taken by the Respondent, regarding the disputes of fact is good and deserves to be upheld with costs. It is clear that action proceedings were the appropriate proceedings.

(a) Absence of ***cohsensus ad idem*** and nature and terms ofthe contract.

Mr Kades, in his spirited address, argued that there was no consensus ***ad idem*** in this case for the reason that it is not clear what was sold and on what terms. He argued that in this regard, the Applicant, in the initial Notice of Motion sought payment of the sum in question from the Respondent, against it furnishing the Respondent with share certificates and related paraphernalia. Later, the Applicant alleged the sale ofthe business and amended the Notice of Motion accordingly.

Mr Shilubane, in response, argued that the Applicant's case is made out in.the Affidavit and that whatever is contained or not contained in the Notice of Motion must not be given undue weight. He argued correctly that the Affidavit contains the evidence.

It is however clear that in view of the divergent interpretations placed on the events, as can be seen from the conflicting allegations set in the various sets of affidavits, the minds of the parties can not be said to have been ***ad idem.*** According to the Respondent, it was the Applicant who made the offer and the Respondent accepted it, subject to the finance being made available.

Furthermore, there is no consensus regarding the purpose of annexure "F 1". The Applicant, on the one hand regards it as having been an offer, oblivious to the history set out by the Respondent above i.e. that the Applicant was the offer or. The Respondent, on the other, regarded it as a preliminary step towards obtaining finance for the contract to "be concluded. Can it be said in view of the foregoing that there was consensus regarding the entry into a contract? I think not.

Mr Shilubane's argument regarding the Notice of Motion vis-a-vis, the affidavit, is correct. That notwithstanding, the initial Notice of Motion reflects the Applicant's state of mind regarding the subject and effect of the sale at the time of drafting the Founding Affidavit and the Notice of Motion. If there was consensus ***ad idem*** regarding what exactly was being sold, the initial Notice of Motion would, in my view have been drafted and worded differently.

The Intention to Amend, it must be mentioned, only came into existence after the Respondent took the point that the Notice of Motion is not supported by the allegations in the Founding Affidavit. The Intention to Amend, in my view further obfuscated matters for the reason that it sought to add an alternative prayer to initial Notice of Motion. Where the parties are clear about what is being sold and there is *animo contrahendi* there would in my view, be no need to insert alternative prayers which are inconsistent in wording and effect as the ones before the Court. If agreement was for the sale of shares, one Notice of Motion, the initial one alone would have sufficed. If on the other, it was for the sale of the business, then the proposed amendment would have sufficed.

The Amended Notice of Motion makes no reference to the alternative but jettisoned the initial prayer altogether, leading to some confusion regarding what the Applicant's real case is. It is significant that the Amended Notice of Motion was prepared after the Replying Affidavit had been filed, i.e. after all the evidence was in.

As conectly pointed out by Mr Kades, there is an inconsistency in the Applicants own version. Paragraph 6 of the Founding Affidavit reads as follows:-

> *"Subsequently, on I^{s}'December, 2003 Mr Lambros Dinos went to the respondent's office at Siteki to discuss how the purchase price was to be paid. It was agreed between the parties at that meeting that respondent would pay a deposit of E200.000.00 (Two Hundred Thousand Emalangeni) before the 24th December 2003 and the balance thereof on delivery ofthe business to respondent and transfer of shares in applicant to respondent."*

In paragraph 6 of the Founding Affidavit, the Applicant states the following:-

> *"I agree that respondent agreed to purchase the business but deny that such purchase was conditional on the sale being advertised nor is the sale vitiated by not being advertised in terms ofthe insolvency act.... "*

It is clear from the foregoing that, in paragraph 6 of the Founding Affidavit, a case is made for the sale of the business and its shares, hence the initial Notice of Motion. When once the

Respondent denied this, the Applicant, in reply made a new cause of action, alleging the sale of the*business and not the shares, hence the amendment of the Notice erf Motion.

It is clear, from the foregoing that there is confusion in the Applicant's own papers regarding what was agreed upon. The Respondent's allegations throw the true nature of the Applicant's story into further disarray. It is therefor clear that there was no consensus between the parties *in casu.*

It is important to give heed to the wise injunctions of Caney J. in GODFREY VS PARUK 1965 (2) SA 738 (D) 734 C, quoted by RH .Christie in his work entitled, "The Law of Contract in South Africa, 3rd Ed, Butterworths, 1996, at page 29:-

> *"Thephrase 'offer and acceptance '...is not to be applied as a talisman, revealing, by species of esoteric art, the presence of a contract. It would be ludicrous to suppose that businessmen couch their communications in the form of a catechism or reduce their negotiations to such a species of interrogatory as was formulated in the Roman stipulatid".*

The learned author Christie added the following important excerpt after the above quotation:-

> *"To which it is only necessary to add that offer and acceptance must never be sought for their own sake, but as aids in deciding whether an agreement has been reached. "*

I am of the view that if put to use as aids for determining whether *in casu,* an agreement was reached, the concept of offer and acceptance would lead to the conclusion that agreement was never reached.

Regarding the inconsistent allegations in paragraphs 6 of the Founding Affidavit and paragraph 6 and 7 of. the reply, which were quoted in full above, Mr Kades argued that the Applicant sought to make out a new case (which is supported by the amended Notice of Motion) in the Replying Affidavit. I quite agree that that indeed is the case.

That course is not permissible and authority against such practice is legion. In this regard, Dunn J. (as he then was) held the following in ROYAL SWAZILAND SUGAR

CORPORATION t/a **SIMUNYE VS SWAZILAND AGRICULTURAL PLANTATION WORKERS UNION AND 8 OTHERS CIV. APPLICATION -2959/97** (unreported, per Dunn J.) See the numerous cases therein cited.

In **BOWMAN N.O. VS DE SOUZA ROLDAO 1988 (4) SA 326** at **327 D,** Kirk - Cohen **J.** had this to say in this connection:-

> *" Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely open new grounds in the replying affidavit."*

The learned Judge above proceeded to quote the following excerpt from Krause J. in **POUNTAS' TRUSTEE VS LAHANAS 1924 WLD 67** at **68:-**

> *" ...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegations ofthe facts stated therein, because those are the facts which the respondent is called upon either to confirm or deny.*
>
> *Since it is clear that the applicant stands or falls by his petition and the facts therein alleged.*
>
> *"it is not permissible to make out new grounds for the application in the replying affidavit."*

In view of the foregoing, I am of the view that the application be and is hereby dismissed with costs.

T.S:MASUKU
JUDGE-