

HIGH COURT OF SWAZILAND

Held at Mbabane

**Ptytrade 210 (Pty) Ltd t/a M&B Transport Services**

Applicant

vs

**Brake Services (Swd) (Pty) Ltd**

1<sup>st</sup> Respondent

**The Deputy Sheriff (Hhohho District)**

2nd Respondent

**In re:**

Brake Services (Swd) (Pty) Ltd **Plaintiff**

M&B Transport Services (Pty) Ltd **Defendant**

Civil Case No.4033/2008

Coram

MAPHALALA PJ

For the Applicant

ADV. P. FLYNN

(instructed by Currie & Sibandze)

For the Respondent

MR. C. MOTSA

**JUDGMENT**

2nd September 2009

[1] In November, 2008 this court granted an order in favour of the Applicant for the return of the truck which had been impounded by the Respondent. I indicated that reasons for the

order will be issued in due course. Following are those reasons.

[2] On the 29<sup>th</sup> October 2008 the Applicant filed an urgent application before this court for an order in the following terms:

"1.1 That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency;

22.1 That the Applicant's non-compliance with the rules relating to the above-said forms and service be condoned;

22.2 Interdicting the Second Respondent from selling, alienating or in any way disposing of the Toyota Hino truck with registration number FGN 948 GP (the "Truck") in satisfaction of a judgement granted in this Honourable Court under case number 2276/02;

22.3 Interdicting the First Respondent from executing the judgement in any manner whatsoever as against the assets, movable or immovable, of the Applicant;

22.4 Directing the Second Respondent to forthwith release the truck into the hands of the Applicant;

22.5 Directing the First Respondent to pay the costs of this application on an attorney and client scale;

22.6 Further and/or alternative relief."

[3] The Founding Affidavit of the Applicant is filled in support thereto. Pertinent annexures are also filed.

[4] The Respondent opposes the application and has filled an answering affidavit to that effect.

The said affidavit is deposed to by one Sibusiso Dlamini.

[5] The matter appeared before me where learned Counsel advanced arguments on the pros and cons of the application.

[6] The Applicant was incorporated on the 23<sup>rd</sup> June 2004 and trades as M&B Transport

Services. The close corporation X-Land Transport was incorporated on 2<sup>nd</sup> July 1998 and entered into a written agreement on the 27 July 2004 to acquire the transport business from M&B as a going concern.

[7] X-Land entered into the agreement for the benefit of the Applicant and in so doing acted as principal for the benefit of the Applicant or alternatively as the agent of the Applicant.

[8] The Applicant adopted and ratified the agreement on the 25<sup>th</sup> August 2004. This was in terms of Clause 19 of the agreement. The effective date of the sale of the business was the 2<sup>nd</sup> August 2004.

[9] In terms of Clause 111 (9) of the Sale Agreement the liabilities of the business up to the effective date would remain the obligation of the seller being the company M&B Transport Services (Pty) Ltd.

[10] On the 11 March 2005, the Respondent obtained a judgement against the seller and on the 18<sup>th</sup> May 2007 caused a writ to be served on the Applicant in respect of the judgement. The judgement is clearly against the company M&B Transport Services (Pty) Ltd. M&B Transport Services is a trade name used by the Applicant in terms of the agreement and formed part of the business purchased.

[11] The Applicant contends on these facts that clearly it did not purchase the company which remains an entity which is distinct from the business purchased. The Applicant and the seller are different *persona* and judgements against the seller are not enforceable against the Applicant, a different company.

[12] The Applicant further contends that in terms of the agreement the seller was obliged to

change its name and apparently has done so. The seller is now named Benrien Transport (Pty) Ltd and it is against that entity that the judgement should be executed. Both the seller and the Applicant are companies registered in South Africa and advertisements in terms of Section 34 of the Insolvency Act were therefore placed in newspapers in South Africa and the South African Government Gazette.

[13] On the other hand the 1<sup>st</sup> Respondent contends that the purchaser knew very well that there was a pending matter in this court prior to signing of the alleged agreement and as such the Applicant and X-Land Transport cc acted further in *bad faith* to pay the seller the full purchase price knowingly that there was a pending case which ought to be discharged before full payment was made.

[14] The Applicant alleges that X-Land Transport cc, acting as a nominee or trustee for a company or close corporation to be formed, entered in a written agreement on the 27<sup>th</sup> of July 2004 to acquire a transport business, as a going concern from M&B Transport, .

[15] The Respondent challenged that X-Land Transport cc acted as nominee or trustee for a company or close corporation to be formed.

[16] The 1<sup>st</sup> Respondent contends that no company was ever formed or close corporation to adopt and ratify the agreement.

[17] The Applicant company was formed in June 2004 before the agreement was entered into.

[18] It will be submitted that no intention was ever showed to the Applicant's company to contract on its behalf and to adopt and ratify the alleged agreement see Memorandum of Association at page 91; alternatively it is not clear that there was any intention to contract

for it. See *Hyams vs Wolf & Simpson 1908 TS 83*.

[19] The 1<sup>st</sup> Respondent will submit that the pre-incorporation contract alleged was not privy to the Applicant herein for the Applicant to sue and enforce it.

[20] Thus X-Land Transport cc, now it is alleged acted as an agent or principal for the Applicant.

[21] It is trite law that an agent cannot contract for and on behalf of a non-existing company. This is so because the company alleged by the Applicant to be formed was never formed and is not existing.

[22] It is along this basis that the 1<sup>st</sup> Respondent submit that this agreement is unenforced for the reasons that;

22.7 The alleged adopted and rectification was done prior the sale date as the sale date ought to be have been the 6<sup>th</sup> September 2004 alternatively that the alleged contract was not made in the name of the Applicant with a view to benefit the Applicant and;

22.8 That the Applicant was not privy to the alleged agreement as in its Memorandum of Association no intention was ever shown that it will adopt and ratify the agreement.

22.9 That the Applicant was not privy to the contract, X-Land Transport cc cannot contract on behalf of a non-existent company and further.

22.4 That the creditors were not aware in Swaziland that the seller's business was being sold as a result the purchaser and the seller acted *mala fide* to the disadvantaged of all creditors of the alleged seller, which was conducting and it is still conducting business within the jurisdiction of the above Court.

[23] In my assessing of the arguments of the parties I came to the conclusion that the Applicant and the seller are different *persona* in law and judgements against the seller are not enforceable against the Applicant a different company.

[24] I further agree with the Applicant's contention that the sale agreement is not a pre-incorporation contract and accordingly it is not necessary for the Memorandum to contain as an object the ratification of such an agreement. The 2<sup>nd</sup> Respondent has attached a truck owned and registered in the name of the Applicant's company. There is no legal basis to attach an asset of the Applicant to satisfy a judgement obtained against the seller.

[25] In the result, for the foregoing reasons the application is granted in terms of the Notice of Motion with costs including the costs of counsel in terms of Rule 68.

**S.B. MAPHALALA**

**Principal Judge**