IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Case No: 1573/2011

In the matter between:

Johan Grobler **1st Applicant**

Firstwatch Security & Emergency Services (Pty) Ltd **2nd Applicant**

In re:

Johan Grobler **1st Applicant**

Firstwatch Security & Emergency Services (Pty) Ltd **2nd Applicant**

And

Stealth Security Services (Pty) Ltd
Respondent

Coram	Hlophe J.
For the Applicant	Ms. Boxshall Smith
For the Respondent	Mr. S. Simelane

JUDGMENT

Hlophe J.

[1] The Applicants instituted application proceedings under a certificate of urgency where they sought *inter alia* orders of this Court interdicting the Respondent from disposing off certain assets which formed the subject matter of a certain sale of business between the Applicants and the Respondent. The Applicants further sought an order of this court authorizing the Deputy Sheriff for the District of Manzini to attach and remove from the possession of the Respondent or from whosoever's possession the goods listed in the Notice of Motion which includes certain furniture, a computer, dogs and motor vehicle, wherever such could be found. It was further prayed that the said goods be kept in the possession of the Applicants

[2] The goods in question are the movable goods that, formed the subject of the business sold between the parties and had been delivered to the Respondent by the 2nd Applicant in terms of the agreement between the parties.

[3] The application proceedings were instituted *exparte* by the Applicants, resulting in a rule nisi operating with immediate and interim effect being issued by this Court per Justice Mamba on the 13th May 2011, returnable on the 17th May 2005. However, on the same day the *rale nisi* was issued, the Respondent set the matter down for hearing on 16th May 2011, it having anticipated the rule nisi as it was entitled to do. For various reasons however, the matter ended up being heard on the 20th May 2011, whereupon this Judgment was reserved.

[4] The Applicant's case is that the parties concluded an agreement in terms of which the 2nd Applicant sold to the Respondent the business and what were referred to as sale assets in terms of an agreement annexed to the application. The business sold was defined as the business conducted by Firstwatch Security Services (Pty) Ltd "at the premises and as constituted by the sale assets and the leased assets." This seller is clarified to be the 2nd Applicant even though the name is shortened in the agreement.

[5] The Applicants contend that the Respondent breached the said agreement by not paying in terms thereof. Owing to the alleged breach, the Applicants seem to be of the view they are then entitled to *inter alia* repossess the business and sale assets (goods) sold to the Respondent hence the reliefs sought.

[6] It is however common cause that in terms of paragraph 7.3 of the said agreement, ownership of the goods sold (sale assets and the business) was to pass to the purchaser on the effective date which is defined in paragraph 1.7 of the same agreement as the 1st May 2010. In terms of paragraph 7.2, 7.2.1 and 7.2.2 of the agreement, and delivery of the goods sold was made to and accepted by the purchaser on the 1st May 2010. The purchase price was payable after the delivery of the goods sold and by the 20th May 2010 in terms of paragraph 4.3 of the agreement.

[7] Although the Applicant's founding affidavit seems to be unclear on what was sold to the Respondent between the 2nd Respondent (the company) and the business operated by the 2nd Applicant, that uncertainity in my view cleared by the agreement

of sale of business as it states at paragraph 1.18 that the seller shall mean Firstwatch Security Services (Pty) Ltd. It further goes on to define the business (being sold) as "the business conducted by the seller (Firstwatch Security Services (Pty) Ltd) at the premises as constituted by the sale assets and leased assets.

[8] Following its contending that the Respondent as purchaser of the business was failing to pay the purchase price as agreed, the Applicants approached this Court on an *exparte* basis where they sought and were granted an interim order empowering the Deputy Sheriff for the District of Manzini to forthwith seize and attach the assets sold to the Respondent as part of the business and deliver them to the 2nd Applicant.

[9] On the 16th May 2011, the Respondent filed its answering affidavit in terms of which it raised several points *in limine* which it urged this Court to determine on the return date. The points raised included the following contentions:-

9.1. that the matter was not urgent in so far as there was no compliance with Rule 6 (25) of the Rules of this Honourable Court;

9.2. that there was an unreasonable abridgement of the Rules of Court because there was no basis for the Applicants not to have served the application prior to approaching Court and obtaining the order they did exparte. The thrust of this contention was that the Applicants were not entitled to the order sought because it could only be granted if the Applicants were factually and legally correct to say they were owners of the assets, which it was contended they were not in this matter owing to the fact that ownership in the said goods had passed to the Respondent on the 1st of May 2010 or even on the date of delivery of the same goods. Furthermore the sale concerned was a credit one as the purchase price was payable weeks after delivery of the business and the sale assets. This is referred to because the legal position is settled that ownership possess upon delivery in credit sales as opposed to cash sales. I shall return to this point later on in this judgment on account of the fact that it is the one on which the matter eventually has to be decided upon in my view.

9.3. That there were no facts supporting the interim relief in the sense that the requirements of an interim interdict were not met.

9.4. That the Applicants' contentions were attended by disputes of fact. The disputes were said to relate to the fact that the goods were not owned by the Applicants but by the Respondents including a dispute on what was paid and what is currently outstanding.

9.5. That the Applicants abused the Court process by approaching this Court in the manner they did and thereby misrepresenting the facts before Court. This was to say the application ought to be dismissed on the point that a party who approaches Court on an *exparte* basis has a duty to disclose all relevant information including that adverse to his case.

[10] At the commencement of argument in the matter, the Respondent, who in line with the points *in limine* he had raised, had the duty or right to begin and did so by indicating that he was no longer pursuing all the other points as they mainly required

evidence to resolve, but was only going to insist on one point; being that referred to in paragraph 9.2 hereinabove; which is to the effect, that the Applicant's application is ill- conceived because the movable goods which formed the gravemen of the application, did not belong to the Applicants but to the Respondent by operation of law and as stated in the agreement of the sale of business itself which stated at paragraph 7.3 of the agreement that ownership to the "business and the sale assets shall pass to the purchaser on the effective date," defined as the date of the commencement of business (by the Respondent) in the agreement itself and also defined as the 1st May in terms of paragraph 1.7 of the said agreement.

[11] As I understood it, the Respondent's case is simply that because the business and the sale assets belonged to it, it was not opened to Applicant to rely on the said items to found its cause of action. It argued that this Court when granting the interim relief it did; did so in error and upon being misled as the ownership of the goods had already passed from the Applicant to

the Respondent. This necessitated that the *rule nisi* be discharged. It further contended that it was open to this Court to rescind an order granted erroneously in terms of Rule 42 of the High Court Rules.

[12] The Applicant on the other hand, and in opposition to the points raised, stated in its papers that it had since cancelled the agreement and as I understand it, it further contends that by so doing it is now entitled to the ownership of the business and assets initially sold by virtue of its cancellation of the agreement it concluded with the purchaser.

[13] The position is settled on what the effect of cancellation of an agreement is in law. In his book **The Principles of the Law of Contract,** Sixth Edition, Lexis Nexis Butterworths, AJ Kerr had the following to say at page 703 thereof:-

"*In the case of cancellation the major change is that no further performance by either party is due; obligations to perform in future are terminated, brought to an end, no longer exist;*

but rights already accrued, due and enforceable can be pursued and whatever adjustments the law allows in respect of the default by the one party can be enforced."

[14] To complete the picture, AJ Kerr states the following at page 732:-

"*Cancellation following a breach of the contract does not, as in the case of cancellation for fraud, refer back to the date when the contract came into being. Cancellation following a breach of contract means that the major change in the history of the parties' contractual relationship, referred to above, (Ie. in the above quote) takes place. The period during which the contract has existed is recognised, not nullified.*" **See *Salzwedch v Raoth 1956 (2) SA 160 (E) at 163 - 164.***

[15] The above can only mean that the subsequent cancellation of the contract the Applicants claim to have done preceding their application has no effect on the ownership of the business or sale assets as such ownership had passed to the Respondent during the tenure of the agreement - in other words the ownership remains with the Respondent dispite the cancellation. Indeed in **Walker's Fruit Farms Ltd vs Sumner 1930 TPD 394 at 401,** Greenberg J stated the position as follows :-

> *"No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract But it appears to me that this only applies to the executory portion of the contract; but where a certain right has accrued/to the one vartu before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced."*

[16] If it is common cause that ownership of the goods (business plus the sale assets) had passed from the seller to the purchaser by means of the agreement with effect from the defined effective date, then the subsequent cancellation of the agreement does not affect such ownership which remains a right enforceable by the purchaser.

[17] In her argument Miss Boshall Smith, submitted that whether or not the delivery of the said goods envisaged an intention to pass ownership depends on the facts. I agree with this position as expressing the true legal position but I also need to state the following common cause facts in this matter: -

17.1. At paragraph 7.3 of the agreement it is stated that "ownership in and to the business and the sale assets shall pass to the purchaser on the effective date.

17.2. The effective date is defined at paragraph 1.7 of the agreement as the 1st May 2010.

[18] It is not in doubt that the parties specifically agreed on when the ownership in the goods sold passed or was to pass to the purchaser. Where the parties specifically so agree, there is no need in my view to construe the intention of the parties to the sale from the other facts and circumstances of the matter other than the express provision made by the parties. In **Lendalease Finance v Corporation de Mercades Agricola 1976 (4) Sa 464 (A) at 489 - 90** it was stated that the intention of the parties is ascertainable from "(a) Whether the contract contains conditions affecting the passing of ownership and (b) whether the sale is for cash or on credit."

[19] My understanding is that once the parties have specifically agreed on how ownership is to pass, as was the case in this matter, then effect has to be given to their agreement. Consequently, I am of the view that ownership did pass from the seller to the purchaser as from the effective date of the agreement as stated above. In this regard I believe I have the support of cases like the **Commissioner of Customs and Excise v Randies Brothers and Hudson Ltd 1941 AD 369 at 388 as well as that of Drive Control Services (Pty) Ltd v Troycom Systems (Pty) Ltd (N-Trique Trading CC Intervening) 2000 (2) SA 722 (W)** where the Court held that an express provision decided the issue where it had reserved ownership in the goods therein sold.

[20] Without delving much into this aspect of the matter, it is still my view that even if there was no specific provision on how ownership was to pass, it would still have passed in this matter given that the sale was in my view a credit sale when considering the circumstances of the matter particularly that payment of the

full purchase price was to be made on the 20th May 2010, Twenty days after delivery which was to go with ownership on the effective day. See in this regard paragraph to 7.2.2 of the agreement. The apparent contradiction on when ownership was to specifically pass created by paragraph 4.2. does not present much of a problem when one considers the repeated expressions that same was to pass on the effective date coupled with the delivery made which itself was made subject to the effective date as provided in paragraph 7.3.

[21] The position is now settled that "in the case of an ordinary credit sale, delivery raises the presumption that it was the intention of the seller to pass ownership. A mere mental reservation on his part cannot rebut the presumption," according to Gibson, South African Mercantile & Company Law, Eighth Edition at page 127. See also **Laing v South African Milling Co. Ltd 1921 AD 387 at 402.**

[22] Having come to the conclusion that ownership of the business and sale assets had already passed to the Respondent

when these proceedings were instituted, can this Court confirm the rule issued with interim effect and *exparte* on the 13th May 2011? Owing to the conclusion I have come to, which is that ownership had passed on the effective date, the *rule nisi* issued with interim effect seems to have been a result of an understanding that the Applicant could still reclaim the goods, I have no doubt that the *rule nisi* in question was granted in error. According to Erasmus H.J. and Others, "Superior Court Practice" Juta and Company, Service 6 1996 at page BI - 308 "an order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made such an order." See also **Athmaram v Singh 1989 (3) SA 953 (D) at 956 D and 956 I.** It was obviously not legally competent for this Court to issue the *rule nisi* operating with interim effect such that the Applicant was reclaiming the goods in a case where ownership therein had already passed to the Respondent:

[23] In my view, if it was open to this Court to rescind a Judgment granted in error, it is equally open to this Court not to confirm a *rule nisi* obviously granted in error. Applicants remedy in my view lies in proceedings for specific performance or an action for damages against the Respondent and not to simply reclaim the goods after cancellation of the agreement.

[24] Consequently I have come to the conclusion that the Respondent's point *in limine* to the effect that ownership of the goods had already passed to the purchaser such that Applicant's application was untenable, must be upheld. Accordingly I make the following order:-

24.1. The *rule nisi* issued with interim effect by this Court on the 13th May 2011 be and is hereby discharged.

24.2. The Applicant's application be and is hereby dismissed.

24.3. The Applicant be and is hereby ordered to pay the costs of this application.

Delivered in open Court on this 24th day of June 2011.

N.J. HLOPLE

JUDGE