IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1420/2022**

In the matter between:

JABULANI SYDNEY KUNENE **PLAINTIFF**

And

MKHULULI PETER HLOPHE **FIRST DEFENDANT**

DOVES ENGINEERING (PTY) LTD **SECOND DEFENDANT**

Neutral citation : *Jabulani Sydney Kunene v Mkhululi Peter Hlophe & Another (1420/2022)[2023] SZHC 64 (30/03/2023)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 14 March 2023

DATE DELIVERED 30 March 2023

Summary: *Civil Procedure-Notice of Exception-Defendant arguing that Plaintiff's Particulars of Claim ought to have disclosed that verbal agreement is valid. Defendant also arguing that verbal agreement invalid and unenforceable for non-compliance with the Competitions Act, 2007.*

Held; *The exception is misdirected as there is no legal requirement for one to expressly state in the pleadings that a contract is lawful. The reliance by the Defendant on Section 35 of the Competitions Act, 2007 to opt out of the contract is similarly misplaced and is rejected. The Exception is dismissed with costs.*

JUDGMENT

INTRODUCTION

[1] On the 27th July 2022, the Plaintiff sued out summons against the Defendant demanding payment of the sum of E 700,000.00 (Seven Hundred Thousand Emalangeni) being the outstanding balance for the sale of shares held by the Plaintiff with the Second Defendant. The shares were sold to the First Defendant in terms of an oral agreement concluded between the parties during or around October 2018.

[2] It is alleged in the Particulars of Claim that;

"5. *The Plaintiff who acted in person and the 1st Defendant who also acted in person on or around October 2018 and at Manzini entered into an oral sale agreement in which the Plaintiff sold his shares held with the 2nd Defendant.*

5.1 It was agreed that the purchase price of the shares sold by Plaintiff to 1st Defendant was E 1 000,000.00 (One Million Emalangeni) of which the 1st Defendant would

pay the sum of E 250,000.00 (Two Hundred and Fifty Thousand Emalangeni) up front as a deposit after which the Plaintiff would resign as a director and the 1st Defendant would be made a director of the 2nd Defendant.

5.2 It was also agreed between the parties that the balance of E 750,000.00 (Seven Hundred and Fifty Thousand Emalangeni would be paid by the 1st Defendant by him remitting to Plaintiff his (1st Defendant's) entire share of dividends at the end of the 2nd Defendant's financial year being April until the balance was paid in full.

5.3 Furthermore, it was agreed that in the case of a breach of contract the Plaintiff could cancel the sale or claim immediate payment of the full purchase price."

[3] Pursuant to the summons being served upon the First Defendant (herein referred to as the "Defendant") and, having served a Notice of Intention to Defend, the latter filed and served a Notice of Exception in which two points are raised namely;

(i) The Plaintiff has failed to state clearly why the agreement entered into between the parties is not in writing and also failed to state that the agreement is legally enforceable.

(ii) The agreement between the parties is invalid. The invalidity of the agreement, according to the Defendant, emanates from the provisions of the Competitions Act, 2007 which requires that all such agreements as concluded between the parties herein must be reported and receive approval from the Competition Commission.

EXCIPIENT'S SUBMISSIONS

[4] In argument, the Defendant's representative submitted that it was imperative for the Plaintiff to expressly state in the Particulars of Claim that the agreement entered into between the parties was lawful. According to the Defendant, in the absence of such an allegation, the Plaintiff's claim could not be sustained and was liable to be thrown out.

[5] The Defendant further strongly argued that the agreement between the parties is invalid and unenforceable in that it contravenes Section 35 (1) and (2) of the Competitions Act, 2007. In essence, the Defendant's argument was that the agreement concluded between the parties constituted a 'merger' as defined in the Competitions Act in that it allowed the acquisition of a 'controlling interest' in the affairs of the Second Defendant by the First Defendant, which controlling interest was previously held by the Plaintiff.

[6] According to the Defendant, Section 35 (1) and (2) of the Act provides;

"(1) **A merger shall not be carried out without the authorization of the Commission...**

(2) **A merger or takeover made in contravention of subsection (1) shall not have any legal effect and no rights or obligations imposed on the participating parties, by any agreement in respect of the merger or takeover, shall be legally enforceable unless an application for condonation has been made to and granted by the Commission.**

[7] It was submitted on behalf of the Defendant that in the absence of a report and authorization from the Competition Commission, the agreement was invalid with the result that no rights and obligations could flow from it. It is stated by the Defendant in his written submissions which were supplemented by oral arguments that;

"7.5 **A further highlight about the allegations of the Plaintiff at paragraph 5.1 of its combined summons, clearly states that the terms of the agreement were that the Plaintiff would resign as a director and the 1st Defendant would be made director of the 2nd Defendant. We respectfully submit that the said directorship as per the allegations of the Plaintiff, would then give the 1st Defendant a controlling interest in the 2nd Defendant in that the 1st Defendant would then have the ability to exercise decisive influence over the policies of the 2nd Defendant and its strategic direction."**

[8] The Defendant prayed that the exception be upheld and that the Plaintiff's action be dismissed with costs.

PLAINTIFF'S SUBMISSIONS

[9] The submissions made on behalf of the Plaintiff was that on the facts placed before Court, there is no evidence to support the contention that by selling the shares to the First Defendant, the latter automatically assumed control in "*any trade involved in the production or distribution of any goods and services.*" The Plaintiff further submitted that on the facts of the matter, it cannot be said that the sale agreement between the parties constituted the sale of "*an asset which is or may be utilized for or in connection with the production or distribution of any commodity.*"

[10] The Plaintiff argued that not all enterprises are incorporated for purposes of trading which involves the production of goods or services. Similarly, it cannot be said that all enterprises are incorporated for purposes of holding an asset or assets which is or may be used with the production or distribution of commodities. Some companies, according to the Plaintiff, are incorporated just to be holding companies with no involvement in any trade relating to the production and distribution of goods or services.

[11] The essence of Plaintiff's argument was that without proper facts being pleaded, it could not be assumed that the business of the Second Defendant constitutes that which is described in Section 2 of the Competitions Act, 2007 in relation to the acquisition of a controlling interest. The Plaintiff's argument was that at the very least, the Defendants ought to have raised a 'special plea' which would have enabled the Defendants to raise their objection as a preliminary point whilst being supported by the facts pleaded on the merits of the matter.

[12] Further argument by the Plaintiff was that the Competitions Act, 2007 did not prohibit the conclusion of sale agreements between parties but only **prohibited the implementation or operationalization** of those agreements without authorization from the Commission. [under-lined for emphasis].

ANALYSIS AND CONCLUSION

[13] It is provided in Section 35 (1) of the Competitions Act, 2007 that;

"A merger shall not be carried out without the authorization of the Commission and a person who, in the absence of authority

from the Commission, whether as principal or agent and whether himself or his/her agent, participates in effecting-

(a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;

(b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise,

Commits an offence and shall, on conviction be liable to a fine not exceeding two hundred and fifty thousand Emalangeni or to imprisonment to a term not exceeding five years or both."

[14] The Defendants have expressly relied on Section 35 (1) and (2) in seeking to invalidate the agreement entered into between them and the Plaintiff. Section 35 (1) (a) clearly talks of '*two or more independent enterprises engaged in the manufacturing or distribution of substantially similar goods or providing substantially similar*

services." The case at hand clearly does not fall within the scope of section 35 (1) (a). There is no evidence placed before Court to the effect that the First Defendant, other than his involvement with the Second Defendant, also has another enterprise which does similar work as the Second Defendant.

[15] Similarly, section 35 (1) (b) envisages a takeover of one company by another company or another person **who controls another such enterprise.** Again there is no evidence placed before Court that the First Defendant has a controlling interest in another similar enterprise as the Second Defendant. In the Court's view, the reliance by the Defendants on section 35 (1) and (2) is misdirected.

[16] The other point to consider relates to a proper interpretation to be assigned to the phrase '*a merger shall not be carried out*' as contained in section 35 (1) of the Act. From a plain reading of the section, what is outlawed is the *carrying out* of the merger. The merger itself connotes the final product of the sale agreement between the parties. It would appear that the Defendants' representative was content in using the term 'merger' as meaning the same thing as the 'sale agreement'.

In reference to the Plaintiff's Particulars of Claim, the Defendant's representative strongly argued that the Plaintiff actually resigned and that the First Defendant assumed directorship within the Second Defendant. This, according to the Defendants' representative, means First Defendant assumed control over the Second Defendant without authorization from the Commission, an act which, according to him is unlawful. The agreement between the parties, according to the Defendants' representative is fully operational.

[17] The phrase 'shall not be carried out' as contained in the Act has a legal significance. This issue, in the Court's view, boils down to the old debate of which came first between the egg and the chicken. If the parties, without fulfilling their agreement, approach the Competition Commission for authorization, then such authorization would be in vain because issues such as non-compliance by one party may render the agreement itself a nullity. If, on the other hand, all the terms of the agreement are fulfilled and only then that the parties report their transaction to the Commission for authorization, the Commission may allow or disallow the transaction. If the transaction is disallowed, it

automatically means the agreement between the parties also falls away.

[18] In the Court's view, approval or disapproval of the transaction is a separate process altogether from the terms of the agreement between the parties. The Plaintiff is only seeking to enforce the terms of the agreement between himself and the First Defendant. Upon those terms being fulfilled, there is nothing preventing the parties from reporting the transaction to the Competition Commission, that is, if it reportable. Even if it may be accepted that the First Defendant has already assumed the role of director within the Second Defendant, legally that status is not complete unless and until the terms of the agreement are fulfilled.

[19] The third ground upon which the exception cannot be upheld is that in essence, the Defendants are arguing that the contract between them and the Plaintiff was concluded in error in the absence of prior approval from the Competition Commission as required by Section 35 of the Act. This mistake is, in law referred to as *justus error* or error of law. The error, according to the Defendants, is that certain

provisions of the Competitions Act, 2007 were not followed when the parties entered into the agreement.

[20] In the case of **The Head of Department of Education Limpompo and Another v Lekganyane and Another (7591/2019) [2021] ZALMPPHC 48 (19 August 2021)**, the High Court of South Africa for the Limpompo Province referred to the case of **George v Fairmead 1958 (2) SA 465 (A) 471 A-D** in which it was held as follows;

"When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read decisions, our Courts, in applying the test, have taken into account the fact there is another party involved and have considered his position. They have, in effect said: Has the first party- the one who is trying to resile-been to blame in the sense that by his conduct he has led the other, as a reasonable man, to believe that he was binding himself?...if his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[21] The fundamental question arising is therefore whether it can be said that the Plaintiff acted fraudulently or misrepresented facts or the law to the First Defendant thereby inducing the latter to enter into the verbal agreement for the sale of shares. The answer to this question is clearly in the negative. In the contrary it appears that it was the First Defendant, being aware of the law, who failed to disclose to the Plaintiff about the consequences of not reporting the transaction to the Competition Commission, if at all this was a requirement.

[22] In another case of **Theodosiou and Others v Schindlers Attorneys and Others (14038/2021) [2022] ZAGPJHC 252 (21 April 2022)** the Court held that;

"[25] The starting point interpreting statutes to determine whether their effect is to void a contract entered into in contravention of the terms of a statute is Innes CJ's dictum in Schierhout v Minister of Justice 1926 AD at page 99, where Solomon A at 274 held;

"The contention on behalf of the respondent is that when the Legislature penalizes an act, it impliedly prohibits it and that the

effect of the prohibition is to render the Act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, we have to get the intention of the Legislature, and, if we are satisfied in any case that the legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet, 1.3.16 puts it-'*but that which is done contrary to the law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it*'. Then, after giving some instances in illustration of the principle, he proceeds: '*The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.*' These remarks are peculiarly applicable to the present case."

[23] One is therefore required to ask the question: Do the provisions of the Competitions Act, 2007 prevent parties from entering into agreements which are related to business competition? It appears there is nothing in the Act preventing parties from entering into such agreements. If the intention of the Legislature was to require parties to first seek authorization from the Commission prior to entering into common law

agreements, then the Legislature would have said so in clear and plain language.

[24] What the Legislature has sought to penalize and regulate through the Competition Act is the carrying out or operationalization of agreements which touch on competition matters as defined in the Act. The carrying out of agreements falling within this category can only take place once the terms and obligations of the parties to the agreement have been fulfilled. This is because, logically and, in legal terms, if there is non-compliance to a term or terms of an agreement by one of the parties to a contract, for all intents and purposes, there is no enforceable agreement. The Competition Act cannot prohibit an invalid or unenforceable agreement.

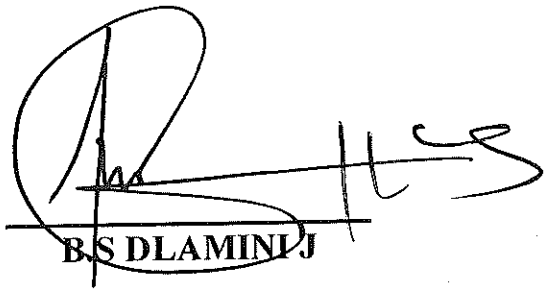
[25] In the present matter, it is alleged in the Particulars of Claim that the First Defendant has reneged on his obligation to pay the balance outstanding on the sale of shares in terms of the verbal agreement between the parties. Instead of responding to this allegation, the First Defendant has chosen to raise an exception and to argue that the agreement is invalid. The exception is, in the Court's view,

misdirected and constitutes a ploy by the First Defendant to avoid answering to the allegations made by Plaintiff in the Particulars of Claim.

[26] The Court accordingly grants orders as follows;

(a) The Notice of Exception raised on behalf of the First Defendant is dismissed.

(b) The First Defendant is ordered to pay costs of the exception.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Defendant: *Mr. M. Donga (S.V Mdladla & Associates Attorneys)*

For Plaintiff: *Mr. M. Magagula (Zonke Magagula & Co Attorneys)*