DATAVYF/Jhb/JduP.

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NUMBER : 12946/97 DATE : 18 JUNE 1997

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED

DATE 24/7/97. SIGNATURE

In the matter between :-

SWEECO (PTY) LIMITED AND OTHERS Applicants

and

MAX ERDMANN AND OTHERS Respondents

J U D G M E N T

WUNSH. J.: The unsuccessful respondents in an urgent application seek leave to appeal against the whole of the judgment which I delivered on 9 June 1997. The applicants oppose it. To avoid confusion I shall retain the descriptions which applied in the initial application and the abbreviations which I used in my judgment so that the

present/....

present applicants, who were the first, second, sixth, seventh and eighth respondents, the other respondents not having been parties to the proceedings although they were cited, will be called "the respondents" and severally Rema Tools, the second respondent, Arendsen, Max and Stefan. I shall again refer to the fifth respondent, who is not a party to the proceedings, as Marius. The respondents in this application are then Sweeco, the second applicant, and Gerhard.

The orders, apart from costs, which the respondents wish to challenge in a superior tribunal, are briefly:

1. That they return certain specified moulds to Sweeco or Gerhard and, in addition,

   "any other moulds related to rubber brooms and brushes which have been manufactured for Sweeco and Gerhard".

   The respondents submit generally that there is a reasonable prospect that another court will take a different view on all the issues which I decided against them, and specifically that by embracing "any other moulds" the order strikes certain moulds in which Andersen has a half interest.

2. That Rema Tools and the second respondent shall render to the applicants an account of the products manufactured by them, utilising any of the moulds referred to in paragraph 1, from 1 October 1996 to date. The respondents submit that, in the absence of a statutory contractual or fiduciary duty, there is no basis for this obligation.

3. That the respondents, other than Arendsen, be

interdicted from manufacturing rubber brushes by using any of the moulds referred to in paragraph 1 or replicas thereof. The respondents contend that there is a reasonable prospect that a higher court will hold that the respondents are entitled to use the moulds; that in any event the order travels beyond the applicable prayer in the notice of motion by embracing replicas; and that even if the agreement, which my judgment renders applicable to Rema Tools and Max, precludes them from using the moulds to manufacture products for other parties, which they contend is not the case, the second respondent and Stefan were not parties to it and are not bound by it. Furthermore, it is said in the grounds of appeal that I misdirected myself in not finding that the failure to serve the application on the peregrine respondents constituted a non-joinder inasmuch as they had a direct and substantial interest in the outcome of the application.

The specified grounds of the intended appeal, of which there are 33, are directed mainly at the basis on which I have found that the moulds were the property of Sweeco.

Although counsel for the respondents argued that another court may hold that I was not entitled, on the case made out by the applicants, to grant them an order for the delivery of the moulds even if they had not proved that they or one of them were the owners but in order to enforce a ius in personam ad rem acquirendam, the application for leave to appeal, twice supplemented and amended,

does/...

does not specify that ground.

Even if the respondents were to succeed on their dispute about ownership they have not said that they wish to appeal against the order for delivery on the ground that Sweeco is entitled to delivery in personam.

I shall deal with the respondents' submissions substantially in the order in which their counsel made them.

REPLICAS OF THE MOULDS

No finding was made as to patent rights. I did find that Sweeco owned the copyright and that this had been acknowledged by Rema Tools, Max and Stefan. The reason why the order I made extends to replicas was to render the restriction on the respondents' breach of their obligations to the applicants effective. It may well be that another court will take the view, put forward by the respondents, that I exceeded my powers in doing so and the respondents should have an opportunity to attempt to persuade such a court that I did.

ARENDSEN'S INTEREST IN THE MOULDS

The founding affidavit alleged an agreement in terms of which Arendsen purchased a 50% interest in four moulds from Gerhard for R162 000. The respondents made no issue about the use by or value to them or Arendsen of these moulds nor did Andersen take a stand on them. On the contrary, Stefan's answering affidavit says:

"25.2 I am however able to state that the four moulds which were delivered to the fourth respondent (i.e. Sqeeper Nederland BV) in the Netherlands on behalf of the sixth respondent (i.e. Arendsen) were to all intents and purposes

valueless/...

" valueless. They were obsolete and practically speaking there was no way in which they could have been kept in production in any way which made financially viable sense.

25.3 The four moulds were either shipped off to the Netherlands where, I believe, their uselessness was ascertained and they were later returned to South Africa. They are currently in the possession of the first respondent. They are of no use to anybody.

25.4 I have since been informed that the sixth respondent paid an amount of R162 000 for a 50% share in the said four moulds. I state unequivocally that a 50% share in such moulds is far too high a price for anyone to pay for them."

Arendsen's supporting affidavit says:

"I have read the affidavit deposed to by Stefan Erdmann and confirm the contents therein insofar as they relate to me."

This is a new issue which is so devoid of merit that it cannot have a prospect of assisting the respondents on appeal.

THE OWNERSHIP OF THE MOULDS

This was dealt with fully in my judgment. In view of the repeated admissions by Max and Rema Tools, and the other considerations dealt with by me, I consider that there is no prospect of success on this issue. Much of the respondents' argument in the present application was a rehash of what I had previously heard and rejected. I shall deal with additional arguments and grounds on which

it was said that statements in my judgment may not find favour with a higher court:

1. It was said that I was bound to accept the averment of Stefan that ownership did not vest in any of the applicants by reason of the test laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A) at 634 H - 635 B. One of the rules formulated by Corbett JA in that case entitled me to reject the respondents' contentions because they were "so far-fetched or clearly untenable" as to justify my doing so. It should be clear from my judgment that I considered the respondents' arguments to be completely untenable, and I consider equally untenable the proposition advanced by counsel that I had to articulate this reason in order to rely on it. Counsel at the hearing was at pains to tell me that I could not rely on a layperson's opinion about ownership.

2. In Goldinger's Trustee v Whitelaw & Son 1917 AD 66 at 90 Maasdorp JA said, in regard to constitutum possessorium that there:

> "should be an express declaration that the previous possessor is for the future to manage the possession of another."

The learned judge did not say that there had to be an express constitutum. It would be unrealistic to insist on this from laypersons before you find that there has been effective delivery. There has to be a declaration that the possessor is to manage the possession for the new owner. That was arrived at by

the/...

the agreement that Rema Tools would use the moulds to manufacture the products for the applicants.

3. I found that there was a tacit constitutum possessorium without the applicants having alleged it, as I suggested was necessary in Bezuidenhout v Otto and Others 1966 3 SA 339 (W) at 344 H-J. The applicants may not have elegantly pleaded this but they certainly made that case in the founding affidavit.

4. I would not have referred to the respondents' wish to attack my assessment of the position in Mankowitz v Lowenthal 1982 3 SA 758 (A) if their reasons had not included the following, a view in which counsel has continued to persist despite my efforts to put him right:

> "It is submitted that it is manifest from the aforegoing quotations (from the judgment) that the contract of donation had already been executed. It was not an executory donation and accordingly section 6 of the General Law Amendment Act, 53 of 1956, was inapplicable, i.e. the contract of donation did not have to be in writing."

In desperation I was constrained to refer counsel to volume 8 Part 1, Law of South Africa, 1995 at paras.268 and 276.

5. In dealing with the approach to the evidence of constitutum possessorium I said in my judgment at page 18 there was a causa detentionis and, having regard to the business basis thereof and the absence of any third party interest, there is adequate evidence that

ownership passed to Sweeco. The respondents argue that there is a reasonable prospect that another court will not agree that there is no third party interest. What would happen, they say, if Sweeco were liquidated or Gerhard were sequestrated? Third parties, i.e. the creditors of either of them or of Rema Tools will be affected by my finding. There is certainly no suggestion in the papers of either of these events as a contingency to contemplate and I perceive no relevant direct third party interest which renders my approach to the issue impeachable with a reasonable prospect of success.

THE COPYRIGHT ISSUE AND THE PATENT CONTENTIONS

Nothing has been advances which gives me the belief that another court will be persuaded to make a finding on these issues which would defeat the applicants' claim for relief.

THE APPLICANTS' TERMINATION OF REMA TOOLS' RIGHT OF POSSESSION

One of the critical issues was whether Rema Tools was entitled to use the moulds to manufacture the products for others. Because I have found that it was not, I did not deal with another question. The way the respondents would read the manufacturing agreement presumably Rema Tools could decide not to accept or implement orders for goods. They had rights but no obligations, or they could accept large volumes of orders from others and tell Sweeco to go to the back of the queue. The finding which I was told could, with a reasonable prospect of success, be challenged on appeal is that it was clearly at least implied

that/...

that Rema Tools could not use the moulds to manufacture the products for anyone else. My choice of language was unfortunate but it should be clear from my reference to the dictum of Rumpff CJ in Swart en 'n Ander v Cape Fabrics (Pty) Ltd 1979 1 SA 195 (A) at 222 B-C that I was saying that that was the meaning of the agreement, which could not be taken literally. (Cf OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another 1993 2 SA 471 (A) at 478 D-E).

In my judgment I said (p.23): (10)

"Prima facie it seems to be an impertinence for (Rema Tools) to claim that its business relationship with Sweeco had not ceased or that Sweeco had not lawfully terminated it."

The applicants' averments in the founding affidavit with regard to the contractual relationship between Sweeco and Rema Tools were not effectively put in issue in the answering affidavit. These are the substantive averments which one finds.

"77. AD PARAGRAPH 116 (which starts the narrative of (20) the contractual relationship).

The allegation in regard to manufacture by the second respondent has been repeatedly dealt with in this affidavit and I see no need to continue the repetition.

78. AD PARAGRAPHS 117, 118, 119 and 120

I am unable to understand upon what basis it can be alleged that the second respondent was obliged to manufacture products for the first applicant only. I can accordingly not deal with (30)

the/...

' the allegations contained in paragraph 120.

...

82. AD PARAGRAPH 129

It is unclear to me to which respondents and to which manufacturing and distribution agreements the third applicant is attempting to refer. Accordingly I cannot comment upon the alleged repudiation."

Yes, says the respondents' counsel, he agrees that this was prima facie an impertinence but, he goes on to say that prima facie is not good enough. The court has not heard Marius' version of the events. That observation of mine was not the foundation of my finding. It introduced the discussion. In any event, if the respondents wanted me or want an appeal court to know what Marius had to say, they did not explain and have not explained why they did not deliver an affidavit by him. He was obviously available and he could have sworn to an affidavit as a witness without becoming a party to the proceedings.

The applicants' attorney, who presented his clients' closing argument on this application, pointed out that on 5 May 1997 Marius had attended a meeting in Calgary, Canada with Max and the president of Quality Space Products and that the respondents had, in the interlocutory application, produced a licensing agreement between Monosata and the Netherlands companies, of which the applicants have no knowledge, the source of which is obviously Marius or the Netherlands companies.

STATEMENT OF ACCOUNT

Reference was made to Victor Products SA Limited v

Lateulere Manufacturing Ltd 1975 1 SA 960 (W) at 963 B-C where Moll J said:

> "The right at common law to claim a statement of account is of course recognised in our law provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account."

In this case there was, I found, more than a debtor/creditor relationship. The respondents had mala fide and dolo diverted business from the applicants. Goods were exported when they should have been supplied to the applicants. There is uncontroverted evidence that between six and eight containers were exported in March and April 1997. In the leading case, Doyle and Another v Fleet Motors P.E. (Pty) Ltd 1971 3 SA 760 (A), Holmes JA said inter alia in regard to a statement and abatement of account:

> "The plaintiff should aver -
>
> (a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise." (at 762 F-G: I underline).

I understand the respondents to say that "or otherwise" refers to only a statutory right to an account.

All that I ordered in this case is a statement of sales not of profits. I did not substantiate my

conclusion, probably because little if anything was said about it in argument or in the papers. I cannot say that there is no reasonable prospect that my order will be upset by another court.

The interdict against Stefan and Sweeco Manufacturing (Pty) Limited (the second respondent). The objection is based on their not having been parties to the manufacturing agreement. Stefan's wife is the owner of Renaté Marketing and he is the active antagonist on behalf of Rema Tools. Sweeco Manufacturing is claimed by the respondents to be a facade. It is, however, the company which has entered or purported to enter into transactions with Sweeco and received payments from it. It uses Rema Tools' VAT number (not as said in my judgment, its own). All these parties have been participants in the diversion of business from Sweeco in a way which I have found to be unlawful. I cannot see another court taking a different view.

I should add that a ground of appeal is that I misdirected myself in saying that "the applicants are entitled to an order prohibiting the use of the moulds by the respondents". I have already given my view on the attack on the finding of ownership and the right to terminate the respondents' possession and the exercise thereof. All these issues support the prohibition.

NON-JOINDER

No order was made against the peregrini. I consider this submission to be without merit in a case which deals with a dispute arising out of a contractual relationship between the litigants in the application and the

applicants'/...

applicants' proprietary rights.

THE COSTS OF THE INTERLOCUTORY APPLICATION

Counsel for the respondents appear to have misunderstood my judgment when I said at page 35:

> "The applicants have achieved their main objective and should be awarded all their party and party costs".

This he thought was the basis for my decision that the costs of the interlocutory application should be costs in the cause.

If I did not express myself clearly enough that is my fault, but that was not the basis. It was the reason for awarding costs of the application to the applicants even though some of their prayers were dismissed.

On the costs of the interlocutory application there were, as I said in my judgment, conflicting arguments. At the end of the day the respondents did not rely on any of the documents of which they claimed discovery. In my discretion I concluded that the costs should be costs in the cause. I do not consider that there is a reasonable prospect that a higher court will interfere with the exercise of my discretion.

ORDER

The parties agreed that it was competent to grant leave to appeal against part of my judgment only, and I would add, only on some grounds. (Cf van Heerden v Theron Wright & Others 1985 2 SA 342 (T) at 344; Ngoumba v Staatspresident 1988 4 SA 224 (A) at 246 H - 247 B).

I make the following order:

1. Leave is granted to the applicants, in the

application for leave to appeal, to appeal to the full bench of the Transvaal Provincial Division or this Division as the Judge President may direct, against -

1.1 paragraph 4 of the order made on 9 June 1997, on the ground set out in paragraph 32 of the application for leave to appeal;

1.2 the inclusion of the words "or replicas thereof" in paragraph 5 of that order, on the ground set out in paragraph 31 of the application for leave to appeal.

2. Save as aforesaid, the application is dismissed.

3. The applicants are ordered jointly and severally to pay two-thirds of the respondents' costs, and they shall bear two-thirds of their own costs. The balance of the respondents' costs and the balance of the applicants' costs are costs in the appeal.

ON BEHALF OF APPLICANTS:	ADV Z F JOUBERT SC
INSTRUCTED BY:	BEDER-FRIEDLAND
ON BEHALF OF RESPONDENTS:	ADV D HANCOCK
INSTRUCTED BY:	BOTHA MASSYN & McKENZIE
DATE OF HEARING:	18 JUNE 1997
DATE OF JUDGMENT:	18 JUNE 1997

DATAVYF/Jhb/JduP.

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NUMBER : 12946/97 DATE : 18 JUNE 1997

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
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DATE 24/7/97. SIGNATURE

In the matter between :-

SWEECO (PTY) LIMITED AND OTHERS Applicants

and

MAX ERDMANN AND OTHERS Respondents

J U D G M E N T

WUNSH. J.: I am now faced with this application for leave to execute. My prima facie view, is that there should be no reason why the respondents should not continue to keep a record of the sales and to render a statement of those sales to the applicants, even though there will be an appeal against that order.

The/...

The real issue is the delivery of the moulds. According to rule 49(11), where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary any order of a court has been made, the operation and execution of the order in question shall be suspended pending the decision of such appeal or application unless the court which gave such order on the application of a party otherwise directs.

The application for leave to appeal to the Chief Justice has not yet been made but I suppose that, from a practical point of view, I should nevertheless deal with this application now because if I defer it until there is an actual petition to the Chief Justice, all that I do is delay the matter for a few days. There seems to be no purpose in that.

In regard to the moulds. In the answering affidavit, which was filed to the application for leave to execute, Stefan said the following:

> "11.8 I repeat the tender on behalf of Rema Tools which I made in the main application, to continue producing the products, supplying them to the respondents herein (subject to payment of the amount of R1 633 089,70 due and owing to the respondents in respect of goods already supplied to the respondents herein) which will enable them to satisfy their lawful commitments."

Yesterday I received a fax from the attorneys for the applicants for leave to execute, and paragraph 4 of which says:

"In order not to destroy the viability of the brooms

"generally and the international broom market specifically, and in view of the applicants' tender to perform, the respondents with prejudice accept such tender on the basis that brooms as manufactured are supplied to them only and no other parties on the existing terms and conditions."

I have been told by both parties that they have no affection each for the other, that they suspect each other, but nevertheless this whole present impasse cries for a sensible business solution because if there is going to be a sterilisation of the ability to manufacture these brooms the market for them could be very substantially undermined, if not ruined. So I am going to give the parties an opportunity to come to a sensible business decision as to how these moulds will be utilised and how goods will be supplied until all the respondents' remedies have been exhausted but I cannot prescribe to the parties: they are free to exercise whatever remedies they have. They can let me know of a suitable time before the end of this week, because the court closes on Friday, when I can hear an application for leave to execute.

(The parties subsequently reached an agreement which was made an order of the Court).

ON BEHALF OF APPLICANTS:	S FRIEDLAND
OF	BEDER-FRIEDLAND
ON BEHALF OF RESPONDENTS:	ADV D HANCOCK
INSTRUCTED BY:	BOTHA MASSYN & McKENZIE
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