

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG LOCAL DIVISION OF GAUTENG COURT
JOHANNESBURG**

CASE NO: 11/43162

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

GREENBERG, LIONEL MERVIN

Plaintiff

and

SCHEEPERS, JAN GABRIËL

First Defendant

JOUBERT, NICOLAUS JOHANNES

Second Defendant

THEODORE WILHELM VAN DER HEEVER NO

Third Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] It would be apt to quote the following from a judgment of the late Patel J in Case Number 13439/2002 delivered on 7 August 2003 in the matter of *Delia Sybil Dall and Hazel Clara Ucko* as applicants and *The Registrar of Close Corporations, The Sheriff, Germiston, Seagate Technologies CC, Esther Greenberg, Felicia Greenberg and Lamprecht Incorporated* as respondents, which in my view and finding, snugly fit the circumstances of this case:

“PATEL J

- [1] *This matter can aptly be described as another episode in the Greenberg saga.*
- [2] *The two applicants, Delia Dall and Hazel Ucko are the sisters of one Lionel Greenberg who features prominently in this application but he is not a party to the proceedings. They applied for a litany of declaratory orders. They sought to be declared the lawful members of the third respondent, Seagate Technologies CC (‘the Close Corporation’), that was with effect from 1 November 2001 being the date of transfer. The first respondent, the Registrar of Close Corporations (‘the Registrar’), was caught in the cross-fire between the applicants and certain of the respondents in an on-going family feud, especially with the fifth respondent, Felicia Greenberg. She was divorced from Lionel Greenberg (‘Lionel’). The fourth respondent, Esther Greenberg, the mother of the applicants and Lionel was central in the transfer of [the] member’s interest in the close corporation.*
- [3] *The Registrar opposed the application because the applicants alleged that he was mala fide and should be penalised with an order of costs. The fifth respondent also opposed the application. She filed a conditional counter-application that in the event the court found that her attachment of the membership interest in the close corporation on 21 February was ineffective, then the further attachment effected on 16 May 2002 was declared valid. Then concomitantly arising from it a declaratory order that the fourth respondent is the sole member of the close corporation.”*

[2] I also consider it appropriate, as part of the introductory remarks in this judgment, that I reproduce the order issued by Patel J in that matter. It reads as follows:

- “A1. That the Applicants’ application be and is hereby dismissed;*
- A2. That the First and Second Applicants jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and client;*
- B1*
- (i) That declaring the Fourth Respondent to be the sole member of the Third Respondent; and*
 - (ii) The Fifth Respondent’s attachment of the Fourth Respondent’s membership and interest in the Third Respondent which was effected on 16 May 2002 is valid;*
- B2 That the Second Respondent is permitted to proceed with the sale in execution of the Fourth Respondent’s membership and any interest in the Third Respondent at the instance of the Fifth Respondent; ...”*

[3] Our present action by the plaintiff, Mr Lionel Mervin Greenberg, is an action for damages against the first defendant in respect of Claim A and against the first and second defendants jointly and severally in respect of Claim B.

[4] The plaintiff claims the sum of R76 000,00 in respect of Claim A and R1 980 000,00 in respect of Claim B.

[5] This case concerns the validity of the attachment of the plaintiff's alleged 100% members' interest in Seagate Technologies CC (*"Seagate Technologies"*) by the first defendant in his capacity as an appointed sheriff of the court; and the registration of a *caveat* against the title deed of an immovable property belonging to Seagate Technologies, allegedly at the instance of the second defendant; and the plaintiff's alleged damages suffered as a result of the foregoing.

[6] The plaintiff herein is the self-same Lionel Greenberg the late Patel J made mention of in his afore-quoted judgment of 7 August 2003. The close corporation in issue here is the self-same close corporation that was the focal point of issues in that case.

[7] After perusing the papers filed of record herein, examining the numerous court judgments delivered by various judges of this Court concerning or about Seagate Technologies and/or the plaintiff herein and listening to evidence as it unfolded in court, I cannot help it but also say:

"Yeah! This is yet another one of the episodes in the Greenberg saga."

[8] It deserves mention at this stage that the plaintiff was all the time represented – both in the drafting and exchange of pleadings and the leading of evidence in court – until the plaintiff discharged or terminated his attorney, Larry Marx Attorneys' mandate towards the end of the case. He (plaintiff) then proceeded to call that same attorney, Mr Larry Marx, as one of his witnesses, after re-opening the plaintiff's case. The defendants did not have any

objection to this strange phenomenon and *ex post facto*, I am satisfied that nobody suffered any prejudice as a result.

PLANTIFF'S CLAIMS

[9] In Claim A, the plaintiff alleges that the first defendant made material misrepresentations and falsely indicated that he had validly attached the members' interest in Seagate Technologies. He is claiming the amount of R76 000,00 allegedly lost by him as legal fees he expended in defending himself in the Commercial Crimes Court around 2008 where he faced charges of fraud related to issues around Seagate Technologies' affairs.

[10] In Claim B, after repeating the allegations of misrepresentations and/or misleading made in Claim A, the plaintiff went further to allege that –

10.1 The first defendant received a letter from Felicia Greenberg's former attorneys, Messrs Lamprechts Incorporated, instructing him (first defendant) to register a *caveat* in the Deeds Registry Office against the immovable property of Seagate Technologies being Erf DG72, Dowerglen in Edenvale, Gauteng Province;

10.2 The second defendant caused the registration of the *caveat*;

10.3 He (plaintiff), unaware of the registration of the *caveat*, proceeded to attempt to raise a second bond on the property so that he could settle debts or satisfy some existing writs of

execution, mostly, if not all, relating to cases instituted against him by his ex-wife, Felicia Greenberg;

10.4 The second bond was approved by Absa Bank in the amount of R505 000,00;

10.5 Because of the *caveat* registered, Absa Bank cancelled the bond, thereby depriving him of the right to obtain the finances to satisfy the writs and also purchase another property, ultimately leading to the sale in execution of the members' interest in Seagate Technologies on 9 November 2001, leading at the end of it all to his provisional and final sequestration on 10 December 2001 and 22 January 2002 respectively;

10.6 The first respondent was squarely to blame for the unlawful registration of the *caveat*, which was a direct cause of his woes ultimately.

[11] The plaintiff thus alleged that the unlawful deeds or conduct complained of are that the first defendant and second defendant intentionally, alternatively, maliciously, further alternatively, with ulterior motive, further alternatively, negligently cause the *caveat* to be registered, precipitating the chain of events leading to him suffering the losses.

[12] He alleged that the immovable property sold in execution as a result was valued at R1 800 000,00 around the date it was sold. The one he

intended purchasing was valued at R700 000,00. Subtracting the amount realised when the members' interest was sold, being the amount of R510 000,00, his total loss amounts to the sum of R1 980 000,00.

DEFENCES RAISED TO ACTION

[13] In addition to general pleas of denial of liability, the defendants raised three special pleas, namely:

13.1 Plaintiff's lack of *locus standi*;

13.2 Prescription; and

13.3 *Res judicata*.

[14] I intend to first deal with the special pleas before going to the defences on the merits as it is my view that if upheld, there would be no need to go to the merits, more so that in dealing with the special pleas, the merits also come to the fore.

[15] Before doing the above it is proper that the parties herein are identified.

THE PARTIES

[16] The plaintiff, Lionel Mervin Greenberg, is an adult male businessman ordinarily residing at 9..... S..... Street, S....., Johannesburg.

[17] The first defendant, Jan Gabriël Scheepers is an adult male person and a duly appointed Sheriff of this Court to service the district of Germiston North, with his principal place of business situated at 1st Floor, T.... House, Corner D.... S..... and 1.... Avenue, E....., Gauteng.

[18] The second defendant, Nicolaus Johannes Joubert, is an adult male Deputy-Sheriff for the Germiston North district, Gauteng, with the same principal place of business as the first defendant.

[19] The third defendant, Theodore Wilhelm van den Heever NO is an adult liquidator trading under the name, D & T Trust (Pty) Ltd under registration number 79/030334/07, with his principal place of business situate at 4.... and 4.... O.... Road, F.... Park, R....., Gauteng.

THE TRIGGER TO THESE PROCEEDINGS

[20] After the sequestration of the plaintiff he was charged in the Commercial Crimes Court in Pretoria for fraud and related offences that arose from the activities related to Seagate Technologies. Around or about 16 or 17 October 2008 it came to the plaintiff's attention that there was no clarity or certainty around the registration of the *caveat*, hence the decision to sue the first and second defendants. The third defendant is being sued because

according to the plaintiff, he failed, neglected or refused to institute legal proceedings against the first and second defendants, hence he did so himself.

RELATED CASES OR CASES TO DO WITH THIS ONE

[21] There are several matters decided in our courts between the years 2001 and 2009 which has Seagate Technologies as the centre piece. Some of the issues thereat decided as well as the parties in some of them deserve being alluded to. Some of the special pleas would be better understood if brief outlines thereof are set out.

Case No 14647/2001 (Van der Merwe J)

[22] This matter was finalised on 21 August 2001. The applicant therein was Felicia Dora Greenberg (plaintiff's ex-wife) and the respondents were Lionel Mervin Greenberg, Esther Greenberg (plaintiff's mother), Seagate Technologies and the Registrar of Close Corporations as the first to fourth respondents respectively.

[23] Without stating the facts thereof, it is my view that the order granted adequately serves to illustrate the points that need to be emphasised.

[24] Van der Merwe J issued the following order:

- "1. Setting aside the transfer of membership by the first respondent, into the name of the second respondent, of the first respondent's*

entire membership of the third respondent, which transfer was registered by the fourth respondent on the 18th April 2001.

2. *Issuing a declaratory order to the effect that the first respondent is the sole member of the third respondent.”*

[25] The Registrar of Close Corporations was also ordered to comply with the order by amending its records accordingly.

Case No 13439/2002 (Patel J)

[26] The applicants here were Delia Sybil Dall and Hazel Clara Ulco, the daughters of Esther Greenberg (fourth respondent therein) and sisters of Lionel Greenberg, the plaintiff in our case. The six respondents were The Registrar of Close Corporations, Sheriff Germiston North, Seagate Technologies, Esther Greenberg, Felicia Greenberg and Lamprecht Incorporated (formerly Felicia’s attorneys) respectively.

[27] In this case Lionel Greenberg (plaintiff in our present case) had purported to have transferred his 100% members’ interest in Seagate Technologies to his mother Esther Greenberg (fourth respondent in that matter) despite the fact that such members’ interest had already been attached by the Sheriff (second respondent) on 6 October 2000 at the instance of Felicia Greenberg (fifth respondent). The registration was effected on 18 April 2001. This precipitated the urgent application under Case Number 14647/2001 whereat Van der Merwe J set aside that transfer.¹ While the urgent application was still pending before court, the fourth respondent

¹ See Case discussion in paragraphs [22] to [25] above.

(Esther) applied for the conversion of the close corporation (Seagate Technologies CC) into a private company. The fourth respondent signed the necessary forms on 21 June 2001 while the urgent application was pending and lodged the application on 13 July 2001. At this date the application for the setting aside of the transfer of the close corporation's members' interest to her was still pending.

[28] As stated above² Van der Merwe J set aside that transfer.

[29] Before the records of the close corporation were corrected or amended, the close corporation was converted into a company on 6 September 2002. This conversion was set aside by Van der Westhuizen J on 18 October 2001. The learned judge declared in his order that Lionel Greenberg was still the sole member of the close corporation, Seagate Technologies. The court also interdicted both Lionel and his mother Esther from dealing with the members' interest in Seagate Technologies. That was when Felicia Greenberg ("*Felicia*") caused writs to be issued and attachments pursuant thereto were made by the Sheriff, Germiston North. On 6 November 2001 Lionel Greenberg launched an urgent application in this Court to set aside the sale in execution that was to take place of the members' interest. Blieden J refused that application, leading to the members' interest being sold in execution for the sum of R510 000,00.

² Paragraphs [22] to [25] of this judgment.

[30] On 9 November 2001, Lionel Greenberg prepared and signed paperwork which among others tendered his resignation as the sole member of Seagate Technologies and purported to transfer same to his mother, Esther. On the same day Esther also signed papers purporting to transfer her 100% members' interest to her two daughters, Delia and Hazel, the applicants in this case (13439/2002).

[31] As already stated elsewhere in this judgment,³ Patel J dismissed the application.

[32] Although Lionel Greenberg was not a party to this application before Patel J, he nevertheless knows about it as he did something that really rubbed the learned late Judge the wrong way. The judge remarked as follows in his judgment:⁴

“[6] But, before I do so (give reasons for an ex tempore ruling already made), it is pertinent to allude to two disquieting aspects that arose after the ex tempore judgment and order and which certainly touches upon the administration of the civil justice system.

First, it is worrying that the entire court file in this matter disappeared and a duplicate file had to be opened ... It is rather disturbing that the contents of a court file can go astray or be missing without any plausible explanation. Missing court record simply frustrate speedy judgment writing. Perhaps the moment has arrived in this technological era to introduce a document tracking system to overcome the perennial problem of lost court papers and files.

The second aspect is a matter of some concern. Although Lionel Greenberg was mentioned in the application papers but

³ Paragraphs [1] to [2] of this judgment.

⁴ Paragraphs [6] of Patel J's judgment.

he was not a party to the proceedings before me. However, he had the audacity to write a letter on the letterhead of 'Kid-Kinder Divorce' to the Registrar indicating that the judgment in this matter was not handed down and imploring - ... 'to favour me with a reply in respect of the status of when the judge contemplating handing down the judgment ...'. For all intents and purposes Lionel Greenberg was an outsider to the proceedings. Therefore it was not his business to query when judgment was to be handed down in spite of having given an ex tempore judgment. The cavalier attitude on Lionel Greenberg's part was an attempt to embarrass the judicial office. It was rather disdainful for him to intervene when it was not his business to do so. He is simply a meddlesome interloper ..."

[33] Further on towards the end of this long paragraph [6] the learned judge continues to say the following:

"... I reject Lionel Greenberg's call for judgment. Even if he has some indirect interest in the present proceedings but he was and still is an outsider ... His intervention tantamounts to undermine judicial neutrality. Under the circumstances, I will not countenance such intrusion."

[34] Very strong words indeed! However, for purposes of our judgment, this only serves to indicate that the plaintiff here was very much aware of what was taking place in the Patel J matter, way back between 24 October 2002 and 7 August 2003.

Case No 18819/2002 (Farber A)

[35] This matter was determined or judgment handed down on 1 September 2003. The applicant was Mr Theodore Wilhelm van den Heever (the third respondent in our matter) and the respondent was Seagate Technologies.

[36] This matter dealt with interrogatories of Lionel Greenberg as the insolvent close corporation's (Seagate Technologies') controller and the attempt to liquidate Seagate Technologies. This application (for liquidation of Seagate) did not succeed.

Case No 16749/2006 (Goldblatt J)

[37] In this matter, judgment was handed down on 28 September 2006 *ex tempore*. Lionel Greenberg was the applicant. The respondents were Fiona Dippenaar and 15 others. Mr Van den Heever (third respondent in our matter) was the second respondent thereat. Lionel was asking the court to compel Mr Van den Heever, the trustee of the insolvent close corporation, to take legal action against some of the respondents thereat.

[38] The application was dismissed.

Case No 317/2007 (Southwood J)

[39] Southwood J handed down judgment in this matter on 18 March 2009. The applicant was Theodor Welhelm van den Heever NO. The five respondents were respectively, Ucko-Stein, Hazel Klara NO, Greenberg,

Felicia Dora, Seagate Technologies CC, Sheriff of the High Court, Germiston North, and The Registrar of Close Corporations.

[40] Our plaintiff, Lionel Mervin Greenberg joined these proceedings as an Intervening Party. It is interesting to note that he did what he did in our case in that case : he excused his counsel and he represented himself, as he is doing in our present action. He opposed the application.

[41] This matter before Southwood J also revolved around the issue that the membership held by Lionel Greenberg in Seagate Technologies be declared to form part of his insolvent estate to be dealt with also in the winding-up of the affairs of his insolvent estate. The Registrar of Close Corporations was to amend its record accordingly.

[42] At the end of the hearing Southwood J issued the following order:

“18. The following orders are made:

- (1) It is declared that the membership interest held by Lionel Mervin Greenberg in Seagate Technologies CC forms part of the insolvent estate of Lionel Mervin Greenberg;*
- (2) It is declared that the member's interest of Lionel Mervin Greenberg in Seagate Technologies is to be dealt with in the winding up of the affairs of the insolvent estate of Lionel Mervin Greenberg;*
- (3) The fifth respondent is directed to take all such steps as are necessary to amend his records to reflect that Lionel Mervin Greenberg is the sole member of Seagate Technologies CC ...”*

Case No A1670/2004 (Du Plessis J et Ranchod and Mabesele AJJ)

[43] This was an appeal heard by a full bench against the judgment of Patel

J.⁵ The full court issued the following order:

- “1. *The appeal against the dismissal of the application is dismissed;*
2. *The appeal against the granting of the fifth respondent’s counter-application (Felicia Greenberg’s) is allowed to the extent that the order made in respect of the counter-application is set aside and the following order is made in its stead:-*
 - (a) *‘It is declared that the fourth respondent (Lionel Greenberg) at all relevant times had a right to the sole membership interest in the third respondent;*
 - (b) *It is declared that the second respondent (Sheriff, Germiston-North) on 21 February 2002 validly attached the fourth respondent’s right to the membership interest in the third respondent (Seagate Technologies).’*
3. *The appeal against the costs order of the court a quo is dismissed;*
4. *The appellants are ordered to pay the first, second, fifth and sixth respondents’ costs of the appeal.”*

[44] The correctness and/or validity of the attachment of the members’ interest in Seagate Technologies as well as other issues incidental thereto was the focal point of all the above judgments. Southwood J summarised the net rulings by the above courts when he stated as follows:⁶

“The correctness of the attachment has not been challenged previously and has been accepted by both Patel J and the full court. Furthermore, on 6 November 2001 Blieden J refused Lionel Greenberg’s application to stop the sale in execution. There is nothing to indicate how proof of

⁵ Paragraphs [26] to [34] of this judgment.

⁶

the invalidity of the attachment prior to the sale will affect the judgment and order of the courts who have ruled on the dispute. As pointed out in the reasons for refusing the application for postponement, the disposition of the members' interest by Lionel Greenberg would offend against the provisions of section 26 of the Insolvency Act and in all probabilities would be set aside."

[45] That much by way of introduction. It would appear that this would also be another episode in the Greenberg saga.

EVIDENCE BY THE PLAINTIFF

[46] For the umpteenth time, the plaintiff has testified about the invalidity or voidness of the attachment of this 100% interest in Seagate Technologies. He re-hashed previously advanced arguments that those attachments were irregular. I deliberately started this judgment by dealing with previous court's judgments that had something to do with Seagate Technologies and/or any or some of the parties involved or cited in this matter.

[47] In the alternative, the plaintiff's opening address was that in the event of this Court not buying the argument or submission as set out hereinbefore, then the court should find that the plaintiff's 100% members' interest in Seagate Technologies was attached *sine causa* as the debts to be serviced by the proceeds from such attachment had already been settled in full when the interest was sold in execution.

[48] As regards Claim B, the plaintiff's case was that the *caveat* on the property was registered pursuant to an unlawful instruction to the first and second defendants by his former wife's erstwhile attorneys, leading to a bond approved at his instance by Absa Bank being cancelled.

[49] He (plaintiff) also testified to the effect that his sequestration was directly linked to or can be traced to the above acts and conduct that he categorises as being illegal and unlawful.

[50] It is common cause that at the time the plaintiff instituted these proceedings he was still an unrehabilitated insolvent. He however lays the blame for this at the door of the trustee of his insolvent estate, the third respondent who according to him (plaintiff) failed, neglected or refused to react to several letters to him to institute them.

[51] He alleged that when these proceedings were instituted in 2011, prescription had not yet set in.

[52] It was the plaintiff's further evidence that he became aware of the invalidity of the attachment of his 100% members' interest in Seagate Technologies during a criminal trial in the Commercial Crimes Court where he was the accused. He was acquitted of those charges in the year 2008. In fact, the prosecution was stopped by the State in terms of section 6 of the Criminal Procedure Act 51 of 1977. The trial Magistrate then returned a

verdict of not guilty and discharged as evidence had already been led. The actual words used were:

“Accused acquitted as per ... Section 6 Act 51 of 1977 ...”

The date of finalisation is 25 November 2008.

[53] The plaintiff reiterated that the basis of his claim was the first defendant's concession at the criminal trial that he (first defendant) did not re-attach the member's interest in the close corporation the second time round. This trial started in May 2006.

[54] The plaintiff repeatedly stated in evidence that he only became aware of the above aspect when he was acquitted on 25 November 2005.

[55] I will deal with this aspect later as the date the first defendant allegedly conceded as the plaintiff alleges will be decisive. It is common cause that the plaintiff was present when the alleged concession was made. Furthermore, at this stage of the proceedings when the plaintiff was testifying he was still represented and led in evidence by his erstwhile attorney, Mr Larry Marx who incidentally is the attorney who prepared and served the summons in this case and was also his defence attorney at the criminal trial.

[56] It is also noteworthy to note that the plaintiff testified that he issued letters of demand or notifications of intention to sue in this matter in June 2011, immediately after Lamont J of this Court had struck a case he (plaintiff)

had instituted as an unrehabilitated insolvent without the assistance, cogency and citation of the third defendant who was the trustee of his insolvent estate.

[57] The above pre-supposes that the plaintiff's awareness or knowledge of the facts relevant to the institution of proceedings in this case occurred in or before June 2011.

[58] The plaintiff then dealt with the three special pleas in turn.

[59] He stated further that only after his 100% members' interest was sold in execution did he complete and sign the relevant document to resign from Seagate Technologies as its sole member, which is one of the aspects that led to Patel J's judgment.

[60] The rest of the plaintiff's evidence revolved around confirming the circumstances surrounding the court judgments by the various courts already alluded to above.

[61] The plaintiff's major gripe with the first and second defendants seems to be that the Sheriff of Germiston North has no authority to effect the attachment of the members' interest in Pretoria's Close Corporation's Registry Office. He also castigates the Sheriffs for complying with attorneys' instructions to register or cause the *caveat* to be registered over the property of the close corporation.

[62] It was his further contention that the previous courts that dealt with these matters never had to decide over the validity or not of the attachments in issue.

[63] Cross-examination on behalf of the defendants rubbished most of the plaintiff's allegations. For example, it was clearly demonstrated that the validity of the attachments and the writs was indeed part of the issues decided in the previous judgments by other courts. The plaintiff could also not explain why he told this Court Blieden J granted his application, for the sale in execution of this members' interest, when the judgment itself, which alluded the opposite view, was displayed to him.

[64] He also conceded that the proceeds from the sale of his members' interest in Seagate Technologies were vended towards the settlement of his liabilities, thus benefitting his insolvent estate. He also agreed that his final sequestration occurred after the proceeds of the sale had already been vended towards extinguishing some of his debts.

[65] It emerged that the plaintiff was sequestrated at the instance of his own attorney for non-payment of fees.

[66] He also agreed that he never brought any proceedings to compel his trustees to institute legal proceedings against any persons or instances he was not happy with.

[67] Cross-examination also elicited and the plaintiff conceded that he told an untruth to this Court when he stated that even Goldblatt J's judgment's details were unknown to him as by November 2011. He conceded that he in fact knew of the reasons for Goldblatt J's judgment before the criminal case but that he was advised by his legal representative, a Mr Kriel, not to mention that fact, both in the Commercial Crimes Court and in this Court.

[68] He stated further in answer to a series of questions that the matter he had instituted where he was represented by Mr Kriel was dismissed and costs had been taxed at the amount exceeding R199 000,00. He indicated that those costs have not yet been settled or paid as he is banking on winning this present case and using the moneys gained therefrom to settle that debt.

[69] It became clear from cross-examination that the third defendant (Mr Scheepers) started testifying in the Commercial Crimes Court on 17 October 2008 and the evidence of the alleged unlawfulness of the attachment of the members' interest in Seagate started emerging on that date.

[70] The evidence of the plaintiff's further witness, Mr Neil John Fuller and a manageress of Absa Bank does not take this matter or either parties' case any further.

[71] At the end of the plaintiff's case the defendants closed their cases without leading any evidence.

SPECIAL PLEAS RAISED BY DEFENDANTS

[72] It is appropriate at this stage that I deal with the three special pleas raised by the defendants.

First Special Plea : Lack of *Locus Standi*

[73] The plaintiff was an unrehabilitated insolvent at the time he instituted these proceedings in November 2011. As stated above, he was provisionally sequestered on 10 December 2001 and finally sequestered on 22 January 2002. In terms of the provisions of section 20 of the Insolvency Act 24 of 1936 (as amended) the results of the plaintiff's sequestration are that he was divested of his estate and it vested in the Master of the High Court. Upon the appointment of the third defendant as the trustee of the plaintiff's insolvent estate on 31 May 2002, he became the only instances that could sue and be sued on any issues relating to the plaintiff, in his representative capacity of course.

[74] The plaintiff replicated to this special plea by stating that the third respondent gave him permission to proceed with the action herein. No evidence was led in support of this allegation. What emerged during the leading of evidence and cross-examination is that the plaintiff may have strived or attempted to make the third defendant aware of his intention to

institute legal proceedings. At no stage did he back up his allegation that the third respondent gave permission or his blessing for him to institute these proceedings.

[75] In the circumstances, the plaintiff did not prove his possession of the requisite *locus standi* to institute and/or pursue these claims.

Second Special Plea : Prescription

[76] The first and second defendants pleaded that both Claims A and B as framed by the plaintiff arose during or about 2001. On the other hand, according to the plaintiff he ought to have become aware of the issues that can be regarded as triggers for these proceedings on 17 October 2008 when the third defendant testified in the Commercial Crimes Court. This and other evidence in my considered view and finding puts paid to the plaintiff's assertion that he became aware of these trigger facts on 25 November 2008 or 2011 – as there was no clarity as to which date between these two the plaintiff was relying on.

[77] Civil proceedings must be instituted within three years of the date the cause of action arose generally or within three years of the date the plaintiff became aware of the facts giving rise to or justifying the institution of legal proceedings. Otherwise the right to do so would have prescribed in terms of section 11 of the Prescription Act 68 of 1969.

[78] The summons herein were issued on 14 November 2011, well over three years after he became aware of the alleged causes of action therein. His evidence in court, instead of substantiating his claim that he was well within the prescription period when he did so, actually supported the defendants' plea that the claims have or had prescribed.

[79] As such, on the evidence before this Court, this special plea also stands to succeed.

Third Special Plea : *Res Judicata*

[80] His Lordship Patel J finally and definitely found in Case 13439/2002⁷ that the purported transfer by the plaintiff to his late mother Esther Greenberg of his 100% members' interest in Seagate Technologies (the close corporation) was not valid. The learned judge also found that the attachment of that interest by the first defendant on 16 May 2003 was valid. This judgment was confirmed on appeal by a full bench or court.⁸

[81] The plaintiff's objection to the above judgment is that he was not a party therein or thereto. As stated hereinbefore⁹ the learned Judge Patel was obliged to reprimand him for demanding that he (Judge) hand down his judgment therein nevertheless. Indeed that makes one to think!

⁷ Paragraphs [26] to [34] of this judgment.

⁸ See paragraphs [43] to [45] of this judgment.

⁹ See quotation from Patel J's judgment at paragraph [32] of this judgment.

[82] The plaintiff's major problem lies with Southwood J's judgment of 18 March 2009.¹⁰ He intervened in those proceedings formally.

[83] In Southwood J's judgment the parties therein (including the plaintiff) and the issues in question are the same or similar to those in issue in our present matter. Consequently, what the plaintiff wants this Court to adjudicate upon has already been dealt with finally by the court. It is also interesting to note that both the honourable justices, Patel and Southwood JJ, ruled over substantially the same issues.

[84] In terms of the *exceptio rei judicata* there is an irrebuttable presumption that a final judgment upon a claim submitted to a competent court is correct. This presumption is founded on public policy which requires that litigation should not be open-ended or re-cycled, as well as upon the requirement of *bona fides* (good faith) which does not permit of the same thing being demanded more than once or as and when a party feels inclined to do so. The principles of this requirement are that:

84.1 there ought to be a final judgment;¹¹

84.2 the judgment must have been between the same parties;¹² and

84.3 it must be in respect of the same *lis* on the same ground.¹³

¹⁰ See paragraphs [39] to [42] of this judgment.

¹¹ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564.

¹² *Le Roux v Le Roux* 1967 (1) SA 446 (A) at 463.

¹³ *African Farms and Townships Ltd v Cape Town Municipality (supra)* at 562; *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W).

[85] It is this Court's finding from the common cause facts placed before this Court that this matter is "*on all fours*" with the principle of *res judicata*.

[86] I have set out the facts and rulings in the other cases hereinbefore.¹⁴ The plaintiff and Seagate Technologies are decidedly the common denominators therein. If I was permitted to refer to them as *facta probantia* to the *facta probanda* relevant herein, I would do so. However, I will be overstepping my beat if I did so. I thus refrain from doing so.

[87] This special plea also stands to succeed.

DEFENCE ON THE MERITS

[88] Upholding of the special pleas makes it academic to go over to evaluate the merits of the plaintiff's case *vis-à-vis* the defendants' defence generally or on the merits.

[89] However, it became common cause as the trial progressed that the *caveat* registered was registered properly and for a good cause. In any event, the registration of the *caveat* was the specific instruction of attorneys representing a non-party herein, the plaintiff's ex-wife, Felicia Greenberg. A sheriff's duty is to act in accordance with instructions. Furthermore, the Deeds Office is the authority that had to decide whether to accept the registration or not. Consequently, it is my finding that in the circumstances of

¹⁴ Paragraphs [26] to [45] of this judgment.

this case, it should not avail the plaintiff to pursue the messenger. The instance that sent out the messenger is there to be pursued if there is such a need or justification.

CONCLUSION

[90] The plaintiff was an unrehabilitated insolvent at the time he instituted these proceedings. Section 20(1) of the Insolvency Act 24 of 1936 provides as follows:

“20. Effect of sequestration insolvent's property

(1) *The effect of the sequestration of the estate of an insolvent shall be –*

(a) *to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him.”*

[91] The plaintiff was obliged to seek the consent of the third defendant to institute the proceedings herein or at the very least, notified the latter of his intention to institute same in a clear, unequivocal or undoubtworthy manner.

[92] It is so that an insolvent is at liberty to institute legal proceedings for damages himself where a trustee unreasonably refuses or neglect to do so.¹⁵ No such unreasonable refusal, neglect or failure has been proven in this trial. What makes things worse is that even if the plaintiff was justified to institute

¹⁵ *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at 153-4.

proceedings against the defendants or any other party for that matter, any damages awarded pursuant thereto would have been for the benefit of the insolvent estate.

[93] In this instance the plaintiff have claimed for his own personal benefit and he was adamant in evidence that no cent from this suit should he win, will go to the insolvent estate or the trustee being the third defendant.

[94] I listened carefully to the evidence led by the plaintiff. It was not impressive. It consisted mostly of conjecture and speculation as well as hearsay. His charge that the first and second defendants acted with malice or in cohorts or co-hoots with the third defendant is not borne out by the facts and/or circumstances as well as the probabilities inherent in this case. When specifically coaxed to indicate the grounds upon which he accused them of malice, he was not forthcoming.

[95] The first and second defendants' conduct were accepted by several judges of our court as having been regular or above reproach. It is my view that to expect this Court to pronounce on the same issues pronounced by the various judges is improper. This Court cannot sit as some pseudo-appeal authority over decisions of judge colleagues. There is no justification for that or acceptable procedural foundation therefor.

[96] The first and second defendants owe their appointment and competencies to the Sheriffs Act 90 of 1986. Section 3(1) of the above Act expects them to execute their duties which include executing lawful instructions from litigants. I have not been convinced or persuaded that the first and second defendants ought to have seen any reason to refuse to execute the instructions issued to them by attorneys who are officers of the court. When regard is had to the myriad of judgments validating the processes that have taken place, which processes the plaintiff now wants this Court to disregard, it is the finding of this Court further, that the first and second defendants did not act outside their mandates. Not much was said about the third defendant except that he is accused of having shirked his responsibilities. As stated hereinbefore, this aspect was not proven on the requisite preponderance of probabilities.

[97] The other question to ask may be : What should the first and second defendants have done once they received the writs of execution and instructions to execute them. It is my finding that had they failed or refused to execute them, they would have opened themselves to disciplinary action or even being sued civilly.

[98] It is thus illogical and misplaced to now seek to hold them liable for doing what was expected of them.

[99] Their conduct and/or *modus operandi* has been approved or given a stamp of approval by various judges of this Court.

[100] As already alluded to above, those competent courts have already ruled over the same issues that the plaintiff is asking this Court to rule on.

[101] To summarise what the various justices ruled in the various judgments around Seagate Technologies, the learned justices frowned upon the plaintiff's or close relatives' attempts to do whatever they could in order to frustrate the execution of costs and other orders for which the plaintiff was liable to his former wife Felicia Greenberg by surreptitiously seeking to alienate his 100% members' interest in Seagate Technologies to his mother and to some extent, to his sisters. It is very difficult not to accept that there could have been whole scale collaboration or connivance amongst the plaintiff and his family. It is so that this is speculation. As such it is not a finding of this Court in this case. The plaintiff also unsuccessfully tried to stop a sale in execution of this members' interest.

[102] The *onus* in this matter rested on the plaintiff throughout.¹⁶ His evidence in substantiation of the allegation was at best salutary and unconvincing. Cross-examination obliterated whatever could still be salvaged at that stage.

[103] It is also trite that a rebuttal of the plaintiff's case, the so-called "*rebuttal onus*" or "*weerleggingslas*" in Afrikaans only arises once the plaintiff had

¹⁶ *Pillay v Kirsha* 1946 AD, 946.

established a *prima facie* case.¹⁷ The plaintiff has failed to establish that *prima facie* case. Furthermore, the defendants have managed to succeed with the three special pleas they raised against the plaintiff's particulars of claim. As a consequence there is no further duty to rebut from the defendants.

[104] There is correspondingly no need on my part to deal with the quantum of damages.

[105] There is no enough evidence indicative of the plaintiff's allegation that he notified the third defendant about his intention to institute these proceedings himself. Evidence of his former attorney, Mr Larry Marx was not cogent enough to reach the threshold required, more so that the latter conceded that he was no expert on how computer software programs worked, thus leaving no sufficient evidence around the issue of making the third defendant aware of his intention to institute these proceedings. This is a far cry from the plaintiff's allegation that he obtained permission from the third defendant.

[106] Mrs Vermeulen, Absa's Rosebank branch manager did not advance the plaintiff's cause. Worse still, she conceded that during 2001 which was the period she purported to be testifying on, she was not employed by Absa Bank, let alone working at the Rosebank branch. She also could not say why she was not in possession of original documents. She could not furnish any first-hand evidence. The copies she was testifying about pointed to two or three

¹⁷ See also C W H Schmidt, *Bewysreg*, 3rd Edition at 23 to 24.

instances having applied for a bond at Absa Bank during that period and the plaintiff was not one of those applicants although his names did appear somewhere in the body of the forms displayed. Furthermore, those document copies indicated that there were conditions precedent to be met before the bond could be approved finally. Mrs Vermeulen could not testify about the contents of those conditions precedent. Whether they were met or not.

[107] The official from the Deeds Office, Mr Mapumulo testified that the decision to register the *caveat* was the Deeds Office's, not the defendants, hence when they decided to cancel that registration, that decision was theirs entirely, as the mistake of registering it was entirely theirs. To ascribe liability on the first and second defendants for the registration of the *caveat* is not only far-fetched but also misplaced.

[108] At the end of it all, it is common cause that –

108.1 the plaintiff lacked the requisite *locus standi*;

108.2 the plaintiff's claim became prescribed some time before the action was instituted;

108.3 the validity of the attachment of the members' interest had already been determined, for purposes of this judgment at least, by Southwood J against the plaintiff. That determination constitutes *res judicata*; and

108.4 the plaintiff have failed, on a conspectus of the evidence led, to make out a *prima facie* case.

[109] In the absence of a *prima facie* case, especially in the face of the plaintiff's failure to successfully challenge the special pleas raised by the defendants, the decision by the three defendants not to take to the witness stand should not be faulted.

[110] I have considered the question whether to grant absolution from the instance or to dismiss the action outright. The plaintiff's failure to lead evidence going near acceptable levels at the end of its case points in my view to a situation where absolution from the instance cannot be an appropriate order.

COSTS

[111] The issue of costs at the end of a trial is pre-eminently within the discretion of the court, properly and judicially exercised. The general view is that the successful party should be awarded costs of litigation. However the court may award costs to the losing party under certain circumstances. Those circumstances are not present in this case.

[112] I am mindful of the fact that the plaintiff ended up conducting his own case after discharging his counsel. That happened at the time when he and

his counsel were finding it very difficult to have certain documents and letters form part of their evidence. Later the plaintiff called the self-same counsel as his witness, the purpose being to lead evidence about those letters and documents. He insisted to do so despite my strong advice not to do so. In the interests of progress in the trial the defendants' counsel did not object to this *modus operandi*. Unfortunately, even with this evidence, the plaintiff's case remained deficient.

[113] In the circumstances, the costs of this litigation should follow the result.

ORDER

[114] The following order is made:

"The plaintiff's suit is dismissed with costs."

N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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DATE OF HEARING

30 JANUARY 2014

DATE OF JUDGMENT

FEBRUARY 2014