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

17/5/2010

DATE

~~IN THE HIGH~~ COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION) 18/05/2010

CASE NO: 1853/09

In the matter between:

VISSER, ANDRE STEPHANUS — Applicant

v

DE VILLIERS, JOHAN DANIEL — First respondent

DE VILLIERS, ANGELIQUE — Second respondent

in re

DE VILLIERS, JOHAN DANIEL — First Applicant

DE VILLIERS, ANGELIQUE — Second Applicant

v

VISSER, ANDRE STEPHANUS — First Respondent

X-PRESSNET-INLAND (PTY) LTD — Second Respondent

CORAM: EBERSOHN AJ
DATE HEARD: 14/5/2010
DATE JUDGMENT HANDED DOWN: 18/5/2010

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

EBERSOHN A.J.

[1] The applicant (whom will be referred hereinafter to as the "first respondent" except in the quotation from the application for leave to appeal) applied for leave to appeal against the order made by the Court against him, stating the following as the proposed grounds of appeal (the second respondent in the main matter is referred to for some reason or other by the first respondent as "third respondent" therein):

a. the Applicant wilfully caused the deposit to be paid into his own account by giving false information - in that he gave his private bank account number to the First and Second respondent without disclosing it was his personal account; and

b. The Applicant knew at the time he provided the information into which account the money was to be paid that he was not entitled to it more particularly; and

c. The funds were to be utilised to enable the Third Respondent to comply with the requirements of the deed of sale.

d. The money were earmarked to be paid into the account of the Third Respondent."

[2] Clause 1.1 of the agreement of sale, annexure "C" to the founding affidavit, which was amended, which fact is not disputed by the first respondent, after the amendment read as follows:

> **1.1 Cash of R1 million (ONE MILLION RAND) <u>to be paid to seller directly</u>, this offer and payment is subject to the conditions as contained in paragraph 16 below"** (Own emphasis)

[3] Clause 1.4 of the deed of sale reads as follows:

> **"1.4 The Seller warrants that the purchase price is sufficient to cover the outstanding bond /s, Agent's commission, rates and taxes electricity and water and other imposts levied by the local municipality."**

[4] Mr. Smith, who appeared for the first respondent, argued that the purchase price would have been sufficient if it was not for the R1M which was paid into the money market bank account of the first respondent and when the R1M was paid into the money market bank account of the first respondent the group of companies which belonged to the first respondent was negotiating a deal with Nedbank to refinance the group and that the R1M would thereafter have been paid into the bond bank account of the second respondent so as to enable the bond to be cancelled and transfer of the purchased property could be registered into the name of the applicants. It is common cause, so went Mr. Smith's argument, that the group's refinancing deal did not materialise and the first respondent did not have the means to pay back the R1M to the second respondent.

[5] The first respondent alleged in paragraph 9.4 of the answering affidavit that upon enquiring from Nedbank, the outstanding amount on the bond was R1,6 million, but this version was suddenly thrown into disarray when at a later stage (although not substantially later) Nedbank apparently indicated that amount owing on the bond was R2.4 million. (Paragraph 9.4 of the answering affidavit.) No explanations was provided for this R800 000,00 discrepancy and this further allegations was completely implausible and left unexplained. This was a further indication that the first respondent was not candid with the Court.

[6] But for the bald allegations of the first respondent in that regard there is

no proof attached to the answering papers to prove the "group deal" and accordingly these allegations does not hold eater and in any case is not a defence to the applicants' case,

[7] When requested by the Court to address the Court on the provisions of section 226 of the Companies Act, Mr. Smith argued that the first respondent's case was that he utilised the R1M to pay the expenses of the first respondent's group of companies including that of the second respondent. The first respondent in fact made the bare allegation in paragraph 9.11 of the answering affidavit namely "at that stage I was dispersing funds continuously for the group of companies" clearly from his own money market bank account. No averment, however, was made that he was authorised to mix the funds of the various companies with his own funds in his personal money market loan account, nor was any written proof in the form of a resolution and/or extracts from minutes of a meeting of the second respondent's board of directors annexed to prove this glaringly improbable allegation.

[8] It is common cause that the R1M deposit the applicants had to pay in terms of the deed of sale was transferred on the 10th March 2008 into the money market account of the first respondent, instead of that of the seller, namely the second respondent. This was done because the first respondent gave the account number to Thomas to give to the estate agent which in turn gave it to the applicants.

[9] Contrary to Mr. Smith's said argument in Court the first respondent, quite surprisingly, attempted to persuade this Court in his answering affidavit that "the true" reason why the applicants were provided with the first respondent's private money market account number into which to transfer the

R1M deposit was:-

> **"...as the group of companies was then awaiting the opening of the new accounts funding promised by Nedbank and as far as I was aware the Second Respondent had no banking account into which to deposit the funds, I furnished him with my private money market banking account details....".** (Answering affidavit para 9.11).

This feeble reason is most improbable in the light of, *inter alia*, the following:

a) On the first respondent's own version he purchased shares in a group of companies during 2007, and the second respondent was one of those companies. The shares were purchased for an amount of R6 million. The first respondent expected this Court to believe that the companies forming a group of companies to the value of R6 million would not have bank accounts.

b) The first respondent provided no details as to why the second respondent did not have it's own bank account number and why it should take longer than a matter of hours to open a new bank account for the second respondent if it had a bank account which was closed.

c) The first respondent alleged that the group had a fleet of trucks and other vehicles which could be refinanced for an amount of R20 million additional cash (Answering affidavit paragraph 9.6) but did not state and or explain why it did not have a bank account, or why it could not obtain a bank account in time.

d) If the rather improbable version was true that there was no bank account, no explanation was provided why the deposit could not be paid into the trust account of the second respondent's attorneys.

[10] The printouts relating to the first respondent's money market bank account relative to that date and the month thereafter, were attached to the founding affidavit as annexures "F1", "F2" and "F3". Regarding these printouts the first respondent stated in paragraph 19 of his answering affidavit, which passage is to be found on page 76 of the record, the following:

> **"a simple perusal of annexure "F" will reveal the manner in which the monies in my personal account were disbursed and the numerous payments for the same made on behalf of companies in the Ex-pressnet Group".**

[11] The statements "F" reflected an opening balance of R90 080,12 on the 10th March 2008 to which the R1M was added on that date. The first payment from this bank account was made on the 17th March 2008 and subsequent payments were made from the account up to the 12th April 2008 when the R1M and part of the opening balance of R90 080,12, was expended, leaving a balance of R76, 753,18 (taking in account only one other deposit which was made on the account during this period, namely R20 000,00 on the 9th April 2008:

17 March	First Auto Fuel 74098	R200 000,00
19 March	Bentleys Suit Andre Visser	R 6,219,00
26 March	Xpressnetbloemacc Avisser Xpressne	R200 000,00
27 March	Genif Waarman Hzepopx	R 2 514,00
27 March	Gorge TripXzfbh	R 4 722,00
28 March	Merino Stop X-press Diesel	R 40 000,00

28 March	Pieter Kruger George 0144fxz	R 7 629,00
28 March	Accomm Pieter K 204313	R 1 100,70
28 March	Av	R 20 000,00
28 March	Xpa	R 80 825,17
1 April	Loan A.S. Visser	R 7 024,00
3 April	Av	R 60 000,00
3 April	Loan A. Visser	R200 000,00
5 April	Cpx PetrolXpresnet Diesel	R 20 000,00
8 April	Alarm Lukas Rand A.S. Visser	R 15 000,00
8 April	Merino I StopXpressnet diesel	R 30 000,00
8 April	A.S. Visser Loan	R 100 000,00
8 April	A.S. Visser Loan	R 25 000,00
8 April	Spartan True	R 46 000,00
11 April	Bollie Diesel Av Xpressnet	R 3 124,18
11 April	Loan A.S. Visser Xpressnet audit	R 31 700,55
12 April	AlarmLukas Rand A.S. Visser	R 20 556,60
12 April	Personal Trainer A.S. Visser	R 2 000,00
12 April	A.S. Visser Loan	R 50 000,00
12 April	Merino I Stop X pressnet Diesel	R 30 000,00

(There was a small credit for interest on the credit balance from time to time and some small debits for banking fees which items were not taken into account in the above as they do not affect them.)

[12] The second respondent has only the fixed property which was sold and none of the entries in the bank account of the first respondent relates to the

property of the second respondent. When studying the items and amounts set out in paragraph [11] supra one notices that vast items were expended for fuel, obviously or the fleet of trucks which do not belong to the second respondent and for which the second respondent was not liable and also a vast amount regarding personal loans to the first respondent.

[13] The allegation of the first respondent referred to in paragraph 8 supra read together with the expenses set out in paragraph 9 supra, indicate that the first respondent fraudulently siphoned off the R1M, which was to be paid into the loan bank account of the second respondent and fraudulently utilized it to his own benefit by vast loan and expenses of other companies.

[14] It is quite clear that the first respondent did want to expose himself more and therefore did not deal more particularly with the payments made from his own money market account annexures "F1", "F2" and "F3".

[15] The first respondent did not prove that the applicants were either informed or aware thereof that the R1M was paid by them into the first respondent's money market bank account and their version that they transferred the amount into the account they were led to believe by the first respondent, and his agent on his instructions, to be the account number of the bond over the property, was in fact proven by the applicants. The first defendant in fact stated under oath that he deliberately gave his own money market bank account number to his agent to give to the applicants as, he, so went his allegation, could do as he pleases as it was his company and that there was no account number with Nedbank, the bondholder over the property purchased by the applicants which averment by the first respondent was, to his knowledge, false and in any case not proven by him.

[16] It is clear that by paying the R1M into the first respondent's money market account, as the applicants were falsely induced to pay by the first respondent, they were seriously prejudiced as the bondholder over the property purchased, namely Nedbank, refused to cancel the bond and the applicants cannot take transfer.

[17] The bald allegation by the first respondent in his answering affidavit to the effect that he was entitled to the R1M is rejected as being false under the circumstances.

[18] It is clear that the first respondent cannot and did not rely on any agreement with the applicants to the effect that they must transfer the R1M into the first respondents money market account and on that basis alone the applicants were entitled to succeed.

[19] The first respondent did not rely, as an excuse for having the R1M deposited into his own money market bank account, that it was a loan by the second respondent to him as he then would have been foul of the provisions of section 226 of the Companies Act.

[20] The following facts appear to be common cause between the parties:

a) The agreement concluded between the applicants and the second respondent which appears as annexure "JDV2" on paginated page 29.

b) The first respondent was not involved in the negotiations and conclusion of the agreement of sale on behalf of the second respondent and as no confirmatory affidavit by the person acting on behalf of the second respondent was attached to the first respondent's answering affidavit and the version of the first respondent in the answering affidavit in this regard is no more than hearsay and his denial of the applicants' version is to be regarded as a mere bare denial.

c) The first respondent did not allege that there was an agreement between him and the second respondent which authorised him to deposit the R1M into his money market account. Therefore the first respondent could not and did not submit that, in terms of the agreement, he was the adictus solutionis gratia (**Powell v Absa Bank Ltd** 1998 (2) SA 807 (SE))

d) That the applicants were under the *bona fide*, yet mistaken belief, that the R1M was paid for the benefit of the second respondent into its bond bank account thereby reducing the amount owing by the second respondent to Nedbank.

[21] The whole of the first respondent's defence is based upon the rather far fetched allegation that he was entitled to the R1M and to dispose thereof as he saw fit.

[22] The first respondent did not prove such right and he did not provide any proof that he was so authorised by the second respondent or ex lege entitled to it.

[23] The first respondent stated that he is "a director" of the second respondent and neither alleged nor proved that he was the sole director and/or shareholder of the second respondent and did not attach any resolution adopted by the members and/or board of directors of the second respondent authorising him to received the R1M on behalf of the second respondent and

to deal therewith as he pleased and also did not allege and prove any other manner of authorisation by the second respondent.

[24] The first respondent in fact, with regard to this application before this Court, merely made the bald allegation that he was "duly authorised to represent it (being the second respondent) in these proceedings", and did not attach a resolution adopted by the board of directors of the second respondent to that effect, to the answering affidavit.

[25] The first respondent made out a case that he is an astute businessman running a group of companies. He was also represented by an attorney and counsel. He was thus aware that to contradict successfully the strong facts and evidence against him, he was called upon to produce evidence by way of documentation and supporting affidavits of others who were involved on behalf of the second respondent in the transaction. The first respondent didn't do it and feebly made bald allegations which were not supported by the necessary material.

[26] If the first respondent's contention was indeed true that the funds would be disbursed by the first respondent on behalf of the second respondent, then there would have been no reason why the monies should not first have been paid into the bond bank account of the second respondent and thereafter either disbursed from that account, alternatively paid over by the second respondent to bank account of the first respondent, alternatively that the second respondent would provide written instructions and/or permission to the applicants to pay the deposit to the first respondent acting as its representative and/or agent. The contention of the first respondent that the second respondent did not have a bona account number with the bondholder Nedbank is disingenuous and manifestly false.

[27] The applicants made the payment intending it to be credited to the bond account of the second respondent with Nedbank in terms of the provisions of clause 1.1 of the deed of sale, and their permission was not obtained to deviate from the provisions of the deed of sale and in this instance the first respondent also prejudiced the second respondent.

[28] The first respondent referred to one Norman Thomas, allegedly his "Group's" Executive Officer and David Veldman, the Group's attorney, yet no confirmatory affidavits from them with regard to the allegations pertaining to them, were attached to the answering affidavit. The first respondent apparently expected this Court to believe that the Chief Executive Officer of the Group of companies would proceed to provide the personal money market bank account number of one of the directors as being the account into which to pay the R1M of the second respondent, in contradiction of all principles of corporate governance and in patent dereliction of his fiduciary duties towards the company. A negative inference is drawn in this regard against the first respondent.

[29] Accordingly, and on the first respondent's own version, the Court found unhesitatingly that the first respondent had no right and never had any right which entitled the first respondent to receive and use the deposit of R1M paid by the applicants in the belief that they were paying it into the bond account of the second respondent and the Court found that the first respondent fraudulently caused the transfer of the R1M to be made indebiti into his personal loan account and that he was to repay it with interest to the applicants (See **African Diamond Exporters (Pty) Ltd. v Barclays Bank International (Pty) Ltd.** 1978 (3) SA 699 (A) ; **Absa Bank Limited v Standard Bank of South Africa Ltd.** 1998 (1) SA 242 (SCA)).

[30] It is clear that the proposed appeal has no merits and that leave to appeal should be refused with costs.

[31] With regard to costs it is clear that the application for leave to appeal, besides not having any merit, was clearly made mala fide with the ulterior motive to delay the matter and a punitive costs order should be granted against the first respondent.

[32] The following order is accordingly made:

1. **The application for leave to appeal is refused and the applicant (first respondent in the main matter) is to pay the costs of the application for leave to appeal on the scale of attorney and own client.**

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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