9/12/2010
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 63920/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
9/12/10
DATE SIGNATURE

In the matter between:

ANTALIS SOUTH AFRICA (PTY) LTD Applicant

and

FASTPULSE TRADING 368 (PROPRIETARY LIMITED First Respondent
Reg. No. 2002/011032/07

KOTZEE, ANNA MARIE Second Respondent

JUDGMENT

Delivered 9/12/10

R D CLAASSEN J:

1.

The Applicant did business with Jakaranda Drukkers (Pty) Ltd(Jakaranda) as co-traders, and Applicant sold goods to Jakaranda. The latter did not and cannot pay its debt of approximately R4,8 million. First Respondent, represented by Mr Coetzee, then entered into a deed of suretyship on behalf of Jakaranda in favour of the Applicant. Applicant also had a notarial bond over Jakaranda's moveable goods. Applicant and Jakaranda had also entered into an amortisation agreement in respect of certain goods bought by Jakaranda. When Jakaranda not did pay, a new payment plan was agreed to. In the meantime Jakaranda stopped trading. When Applicant heard of it, it cancelled the amortisation agreement, and in terms of the notarial bond, attached certain moveables, and sold some of them at an auction.

2.

At an earlier stage, Jakaranda sold a game farm, its only asset, to a third party. Applicant obtained a provisional order that the purchase money be paid into Second Respondent's trust account, pending this (anti dissipation) interdict, or any further actions that may have had to be instituted. This is the return date of that provisional order. Jakaranda has also been liquidated in the meantime.

3.

The main issues stem from the fact that both First Respondent and Jakaranda, are owned by the Shawaal Trust (the trust), in the sense that the trust is the registered shareholder of both. The directors of the two companies were basically the same as the trustees, with certain exceptions:

Jakaranda: Directors: P H Coetzee

	D C Coertzee
	W P Exall
Fastpulse: Directors:	P H Coetzee
	D C Coetzee
Shawaal Trustees:	P H Coetzee
	D C Coetzee
	W J Raubenheimer

4

Three issues arose from these facts, which first respondent put up as defences:

4.1 The validity of the suretyship, because all three *trustees* did not sign it;

4.2 whether sec 226 of the Companies Act 61 of 1973, was transgressed, in the sense that one company gave assistance to another where one or more director or member has a controlling interest;

4.3 Whether the sale prices of the goods sold at the auction, were proper and/or fair and reasonable.

5

VALIDITY OF THE SURETYSHIP

First Respondent's first defence is that the trust could not *de jure* sign the suretyship, because all three trustees did not sign it. Since the trust is not an incorporated body, and cannot hold property *eo nomine*, only the trustees could hold the property, as trustees, and therefore they had to sign the suretyship, as trustees.

6

Section 103(3) of the Companies Act 61 of 1973 states that the *person* in whose name the share/s are registered, shall be deemed to be the shareholder. The Companies Act does not define a *person*. It is trite that a shareholder need not be the owner of the shares, but can hold it as agent or as nominee. The Interpretation Act, 33 of 1957, deals with this issue. Sections 1 and 2, as far as is relevant, states as follows:

1. Application of Act.—The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.

2. Definitions.—The following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely—

"person" includes—
(a) any divisional council, municipal council, village management board, or like authority;
(b) any company incorporated or registered as such under any law;
(c) any body of persons corporate or unincorporate;

From this definition it is clear that *person* includes a body of persons such as the trustees. I can thus not see why they cannot be represented by the trust as the shareholder.

7

It was also argued that since one of the trustees at the time (Raubeheimer), did not partake in the decision to grant the suretyship, the trust did not act unanimously, and therefore the suretyship is also invalid. It is however common cause that the trust deed specifies that all decisions of the trust shall be taken by a majority of trustees. Since two of the trustees took the decision, it was a lawful decision. At the end of the day, it was common cause that the whole issue (on this point) stands or falls on the question whether the trust is "*the shareholder*" or whether the trustees are the *shareholders*. It thus means this defence must fail.

8

A further defence is based on Section 226 of the Companies Act, 61 of 1973. This section prohibits a company from giving credit and other facilities, where basically the same member and/or directors are in control. Since the member/directors of First Respondent and Jakaranda are basically the same, and also so controlled, it is alleged that that makes the whole transaction void. The relevant portions of the section reads as follows:

226. Prohibition of loans to, or security in connection with transactions by, directors and managers.—(1) No company shall directly or indirectly make a loan to—

(a).......

or

(b) any other company or other body corporate controlled by one or more directors or managers of the company or of its holding company or of any company which is a subsidiary of its holding company;

or provide any security to any person in connection with an obligation of such director, manager, company or other body corporate.

(b) one or more directors or managers of a company contemplated in subsection (1) (b) shall be deemed to control another company or body corporate only if—

(i) such director or manager or his nominee is a member or such directors or managers or their nominees are members of such other company or body corporate and the composition of its board of directors is controlled by such director, manager or nominee or such directors, managers or nominees, and such composition shall be deemed to be so controlled if such director or manager or his nominee or such directors or managers or their nominees may, by the exercise of some power and without the consent or concurrence of any other person, appoint or remove the majority of the directors concerned, and such director, manager or nominee or such directors, managers or nominees shall be deemed to have power to appoint a director where a person cannot be appointed as a director without his or their consent or concurrence; or

(ii) more than one-half of the equity share capital of that other company or body corporate or, if that other body corporate is a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act No. 69 of 1984), more than 50 per cent of the interest in such corporation is held by such director, manager or nominee or such directors, managers or nominees;

(1A).......

b) one or more directors or managers of a company contemplated in subsection (1) (b) shall be deemed to control another company or body corporate only if—

(i) such director or manager or his nominee is a member or such directors or managers or their nominees are members of such other company or body corporate and the composition of its board of directors is controlled by such director, manager or nominee or such directors, managers or nominees, and such composition shall be deemed to be so controlled if such director or manager or his nominee or such directors or managers or their nominees may, by the exercise of some power and without the consent or concurrence of any other person, appoint or remove

the majority of the directors concerned, and such director, manager or nominee or such directors, managers or nominees shall be deemed to have power to appoint a director where a person cannot be appointed as a director without his or their consent or concurrence;
(1B)…….
(2) The provisions of subsection (1) shall ***not*** *apply—*
(a) in respect of—
(i) ….
(ii) ….
(iii) the making of a loan by a company to any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company; or
(iv) the provision of security by a company in connection with an obligation of any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company,
with the prior consent of all the members of the company *or in terms of a special resolution relating to a specific transaction: …..*
(My emphasis.)

9

In respect of both companies, the trust is the shareholder. In terms of the trust deed, decisions by the trustees are to be taken by a majority vote. It is common cause that Mr Raubeheimer, as trustee, had no knowledge of the decision to give security. He was an absent trustee living in England at the time. However it is quite clear on the evidence that the two Coetzee's (husband and wife) as trustees and directors, as well as the other director (Exall), all agreed to the decision, in essence on more than one occasion. Under those conditions the *member* of the trust gave prior consent to the granting of the security. This point can thus also not succeed. It is thus not necessary to deal with applicant's further submissions to the effect that sec 226 does not even apply at all (although it seems like a good argument).

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Apart from the issues raised above regarding the security as such, there was no argument that the applicant did meet the requirements for an anti-dissapation order, and it behoves no further discussion.

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The next argument was about the *quantum* of applicant's claim.
Respondent says the quantum is a question of damages which cannot be decided by way of motion, whereas Applicant says the figures are fixed and it is only a question of calculation.

12

The original debt was R4,872,455.61. In the meantime some of the goods/equipment have been sold by public auction after the Applicant had taken possession thereof. The amount presently claimed, after deduction of the sale price, auction costs and transporting costs, is R3,179,290.85. This amount is certified by a certificate presented in terms of the suretyship and not disputed for what it represents to be.

13

The Respondent's problem with the amount is that the Applicant had the equipment, covered by the original application for credit and suretyship, valued in September 2008. It was done about one year before the attachment of the goods took place and approximately 1½ years before the sale. Since the goods were attached and sold to third parties, Respondents had no opportunity to have the goods valued themselves. Furthermore, some of the goods were sold for substantially less than their value as per the valuation. It was therefore submitted that this issue of the valuation must go to trial to have the values tested.

14

I have two problems with this approach. Firstly, it is difficult to imagine how the Respondents are going to be able to have the items valued at this stage. There is no attack against the auction as such. *Prima facie* that would be the best evidence of the actual value at the time. I cannot see how a valuer can put a past value on these items without having seen them at the time (i.e. time of the auction). It may also be difficult to even trace the equipment.

15

The second problem is that there is a certificate of indebtedness to which Respondents are at least *prima facie* bound. To simply state that the prices are much below the valuation of approximately 18 months earlier, is to my mind no way to displace the *prima facie* evidence before the Court. Some proof at least of a sale of a similar machine or item, of more or less similar vintage and condition, should be put up. There is none, and without indicting the auction as such, there is no reason not to accept the certified value. In the circumstances Applicant is entitled to the amount thereof.

I therefore make the following order: (Part B of the notice of motion)

1. That the First Respondent pay the amount of R3,179,290.85 to the Applicant;

2. That the First Respondent pay interest on the aforesaid amount at the rate of 15.5% per annum *a tempore morae* to date of payment;

3. Directing the First Respondent to pay the costs of this application.

R DCLAASSEN
Judge of the High Court