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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. 3123/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

RONELLE BURDEN N.O.

APPLICANT

(In her capacity as the duly appointed trustee in the insolvent estate of PP PROPERTY TRUST – IT9[...],
Master's Ref: T6[...])

And

MATSEPES (BLOEMFONTEIN), INC

1ST RESPONDENT

Registration Number: 199[...])

TSIU VINCENT MATSEPE

2ND RESPONDENT

(ID: 48[...])

ROUX BARRY CLOETE

3RD RESPONDENT

(ID: 47[...])

MASTER OF THE HIGH COURT, PRETORIA

4TH RESPONDENT

CORAM: GUSHA, AJ

HEARD ON: 16 MARCH 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 12h00 on 20 JUNE 2023.

JUDGMENT

INTRODUCTION

[1] This is an application wherein the applicant seeks two declaratory orders together with a claim for payment in the sum of R2,355,111,49 (the claimed amount), jointly and severally from the 1st, 2nd and 3rd respondents, the one paying the other to be absolved.

[2] The application is opposed by the 1st and 3rd respondents. They have also instituted a provisional third party procedure against the applicant and the 2nd respondent in their personal capacities. I shall later on in this judgment revert to same.

THE PARTIES

[3] The applicant is the duly appointed sole trustee¹ in the insolvent estate of PP Property Trust IT 9[...] – Master's Ref T6[...] (the Trust).

¹ Annexure RB1 to the applicant's founding affidavit: Certificate of appointment as Trustee in the insolvent estate PP Property Trust

[4] The 1st respondent is a duly registered and incorporated company in terms of the Companies Act, Act 71 of 2008. It practices as a firm of attorneys and is subject to the provisions of the Legal Practice Act, Act 28 of 2014.

[5] The 2nd respondent is a practicing attorney and was or still is a director of the 1st respondent. He currently practices at and is also a director of Matsepe's Goldfields². He was, until his removal as such by the Master of the High Court, a joint trustee³ in the insolvent estate. The 2nd respondent entered no appearance in these proceedings either in his capacity as the 2nd respondent or as the 2nd third party.

[6] The 3rd respondent is a director of the 1st respondent and a practicing attorney.

[7] The 4th respondent is the Master of the High Court, Pretoria and no relief is sought against it.

RELIEF SOUGHT

[8] The relief sought relates to;

(1) an order that the 1st respondent is declared liable to the applicant for the payment in the sum of R2, 355,111,49 and;

(2) an order to declare that the 2nd and 3rd respondents in their capacities as directors of the 1st respondent are jointly and severally liable to the applicant for such payment the one paying the other to be absolved and;

(3) that the 1st to 3rd respondents, jointly and severally, the one paying the other to be absolved, be ordered to make payment to the applicant in the sum of

² Annexure RB 7 to the founding affidavit indicating the 2nd respondent as a co-director of Matsepe's Goldfields.

³ Ibid. The applicant was on the 7th July 2018 duly appointed as a co-trustee, she and the 2nd respondent remained co-trustees until his removal as such on the 17th March 2022, where after the applicant became the sole trustee in the insolvent estate of the Trust.

R2,355,111,49, together with interest at the rate of 7% per annum calculated from 25 August 2021 to date of payment thereof (both days inclusive).

(4) Cost of suit (to include cost of two counsel).

FACTUAL BACKGROUND

[9] Truncated, the germane facts are the following; the Trust was sequestrated by an order court on the 8th June 2017⁴. Subsequent to the sequestration, the 2nd respondent was appointed as the sole trustee in the insolvent estate of the Trust⁵. During his tenure as sole trustee, the 2nd respondent appointed the 1st respondent to manage the administration of the insolvent estate. In terms of a written mandate⁶ the 1st respondent then invested the funds of the insolvent estate⁷.

[10] The following are the terms of the written mandate;

- (a) the 1st respondent is appointed as the agent of the insolvent estate.
- (b) the insolvent estate is the investment principal.
- (c) the funds will be invested on the basis that:
 - (i) the amount will be invested in a trust savings account or other interest –bearing account;
 - (ii) the account contains a reference to section 78(2A) of the Attorneys Act, 1979 ; and

⁴ An order by the Hon. Madam Justice Potteril in the High Court of South Africa for the Division of Gauteng, Pretoria under case number 18240/2017.

⁵ He was removed as such on the 17th March 2022.

⁶ Annexure RB5 of the founding affidavit.

⁷ Funds it received from the sale of a property of the trust-in liquidation- as transferring attorneys-and which could only be transacted with by the 1st respondent but only on the written instructions of the insolvent estate.

- (iii) the interest which accrues on such investment is to be for the investment principal's account.
- (d) the agent could only transact on the investment account on the written instruction of the insolvent estate to be given by way letter, e-mail or fax:
- (e) all transactions must be addressed to and actioned by the agent; and
- (f) the investment principal will receive confirmation of transactions on the investment account on a monthly basis.

[11] Whilst under the employ of the 1st respondent and under the supervision of the 2nd and 3rd respondents as directors of the 1st respondent, Mr Badenhorst⁸ an erstwhile employee of the 1st respondent, stole the claimed amount from the insolvent estate. Subsequent to this theft being uncovered, the 2nd respondent then still in his nominal capacity, successfully applied for the sequestration of the estate of Mr Badenhorst based on the aforesaid theft. In the 2nd respondent's founding affidavit in the provisional sequestration of the estate of Mr Badenhorst stated the following material facts;

- (a) That he is an attorney and insolvency practitioner practicing at the 1st respondent.
- (b) He acted as trustee in the insolvent estate.
- (c) During the liquidation / sequestration process, funds of insolvent and proceeds of *inter alia* auctions of the insolvent's property are in terms of the provisions of section 70 of the Insolvency Act, Act 24 of 1936 (Insolvency Act), deposited into a bank account which is opened by the trustee(s).

⁸ The 2nd respondent in his founding affidavit under case number 750/21 for the provisional sequestration of the estate of Mr Badenhorst, stated that the latter was appointed in order to administer the liquidation and distribution accounts of insolvent estates.

(d) The funds received in the liquidation process are kept in such a bank account, controlled by the trustees during the liquidation process and eventually any surplus left will be paid to creditors of the relevant estate.

(e) The 2nd respondent opened such an account to achieve the aforesaid purpose and to facilitate the payments required in order to meet the goals of the Insolvency Act.

(f) Badenhorst unlawfully authorized payments to be made from various accounts into his own personal nominated bank account totaling R2, 475,510.30.

[12] The 3rd respondent supported the application and deposed to a confirmatory affidavit⁹ in that regard.

THIRD PARTY PROCEDURE

[13] Subsequent to the applicant issuing out the present applicant against the 1st to 3rd respondents for the relief sought in the notice of motion, the 1st and 3rd respondents delivered a provisional third party notice claiming from Ms Burden (the 1st third party and the applicant in the main proceedings) and the 2nd respondent (the 2nd third party) relief in the form of a contribution and or exoneration premised upon the provisions of the sections 2(8)(a)(ii)¹⁰ and 2(6)(a)¹¹ of the Apportionment of Damages Act, Act 34 of 1956.

⁹ Annexure RB 6 to the founding affidavit.

¹⁰ **2. Proceedings against and contributions between joint and several wrongdoers**

(8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may –

(ii) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint

[14] The 1st third party, Ms Burden, opposes the relief sought in the third party procedure. The nub of the opposition is that the relief sought in the main application is based on the 1st respondent's breach of a contract and mandate given to it by the insolvent estate, thus a contractual claim and not a claim based delict.

[15] During arguments, counsel for the 1st and 3rd respondents conceded the aforesaid aspect, this concession therefore rendered the third party procedure of no moment. I shall therefore not take this aspect any further than I have, save to referring thereto later on in this judgment in relation to costs.

APPLICATION TO STRIKE OUT

[16] Prior to arguing the merits of the application, the 1st and 3rd respondents moved an application to strike out certain portions of the applicant's replying affidavit¹² as being irrelevant, new matter and inadmissible.

[17] They aver that the impugned portions of the applicant's replying affidavit constitute new matter, in that contrary to the applicant's founding affidavit¹³, she now in

wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff;

(6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of subsection (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

[Para. (a) amended by s. 1 of Act 58/71 and s. 33 of Act 88/84]

¹² Para 9.11 and 44.2.

¹³ In the founding affidavit par 8.1 – 8.4, the applicant based the quantum of her claim from the affidavit deposed to by the 2nd respondent in case 750/2021.

the replying affidavit, seeks to introduce a spreadsheet with supporting documents in support of the quantum of her claim. The 1st and 3rd respondents object to this and contend that the new matter sought to be introduced constitutes hearsay evidence, is inadmissible and therefore prejudicial to them.

[18] This application to strike out is opposed by the applicant as well as the 1st third party.

[19] In my view nothing turns on the application to strike out. What the applicant seeks to introduce in the replying affidavit is not new matter, it has been canvassed in the founding affidavit albeit in different terms and or format. Nothing contained in the replying affidavit relating to this aspect is hearsay or prejudicial to the 1st and 3rd respondents. In her replying affidavit she states;

9.11 “**In so far as** (my own emphasis) the Respondents still take issue with the quantum of the aforesaid amount, I annex hereto marked Annexure “RA2”...confirming the exact sum that was stolen/ transferred from such account...”

The applicant says the aforesaid in reply to what the 1st and 3rd and respondent's stated in their answering affidavit, she is not stating new matter, she is merely demonstrating, in amplification perhaps, how the quantum stated in founding was arrived at. In any event even if it were to be successfully argued that I misdirected myself on this aspect, the fact is, supporting documents or not, the case mounted by the applicant is still the same.

[20] Furthermore, on the pleadings, it is common cause between the parties that the mandate was concluded, Badenhorst was employed by the 1st respondent and that he stole the funds of the insolvent estate deposited into the trust account of the 1st respondent and that the 2nd and 3rd respondents were directors of the 1st respondent. I also did not understand the 1st and 3rd respondents to disavow the theft and or the amount stolen. I further did not understand them to disavow that amongst the funds

stolen by Badenhorst, were those belonging to the insolvent estate of the Trust. There can be no dispute of fact on these aspects even if there were the legal principle in *Plascon Evans*¹⁴ would obtain.

[21] The application to strike out is therefore dismissed.

THE ISSUE(S) IN DISPUTE

[22] It is against the aforesaid factual background that I am called upon to decide whether the terms of the mandate were breached, and if so, by whom and whether the insolvent estate suffered any damages as a result of such breach.

THE LEGAL FRAMEWORK

[23] Section 34 of the Legal Practice Council Act provides that;

(7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents—

(c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for—

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and

(ii) in respect of any theft committed during their period of office.

[24] The Companies Act, Act provides as follows;

¹⁴ **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) 623** “...It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order...”

- (3) If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

APPLICATION

Was the mandate breached?

[25] The 1st respondent is, as evident from the pleadings, a personal liability company duly incorporated in terms of section 8(2) (c) of the Companies Act¹⁵ it is furthermore subject to the provisions of the Legal Practice Act. It is furthermore common cause that the relationship between the 1st and 3rd respondents is regulated by the written mandate and the authority to invest alluded to above. It is common cause that the 1st respondent as agent, will only be indemnified against losses suffered, if it acted in accordance with the instructions of the Trust as investment principal. This instruction was not given. Furthermore, the written mandate created strict liability in that the agent, thus the 1st respondent, could only transact on the investment account on the written instructions of the Trust.

[26] It is further common cause that the funds received on behalf of the insolvent estate were entrusted to the 1st respondent and whilst said funds were under the control and supervision of the 1st respondent, the latter invested same for the benefit of the Trust. It is common cause that the funds invested on behalf of the Trust were stolen by Badenhorst and that same, to date, remain unpaid to the Trust.

[27] It is particularly illuminating that the 2nd respondent, in his capacity as co-trustee and co-director in the 1st respondent, being the applicant in the provisional sequestration proceedings against the estate of Badenhorst and bearing full knowledge

¹⁵ **8. Categories of companies**

- (2) (c) a personal liability company if-
 (i) it meets the criteria for a private company; and
 (ii) its Memorandum of Incorporation states that it is a personal liability company; or ...

of the theft¹⁶ for reasons only known to him, elected not to join issue in these proceedings and or challenge the evidence relied upon. In this regard, in the absence of any other evidence gainsaying the applicant's version, what is the most plausible inference to draw other than that the written mandate was indeed breached.

Liability of the 1st respondent

[28] It is patent from the pleadings as well as the capitulation of the 1st and 3rd respondents during the third party procedure, that the dispute between the parties is based on a contractual claim. Thus contractual obligations between the parties to the written mandate are to be determined by their intention¹⁷. In the absence of a contrary stipulation, the law of contract does not require fault (even in the form of negligence) for breach. In the present case, the intention was clear; strict liability applied in the event the agent contrary to the written instructions of the investment principle. It needs no restating that when a mandate is given to firm of attorneys to invest funds in trust that such funds can only be lawfully transacted with. This is steeped in the principle that the firm of attorneys are in a position of trust and thus owe a fiduciary duty to their client in how they deal with the entrusted funds.

[29] In the present case, it is an inescapable fact that payments from the investment account were without any written instructions made, as a consequence, the Trust suffered a loss in the form of the stolen funds. The 1st respondent resultantly breached the terms of the mandate, fault or negligence on its part is immaterial as the terms of the mandate are clear; in the event of breach strict liability applies¹⁸.

Liability of the 2nd and 3rd respondents

¹⁶ As stated in his founding affidavit in the provisional sequestration provisions as well as in his capacity as the director responsible to manage the insolvency department of the 1st respondent.

¹⁷ Loureiro and Others v iMvula Quality Protection (Pty) Ltd [2014] ZACC 4 at para 42.

¹⁸ Ibid. *Thoroughbred Breeders' Association v Price Waterhouse* [2001] ZASCA 82; 2001 (4) SA 551 (SCA) at para 66 and *Administrator, Natal v Edouard* [1990] ZASCA 60; 1990 (3) SA 581 (A) at 597E-F.

[30] Having found that the 1st respondent breached the terms of the written mandate and is thus liable, it follows that the 2nd and 3rd respondents as its past and present directors are together with the 1st respondent jointly and severally liable for the breach.

[31] Finding otherwise would fly in the face of established law as well as the 2nd respondent's own evidence under oath in the application for the sequestration of Badenhorst. It is an undeniable fact that the funds of the insolvent estate were stolen, it is an inescapable fact that the directors of the 1st respondent were well aware of this theft and have, that notwithstanding, not made any effort to refund same.

[32] Here too I am satisfied that the applicant has successfully made out a case for the liability of the 2nd and 3rd respondents.

COSTS

[33] With regards to costs, the general rule is trite and there is no reason for me to depart therefrom.

ORDER

[34] In the result I make the following order;

(1) The third party procedure is dismissed with costs, which costs shall include costs of preparation and costs 1 counsel.

(2) The 1st respondent is declared liable to the applicant for the payment in the sum of R2, 355, 111, 49.

(3) The 2nd and 3rd respondents in their capacities as directors of the 1st respondent are jointly and severally liable to the applicant for such payment, the one paying the other to be absolved and;

(4) The 1st to 3rd respondents, jointly and severally, the one paying the other to be absolved, are ordered to make payment to the applicant in the sum of R2,355,111,49, together with interest at the rate of 7% per annum calculated from 25 August 2021 to date of payment thereof (both days inclusive).

(5) Costs of suit, which costs shall include the costs of 2 counsel.

NG GUSHA, AJ

On behalf of the applicant

Instructed by:

Adv. L.W. De Beer

Vezi & De Beer Inc.

BLOEMFONTEIN

On behalf of the 1st Third Party

Instructed by:

Adv. S.J Scheepers SC

Vezi & De Beer Inc.

BLOEMFONTEIN

On behalf of the 1st and 3rd respondents:

Instructed by:

Adv. PJJ Zietsman SC

Eugene Attorneys

BLOEMFONTEIN