THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

CASE NO: AR 473/2015

In the matter between:

ARGENT INDUSTRIAL LIMITED **APPLICANT**

and

GAVIN CECIL GAINSFORD N.O **FIRST RESPONDENT**

CHETAN KUMAR VENILAL TANNA N.O **SECOND RESPONDENT**

SENTULA MINING LIMITED **THIRD RESPONDENT**

MEGACUBE MINING (PTY) LIMITED **FOURTH RESPONDENT**

ORDER

On appeal from: The High Court of South Africa, Kwazulu-Natal Division, Pietermaritzburg (Koen J sitting as the court of first instance):

[1] The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

D. Pillay J (Jappie JP and Henriques J concurring):

[2] The liquidators[1] of the Golden Autumn Trust (the GAT) claimed payment of the sum of R8,8 million from Argent Industrial Limited (Argent).[2] In turn, Argent joined Sentula Mining Limited (Sentula) and Megacube Mining (Pty) Limited (Megacube) to the action.[3] The Sentula Group, a company listed on the Johannesburg Stock Exchange (JSE) formerly carried on business through several entities including Scharrighuisen Open Cast Mining (SOC)[4] and Scharrighuisen Mining Ltd[5].

[3] The circumstances in which Argent came to receive R8,8 million from the GAT are intriguing. Two friends and business associates, Cas Scharrighuisen and Jason Holland, held directorships in Sentula and Megacube over various periods until 2008. Holland had been the financial director of Sentula and a director of SOC. Scharrighuisen had been the managing director of Sentula and a director of SOC. Holland and Scharrighuisen opened a secret account with Nedbank in the name of SOC, where they deposited money they stole from SOC. Holland established the GAT on 27 March 2007. Its trustees were Holland, Adan Kean Du Plessis and Robert Sun. According to the trust deed, Holland and members of his family were the beneficiaries. He was the only trustee authorised to operate the GAT's bank account.

[4] Holland and Scharrighuisen used the so-called BMI (Bavaria Metal Industries (Pty) Ltd) transactions to steal money from SOC. The scheme was structured as follows: SOC purchased and paid for equipment in a foreign jurisdiction using BMI's import number. Then it invoiced BMI, a subsidiary of Argent for the equipment. SOC could not invoice the bank because it would then have been financing its own asset. So BMI would approach a bank to finance the purchase of the equipment that SOC had already sold to

[1] The first and second plaintiffs in the trial court and the respondents in this appeal in the insolvent estate of the GAT.
[2] The defendant in the trial court and the appellant in this appeal.
[3] First and second third parties in the trial court and third and fourth respondents in this appeal.
[4] Until May 2009.
[5] Until May 2007.

BMI. Once the bank was satisfied that the asset was in the country, it would approach SOC for authorised signatures to the financing agreement. BMI resold the equipment to the bank and the equipment was delivered to the SOC. BMI paid the money it received from the bank for the sale of the equipment to SOC. The net effect of these arrangements was that theoretically, SOC would have gotten both the equipment and the payment for it, a result questionable in itself. In reality, Holland and Scharrighuisen diverted these payments to a secret account.

[5] Remarkably, Trev Robert Hendry, Argent's Chief Executive Officer and a chartered accountant was unperturbed by this convoluted scheme. He testified that the banks were aware of what was going on and BMI had paid over to SOC every cent it had received on its behalf. However, he was evasive about whether BMI was dormant, a subsidiary of Argent Steel Group or merely a financing vehicle for SOC and Megacube. Eventually, the cross-examination extracted his response that BMI existed for purposes of invoicing the banks for hire purchase agreements for SOC and Megacube. Notwithstanding, Argent urged the court to view the BMI transactions in the context of 'the close commercial relationship between SOC and Argent.' Seemingly, Argent's status as a listed entity accountable to its shareholders and a slew of regulatory authorities was of no consequence to the office bearers of the entities and the banks involved.

[6] Whatever the criticism might be of the BMI financing transactions, there was no evidence that they constituted theft. The same cannot be said about the BMI payments to the SOC. BMI or Argent drew cheques in favour of SOC. Over a period, Holland and Scharrighuisen deposited those cheques totalling R584 372 445.78 into the secret bank account. Then they drew cheques on the secret account in favour of the GAT and deposited them into the GAT bank account. Between 23 April 2007 and 29 January 2008, they paid an amount of R65 563 556 from the secret account into the GAT's bank account for their personal benefit. On 5 March 2008, Scharrighuisen and Holland closed the secret account.

[7] About the same time, whilst preparing its financial accounts for submission to the JSC, SOC discovered a shortfall of R60 million. Holland told SOC that Argent owed this amount. Consequently, Louw, on behalf of SOC, demanded payment from Hendry who was representing Argent. Hendry denied that Argent owed SOC any money.

[8] By June 2008, KPMG was instructed to undertake a forensic investigation into the financial affairs of Megacube. By September 2008, KPMG discovered that Scharrighuisen and Holland had established the secret bank account with Nedbank in the name of Megacube on 2 March 2007. On the instructions of Louw to investigate the secret account further, KPMG discovered that Scharrighuisen and Holland had been the managing and financial directors respectively of Sentula when they had opened the secret account. They were the only authorised signatories on the account.

[9] After Louw demanded payment from Argent, the latter received the following amounts totally R45 748 810,79:

a) 27 June 2008, R8,8 million on behalf of Holland;
b) 27 June 2008, R21 150 000 on behalf of Scharrighuisen;
c) 1 July 2008, R4,3 million on behalf of Holland;
d) 1 July 2008, R11 498 810.79 on behalf of Scharrighuisen.

On 3 July 2008, Argent paid SOC the entire sum of R45 748 810.79.

[10] The GAT was sequestrated provisionally on 28 November 2008 and finally on 10 February 2009. On 8 September 2010, the liquidators instituted an action against Argent for the recovery of the claim of R8,8 million. On finding that the GAT had title to the R8,8 million, the trial court granted an order in favour of the liquidators against Argent for payment of the claim with interest and costs.

[11] In this appeal against the judgment of Koen J, Argent denied liability to the insolvent GAT on the bases that first, the GAT did not have any title to the claim once it had paid the money into Argent's bank account; second, the GAT had authorised the transfer from its account to Argent; third, if Argent had to pay the claim it would be

duplicating the payment which it had already included in its lump sum payment to SOC; accordingly the SOC would be unjustifiably enriched at the expense of Argent; fourth, it had acted as an agent for the SOC, as such it had been indemnified; fifth, the GAT's payment to Argent did not amount to a voidable disposition under s 26(1)(*b*) of the Insolvency Act 24 of 1936 (the Act). Argent acknowledged that SOC had been the only creditor of the GAT. Therefore, if any amounts were recovered from Argent it would have to be distributed to SOC, less the trustee's fees.

[12] The liquidators contended that the GAT was entitled to the claim. The GAT had not stolen the monies deposited into its account. Holland's payments from the GAT's account to Argent had not been authorised. Other trustees of the GAT were unaware that Holland and Scharrighuisen had deposited money they had stolen into GAT's account. Approximately R630 000 was not stolen money; *commixtio* had occurred between the stolen money and the R630 000 so that the funds in the GAT's account were inseparable.

[13] Having exhaustively ventilated the issues in a lengthy trial that proceeded over five days, generating a record in excess of 1 500 pages, the facts material to my judgment have since become substantially common cause or not disputed. My approach is to determine whether the GAT was entitled to the claim; whether the GAT authorised the payments to Argent; whether the payment to Argent was a voidable disposition prohibited under s 26 of the Act; whether Argent was entitled to the claim, to receive and transfer it to SOC; and whether SOC would be unjustifiably enriched. Findings on these issues will provide the building blocks for constructing an appropriate remedy.

[14] The source of every deposit into the GAT's bank account was unknown. Included in the deposits was one by Argent to settle a debt due to Scharrighuisen for the amount of R630 000. A transfer of R8 479 000 from the GAT Money Market account into the GAT's bank account was stolen money laundered through the GAT Money Market account. Without any better information, the court must accept Argent's submission that these deposits enabled the GAT to transfer R8, 8 million to Argent.

[15] Structurally and theoretically, the GAT was an entity distinct from Holland. However, in mind and management, Holland's identity was indelibly imprinted on the GAT through his control of its bank account. Although the GAT itself did not steal the money – or rather there was evidence that it did – the bulk of the money in the GAT bank account had been stolen. Consequently, the stolen money had to be returned to its 'owner' or, more precisely, the party entitled to it.

[16] Argent had already returned some of it. The GAT's transfer of the R8.8 million to Argent included the R8 479 000, money that had been stolen. The GAT could not assert title to the stolen money as against the true owner.[6] Conversely, it could validly resist claims from Argent, which also lacked title to the stolen money but received it anyway. However, the GAT had title to Scharrighuisen's R630 000 which the parties accepted had not been stolen. In this case, as it is possible to distinguish stolen money from the rest, *commixtio* does not arise. Although the GAT had no title to the stolen money, the findings on the next three issues are nevertheless relevant to determining whether the liquidators should succeed in their claim.

[17] Irrespective of whether the GAT had title to the stolen money, it had not authorised the payment to Argent, as the trial court correctly found. In terms of the trust deed of the GAT, a majority of trustees had to agree to the payment.[7] Furthermore, the payment was inconsistent with the purposes for which the GAT was formed, which included providing for estate duty. Consequently, Holland could not legitimately have paid the money from the GAT's bank account to Argent. But he did.

[18] His disposition to Argent within two years of the sequestration of the GAT resulting in the latter's liabilities exceeding its assets was not made for value under s 26

[6] *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) para 23; *ABSA Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) at 576A-E; *Gainsford NO, & others v Gulliver's Travel (Bruma) (Pty) Ltd* [2009] JOL 23787 (W).
[7] *Coetzee v Peet Smith Trust en andere* 2003 (5) SA 674 (T) at 681A-B.

of the Act. With these jurisdictional prerequisites established, the disposition fell to be set aside, as the trial court correctly found. Argent's concessions fortify this finding.

[19] Argent conceded that it had no title to the payments it received on behalf of the GAT and that it was a mere conduit for receiving and transmitting monies rightfully due to SOC, its alleged principal. Lacking title itself and having accepted the payment, Argent could not validly contest the GAT's title to the stolen money. Hendry advanced three facts to support Argent's offer to pay any money it had received:

(a) SOC had been in a dire situation with a looming JSE deadline to publish its financial statements;

(b) Sentula's chairman and other directors, namely Alan Joffe and Sam Jonah had urged Hendry to assist in getting the payment of 'the money' – its source was a mystery to SOC; and

(c) SOC had exhausted Holland as a source to resolve the debit in the accounting and the auditors had not been able to identify the source of the debit.

Argent alleged, euphemistically in my view, that its role was 'to assist and facilitate the transfer of credit' to SOC.

[20] Not only was Hendry emphatic that Argent was not a debtor of SOC but there was also no commercial substratum for Argent receiving payment of the claim. If the GAT was liable to SOC and wanted to pay SOC it should have done so without Argent having to facilitate the transfer. Then the question of the alleged mandate and indemnity arose.

[21] Argent relied on a mandate and indemnity from SOC. As a general rule a principal must indemnify and reimburse an agent who, acting in good faith and in the proper service of the principal, suffers loss.[8] In this instance, the purported mandate had allegedly been established by an exchange of emails between Hendry and Louw. The mandate consisted of a single term, namely, Argent must facilitate the receipt of money from 'third parties' owing to SOC or Megacube and transfer it to SOC or Megacube by depositing it into a bank account details of which Louw provided. The very content of

[8] *De Villiers & others v The Beaufort West Municipality* 1924 CPD 501 at 507.

such a mandate should have been manifestly suspected. Who the ‘third parties’ were, was contested when Hendry had to prove what his beliefs had been about who owed SOC. His beliefs were relevant to determining his mandate, the indemnity, enrichment, the propriety of the payment and his credibility generally.

[22] Argent pleaded that it had paid SOC ‘in the reasonable and bona fide belief that the GAT, Holland and/or Scharrighuisen were indebted’ to SOC or Megacube. Argent also pleaded that it received the lump sum of R45 748 810.79 on behalf of Holland and Scharrighuisen. These allegations in its pleadings did not square with Hendry’s evidence. Hendry testified that he believed that Holland and Scharrighuisen did not owe SOC or Megacube. As to whether he believed that the GAT owed money to SOC or Megacube, Hendry replied ‘no’ but only after the trial judge intervened to get his response. In the circumstances, the submission by counsel for Argent that the judge erred in finding that Hendry did not believe that even the GAT owed SOC was unfounded.

[23] Hendry’s evasiveness persisted under cross-examination about whether he had asked Scharrighuisen and Holland about them owing money to Megacube and Sentula. His evidence was that he had not asked that question. Instead, he had sought legal advice because he had emails referring to money that BMI owed SOC when he knew that was not possible.

[24] As the CEO and a chartered accountant Hendry had received payment in Euros, but he had ‘no idea’ about this payment. Despite the deposit of R8.8 million being annotated as ‘TRF from Golden Autumn Trust’, that name simply ‘didn’t ring any bell’ for Hendry. And subsequently, when he received the two payments referenced to Holland, on instructions from Mr Davis of Webber Wentzel, he confirmed with Scharrighuisen that he could transfer the entire amount of R45,7 million to SOC.

[25] The opaqueness of the transactions and the lack of an adequate explanation for them leads the court inevitably to infer that Argent knew or ought to have known much

more about the GAT's payments to SOC. 'Plugging the holes' in SOC's accounting so that they did not show up in the financial statements due for publication was reason enough to believe, in the absence of an explanation for both the 'holes' and the reasons for the GAT 'plugging' them, that something subversive was underway.

[26] In these circumstances, Hendry's evidence about his beliefs must be rejected as false. Hendry was a single witness for Argent. The chairmen of Argent and BMI who had urged Hendry to assist SOC did not testify. Considering the close intersecting directorships and personal relationships amongst those involved in these companies, Argent's disclaimers are unconvincing.

[27] Counsel's bald submission that Hendry's belief was that 'the money was due to the SOC' compounded the obfuscation. He failed to identify the debtors and also denied that Holland, Scharrighuisen and the GAT were the debtors. The clearest evidence that Hendry did not act as agent for SOC but under pressure from within Argent and BMI, emerged from the following extract from his testimony:

'. . . why were you phoning Cas Scharrighuisen? . . . everyone's phoning me to help and to assist.

Who is everybody . . . Sorry, and [Sir] Jonah and Alan Joffe, I think Jonathan Best and our chairman.

Koen J: Who is your chairman? . . . Tony Scharrighuisen'

[28] Tony Scharrighuisen was the brother of Cas Scharrighuisen and the chairman of Argent when Hendry was its chief executive officer. The chairman had asked Hendry to assist SOC. Sir Jonah was the chairman of BMI. Eventually, Hendry accounted to Sir Jonah, Richard Jonah and Alan Joffe of Sentula about the transfer of all the money paid out of Argents accounts to SOC.

[29] Hendry's mandate came from within Argent and BMI and not from SOC. Contrary to submissions for Argent, Hendry tried to avoid communicating with Louw who

pursued him via emails for payment. Having failed to prove a mandate from SOC, no indemnity arises.

[30] These findings necessarily implicated Argent's claim against SOC based on enrichment. Argent paid over all the money it received from the GAT to the SOC, including the claim of R8.8 million. With enrichment as its cause of action, Argent had to prove on a balance of probabilities that Hendry believed in good faith that the payment was due to SOC. Argent was trapped in a catch 22 situation. To succeed in its defence against the liquidators, Argent had to prove that it was unaware of who owed the money and the reason for the GAT paying the SOC. To succeed in its enrichment action, Argent had to prove that its transfer to SOC had been made in the bona fide and reasonable but mistaken belief that it had been owing. Without Argent proving what reasonable enquiries it had made to avoid mistakes, it cannot overcome the bona fide and reasonableness threshold.

[31] Its belief would have been genuine, even if mistaken, if it had been accompanied by a cogent explanation for the circuitous transaction from the GAT to Argent and then to SOC. Argent had to know who owed the money and what authority Scharrighuisen had to instruct him to pay SOC. Argent's disclaimers were disingenuous. It could not prove on a balance of probabilities that it genuinely believed that the GAT owed money to SOC, without undermining its primary defence, namely that Hendry believed that neither Scharrighuisen and Holland nor the GAT owed the money. That SOC subsequently successfully proved a claim against the GAT is irrelevant.

[32] In this sea of corporate malfeasance, the rule of law offers refuge. Any remedy devised must seek to reinforce a return to the rule of law. The basic principles of banking law and insolvency law apply.

[33] Fungible money deposited in a bank loses its identity as it commixes with other funds.[9] A bank is the owner of monies deposited into its customers' accounts. Customers, as account holders, were entitled to the credit created by their deposits. Contractually, the bank (debtor) is obliged to repay its customer (creditor) and honour its cheques. The bank would have obligations to a third party against a customer's account if the latter authorises the bank.[10] For instance, the customer might agree with the bank to warehouse monies deposited into the customer's account for the benefit of a third party. In that event, the bank would be bound to comply with the contract for the benefit of a third party.[11] In the absence of the customer's consent, a third party will have to prove its claim to the deposits, usually through a quasi-vindicatory action.[12]

[34] If a bank were unaware that its customer settled debts from deposits of stolen money, the bank's payments would nevertheless extinguish the debts and the bank would not be liable.[13] The payments would be unimpeachable if creditors receive them in good faith, unaware that the funds had been stolen.[14]

[35] Against these principles, Nedbank was contractually bound to act only on Holland's instructions on behalf of the GAT. As there was no evidence that the deposits had been stolen, Nedbank could not be held liable for paying on Holland's instructions. It could not pay SOC as the third party without Holland's consent or proof that SOC had been the true former owner of the money before Holland had stolen it. SOC has since proven such a claim in liquidating the GAT. Insolvency law entrusts to the liquidators the powers and functions to recover assets and claims in favour of the GAT. Only the liquidators could lawfully instruct Nedbank about how it should dispose of the money in the GAT's account. Additionally, as liquidators, their functions include recovering void, voidable and unauthorised dispositions of the GAT's property, considering and settling

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[9] *First National Bank of Southern Africa Ltd v Perry No & others* 2001 (3) SA 960 (SCA) para 16.
[10] *Absa Bank Limited v Leech & others* [2001] 4 All SA 55 (A) para 19.
[11] *Spar Group Ltd v FirstRand Bank Ltd & another* 2017 1 SA 449 (GP) para 52.
[12] *Nissan South Africa (Pty) Ltd v Marnitz NO & others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) para 32.
[13] *ABSA Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para 18.
[14] *ABSA Bank Ltd v Lombard Insurance Co Ltd* para 9, 18 and 19.

the claims of its creditors and rendering liquidation and distribution accounts to the Master, who oversees the process.

[36] Even if Argent's payment to SOC had been in good faith but mistaken, an order against Argent to pay the claim would not result in unjustly enriching Sentula, which replaced the SOC after the latter was liquidated. Having received R65 563 556 from the secret account, the GAT had a balance of at least R19 808 745.30 still owing to SOC after the latter had received R45 784 810.79 via Argent. Where there is receipt of what is owed there is no enrichment (*suum recipit*).[15]

[37] In the circumstances, the appeal is dismissed with costs, including the costs of two counsel.

D Pillay J

Jappie JP

Henriques J

[15] *Absa Bank Limited v Lombard Insurance Co Ltd.*

APPEARANCES

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Date of Hearing	:	30 July 2018
Date of Judgment	:	27 August 2018