

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

21/8/15

Case No.: 14371/2011

In the matter between:

TOURVEST HOLDINGS (Pty) LTD

Plaintiff

and

PASCAL NONKAM

Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

1. The unsuccessful defendant applies for leave to appeal.
2. The Notice of Application for Leave to Appeal raised a number of grounds upon which the defendant asserted another court would reasonably come to a different conclusion than the trial court. In argument only some of these were pursued with any measure of conviction; the principal submission being that the Court's reference to the provisions of section 423 of the Companies Act 61 of the Companies Act was misguided and justified re-examination on appeal.

3. It was further argued that the Court's criticism of Mr Henning's failure to testify in his capacity as the defendant's attorney at all relevant times was unjustified.
4. It was also argued that defendant's attachment of the amounts still standing to the credit of the company Tulah Trading (Pty) Ltd in its bank account was not executed in his capacity as a director, but in his capacity as a creditor, rendering the action unassailable in terms of section 424 of the old Companies Act. This should all the more be the case, so the argument ran, as the said company was at that stage dormant and defendant had been prevented from exercising his functions as director during the battles with members of his family.
5. In the alternative it was submitted that the amount in which the defendant was held liable should be reduced to the sum of the funds still in the Bank account of the company whose affairs were dealt with recklessly; and which sum was attached on the defendant's behest.
6. The Court was also criticised for granting attorney and client costs when these had not been sought by the successful plaintiff.
7. None of these arguments justify the granting of leave to appeal. The principal factual findings made in the judgment have not been challenged. It is indisputable that defendant defrauded Tulah Trading (Pty) Ltd while he was still a director, whether active or not. He surreptitiously arranged for the attachment of the funds paid to the company as a result of a *bona fide* error and to which the company was not entitled, a fact of which both he and his attorney were fully aware. He surreptitiously and fraudulently appropriated the funds for himself while he was embroiled in a family battle about worldly

goods. Any claim to any funds arising from any business relating to the family affairs was hotly contested and a similar raid on another company executed by the defendant was overturned when the family became aware thereof.

8. The defendant's actions are therefore fully covered by the provisions of section 424 of the old Companies Act. His attachment of the funds amounted to a dealing with assets that did not belong to the company even though the funds were paid into the company's bank account. The unlawful attachment thereof rendered the company insolvent to the prejudice of all its creditors, including the plaintiff. The court was therefore called upon to hold the defendant liable for the full measure of the company's debts owing to the plaintiff.
9. In addition, the defendant was an untruthful witness whose evidence did not stand up to scrutiny. His entire defence was dishonest. This finding is strongly supported by the failure of his attorney, who admittedly was fully conversant with the true facts, to support his client's case by giving evidence himself.
10. Because the defendant's defence amounted to an abuse of the process the Court was justified in the exercise of its discretion to award costs on a punitive scale to mark its displeasure with the defendant.
11. There is no reasonable prospect of another court coming to a different conclusion. Leave to appeal must therefore be refused.

The following order is therefore made:

The application for leave to appeal is dismissed with costs .

Signed at Pretoria on this *17th* day of August 2015.



E BERTELSMANN

Judge of the High Court